SUPREME COURT OF YUKON

Citation: *S.M.* and *D.M.* v. *D.M.* and *J.M.,* 2012 YKSC 67

Date: 20120724
Docket S.C. No.: 12-B0035
Registry: Whitehorse

BETWEEN:

S.H.T.M. and D.M.M.

Plaintiffs

AND:

D.M.M. and J.M. aka J.E.

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

S.M. and D.M. — Appearing on their own behalf
Tess Lawrence — Appearing for the Defendants

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): On Thursday, July 12, 2012, this Court made an order that A. (the "child"), born July 3, 2002, shall have his principal residence with his paternal grandparents, who are the plaintiffs and reside in Whitehorse. The defendant D.M.M. is the natural father of the child. He resides in Saskatchewan and consents to the application of the paternal grandparents for custody of the child.

[2] The order was made without notice to the child's mother, J.M., who resides in Anchorage, Alaska, with her husband, J.E. (the "stepfather"). The mother and the stepfather have two other children, J., age seven, and S., age five. I should indicate that the child is approximately ten years old and he will going to school and is planning to

play football at a school in Anchorage.

[3] My without notice court order of July 12, 2012, was made pursuant to s. 38 of the *Children's Law Act,* S.Y. 2008, c. 31, amended by S.Y. 2003, c.21, s. 6; S.Y. 2008, c.1, s. 199, and that reads as follows:

> 38….the court may exercise its jurisdiction to make or to vary an order in respect of the custody of or access to a child if
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> a) the child is physically present in the Yukon; and
>
> b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,
>
> i) the child remains in the custody of the person legally entitled to custody of the child, or
>
> ii) the child is returned to the custody of the person legally entitled to custody of the child.

[4] The evidence before me on July 12 was the evidence of the evidence of the paternal grandparents and the father of the child. M.T. states that she is the aunt of the child, and she disclosed the following items, and I will read them all because they are the basis of the without notice court order:

> a) that the child is always at fault and therefore deserves any "whipping" that he receives

This is the abuse that was disclosed to her by the child.

> b) that, while the child is no longer beaten with a shoe, the child's own belt is used in place of the shoe.
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> c) that, when the child and his half brother J. fight, they both get whipped.
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> d) that if the child and his half siblings do not clean up as required, they are not allowed to have dinner and have nothing to eat until breakfast.

e) that both the mother and the stepfather physically assault the children, including the child.

f) that the child is afraid to tell his teacher because the teacher will simply tell the mother what has been said and nothing will happen.

g) that the mother has informed the child that if he reports the assaults, the stepfather will have to leave their home, the child himself will be sent back to Canada and that his half siblings will be sent to foster homes where they [are] likely [to] be mistreated.

h) that the child has stated that he has become used to being assaulted since he was of the age of 6 or 8 years.

i) that the child has stated that within a few days of his return from access in Canada he will be "whipped" or not be allowed his lunch or dinner.

And she communicated these to the paternal grandmother.

[5] The evidence of D.M., the child's father, is:

3. that I have had conversations with the child in which the child has stated the following to me:

a) that the child stated that his stepfather whips him with a belt.

b) that, on one occasion, the stepfather whipped the child with a belt until he passed out and the Child was then able to go to bed.

c) that the children, including the child, are assaulted if they have the sound too loud on the television.

d) that, in 2008, the child, was in Alberta with me and reported that the teenage son of the stepfather held the child down, removed his trousers and touched his genitals.

[6] So this is essentially the evidence that I relied on for the without notice order, and of course it was backed up by an affidavit of the paternal grandmother as well, which reported similar events but reported them as hearsay from the other parties.

[7] The child has been in Whitehorse pursuant to an access order granted by the Superior Court of the State of Alaska on May 14, 2004, in Anchorage. That order granted custody of the child to the mother and access to the father, with specified terms that are not important at this time. Given that the State of Alaska Court made an order, it is not possible for me to make an order under s. 37, which is the usual section that we resort to in this jurisdiction to make orders where there are concerns about children. I am going to just read that. Section 37 indicates:

> The court shall only exercise its jurisdiction to make an order for custody of or access to a child if
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> …
>
> b) although the child is not habitually a resident in the Yukon, the court is satisfied that
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> (i) the child is physically present in the Yukon at the commencement of the application for the order,
>
> (ii) substantial evidence concerning the best interests of the child is available in the Yukon,
>
> (iii) no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
>
> (iv) no extra-provincial order in respect of custody or access to the child has been recognized by a court in the Yukon,
>
> (v) the child has a real and substantial connection with the Yukon,
>
> (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in the Yukon.

[8] In my view, s. 37 is not adequate to make an order to assume jurisdiction of the child for this Court because substantial evidence about his best interests is available in Alaska. There is a court order outstanding in Alaska and the child does not have a real and substantial connection within the meaning of that term in this section. So I have to

turn back to s. 38 to determine whether there is jurisdiction to make an order with respect to the child.

[9] The issue before me is whether I am satisfied on the balance of probabilities that the child would suffer serious harm if returned to the custody of his mother. I am not satisfied he would suffer that serious harm under s. 38, based primarily on the new evidence before me and the RCMP investigation that was done in Whitehorse. It is most significant that the RCMP have interviewed the child. That interview is the basis of a decision of the Children's and Family Services Department in Whitehorse not to intervene in the matter, and I note the RCMP are not intervening in the matter at this point. They may in the future, but they are not at this point.

[10] I am going to quote from the letter of Tara Grandy, who is the lawyer for the Government of Yukon that investigates allegations of abuse, and I quote from her letter dated July 19, 2012:

> I can advise that on July 5, 2012 the Child's paternal grandmother S.M. reported to Family and Children's Services that the Child disclosed to her that he had been physically and sexually abused by his step-father J.E. I understand J.E. is your client's current partner.
>
> [The paternal grandmother] didn't provide any dates as to when the abuse took place or any details about the abuse: Ms. M. did indicate that the abuse occurred in Anchorage, Alaska.
>
> The Yukon RCMP interviewed the Child on Tuesday July 17, 2012 at the request of the Anchorage Police Force. During this interview, A. did not disclose any information that would indicate that he has been exposed to physical, sexual or emotional abuse. The Director [the Director of Children's and Family Services] did not conduct their own interview of A.; instead the social workers relied on the information obtained from this RCMP interview.

> Based on the information obtained from the RCMP interview and discussions with the interviewer Constable Mike Simpson, and based on the information provided by the Anchorage Police who informed my clients that there was no child protection history with [the mother] or [the stepfather], the Director closed their file on this matter.

[11] Now, clearly, from the statements made by the paternal grandmother, the RCMP investigation continues and their involvement with the Anchorage Police, who have obviously been involved with the allegations. The point simply is that the evidence and the jurisdiction for allegations of this nature is the State of Alaska, both from a criminal perspective and from the perspective of the *Children's Law Act*. In addition, the mother and the stepfather have come from Anchorage to pick up the child and they have been prevented from seeing him and served with the without notice court order.

[12] They have responded immediately and filed six affidavits responding to the allegations about the abuse of the child as follows:

1. The mother indicates that she has been employed by the Denali Family Services in Anchorage for ten years and she cannot do so without background checks.
2. She states that the allegations of abuse and neglect of the child were part of the old custody battle in 2004 with some new information coming from 2008.
3. She candidly acknowledges having spanked her children prior to 2008 when she stopped, and she now uses more appropriate time outs.
4. With respect to the allegation that J., [spelling provided], the son of her husband J.E. committing sexual assault in that J. is alleged to have touched the genitals of the child, the mother states that J. is 18 years old, a student who occasionally visits them in Anchorage. He is not left alone with the child and sleeps in a separate room and she has never noticed any behaviour by J. that would cause her any concern.

This information is contained in paras. 11, 12 and 13 of her affidavit. Specifically, I am going to quote from para. 13.

> 13. I believe the allegations of sexual abuse by J. towards A. are false. The Plaintiff has apparently had concerns of sexual abuse since 2008 and yet she did not bring them to my attention or the attention of the Office of Children Services or the Alaska State Troopers. Both agencies look into any report of harm to a child, no matter where it is reported from. If such abuse was suspected, I do not understand why it would be unreported for four years. The Plaintiff has visited Alaska during the past four years and had the opportunity to report the suspected abuse.
>
> …

[13] The stepfather has also filed an affidavit. He has lived with the mother since 2004 and they have been married since November 2008.

[14] The stepfather acknowledges spanking the child on the buttocks with a belt twice and over clothing, once in 2006 and once in 2007. He says that these spankings with the belt have stopped.

[15] I might add that these are clearly issues of concern about the child's safety, but I must confess that they are not new and should have been pursued many years ago.

[16] The stepfather denies ever whipping anyone, much less the child A.

[17] The mother has filed supportive affidavits. The first one is from Wendy Barrett, a social worker for 25 years in the State of Alaska. She describes the mother as an exemplary employee and she states the following in paras. 6 through 9 of her affidavit:

> 6. During my tenure in child protective services and in approximately 2005, [the mother] and her family were subjected to a child abuse investigation due to allegations of physical abuse. The investigation was a priority three investigation which means that the injury reported was not of such a concern that immediate

intervention or investigation was required. An investigative social worker followed up on the complaint within ten days of the concern being reported. The result of the investigation was that the allegations of abuse were unsubstantiated. Since that investigation, no further complaints have been reported to child protective services.

7. If there had been a substantiated report, [the mother] would have lost her license to practice and continue doing the job that she does today.

8. At no time in all my years as a mandated reporter of child abuse have I had any concerns in regards to [the mother's] parenting abilities or discipline measures with their children, including the child. The mother is well trained in parenting techniques, is a mandated reporter of child abuse, and continues to work under the State of Alaska background clearances as a direct service provider to children and their families.

9. I have been informed of the allegations of abuse made against [the mother] and believe the allegations to be completely false. I have never observed any concerning behaviour by her children or seen any concerning marks on her children that would cause me alarm or suspicions of abuse.

[18] Kirsten McCart is case manager supervisor at Denali Family Services. She says that she has known the mother since July of 2006 and she states the following:

6. As a fellow parent of a 10 year old boy, I have witnessed the mother and the stepfather uphold appropriate expectations for behavior as well as deliver appropriate consequences when these expectations were not met. For example, time outs, removal of rewards, and not allowing A. to spend the night with my son.

…

9. Through my work with and observations of the mother and the stepfather, I have no concerns with their ability to appropriately care for A. and provide him with a loving home.

10. Through my observations and contact with A., I believe he is well cared for and loved by both the mother and the stepfather. He is a well-adjusted and well-behaved boy and appears to be physically healthy and happy.

> 11. I am shocked by the allegations of the Plaintiffs and do not believe them to be true. The mother and the stepfather are very loving parents to A. and their two younger children.

[19] In the same vein, Andy Stephens, a Medicaid Coordinator for Special Needs Services at Catholic Social Services in Anchorage states that he has known the mother for ten years and for seven years he worked with her when they cared for and provided skill development for severely emotionally disturbed children. For three years he was the mother's boss as Director of School Based Services at Denali Family Services. He says in para. 5:

> 5. Based on my observations, I believe the mother's children are happy, healthy and very well cared for. I have known A. for most of his life and I have never seen anything in his behavior or appearance to cause me concern. I have only seen him happy, healthy and showing love towards his mom and family.
>
> …
>
> 7. I have been informed of the allegations of abuse made against the mother and I believe the allegations to be completely false. I have never observed any concerning behavior by her children or seen any concerning marks on her children that would cause me alarm or suspicions of abuse.

[20] The paternal grandparents have had much of this information since the time of the separation and divorce of their son from the mother, and certainly they have had this information long before Friday, July 20, 2012. When they received the information on July 20, 2012, which was the response to their obtaining the without notice court order, they have not seen fit to retain a lawyer or file any affidavits in response. Now, I do not doubt their sincerity in making these allegations but they must know that there is a proper procedure for raising these allegations. That procedure has been followed in this Territory because both the Department of Family and Children's Services and the

RCMP have been involved, and they have decided to take no action. That still leaves, of course, the State of Alaska where these events allegedly took place as the proper jurisdiction to pursue the allegations, but it is not in this Court, which I find has no jurisdiction based on the allegations.

[21] I am, therefore, making an order as follows:

1. The Supreme Court of Yukon Order Without Notice filed July 12, 2012, is immediately revoked.
2. The child A. born July 3, 2002, shall be returned to the defendant J.L.M. immediately.
3. The style of cause shall be amended to show the proper legal name of the defendant from J.M., aka J.E., to J.L.M.
4. The requirement for the signatures of the plaintiff S.H.T.M. and D.M.M. and the defendant D.M.M. shall be dispensed with.

[22] The final matter that I want submissions on is the claim is for a lump sum of $2,000 to be payable by the paternal grandparents to the mother forthwith. That is a normal and appropriate order in circumstances like this where someone has been delivering their children to this jurisdiction for years and picking them up and suddenly old allegations are raised. But I have not given you the opportunity to make submissions on that, Ms. M. Do you have anything you want to say about that?

[SUBMISSIONS BY S.M. RE COSTS]

[23] THE COURT: I have just made that order because I do not have any jurisdiction to not do that. But let me ask you, Ms. Lawrence, on the issue of costs. That is the only part of the order that I have not given.

[24] MS. LAWRENCE: Well, as I expressed in my submissions to the Court, my clients to date have incurred legal fees of approximately $3,500, as well as hotel costs, food costs of approximately $5,225, as well as in terms of damages, they've lost approximately $3,300 in lost wages. They have been away from their home for a week and haven't been there for their other two children. So this has been taxing emotionally, mentally, as well as financially, and therefore we seek the lump sum payment of $2,000.

[25] THE COURT: I will grant you the order of the lump sum payment in the amount of $2,000 payable forthwith.

[26] MS. LAWRENCE: Thank you, Your Honour.

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VEALE J.