

SUPREME COURT OF YUKON

Citation: *E.M.M. v. D.W.M.*, 2013 YKSC 100

Date: 20130904
S.C. No. 12-B0017
Registry: Whitehorse

BETWEEN:

E.M.M.

PLAINTIFF

AND:

D.W.M.

DEFENDANT

Before: Mr. Justice L.F. Gower

Appearances:
Lynn MacDiarmid

Agent for Kim Hawkins, counsel for the
Plaintiff

David Christie

Counsel for the Defendant

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by the father to cancel the order that I made on December 14, 2012. That order specified, firstly, that the father was to have no access direct or indirect with the mother, except through a third party for the purposes of arranging access to the child, J., who is now just over two-and-half years old. Secondly, regarding the order of Justice Stach, which was made on September 13, 2012, clause 2 was to be varied to read that the defendant, the father, would have access by telephone or Skype with J. every Wednesday at 6:00 p.m. on an interim

basis. Thirdly, the order permitted the mother to travel to the Northwest Territories for a period of six months with J. Lastly, there was an RCMP assist clause at para. 4.

[2] The father's application also seeks interim reasonable access with J., as set out in his affidavit, including in-person access, although he accepts that the access could be supervised in the interim period, and suggests that his parents, who reside in Carmacks, could assist in that regard. Next, the father seeks a review of the issue of access within one month of any order that I might make. Lastly, he seeks a recommendation for a custody and access report.

[3] Clearly, the onus is on the father in this situation, as it is his application.

[4] There was an initial issue regarding the question of whether there had been a material change in circumstances since December 14, 2012. I am prepared to accept for the sake of argument, although just, that the combination of all of the circumstances together is barely capable of constituting a material change in circumstances. I realize that the father has since embarked on a regular period of counselling with Many Rivers in Whitehorse, and I believe is continuing to do that on a weekly basis. As of the time of his affidavit in support, he had completed ten sessions, and has indicated in a subsequent affidavit that he continues to see his counsellor weekly.

[5] Secondly, at the time of the December 14, 2012 order, although the father was present in court, he did not have legal counsel, and relied upon his own father, R.M., to make representations on his behalf. Presently, the defendant father is represented by counsel. That is a different situation than what it was before. Thirdly, there has been a relatively significant period of time which has passed, given the relatively young age of

the child, since the December 14th order. Lastly, there was the issue of the mother's leaving the Yukon for a period of time, as anticipated in my December 14th order. It turned out that she appears to have been away from the Territory for a shorter period of time than six months, but in any event, she did leave for a period of time and has since returned to the Territory. Thus, I am prepared to accept for today's purposes that the father has met his onus in establishing a material change in circumstance.

[6] However, I also indicated to the father at the outset of the hearing that I had concerns regarding the state of the evidence in this file, as there is already a long history of lengthy, contested and contradictory affidavits. In response to the father's most recent affidavits in support of his application, I received the mother's fifth affidavit, which contains a number of specific allegations. I suggested to counsel for the father, that the father may wish to respond to these allegations in specific terms before proceeding with the application. However, the father has apparently instructed counsel to proceed as quickly as possible. His application has been pending since June, and he has a clear desire to re-establish in-person contact with the child as soon as possible. The application proceeded, but the unfortunate consequence is that a number of the specific allegations which are made by the mother in her fifth affidavit remain uncontradicted, which is going to prove to be a significant problem for the father.

[7] I say all of this, recognizing that there has been no cross-examination on any of the affidavits thus far. This is not a trial. It is simply an interim application, and therefore, it is very, very difficult to make clear findings of fact when the evidence is disputed and contradicted in this fashion. That said, there has been some previous judicial consideration of the affidavit material by Justice Stach when he made his decision on

September 13, 2012 and issued reasons from the bench at that time. I quote from a portion of those reasons as follows at paras. 8 through 11:

“There is in the material evidence to support the proposition that [the mother] has, on numerous occasions, been controlling insofar as access by [the father] and members of his family is concerned. That behaviour, while troubling, may have its origins in the abusive behaviour that she attributes to [the father]. Troubling though it is, taken cumulatively, it is not sufficient in my view to disqualify [the mother] as a custodial parent on grounds of alienation. There is independent evidence that [the mother] has a clean and safe home in Dawson City that is appropriate for children and that her behaviour as a mother towards [the child] is otherwise exemplary.

In addition to the allegations that [the mother] makes respecting the bad behaviour of [the father], there is a body of affidavit evidence that tends to corroborate the proposition that [the father] has, on multiple occasions, exhibited eruptions of temper that have, at the very least, resulted in destruction to property.

[The father] acknowledges a history of regular marihuana use. While he says in his affidavit that he has stopped, there remain suggestions that his use marihuana continues from time to time. I am not in a position from the material before me to make a definite finding. The uncertainty, however, is disquieting. On balance, I am persuaded that [the mother] should have sole custody of [the child].

The combined effect of findings that, on a balance of probability, [the father] has exhibited aggressive eruptions of temper, and having regard for the uncertainty respecting ongoing marihuana use, I regard it as prudent in the short term to direct that there be a transitional period where his access to [the child] requires supervision.”

I will interject parenthetically that the comments of Stach J. regarding the destruction of property by the father, in my respectful view, are generous to the father. Having reviewed the affidavit material leading up to those reasons, it is my own view that the photographic evidence of the property damage in the couple's home in one of the early

affidavits by the mother is quite remarkable and indicates significant and frequent regularity of property destruction.

[8] Now, this was acknowledged in part by the father in his responsive affidavits, but even there, there was a pattern of avoidance and minimization in suggesting that a lot of the property damage was done by the mother herself and by a previous tenant in the property. In any event, the eventual order of Stach J. was to provide the father with an opportunity to exercise supervised access on a bi-weekly basis, as specified in the details of the order of September 13, 2012. However, despite being given an opportunity to demonstrate good faith, stability, and an ability to comply with that order, the father continued to display more antagonistic behaviour, some in apparent direct contradiction of the Stach J. order, and some of which has been corroborated by criminal charges.

[9] In the mother's fourth affidavit, she refers to an incident on September 29, 2012 when the father showed up at her home on a Saturday night unannounced and uninvited. There were some difficulties between the father and the mother at that time, and an argument ensued. There was another reference to an incident on the evening of Saturday October 6, 2012, where the father attended at the mother's residence, again unannounced, and difficulties ensued. The following morning, Sunday October 7, there was another visit by the father to the mother's house, unannounced and uninvited, and the result of which was that difficulties again ensued. As a result of those difficulties, the father was charged with mischief in excess of \$5,000 value from the incident of October 7, 2012. Following that, there were continuing contacts made by the father to the mother, apparently in violation of his undertaking resulting from the October 7th matter.

There is an Information in evidence that shows that between October 18th and 24th, 2012, the father breached his undertaking by failing to abide by a condition, to have no contact directly or indirectly, in any way with the mother.

[10] That evidence was before me leading up to my orders of November 27 and December 14, 2012 and led me to restrict the access by the father to the child to telephone and Skype only.

[11] The issue, it seems to me, in this application is whether the father can be trusted on an on-going basis to continue to respect court orders and act in a fashion which acknowledges and fosters the best interests of the child in any future access which he may exercise, whether that is supervised by his own parents or others, or where it is, ultimately, in the longer term, unsupervised. Now, the father complains that there was nothing preventing the mother from showing good faith on her part by agreeing to additional in-person access or other access beyond the terms specified in my December 14, 2012 order. However, the question arises why she would do so when the father has continued to demonstrate a lack of genuine motivation to exercise the access which he was allowed and has continued to show that he cannot be trusted to abide by the Court's orders.

[12] The mother's evidence in her fifth affidavit is presently uncontradicted for the most part. At para. 19, she indicates that she had left a voicemail message for the father at the telephone number that he provided to her, confirming her Skype address and indicating that the child would be waiting by the computer with his grandmother at 6:00 p.m. on Wednesdays. The next paragraph indicates that the father attempted to

instigate a variety of stipulations about his Skype access. Apparently, he did not want to use a regular Skype account, but rather wanted to set up a different type of a computer account, in which he would have a secret password that he would only give to a Social Worker who would come to the mother's parent's home in the evening to be present for the Skype calls.

[13] After attempting to resolve those issues on February 18, 2013, the mother's lawyer finally sent an e-mail to the father and the Native Court Worker. She confirmed the contact information at which the father could reach the child for his Wednesday night access visits, encouraged the father to exercise that access, and stated that she would be closing her file.

[14] The mother further deposed that every Wednesday after the December 14, 2012 order was made, she waited by her computer with Skype turned on and with the child at the appointed 6:00 p.m. time. They always, she says, left the computer on, for at least 15 minutes in case the father called, and a third party was always present. The mother further deposed that she made short video recordings of most of those occasions so that she could prove, if necessary, that the father was available for these access visits. She refers to being present at the computer with the child on January 16 through May 8, 2013, on some 17 occasions, and only two of which were not recorded because the video did not work properly. The mother further deposed that on January 30, 2013, as she had not heard from the father and her lawyer had told her that the father was having trouble finding her on Skype, despite being provided with the correct Skype address, she sent the father a Skype friend request, which she has attached as an exhibit to her original affidavit. Notwithstanding that, the father did not add the mother as a Skype

contact until May 8, 2013, over three months later, and about five months after my December 14, 2012 order. That goes, in my respectful view, to the sincerity of the motivation of the father to exercise access to his son as he claims. Further, this evidence is consistent with the pattern indicated in previous affidavits that the father is continuing to act in a manipulative and controlling fashion, when he could have simply set up an ordinary Skype account much earlier and commenced access in an untroubled way.

[15] In addition, there were problems with unauthorized access or contact by the father with the mother. Those began by text messages starting on April 25th. Initially, the mother did not realize who was sending her the text messages, because apparently there was a new phone number involved. Once she confirmed it was the father, she stopped responding to those texts. She deposes that between April 25th and June 21st, the father sent her 37 individual text messages.

[16] Further, in para. 29 of the mother's fifth affidavit, one of the initial messages was:

"So u going to hear my side or no. I have never talk [sic] about u and when I did it was nothing but good things and that is the truth."

There were indications of the father sending text messages after one o'clock in the morning on two occasions, asking whether the mother was available to communicate with him. One of the texts talks about the father having made a reference to the mother's, "Yung [sic] boyfriend", and wishing to reconcile. Again, all of that is indicative of a pattern that the father continues to be enmeshed in the relationship and desirous of

continuing the relationship, notwithstanding that the mother has clearly indicated that she has no such interest.

[17] In addition to the text messages, the father has also violated the December 14, 2012 order by telephoning the mother on a number of occasions, and attempting to engage her in conversation.

[18] I agree with the mother's counsel that despite the father having taken a number of counselling sessions with Many Rivers, the fact that he is continuing to breach this court order while undergoing those counselling sessions indicates that perhaps he is not receiving the benefit which he suggests he is receiving from that ongoing counselling.

[19] I agree with the mother's counsel that, as the mother put it in para. 40 of her affidavit,

"I disagree with [the father's] opinion as to what is in [the child's] best interest at this point in time. I believe that it is currently in [the child's] best interests to continue to exercise telephone access with [the father] until [the father] has demonstrated a longer period of stability, until [the child] is a bit older and more able to articulate what is going on for him, and until [the father] has demonstrated that he can follow the visitation schedule and put [the child's] emotional needs first. Subsequently, [the father's] access would need to be supervised."

[20] In short, what the father has to show is that he can be trusted to abide by orders of this Court. Until he does so, I see a continuing risk of conflict, outbursts, potential for violence, and verbal abuse in the presence of the child, as has occurred in the past, which would not be in the child's best interests.

[21] Therefore, it is my ruling that the father's application be adjourned for a further period of approximately three months, which would put us to the next regular Chambers' day of December 10, 2013, for the purpose of a review of his level of compliance with the ongoing court order and to see if there has been any improvement in the level of cooperation between the parties.

[22] With respect to the father's application for a custody and access report, that application can be readdressed at that time. It is my view that it is presently premature, until the father can demonstrate an ability to comply with the orders of this Court.

[DISCUSSION RE FURTHER APPLICATIONS BY COUNSEL]

[23] THE COURT: I will grant you leave to withdraw as counsel, Mr. Christie.

[24] MR. CHRISTIE: Thank you.

[DISCUSSION RE DECEMBER 10 ADJOURNMENT DATE]

[25] THE COURT: Okay. Let us make it December 3rd, then.

[26] MS. HAWKINS: And, Your Honour, in light of the fact that at this point in time I am continuing with the mobility application, I don't have concerns about staying on the record for the moment. Of course, I will have to, I suppose, check with my employer regarding coverage, but certainly, for the moment, I am content to stay on.

[DISCUSSION RE ADJOURNMENT OF MOBILITY APPLICATION]

[27] THE COURT: Right. That way, if you set it far enough down the road, if Mr. Christie gets authorization to act in response to that application, then the two of you can work out a date together.

[28] MS. HAWKINS: Thank you.

[29] MR. CHRISTIE: Thank you, I appreciate that.

[30] THE COURT: Okay. Thank you. I will make that order.

[31] THE CLERK: Return date?

[32] THE COURT: The mother's application is adjourned generally, subject to a hearing date being scheduled.

GOWER J.