

SUPREME COURT OF YUKON

Citation: *B.E.D.E. v. C.M.P.*, 2014 YKSC 34

Date: 20140626
S.C. No. 13-B0021
Registry: Whitehorse

BETWEEN:

B.E.D.E.

PLAINTIFF

AND

C.M.P.

DEFENDANT

Before: Mr. Justice R.S. Veale

Appearances:

Celia Petter
Shayne Fairman

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Veale J. (Oral) This is an application by the mother for the temporary removal of the child R., born May 6, 2009, to Calgary, Alberta for the period July 1, 2014 to July 31, 2015, for the limited purpose of attending the Aveda Institute & Academy Salon to take a 12-month hairstyling and esthetician course. The mother seeks an interim custody order with specific access to the father.

[2] The father, while encouraging the mother to take the course, objects to the removal of the child on the ground that it will detrimentally affect his relationship with the

child. He filed an application on May 28, 2013 for interim joint custody and an equal sharing of custody. There has been no custody order to date but several orders relating to the father's access.

BACKGROUND

[3] The mother and father have been in high conflict and have been unable to agree on such basic matters as whether they actually lived together. The father says they lived together from about August 1, 2008 until February 13, 2010. The mother acknowledges that they were in a relationship from August 1, 2008 until June 1, 2009 but states they never actually lived together. I do not feel it necessary to decide that issue to address the mother's application.

[4] There are at least two reasons provided to explain the high conflict. The mother's view is that it relates to serious drug and alcohol abuse by the father.

[5] The father acknowledges his struggles with alcohol and drug abuse in the past but now says his sobriety is the most important thing in his life to ensure that he can be the father that R. deserves. He acknowledges the serious nature of his drug and alcohol abuse as he indicates he spent 20 days in jail in 2011 on a 30-day sentence and another 20 days in jail after credit in 2012. His past criminal record indicates December 15, 2010 convictions for possession of a prohibited substance, driving while impaired and two failures to comply with recognizances. On December 19, 2012, he was convicted of failure to comply with an undertaking and refused to provide a breathalyzer sample. He also received a driving prohibition of eighteen months.

[6] He was charged with assault causing bodily harm from an incident on November 27, 2012, pled guilty and received a conditional sentence of three months on March 31, 2014, to be served in the community, followed by a probation order of nine months.

[7] Before his guilty plea to the November 27, 2012 offence, the father was in a Community Wellness program in Territorial Court to work on his relapse prevention. He had made some progress although he failed a drug test in November 2013. A Wellness Plan was ordered on December 9, 2013. Unfortunately, the father withdrew from the Community Wellness Court process in February 2014 and pled guilty as indicated above. The father's withdrawal was reported in an incomplete one-page document that appears to be part of a Pre-Sentence Report. It confirmed that the father opted out of a psychological assessment in the Community Wellness Court process "on the caution that he would likely then be removed from the CWC process citing his concerns that this information could be used against him in his child custody matters." This is indeed very unfortunate as he was participating and completed the Substance Abuse Management Program, and the relapse prevention plan. He also attended and completed the Violence Prevention Program from September 28, 2013 to December 13, 2013. I commend the father for his candour in describing the extent of his drug and alcohol addiction. However, it is not helpful in an application to determine the best interests of a child that full reports are not produced.

[8] On the positive side, the father has repaired his relationship with his mother, who supports him in this application. She is very desirous of having a relationship with the child and introducing him to her Inuvialuit culture. To this end, she supports the repair of the relationship between the applicant mother and her son.

[9] The mother has essentially been the primary caregiver for the child but she has faced challenges as well. She had an abusive partner who assaulted her on December 15, 2012, which ended the relationship. He assaulted her again on October 4, 2013. The father cites this in explanation of the high conflict between the mother and father.

[10] The father was understandably unhappy about the wife's relationship with the abusive partner and contacted Family and Children's Services about the safety of the child. A letter dated May 28, 2014 outlines that Family and Children's Services started working with the mother in June 2012 and that "she has successfully mitigated the initial child protection concerns." On November 26, 2013 and again on February 19, 2014, the Child Protection social worker was prepared to close the file. The mother has requested that the file remain open to continue to receive the support of her worker until she leaves the Yukon or chooses to no longer require support from Family and Children's Services.

[11] The child has also been referred to the Child Development Centre for concerns about delayed speech development and witnessing family fighting. Their report dated March 3, 2014 indicated awareness of a possible move to Calgary and concluded with the importance of continued support for the child. At this point, there is disagreement between the mother and father over the child attending kindergarten. The father wants the child to attend kindergarten but the mother says the child is not ready but she will continue to ensure access to programming similar to that at the Child Development Centre while in Calgary.

[12] The mother has been on social assistance since the birth of the child in 2009. The father has been on social assistance since 2011, but will be able to return to work

when his driving prohibition is addressed either by an ignition interlock device in his car or a work-related exemption, neither of which are available yet. As stated above, the father received an 18-month driving prohibition on January 19, 2012 which has now expired, but he has been unable to obtain a driver's license. He has used friends for transportation for access to the child. His lack of a driver's license has been a source of disagreement between the mother and the father, leading to a court order prohibiting the mother from being no closer than five to 10 metres to his car. The mother says that she has concerns about alcohol consumption and driving while prohibited.

[13] I have no doubt that the mother's lack of trust has detrimentally affected the father's access. The Court ordered access to the father, to be supervised by the mother at the Canada Games Centre, in August and September 2013. On December 17, 2013, the Court granted the father unsupervised access on Saturdays from 10:00 AM to 7:00 PM and on Sundays from 1:00 PM to 7:00 PM. That order also included a term prohibiting the mother from removing the child from the Yukon without the written permission of the father or further order of this Court.

[14] The mother has been accepted for the hairstyling and esthetician course and paid a \$500 deposit. To obtain entry into the course, the mother completed an application and interview, and also prepared a personal essay and obtained letters of recommendation. She has signed a contract entitled Alberta Student Enrolment Contract for Licensed Vocational Training Program for \$12,750. She is eligible for the Yukon Grant and approved for Canada Student Loans, in addition to applying for scholarships. In order to accomplish this, she had to upgrade her Grade 11 and 12 credits. Her lowest mark was 90% in Apprenticeship and Workplace Math and her

highest was 98% in Law 12. She went to Yukon College on July 2, 2013 to meet with an academic advisor. She expects to obtain a job in Whitehorse on her return. She has made arrangements to reside in a basement suite owned by a female friend in Calgary. It is close to children's parks and a leisure centre with full indoor activities like the Canada Games Centre in Whitehorse. Her female friend worked for and lived with the maternal grandmother in Whitehorse before relocating to Calgary. The maternal grandmother is very close to the child and supportive of the mother.

DECISION

[15] The guiding principles from *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 49, can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia:
 - (a) the existing custody arrangement and relationship between the child and the custodial parent;
 - (b) the existing access arrangement and the relationship between the child and the access parent;
 - (c) the desirability of maximizing contact between the child and both parents;
 - (d) the views of the child;
 - (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - (f) disruption to the child of a change in custody;
 - (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[16] Relocation, even temporary, is a material change. The fundamental question is what is in the best interests of the child. In this case the mother has been the only consistent and reliable caregiver for the child. It is encouraging that the father is working out his personal issues to be a good father to the child. There is no question that this one year absence will be a hardship for the father who is re-establishing his parental

role. The father is not quite ready for the demanding role of primary parent but he has shown progress. There will be some disruption to the child but the disruption and risk of a change of custody to the father would be greater.

[17] The mother has made a remarkable turnaround to become self-sufficient and that is an important factor for the child. In my view, the positive aspects of this temporary move outweigh the negative aspects. The father's bond will not be destroyed and hopefully the father will be able to get employed and make visits to the child in Calgary. I remain concerned about the father's unwillingness to continue in the Community Wellness Program but I assume that he will continue programming and counseling so that he will be ready to assume a parenting role on the child's return.

[18] I therefore make the following Order:

1. The mother shall have interim custody and permission to go to Calgary with the child from July 1, 2014 to July 31, 2015 on the condition that she and the child return to Whitehorse if she stops attending the Aveda Institute on a full-time basis, and that at the very latest she return to Whitehorse by July 31, 2015.
2. The child shall be placed in a suitable day home or daycare and continue to receive developmental support similar to that provided by the Child Development Centre.
3. The mother shall make her best efforts to find a Family Support Worker while in Calgary.

4. The mother shall make two 10-day trips from Calgary to Whitehorse with the child and reside with her mother in Whitehorse. These trips may also be unescorted minor flights if the mother wishes to remain in Calgary.
5. The father shall have access to the child every second day during the two trips, between 10:00 AM and 7:00 PM and shall contribute one half of the airfare. The mother and father may agree to unescorted minor flights on the condition that the child reside with, and be under the care and control of the maternal grandmother while he is in Whitehorse.
6. The father shall have similar access in Calgary, subject to the child's appointments for professional support, for two weeks in the fall and two weeks in the spring should he be able to travel to Calgary.
7. The father shall have telephone and webcam access twice a week at agreed upon times.
8. The father shall not be under the influence of alcohol or non-prescription drugs while exercising access with the child and shall not permit anyone in the child's presence during access to be under the influence of alcohol or non-prescription drugs, and shall generally ensure that the child is not exposed in any way to alcohol or non-prescription drugs during access visits.
9. The child shall always be in an appropriate child restraint system or seatbelt when being driven in a car.
10. The mother and father may agree to vary the access set out in this Order to ensure that the father can exercise reasonable access.

[19] This Order shall supercede the previous court orders up until July 31, 2015.

[20] I am making this order on the understanding that the mother has the responsibility to ensure that the access is safe. The mother must understand that an award of custody is based upon a consideration of the effect that her custody will have on the ability of the father to have reasonable access to the child. This Court shall retain jurisdiction over the custody and access of the child while temporarily in Alberta.

[21] I have not ordered either a custody and access report, or the appointment of a Child Advocate and those applications may be renewed on the child's return.

VEALE J.