SUPREME COURT OF YUKON

Citation: *J.C.M.B. v. M.A.C.*, 2014 YKSC 55

Date: 20141023
S.C. No.: 14-B0055
Registry: Whitehorse

BETWEEN:

J.C.M.B.

PLAINTIFF

AND:

M.A.C.

DEFENDANT

Before the Honourable Mr. Justice L.F. Gower

Appearances:
Kim Hawkins — Counsel for the Plaintiff
Lenore Morris — Counsel for the Defendant

RULING ON APPLICATION

[1] GOWER J. (Oral): I have, for the record, had an opportunity to review all of the material at some length, so I am familiar with it.

[2] The first issue that arises between the parties has to do with the question of when and how the mother received notice that there were existing orders in Alberta which directed her to return to that province with the child, ultimately for the purpose of having a custody and access hearing.

[3] I do not need to resolve that issue today because of what I am about to say later, but it does strike me that -- and I, by and large, tend to agree with the submissions of the father's counsel here -- that this is a situation where the mother's conduct would appear to border on wilful blindness. She had to have known that bringing the child to the Yukon, contrary to her prior agreement with the father to return to Edmonton on July 18th, would cause some significant concern for the father. She was receiving regular phone calls and text messages that refer to the father having a court order of some kind. She was contacted by the Camrose police force apparently around the end of August. She says that there was no discussion about any court order in Alberta at that time. She does not say precisely what the conversation was about, but because she is silent on the point, it leaves me wondering why she might not have asked the officers if there was indeed a court order in Alberta. However, she seems to leave that to one side in her affidavit sworn October 22, 2014.

[4] I also agree with the submission of the father's counsel that if the mother indeed was not able to read messages sent to her via Facebook on her smartphone, then she had an obligation in these circumstances to be more diligent in terms of attempting to get onto her laptop computer where those messages could be viewed. And according to her, she virtually did not do that at all until September 29, which was a long time after she arrived in the Yukon on July 20th, knowing that the father was concerned, knowing that we were dealing with a year-and-a-half-old child, and being suspicious or being alerted to the fact that there may have been an Alberta order dealing with this situation.

[5] But, that is as much as I need to say about that, because I do not think this return application turns on the question of notice. What I think it does turn on is the question

of whether the mother has made a case under s. 38 of the *Children's Law Act*, which reads:

> Despite sections 37 and 50, 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
>
> (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. S.Y.*, c.31, s.38.* [emphasis added]

[6] In relation to the question of serious harm, the mother's counsel referred principally to two issues.

[7] One is the extent to which the father has exhibited physical violence. The mother alleges that there were two incidents of his physical violence: one in early 2013, and a subsequent one on the May 24th long weekend in 2014. The father only admits to the former and absolutely denies the latter. It seems to me that there is going to have to be a trial of that issue and *viva voce* evidence may need to be called to get to the bottom of it. But at the moment, I cannot accept the mother's evidence as to the second incident simply on the basis of her affidavit.

[8] With respect to the first incident, the father acknowledges punching the mother in the face. It would appear that he received a 90-day intermittent sentence. He was allowed to spend time with the mother in the family home during the week between his

weekend sentence time. I tend to agree that that indicates that the Crown must not have had significant concerns about the mother's safety, as the father was allowed that continuing contact following the imposition of the sentence. That tends to go to the relative lack of seriousness of that offence. And the fact that the father received a jail sentence at all, I conclude, may well be explained by the fact that he apparently has an undenied criminal record where he has previously served lengthy prison terms.

[9] The second factor that the mother's counsel raises is the father's out of control drinking, which the father does not outright deny. Rather, he indicates that he is in as control of his drinking as the mother is of her marihuana use. In particular, the father acknowledged in his affidavit that he sometimes has too many beers in the evenings, but that is the extent of his admission in that regard.

[10] Any concerns that the mother has on either of these two grounds, it seems to me, are adequately addressed by the father's offer: (1) to have the mother flown back to Edmonton initially and then ultimately travelling to Camrose; (2) to have the mother reside with the child in their conjugal apartment in Camrose; (3) and for the father to agree to some form of a restraining order, so that he would not attend within a certain distance from that apartment, as he has indicated in para. 12 of his affidavit filed October 17, 2014; and (4) that he is also prepared to abide by a condition that any access that he has to the child, following the mother's return, would be subject to a condition that he not possess or consume alcohol during or prior to such access visits.

[11] So in my respectful view, that offer by the father largely neutralizes any residual concerns that this Court may have, even if it were to be satisfied that there is a risk of serious harm, which I am not.

[12] I note that in *S.A.G. v. C.D.G.*, 2009 YKSC 21, Justice Veale of this Court summarized the principles from the case law regarding s. 38 of the *Children's Law Act*. The first two are, and I quote:

> 1. the test for determining "serious harm" under the provincial or territorial children's legislation is similar to the Hague Convention test for "grave risk" of physical or psychological harm;
>
> 2. the test requires that there must be a weighty risk of substantial and not trivial physical or psychological harm; ... [emphasis added]

[13] I am not satisfied that that test has been met by the mother in this application.

[14] Under s. 49 of the *Children's Law Act*, as I understand it, I can decline jurisdiction under s. 39, which is what I am doing. I am declining to exercise jurisdiction for the reasons I have just stated.

[15] I will, however, exercise my residual jurisdiction, if I can call it that, under s. 49 of the *Act*. Well, I guess, it depends on how you read s. 49. If it requires that my declining jurisdiction must be viewed as a stay of the mother's application, then I so order. That allows me to add "any other conditions the court considers appropriate" in the circumstances (s. 49(b)(ii)). Further, under (c) of that section, I may:

> (c) order a party to return the child to any place the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application. *S.Y., c.31, s.49.*

[16] In my view, that authorizes me to make residual orders regarding the return of the child under certain conditions. And it is my expectation that once this order is filed (and I note that under the Child Abduction Protocol, the order is to be signed off and filed within 24 hours of this decision being rendered), it can then be sent to the father's

Camrose counsel and can be registered in the Alberta Court of Queen's Bench, so it is effective there as well. Because, obviously, anything that I say here in the Yukon regarding the conduct of the parties in Alberta would not, on its face, be enforceable there. So it may require registration of this order in the Alberta courts to achieve that enforceability.

[17] But it is my intention, first of all, that the order of Mr. Justice Groves on October 3, 2014, which suspended the effect of the Alberta orders, which had been previously registered in the Yukon on October 1st, be lifted. That makes the enforceability of those orders -- it restores the enforceability of those orders to life. So, that is the first thing that needs to be dealt with.

[18] I further declare that Alberta is the appropriate jurisdiction for the determination of the matters that are the subject of this proceeding, in particular, the custody and access of the child born April 6, 2013.

[19] I further order that the child be forthwith returned to, ultimately, Camrose, in the company of the mother. Forthwith, of course, means as soon as reasonably practicable. I do not need to make it a term of the order, I do not think, that the father initially pays the cost of that travel, because the father has agreed to pay it. I expect that he will be able to seek compensation for that expense in the future as part of the continuing Alberta proceedings, but I will leave that in the hands of the father and his counsel.

[20] I will also make it a term of this order that upon returning to Camrose, that the mother reside in the conjugal apartment of the parties with the child; and further, that the father be entitled to reasonable access to the child, subject to the no-alcohol

condition that I mentioned a moment ago, as well as any of the other immediate family members which have been mentioned in this proceeding. I will leave the drafting of this order, of course, to the lawyers, who know more about that than I.

[21] I think it is also appropriate that there should be some type of a restraining order against the father, as he has offered, vis-à-vis his access to the mother's premises or the conjugal apartment. As to the precise wording of that, which we did not get into in this hearing, again, I turn to counsel to work out terms. That should address, in large part, the mother's safety concerns.

[22] There should be a term of this order that the father, within 14 days of the date of this order, will instruct counsel in Camrose to file a notice of application to seek a further hearing on the issue of custody and access, where all of these issues can be aired more fully and completely. I have to say that I am informed by Justice Moreau, whom I spoke about earlier, that there is a very good chance that that hearing will involve direct evidence or *viva voce* live evidence from the parties, so that there can be a fulsome opportunity for the witnesses to be cross-examined on some of these thorny issues.

[23] Counsel, I think I have addressed everything that I intended to address but if I have not, please tell me.

[DISCUSSION WITH COUNSEL]

[24] I would expect that between counsel arrangements can be made for the father to buy a ticket for the mother and the child, and then we can get things rolling. And I expect that to happen tomorrow, if not today.

[DISCUSSION WITH COUNSEL]

[25] I should make these two Facebook hand-ups exhibits on the hearing.

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GOWER J.