SUPREME COURT OF YUKON

Citation: *C.M.C. v. R.S.F.*, 2014 YKSC 60

Date: 20141003
S.C. No.: 12-B0016
Registry: Whitehorse

BETWEEN:

C.M.C.

Plaintiff

AND:

R.S.F.

Defendant

Before the Honourable Mr. Justice J. Groves

Appearances:
Lenore Morris — Counsel for the Plaintiff
H. Shayne Fairman — Counsel for the Defendant

REASONS FOR JUDGMENT

[1] GROVES J. (Oral): These are my reasons on the matter of C.M.C. and R.S.F. Before the Court are essentially cross-applications, applications which deal with the challenging issue of mobility of parents and, thus, children.

[2] Ms. C. and Mr. F. were not married; they lived in a brief common-law relationship. As a result of the relationship, the child, M., was born on April 21, 2009. The common-law relationship appears to have ended completely some time in the latter part of 2011.

[3] I am satisfied that, since the time of the child's birth, the mother, Ms. C., has

been the primary parent for M. The orders of this Court, specifically the order of Mr. Justice Veale on July 13, 2012, recognizes this in that it relies on the presumption of joint custody, I find that the parties to be joint custodial parents, but indicates that the plaintiff shall have the primary residency of the child.

[4] The mother has a desire to return to her hometown of Terrace, British Columbia. I am satisfied on the evidence that this is a legitimate request. And by "legitimate", I am satisfied that the request is not motivated by extraneous factors, such as a desire to move the child for the sake of destroying a relationship with the other parent. Terrace is her hometown, having resided there until through the beginning of her high school years. Her parents, with whom she is close, reside in Terrace, having retired to that community where they had earlier resided.

[5] Ms. C.'s other contacts with Terrace include her recent attendance there at a community college where she was enrolled and successfully completed a healthcare certificate program. I am satisfied on the evidence that she provided that her job prospects there are quite good and she deposes in her materials that, despite looking for jobs in the area in which she is trained in Whitehorse, she has not been successful. This is likely due to the fact, I am satisfied, as she has suggested, that there is a competing program in the same discipline offered through Yukon College with the likelihood of preference by local employers for those who have graduated locally or completed practicums locally.

[6] Ms. C. suggests that the child is acclimatized to the Terrace community. She was most recently there until the latter part of June, for a 6-month period of time in Terrace with her mother, while her mother attended at the community college there and

completed her healthcare certificate program. The parties resided in the home of Ms. C.'s parents, which I am satisfied is an adequate home for all the parties.

[7] The father in this case, R.S.F., has had a traditional access relationship with his daughter. He works in the construction or, perhaps, mining industry and, until recently, I am satisfied that the vast majority of his work was out of Whitehorse. Historically his time in Whitehorse was not regular -- he was out of town at camps -- but he did have his daughter, M., with him during the time that he was in Whitehorse, not working out of the city.

[8] In regard to the father there is a concern which, frankly, I am not quite sure how to address. The father has a child other than M. with someone else. This child is a daughter named C., born on July 28, 2006, and she is approximately 8 years of age. Mr. F. has a child with Ms. C. M., the child in question, was born on the April 21, 2009. She is five. Those children were the result of two relatively short common-law relationships. He now has a child with his current wife, K.F., a woman he became engaged to on December 31, 2011, and has lived with since that date it appears, a date shortly after he ended his relationship with the plaintiff.

[9] The difficult concern, in taking a step back, and reading the affidavit evidence, frankly, present a fairly negative picture about the commitment or levels of commitment which Mr. F. has been able to make, at least to the people with whom he has a close personal relationship.

[10] He was living with Ms. C., it appears, until some time in November of 2011. He states in his affidavit that he has been involved in a personal relationship with the now Ms. F. since December of 2011, the month they got engaged. That is perhaps quick

and a bit odd, but Ms. C.'s comments in that regard are to point to the difficult behaviour of Mr. F. during the latter part of her relationship with him. Ms. C. states in her affidavit that in December of 2010, a year before they broke up, she discovered that Mr. F. was having a sexual relationship with the now K.F., a relationship he promised to end. He did not.

[11] In October of 2011, she deposes that Mr. F. said he was going to Lone Butte to visit his sick uncle. She found, shortly thereafter, tickets charged to his VISA, tickets from Whitehorse to Vancouver. When she asked him about those, he first told her that they were for his former partner, C.R., and his eldest daughter, C., to go to Vancouver for the purposes of a medical appointment for C. C.R. was asked about this and denied it. Eventually, Mr. F. came clean that, rather than seeing his uncle in Lone Butte, he was with the new Ms. F. in Vancouver.

[12] Conduct, generally speaking, is not a relevant factor. Mr. F.'s comments in his affidavits about these allegations consist of a general denial only. But, unfortunately, a general denial is not good enough because what is left before the Court is a picture of someone's character, and character is a significant factor in one's parenting abilities and, specifically, one's ability to be a good role model.

[13] Putting the incident of his break-up with Ms. C. aside, there is an additional difficult factual point here. And that is, frankly, the situation that is created by someone, Mr. F., choosing in an eight-year period of time to have three children with three different partners. The challenge that that creates is there are now three children, each of whom has two stepsiblings and each of those two stepsiblings has different mothers; there are three households, all of whom have to revolve around his schedule; and,

potentially, there are three women restricted by the actions of this individual. Restricted in that they have to remain, in theory, in a close relationship with him because of the best interests of their children being, at least in part, determined by relationship with stepsiblings. This creates, frankly, a misogynistic environment where everyone associated with this father has to be centered around this father's life and his schedules because of the situation that has been created.

[14] In that respect, the law, developed in this area of mobility, has its limits. A father who chooses in eight short years to create three family units with three different partners cannot, respectfully, possibly expect the same consideration on the aspects of the best interests test of a child as it relates to that child's relationship with stepsiblings.

[15] The affidavit and materials, which I have had an opportunity to review, also convince me of the following. Despite a letter from his employer, I am satisfied that in the past and likely in the future, much of Mr. F.'s work will keep him out of town regularly. That is a pattern that has developed over a number of years and only seems to have changed as a result of the application of Ms. C. to move. I am not satisfied, based on the evidence before me, that simply because of Mr. F.'s current situation, that his employer will be as accommodating as he suggests.

[16] Additionally, I am satisfied that while the mother was in Terrace for school, access happened. And even though there was distance, the mother was cooperative about ensuring that the child saw her father and ensuring that that relationship continued.

[17] After the time in Terrace -- and I am satisfied an overholding of the father here in Whitehorse -- there was a period of time, I am satisfied on the evidence, where Mr. F.

did not see his daughter much, if at all, over the summer months despite offers of that time. That changed once the present application appears to have been percolating.

[18] I note that the child is in kindergarten. Kindergarten is, frankly, important but not the most important year of a child's long-term education.

[19] I note as well that this application has been made by way of affidavit, and that is problematic. It is problematic because affidavits do not often paint the full picture. They contain allegations and cross-allegations which are, in this case, not expressly refuted and that may not be the whole story. It is problematic that Mr. F. has not commented on the negative comments about his care of the child and about his transient personal relationship and the suggested historic lack of true concern for his daughter.

[20] I am aware, however, that there are two sides of the story but have not been given much assistance from Mr. F. in this regard.

[21] The law that needs to be applied in this case is s. 30 of the *Children's Law Act*, S.Y., 2002, c. 31. Section 30 reads:

> 30(1) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including
>
> (a) the bonding, love, affection and emotional ties between the child and
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons, including grandparents involved in the care and upbringing of the child;
>
> (b) the views and preferences of the child, if those views and preferences can be reasonably determined;

> (c) the length of time, having regard to the child's sense of time, that the child has lived in a stable home environment;
>
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessaties[sic] of life and any special needs of the child;
>
> (e) any plans proposed for the care and upbringing of the child;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live; and
>
> (g) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child.
>
> (2) The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the conduct is relevant to the ability of the person to have the care or custody of a child.
>
> (3) There is no presumption of law or fact that the best interests of a child are, solely because of the age or the sex of the child, best served by placing the child in the care or custody of a female person rather than a male person or of a male person rather than a female person.
>
> (4) In any proceedings in respect of custody of a child between the mother and the father of that child, there shall be a rebuttable presumption that the court ought to award the care of the child to one parent or the other and that all other parental rights associated with custody of that child ought to be shared by the mother and the father jointly.
> *S.Y. 1998, c. 4, s. 2; R.S., c. 22, s. 30.*

[22] In terms of an analysis of s. 30, I am satisfied that in terms of the bonding, love, affection, and emotional ties that exists with this child, those ties are clearly closer with the mother than they are with the father. I am satisfied as well that the child has a good relationship with her older sister, C., and with extended family members, both in Whitehorse and in Terrace.

[23] In my view, there is really no objective evidence about the views or preferences of this child, and, frankly, the views or preferences of a child this age are of little weight for the Court. She is of tender years.

[24] In terms of the length of time that the child has been in a stable home environment, I note that despite the temporary move to Terrace, the mother has provided a stable home environment for the child and the child's home environment has always been with the mother.

[25] In terms of the ability and willingness of each person to provide guidance, education, and the necessities of life for the children, both parties appear able and willing to provide that.

[26] The next consideration is the plans for the child's care and upbringing. The plans for the mother are to do this in her traditional home territory of Terrace with her parents close by. The father's view is that this can be done in Whitehorse with other extended members of the family.

[27] In terms of permanence and stability of the family unit, Ms. C. has provided since this child's birth a stable family environment. Mr. F.'s stability and personal relationships I have already commented on and do not appear to be solid. I again believe he will work out of town much of the time, and leave it to Ms. C to provide care for C.

[28] In terms of a person's ability to provide for the access to the other parent, I am satisfied that Ms. C. has, during the period of time that she was in Terrace, made more than reasonable arrangements by consent with Mr. F., and Mr. F. obviously was the beneficiary of that. Those were negotiated terms.

[29] In terms of the case law that gives guidance, the seminal case, as counsel have

advised, is the decision of *Gordon v. Goertz*, [1996] 2 S.C.R. 27. Paragraph 49 of that decision summarizes the law.

> 49 The law 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 ill custody;
>
> g. disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> 50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[30] What *Gordon* tells us is that a parent who has applied for a move must establish, essentially, a threshold requirement of material change in circumstances. I am satisfied here that that is the case with the mother's proposed move to Terrace.

[31] From that point, courts are to embark on a fresh inquiry into the best interests of this child. I am satisfied, based on the mother's historical and lengthy involvement with this child, the father's role of being an access parent who sees his child sometimes regularly and sometimes as little as one period of time over a six-week period, that, clearly, the best interests of this child in regards to time and in regards to the ability to meet the child's needs is a factor which favours the mother.

[32] I note as well that *Gordon* provides that there must not be a legal presumption in favour of a custodial parent. And for the purposes of this analysis, I believe the law is clear that when one considers "custodial parent" in this context, one is talking about a primary resident parent. And I note that *Gordon* directs the courts to consider the custodial parent's views as entitled to great respect.

[33] In terms of the focus of the test in *Gordon* being on the best interests of child, not on the interests of parents, I am satisfied that this mother, Ms. C., has always acted in a circumstance related to the best interests of her child and I am satisfied that if a move is permitted, she would continue to do so and would continue to ensure that the relationship with R.S.F. would be a relationship that was fostered.

[34] I am satisfied, having considered s. 30 and considered the test in *Gordon* that on an interim basis, based on the law as I believe it to be and based on the materials before me at this stage, it is in the best interests of this child to be in her mother's care and it is in her best interests to be in her mother's care even if her mother moves to Terrace. Her father's role in her life is limited and I am satisfied this involvement can continue to take place despite the distance to Terrace, as it did from January to July of 2014 when the mother was there for schooling in Terrace.

[35] I know that this child is in school now, that it is only kindergarten, and I know, as I continue these reasons, this will become relevant, that between now and next summer there are substantial breaks over Christmas, over a two-week spring break period in British Columbia, as well as other times that the child can be with her father and not miss too much of the kindergarten year.

[36] I am ordering on the interim that the mother is permitted to move with the child to Terrace and the parties are at liberty at any time to bring on a court application if they cannot settle on the terms of access while the mother resides in Terrace and the father resides here.

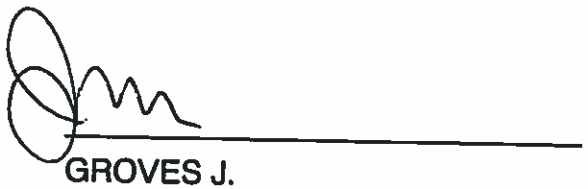
[37] As this is only an interim order, either party is at liberty to set the matter for trial between the months of March and June of 2015 so that, if the parties wish to continue

to litigate the matter, the matter can be resolved effectively before the child begins her first year of real school.

[38] I can advise the parties that, if need be, I will make myself available to hear that trial in those months. At trial, a judge may make different findings. I am restricted to findings on affidavits and I will be the first to admit that affidavits never tell the full picture and often do not tell even part of the picture.

[39] But I am satisfied that there is good reason for the mother to move and that it is in the best interests of this child, at her age and considering her circumstances to date, to be in the primary care of her mother and the child should complete the kindergarten year in Terrace. The Court, if the parties wish to continue to litigate the matter, can make another determination or the same determination, depending on the outcome, for her school year beginning in grade 1.

[40] As such, the father's application for shared time is dismissed and the plaintiff is entitled to her costs.



GROVES J.