

SUPREME COURT OF YUKON

Citation: *A-MCM-L v JBL*, 2015 YKSC 60

Date: 20151124
S.C. No.: 08-D4076
Registry: Whitehorse

BETWEEN:

A.-M.C.M.-L.

PETITIONER

AND

J.B.L.

RESPONDENT

Before the Honourable Mr. Justice L.F. Gower

Appearances:
Kathleen M. Kinchen
Lenore Morris

Counsel for the Petitioner
Counsel for the Respondent

REASONS FOR JUDGMENT

[1] GOWER J. (Oral): This is an application by the father for the appointment of a children's lawyer for the two boys M., who is age 14, and G., who is age 12.

[2] M. has some significant cognitive and medical issues. It is understood that he is at the cognitive age of approximately a six-year-old. He also has some difficulties in communicating with other adults.

[3] I made a decision on a similar application by the father on February 17, 2015. At that time, I indicated that it was a very difficult decision to make as to whether a children's lawyer should be appointed. I indicated that, in general, my practice is to err on the side of appointing such a lawyer, when the children are of an age where it seems

appropriate, because it is important wherever possible to obtain some objective information about the views and preferences of the children. In this particular case, those views and preferences will have an impact on whether there is a significant or any change to the residential schedule of the children, which has been in place now for quite some time. The father seeks to change this schedule.

[4] The mother opposes that change and is concerned that if a children's lawyer is appointed and that person interviews the children this will put the children further into the conflict and create additional stress for each of them, particularly with respect to M., who has special needs, as I say.

[5] When I decided this matter in February, I was not satisfied that the statements the father was making about the boys wanting to spend more time with him were genuine, accurate, and objectively supportable, as opposed to perhaps the father's own perception of what the boys wanted. Today, I am satisfied on a balance of probabilities that there is now more objectively supportable evidence, particularly in the form of the older daughter, C., who is 26 years of age and has filed two affidavits, and the older son, T., who is 29 years of age and has filed one affidavit. I will come to those in a moment.

[6] The mother's counsel has indicated that nothing has changed in the last nine months to justify my reconsideration of the issue of appointing a children's lawyer. I disagree.

[7] First of all, both children are nine months older. G. is now 12 and M. is now 14. I am told M. is into his puberty. Perhaps it is only nine months, but it is at a critical time of each child's development.

[8] Secondly, since my February decision, there is now also further evidence that the children have continued to request more time with their father. And, that information is not just coming from the father; it is now coming from both C. and T.

[9] I indicated in February to the father that if these requests continue and the children continue to pursue more time with you, there has got to be another way to address them other than putting the boys in the middle of the conflict. That is my concern. It appears that the father has respected my warning -- or order, if you like -- since that time. He has indicated that whenever the children now raise the issue with him about spending more time, he specifically declines to engage in a conversation with them about the topic. But, at the same time, that has put him in a very difficult situation. What I indicated in February was that if those requests continued, the father was going to have to find another way. I think that other way now is obvious, and that is the appointment of a children's lawyer. I do not see any other alternative.

[10] The third thing that has changed is that C. has returned to Whitehorse and has been living in the father's home for the last five months and has rekindled a very close relationship with each of the boys. She has deposed in two affidavits that in the summer of 2014, she had a conversation with G. in which he said that he wanted to spend equal time at each of his parents' homes. She also had a conversation with M. in the summer of 2014, where he said he wanted to live full-time with his dad. Since her move back to Whitehorse, she deposed that M. almost daily says that he wants to stay longer at his dad's house and that he is very blunt about it. She also says that she knows that her dad has been told by me that he must not talk to her brothers about

where they want to live, so the result is that no one knows what to say to M. and that the situation is uncomfortable.

[11] I sympathize with that predicament, but I am hopeful that the appointment of a children's lawyer will provide an outlet and an alternative means of handling that uncomfortable situation.

[12] C. also says that since she moved back, her brother, G., has also told her several times that he would like to spend more time with the father's family. In the middle of September, G. spoke to her again. She asked him if he would put it in writing. He did. He wrote a short note, which she gave to the father. She also indicates that M. has asked her to speak to his mom about the fact that he wants to live with his dad, but she has not done so because she thought it might make things worse.

[13] In her second affidavit she indicates that M. and G. always initiate the conversations regarding their living arrangements and their hopes to spend more time with their father. She says that at no time has she ever, or would she ever, bring up the matter to either of the boys; rather, it is at their own request that they talk about it.

[14] There is a good deal of conflict between the affidavits of C. and the affidavits of the mother, which really cannot be resolved on a chambers application like today, but may well be explored further if there is a trial of the issue of the change in residency. Suffice it to say that despite those conflicts in the evidence my general impression -- and it is just a very general impression, which is all I can obtain on such a chambers application without cross-examination -- is that C. does not have an axe to grind with the mother. She certainly disagrees in several respects with the mother's recounting of historical events, but there does not appear to be an animus by C. towards the mother.

Her comments regarding the children speaking to her about their desire to spend more time with the father resonate with a certain ring of truth and are consistent with what the father has been saying for some time. C.'s evidence provides a level of objectivity that I did not have when the matter was before me in February.

[15] The fourth thing that is different now, as compared with then, is that T. has become involved and has filed an affidavit indicating that he had a conversation with G. at one time when G. was visiting him in British Columbia. This would appear to be sometime between 2011 and 2014, where G. said that he did not want to leave and that he wanted to spend more time with the father and wanted more freedom. T. also deposed that when he is in Whitehorse visiting the boys, they often complain about the fact that they have to leave their father's and return to their mother's home. That, again, is an additional layer of objectivity that was not available to me in February.

[16] The other thing that is different is that the father has now had about nine months to indicate or to demonstrate that he felt obliged by my reasons in February of this year not to further engage either of the boys in these conversations about spending more time. There is no evidence to the contrary to suggest that he has failed to abide by that suggestion, notwithstanding that that has put him in a very awkward position, as I alluded to earlier. In my view, that indicates a substantial degree of good faith by the father in attempting to abide by my direction and adds further credibility to his claims that this is a genuine plea from each of the children to spend more time with him.

[17] In terms of the downside, which is the risk of creating further anxiety with the children, as submitted by the mother's lawyer both in February and again today, based largely on what is in the December 2012 custody and access report, I simply note that

that report is now somewhat dated, as it is almost three years old. Weighing the risk of there being a further increase in the anxiety of the children or causing them further stress against the need for the Court to have the voice of the children put before the Court in the form of a children's lawyer, I am convinced that the latter is the appropriate way to go.

[18] Particularly with respect to G., I agree with the submission by the father's counsel that if he continues to exhibit true "switching behaviour", which was alluded to in the custody and access report, that that is an additional reason to have the objectivity of a neutral children's lawyer getting involved and seeking out his genuine views and preferences.

[19] Lastly, because of my knowledge of the calibre of the counsel who are usually appointed by the Official Guardian under the *Children's Law Act* to act in these roles, I am confident that whoever is appointed will approach their role as children's lawyer, particularly in this difficult family situation, with care and caution and that they will act in a professional manner. Hopefully that will go some distance towards assuaging the concerns of the mother.

[20] So for all those reasons, I am going to make the recommendation that a children's lawyer be appointed for the boys. Thank you.

GOWER J.