SUPREME COURT OF YUKON

Citation: *AKM v BTR*, 2016 YKSC 20

Date: 20160311
S.C. No. 11-B0040
Registry: Whitehorse

Between:

A.K.M.

Plaintiff

And

B.T.R.

Defendant

Before Mr. Justice L.F. Gower

Appearances:
Malcolm E.J. Campbell — Counsel for the Plaintiff
Norah Mooney — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the defendant father for a change in the custody and primary residence of the three children, T., age nine, B., age seven, and H., who is almost six, from the mother, who currently resides in Burnaby, British Columbia, to the father, who resides in Faro, Yukon. A threshold issue arises before this Court can decide the application. The issue is whether the children can be said to be "habitually resident" in the Yukon, as that is a precondition for this Court to assume jurisdiction under the *Children's Law Act,* R.S.Y. 2002, c. 31 (as amended), (the "*Act*"). If the

children are not habitually resident here, then, on these facts, this Court has no statutory jurisdiction to proceed any further on the question of custody or access.

[2] Jurisdiction is at issue because of the provisions in ss .37 and 38 of the *Act* the relevant portions of which state as follows:

> 37(1) The court shall only exercise its jurisdiction to make an order for custody of or access to a child if
>
> (a) the child is habitually resident in the Yukon at the commencement of the application for the order; or
>
> (b) although the child is not habitually resident in the Yukon, the court is satisfied that
>
> (i) the child is physically present in the Yukon at the commencement of the application for the order,
>
> (ii) substantial evidence concerning the best interests of the child is available in the Yukon,
>
> (iii) no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
>
> (iv) no extra-provincial order in respect of custody of or access to the child has been recognized by a court in the Yukon,
>
> (v) the child has a real and substantial connection with the Yukon, and
>
> (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in the Yukon.
>
> (2) A child is habitually resident in the place where the child resided
>
> (a) with both parents;
> (b) if the parents are living separate and apart, with one parent under an agreement or with the consent,

> the implied consent or the acquiescence of the other, or under a court order; or
>
> (c) with a person other than a parent on a permanent basis for a significant period of time,
> whichever last occurred.
>
> …
>
> 38 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. 2002, c. 31, s. 38. (my emphasis)

[3] Sections 37 and 38 are found in Part 2 of the *Act*. Section 29 further states:

> The purposes of this Part are to
>
> …
>
> (b) recognize that the concurrent exercise of jurisdiction by judicial tribunals of more than one province, territory or state in respect of the custody of the same child are to be avoided, and to make provision so that the court will, unless there are exceptional circumstances, decline or refrain from exercising jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal having jurisdiction in another place with which the child has a closer connection; (my emphasis)

BACKGROUND

[4] The parties lived together in a common-law relationship from 2005 to 2011. Following their separation, on September 13, 2011, Veale J., of this Court, granted the parties joint custody of the children, with T. and B. to reside primarily with the father in Faro, and H. to reside primarily with the mother in Burnaby. The access of each parent over spring break, Christmas and summer was specified. A dispute arose regarding the performance of the access provisions by the father, including an over-holding by him of H., following her summer visit in Faro in 2014. The mother came to the Yukon in the fall of 2014 to seek a variation of Veale J.'s Order, such that she would be granted interim custody of all three children. Principally over concerns that the father was exhibiting detrimental alienating behaviour, I made an Order on November 21, 2014, granting the mother interim custody and primary residence of all three children.

[5] On July 15, 2015, the children were removed from the mother's care by the Ministry of Children and Family Development of British Columbia ("the Ministry") because the mother was committed to hospital under the British Columbia *Mental Health Act* on the grounds that she was delusional. The Ministry also had concerns about a history of the children being malnourished, having scabies, and possibly being inappropriately disciplined by the mother. The children were placed temporarily in the home of members of the mother's extended family. However, two days later they were removed from that home due to safety concerns, and placed in care. The children remained in care until October 21, 2015, when they were returned to the mother under a six-month supervision order with various conditions. On October 27, 2015, the mother

asked that the children go back into care under a voluntary care agreement. The children remain in care to this day.

[6] On September 28, 2015, the mother's B.C. counsel filed a Notice of Family Claim in the Supreme Court of British Columbia seeking to have that court recognize Veale J.'s Order of September 13, 2011, and my Order of November 21, 2014, so as to retain her right to sole custody and guardianship of the children in British Columbia. On October 8, 2015, the father's B.C. counsel filed a Response to that Notice, along with a Counterclaim seeking sole custody and guardianship of the children and permission for them to reside in the Yukon.

[7] On January 22, 2016, the father's Yukon counsel filed a notice of application in this Court seeking an order for the custody and primary residence of the children to revert to him in the Yukon.

[8] On March 4, 2016, the mother's Yukon counsel filed a cross-application for an order that this Court decline jurisdiction over the children pursuant to s. 37 of the *Act*.

ANALYSIS

[9] The mother's counsel argues that the children are not habitually resident in the Yukon because the parents are "living separate and apart" and the children were "last" residing "with one parent", i.e. the mother, "under a court order", i.e. my Order of November 21, 2014, in British Columbia. Therefore, pursuant to s. 37(2) (b), the children must be deemed to be habitually resident in British Columbia.

[10] The father's counsel argues that, since the children are currently not residing with the mother, because they are in the care of the Ministry, then it cannot be said that "the place" where they are currently residing is "with" the mother. Therefore, s. 37(2)(b) does

not apply. In that case, by default, s. 37(2) (a) would apply, and the place where the children were last residing "with both parents" was the Yukon. Accordingly, they can be said to the habitually resident here.

[11] Implicit in this argument is that the "place" in s. 37(2) must be interpreted as meaning the residence of the mother, rather than the province of British Columbia. In my view, such an interpretation would be unduly narrow and inconsistent with the concept of habitual residence. This term is defined in Black's Law Dictionary, ninth edition, as:

> *Family law*. A person's customary place of residence; esp., a child's customary place of residence before being removed to some other place. The term, which appears as an undefined term in the Hague Convention, is used in determining the country having a presumed paramount interest in the child…

Section 37(1)(a) and (b) speak of the child either being or not being "habitually resident in the Yukon". Therefore, when s. 37(2) speaks of the child being "habitually resident in the place where the child resided…", the legislature must have intended to refer to a territory, province or state, and not simply a particular residence. Such an interpretation would also be consistent with s. 51(1)(b)(ii) of the *Act*, which authorizes the Yukon court to make orders superseding extra-provincial orders regarding custody or access, where it is established, among other things, that:

> the child no longer has a real and substantial connection with the place where the extra-provincial order was made, (my emphasis)

Once again, I say that the legislature must have been referring here to a territory, province or state, and not simply a particular building being used as a residence or home.

[12] In any event, the argument of the father's counsel ignores the fact that s. 37(2) also requires the court to consider which of the three possible scenarios set out there "last occurred". Thus, even using counsel's interpretation of the "place" as meaning "the mother's residence", that in fact is the scenario which last occurred before the children were taken into care by the Ministry.

[13] Neither counsel provided me with any case law on the statutory interpretation/jurisdiction question.

[14] However, a decision of Veale J. in this Court, *T.T.T.M. v. E.E.Q*., 2008 YKSC 37, goes beyond the issue of statutory jurisdiction and raises the potential applicability of *parens patriae* jurisdiction. In that case, Veale J. referred with approval to a case from the British Columbia Court of Appeal, *Yassin v. Loubani*, 2006 BCCA 509, which held that the *parens patriae* jurisdiction of superior courts to take jurisdiction over Canadian children (i.e. citizens) habitually resident in other countries had not been limited by the British Columbia *Family Relations Act* (see para s. 27 to 31). In *T.T.T.M*. Veale J. also referred with approval to *Arsenault v. Burke*, 2007 BCSC 23, a decision of Garson J., which relied upon *Yassin* and concluded that even if the British Columbia Supreme Court does not have jurisdiction under the *Family Relations Act*, it does have inherent jurisdiction to act in a *parens patriae* capacity to determine custody of and access to a child that is within its territorial jurisdiction (paras. 51 to 53). Lastly, at para. 40, Veale J. also quoted Professor Hovius, in his commentary about s. 37 (1)(b) of the *Act*, in the looseleaf *Child Custody Law and Practice,* where he wrote that the determination of the six criteria in the subsection:

> ... will often turn on rather subjective assessments of whether substantial evidence is available, whether the child

> has a real and substantial connection to the jurisdiction, and the balance of convenience. In these assessments, the courts should keep in mind the general policy underlying the legislation; namely, that children's custodial arrangements should be dealt with only in the jurisdiction of their habitual residence unless there is a very good reason for the courts of another place to assert jurisdiction based on physical presence and balance of convenience. (McLeod J. ed., *Child Custody Law and Practice,* looseleaf (Scarborough: Carswell, 1992) at ch. 7. "Mobility Issues in Custody and Access cases") (my emphasis)

[15] In the case at bar, since the children are not habitually resident in the Yukon, this Court can only assume statutory jurisdiction over them if it is satisfied that all of the provisions of s. 37(1)(b)(i) through (vi) are satisfied. That cannot be the case here because the children are not “physically present” in the Yukon and also because the mother has a pending application for custody in British Columbia, where the children are habitually resident.

[16] Further, I do not feel this is an appropriate case for this Court to exercise its *parens patriae* jurisdiction over the children for the following reasons:

1) the children are not physically present in the Yukon ;
2) the jurisdiction of habitual residence of the children is now British Columbia, and they have been residing there for the last 16 months;
3) the most recent evidence regarding the welfare of the children is likely to emanate from British Columbia;
4) there is a pending family law proceeding in British Columbia to which the father has attorned; and
5) any custody determination will have to be decided in the context of the child protection proceedings in British Columbia.

CONCLUSION

[17] I conclude that this Court has no jurisdiction over the children with respect to custody or access. Any further determinations in that regard will have to be made in the Supreme Court of British Columbia. If time is of the essence for the father, I note that he is a counter-claimant in that Court and is represented by counsel in that proceeding. I therefore expect that he should be able to move the matter forward as expeditiously as the court calendar will allow, without having to wait for the mother to take the next step.

[18] The mother will have her costs fixed in the amount of $250.

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GOWER J.