SUPREME COURT OF YUKON

Citation: *E.M.M. v. D.W.M.,* 2019 YKSC 44

Date: 20190815
S.C. No.: 12-B0017
Registry: Whitehorse

BETWEEN:

E.M.M.

PLAINTIFF

AND

D.W.M.

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:
Baird Makinson — Counsel for the Plaintiff
Paul Di Libero — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] VEALE C.J. (Oral): This is an application of D.M., who is the father of J., born January 3, 2011. There is a long procedural history to the file, which I will set out, but the application that is before me by D.M., who resides in Carmacks, Yukon, is an application essentially expanding the Skype contact, which was ordered by Justice Gower in 2012, and is also asking for some in-person contact when J. visits the Yukon.

PROCEDURAL HISTORY

[2] This came before the Court in 2012. Justice Gower ordered interim interim custody to E.M. and set out a specific access schedule.

[3] In September 2012, Mr. Justice Stach continued E.M's custody and also set out a detailed access schedule.

[4] Both Mr. Justice Gower and Mr. Justice Stach have provided extensive reasons for their decisions.

[5] On November 27, 2012, Mr. Justice Gower made the decision that is essentially the one that D.M. wishes to vary on this occasion, basically restricting access of D.M. to J. to Skype calls on Wednesday at 6 p.m.

[6] There was a further application in December 2012 where Mr. Justice Gower permitted E.M. to travel with J.

[7] There were some applications in 2013. The one that I decided was in October 2013. I granted E.M.'s application to establish her residence in British Columbia. As I understand it, D.M. did not attend that hearing.

[8] In 2016, D.M. brought the matter back to the Court. There was no court order during that time but extensive consultations, and it was resolved without an order.

[9] This application is now brought in June 2019 to vary the 2012 order and increase Skype access and allow for in-person contact when J. is in the jurisdiction.

ANALYSIS

[10] The present circumstances are that J. has resided with E.M. in British Columbia since mid-2014, approximately five years.

[11] The section that is brought to bear is s. 37 of the *Children's Law Act*, R.S.Y. 2002, c. 31. Section 37 is very clear.

[12] Section 37(1) says that:

> 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 . . .

[13] That is not the case. In the application before me, the child habitually resides in British Columbia.

[14] However in s. 37(1)(b), there are six factors that can be considered and must be found to apply in each case that the Court would be satisfied that even though the child does not habitually reside in the Yukon, it would be appropriate to continue to exercise jurisdiction.

[15] The other principle that can be applied in some circumstances — and I would say it is an extraordinary remedy — is what is known as — and I dislike Latin expressions but I will use it because we will not be able to identify it — *parens patriae* jurisdiction. That is where the Court essentially considers that the statutory provisions do not permit the exercise of its jurisdiction, but for extraordinary reasons determines that the Court would exercise its jurisdiction.

[16] I have indicated in the case that both counsel are referring to, *T.T.T.M.* v. *E.E.Q.*, 2008 YKSC 37, that it does require some unusual circumstance to invoke the *parens patriae* jurisdiction. I would agree with counsel for E.M. that it is an extraordinary remedy because the Court should not override clear statutory provisions except in exceptional or extraordinary circumstances. This is not a case requiring an extraordinary remedy.

[17] There is no question that if this Court does not exercise jurisdiction that it does involve inconvenience for D.M., who is present in court today. But equally, it involves inconvenience for E.M., who is in British Columbia. Both parties are going to have to obtain separate counsel in British Columbia, in the event that I do not exercise

jurisdiction, and a British Columbia judge, of course, will have to wade through the extensive documentation and reasons for judgment on this file.

CONCLUSION

[18] To conclude, I am of the view that s. 37(1) of the *Children's Law Act* applies and the conditions set out in s. 37(1)(b) are not enough to satisfy me that I should exercise jurisdiction. Therefore, the matter should be commenced in the Province of British Columbia. I do not find that unusual or extraordinary circumstances exist to invoke the *parens patriae* jurisdiction.

[19] The only condition that I would add to that is that the entire affidavits, orders and reasons for judgment in the file need to be transferred to that jurisdiction so that the judge would have an opportunity to review them.

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VEALE C.J.