SUPREME COURT OF YUKON

Citation: *J.C.E. v. C.D.G.,* 2020 YKSC 11

Date: 20200309
S.C. No.: 19-D5191
Registry: Whitehorse

BETWEEN:

J.C.E.

PLAINTIFF

AND

C.D.G.

DEFENDANT

Before Madam Justice S.M. Duncan

Appearances:
Allyssa Tone — Counsel for the Plaintiff
C.D.G. — Appearing on his own behalf

REASONS FOR JUDGMENT

[1] DUNCAN J. (Oral): This is an application by the defendant, C.D.G., who is now self-represented, for an order for:

- shared custody and decision-making on the health, education, and spirituality of the children of the marriage, M.D.E., born July 4, 2016, and K.E., born January 28, 2019;
- equal parenting time to both parents, including overnight unsupervised access on weekends and once during the week;
- access to the family home garage once a week every Wednesday when the plaintiff is not at home; and that

- the plaintiff must obtain written approval regarding any relocation of the children outside of Whitehorse.

[2] The parties' last court appearance before this current application was November 8, 2019, when I ordered interim custody of the children to the plaintiff mother, J.C.E.; supervised access to C.D.G. at times to be agreed between the parties; and access to the family home garage by C.D.G. to retrieve his belongings.

[3] C.D.G. now says there has been a change in circumstances that justifies the granting of a new order as requested.

[4] The primary issues in this application are whether the test for change in circumstances has been met and also what is in the best interests of the children.

[5] The test of change in circumstances in a case of custody and access, such as this, was set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. First, the Court said: Have there been material changes that have altered the child's needs or the ability of the parent to meet those needs in a fundamental way?

[6] The question the Court must consider on a variation proceeding is whether the previous order might have been different had the circumstances now existing prevailed earlier. Change alone and the passage of time are not enough.

[7] The applicant in this case, C.D.G., has the onus of proof to show on a balance of probabilities that:

1. there has been a change in the condition, means, needs, or other circumstances of the child and/or the ability of the parties to meet those needs;
2. the change materially affects the child; and

3. the change was not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[8] Other factors in considering material change include the following:

1. material change must be viewed flexibly in order to accommodate a host of factual developments that may have occurred since the existing order was made; and
2. the change must be significant and long-lasting and not trivial, insignificant, and short-lived.

[9] Much of C.D.G.'s submissions in this application were focused on re-litigating matters decided at the last hearing, in blaming J.C.E. for abusive behaviour towards him and the children, and attempting to bolster his own character. These were not substantively relevant submissions to the change in circumstances aspect of the application, but I did take the fact that they were made into account in considering the appropriateness of the order requested.

[10] C.D.G.'s views of the changes occurring since the order was made include:

1. there has been improvement in communication between him and J.C.E.;
2. there is a letter from Family and Children's Services in the Yukon closing the child protection file that was opened after the incident in September referred to and talked about in the last court hearing;
3. there is correspondence from Family and Children's Services in British Columbia allowing C.D.G. telephone and video access with the foster child, M.C., although as yet no in-person contact is allowed;

4. C.D.G.'s attending of counselling with J.G., which includes counselling for the effects of trauma as well as for communication, his completion of three Family Law Information Centre courses available for separating couples with children, and his completion of an Indigenous parenting course;
5. the regression of M.D.E.-in particular, more accidents in wetting himself and more tantrums- which C.D.G. attributes to his reduced presence in M.D.E.'s life; and
6. the fact that nothing negative has occurred during his supervised access with the children, supporting his view that supervision is unnecessary.

[11] J.C.E. opposes the entirety of C.D.G.'s application. She says there has been no material change warranting a change to the existing order. Although she acknowledges that C.D.G.'s texts have been more respectful, she says she found the material he filed for the purpose of this application and the oral submissions he made, which followed the affidavit material very closely, incredibly discouraging. She says that his blaming of her, his minimizing of his own role in the conflict, and his attempts to justify his behaviour throughout his written and oral submissions suggested to her that very little has changed. While she is glad that C.D.G. has completed the courses that he has, and is attending counselling for trauma, she does not yet see positive results from these initiatives that demonstrate insight into his contributions to the breakdown of their relationship and the effect on the children.

[12] J.C.E. says that the letter from Family and Children's Services is short on information and the reasons for closing the file are not apparent. She notes that while

C.D.G. is now able to have access to M.C. by telephone and video, he does not yet have permission from Family and Children's Services for in-person access.

[13] She notes that M.D.E.'s tantrums and incidents of wetting himself have reduced in frequency. She also notes the Child Development Centre's observation that regression is to be expected for young children experiencing the separation of their parents, thus, she says, regression cannot necessarily be attributed only to C.D.G.'s reduced participation in their lives or in M.D.E.'s life.

[14] Finally, J.C.E. notes her disappointment and frustration at the one joint counselling session during which she felt blamed and demeaned. She has no interest in a further joint counselling session at this time especially after hearing from C.D.G. that he felt the session went well.

[15] J.C.E. remains worried for the children if access by C.D.G. were unsupervised. Her basis for this worry are the incidents from September 2019, showing poor judgment and risk-taking behaviour by C.D.G., and his ongoing refusal to take responsibility for those incidents.

[16] She is also concerned about one recent incident occurring at the Canada Games Centre swimming pool, where the female access supervisor was not with C.D.G. and the children for between 2 and 10 minutes while K.E. was at the side of the pool and C.D.G. and M.D.E. were in the pool.

[17] She is also concerned about the fact that some of the supervisors did not seem to take their roles seriously, based on what she believes C.D.G. told them about the situation.

[18] She also has concerns about C.D.G. interrogating M.D.E.

[19] J.C.E. says she needs to see more evidence of change and insight into C.D.G.'s behaviour and its effect on her and the children. She needs more details, she says, of the kind of counselling that he is undergoing. She needs to see less blaming of her before she could be comfortable with any change to the existing order.

[20] Having said all of this, J.C.E. does acknowledge that C.D.G. has a genuine interest in the well-being of the children and she knows he is capable of being a good father.

[21] First, I will address the threshold issue of whether there has been a material change in circumstances. If I find that there has been, I will then address what arrangement is in the best interests of the children.

[22] One of the main reasons for my order of interim joint custody and supervised access at the last court hearing was because of the open child protection file of Family and Children's Services and the decision of Family and Children's Services in British Columbia to forbid contact between M.C. and C.D.G. The Yukon file has now been closed, albeit with no information as to why. In the British Columbia Family and Children's Services matter, telephone and video contact is now permitted with the possibility of further access awaiting a report from a child psychologist.

[23] If I had known at the last hearing that the Family and Children's file had been closed and that limited contact with M.C. was allowed, I may have decided the matter differently. I do consider this to be a material change that may affect the order.

[24] I note here that C.D.G. was represented by counsel at the last date when I gave my oral decision approximately 10 days after the hearing was held. C.D.G. did, on his own, (not through his counsel at the time) advise me that he had a letter from Family

and Children's Services but it was not produced and I was not told what its contents were. I advised C.D.G. at the time to speak to his counsel and if they wanted to apply to reopen the evidence, they could do so. This did not happen. I was provided with the Family and Children's Services letter by C.D.G. only on the most recent application.

[25] I also take into account that C.D.G. has begun counselling for effects of trauma and for communication, although I agree that more detail of the nature of counselling and his progress would be helpful, and, in particular, how the counselling may affect his relationship with the children.

[26] I also note that there is no evidence from any of the supervisors of any negative behaviour by C.D.G. during the visits with the children.

[27] In conclusion on the material change issue, the actions of Family and Children's Services in closing the file and in relaxing the no contact with M.C., the fact that C.D.G. is attending counselling for the effects of trauma and has completed other parenting courses, the fact that there have been no reports of any bad behaviour during access visits from any supervisors, and the fact that M.D.E.'s tantrums and accidents have subsided over the last couple of months all lead me to the conclusion that there has been a material change in circumstances.

[28] However, I must now determine what is in the best interests of the children. This requires me to analyze what kind of custody and time-sharing arrangement is in their best interests. I am able to consider the matter afresh without defaulting to the existing arrangement. Both parties have the onus at this second stage to demonstrate where the best interests of the children lie. I have to consider all the evidence, including the

evidence related to the changed circumstances to decide what custody and access terms support the children's best interests.

[29] First, joint custody. There is no presumption at law for or against joint custody. In order for joint custody and joint decision-making to work, the parents must be able to communicate civilly and effectively with each other — at least about the children — for the benefit of the children. There must be a certain amount of trust between the parents to allow this level of communication to occur. This level of trust and effective communication does not yet exist in this case. Despite the more polite texting from C.D.G., which is a laudable improvement, there remains high conflict between the two of them and finger-pointing and blaming that is ongoing. I do not see a significant enough change in the relationship between the two parents to find that joint custody and decision-making is in the best interests of the children at this time.

[30] Second, equal parenting time. For similar reasons, I am of the view that there has not been a significant enough change to justify equal parenting time. This, too, requires ongoing, civil, effective, and respectful communication, and that, unfortunately, does not yet exist here. I do not believe it is in the best interests of the children at this stage to have equal time with each parent. The conflict is too high, the emotions are too volatile, and the trust is not yet there.

[31] Finally, the most difficult decision, in my view: Should there be supervised or unsupervised access? As discussed at the hearing, the principles of access and supervision are summarized well in the case of *Miller v. McMaster*, 2005 NSSC 259. The Court in that case said:

> [9] A child is entitled to share in the daily life of his/her parents unless such is not in the child's best interests to do

> so. Access is the right of the child and not the right of the parent.
>
> …
>
> [10] The comments of Daley J. in Neill v. Best (1995) 147 N.S.R. (2d) 54 (F.C.) at paragraph 27 are worthy of note in the access decision to be determined:
>
> > [27] The welfare of the child rule is paramount. Access is not a reward for parenting or for not having custody… It should look for benefits to the child…

[32] As acknowledged by the plaintiff during the hearing, supervised access is not a long-term solution to access problems which usually arise in high-conflict custody and access cases where distrust and negative parental allocations abound.

[33] As noted in paragraph 11 in the case of *Miller v. McMaster*, supervised access is appropriate in specific situations, some of which include the following:

> [a] where the child requires protection from physical, sexual, or emotional abuse;
> [b] where the child is introduced or reintroduced into the life of a parent after a long absence;
> [c] where there are substance abuse issues; or
> [d] where there are clinical issues involving the access parent.

[34] The court further wrote at paragraph 12 that "[s]upervised access is not appropriate if its sole purpose is to provide comfort to the custodial parent. Access is for the benefit of the child and each application is to be determined on its own merits."

[35] While I acknowledge that none of the above four examples of situations where supervised access is appropriate exists in this case, I also appreciate that this is a non-exhaustive list.

[36] Previously in this case, there was the incident of C.D.G. holding K.E. by the neck or the head which was very concerning. Although C.D.G. did admit at the October

hearing that it was a stupid thing to do, at this most recent hearing, he minimized the incident and saying in his affidavit that "this was a false allegation". He also tried to discredit J.C.E.'s evidence of the incident.

[37] C.D.G. also showed some absence of insight into his reckless behaviour in September when he fled with the children — when Family and Children's Services came to the house — without telling J.C.E. where they were, requiring the RCMP to find him and return the children to J.C.E. He said at this hearing that he regretted his actions but he never thought it would be that serious.

[38] This ongoing lack of insight into his past behaviour is concerning and no doubt is legitimately contributing to J.C.E.'s fears.

[39] I find that this case is similar to the case of *Riaz v. Ul Islam*, 2019 ONCJ 108. In that case, the father was granted supervised access to his two-year-old child for two hours every two weeks. After this had continued for two years, the father sought to remove the conditions of supervision, granted on consent almost two years earlier, and to expand his access.

[40] The Court found that on the evidence from the supervised access centre there were positive regular visits and no critical reports, and this was a material change in circumstances. However, the Court went on to find that the evidence did not support a variation of the existing order to transition from supervised to unsupervised access because some behaviours of the father were not child-focused: including questioning of the child; reframing questions until a response was received; insistence that the child display affection physically or verbally; and questioning the care that the child received while residing with the mother.

[41] There was also evidence of the parties' difficulties in communication with each other, their trust, their motivation, and the acceptance of the other's role in the life of their child. There was a belief on the father's part that the mother was trying to control him and their contact; and on the mother's part that the father was a bad role model and would discredit her.

[42] In conclusion, the Court found that despite attending a parenting course, the father had not gained insight as to how his behaviour had impacted the child.

[43] I do acknowledge that the facts in the *Riaz* case are more extreme than the facts of this case, but there are indications in this case of similar factors, including J.C.E.'s expressed concern about inappropriate questioning of M.D.E. by C.D.G. and her concern that that would increase if there were no supervisor, evidence of C.D.G. minimizing his behaviours with the children, and evidence of ongoing communication problems and a trust breakdown between the parents.

[44] C.D.G. is doing the right things. There have been material changes in circumstances but, in my view, more changes have to occur before changes to access and custody can happen. It has been less than four months since the last order and C.D.G. was away for approximately three weeks of that time. C.D.G. has begun counselling only recently and the positive effects of that counselling have not yet been seen by J.C.E. or this Court, apart from the more respectful and polite texting which I do not downplay at all. It is a major and commendable improvement. Good changes are happening but more have to happen and there must be more time for solidification for these changes so that they become the new normal.

[45] The fact that C.D.G. has said during the hearing that he has done everything J.C.E. has asked him to do suggests to me that he does not fully accept that he needs to make more changes so that the communication improves with J.C.E., so that she is no longer fearful, and so that the children will be able to enjoy the best of both parents.

[46] I appreciate that it is difficult to find supervisors, but for now I am persuaded that the best interests of the children require ongoing supervised access. There needs to be further improvements in the trust, in the communication ability, in the evidence of progress of the trauma counselling and other counselling, such as greater insights and less blaming. Stress levels need to be reduced because this affects the children negatively.

[47] Counselling and the effects of counselling to effect real change takes time. When this application was originally brought in January, only two months had passed since the last order. Now just less than four months have passed. I do not believe that is a long enough time to achieve the kind of change that needs to happen here.

[48] I do remind the parties that this is still an interim order and I note, again, that J.C.E. has always said that C.D.G. genuinely cares for and is concerned about their children. C.D.G. clearly has been an involved father who loves his children very much and wants to remain fully involved in their lives. None of us wants this to remain the *status quo*, but right now the best interests of the children is to have the stability of remaining in the house with their mother, seeing their dad as often as possible by phone and by video and in-person visits with supervision. I encourage J.C.E. to continue to provide generous access as she has in the past.

[49] The garage. Again, because of the lack of trust between J.C.E. and C.D.G., I do not think at this time that regular access to the garage by C.D.G. is appropriate. If there are improvements in their ability to communicate and if the trust level improves then this may be able to be revisited, of course; but at this stage of the relationship, that level has not yet been reached. Of course, J.C.E. is free to consent to C.D.G.'s attendance at the garage at any time.

[50] Finally, C.D.G. seeks written permission before relocation of the children outside of Whitehorse. If unilateral relocation were done, this would have significant implications for meaningful access by C.D.G. and possible future joint custody.

[51] Section 16(7) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) allows the Court to include a term in an order requiring the parent who has custody and intends to change the place of residence to notify the parent who has access of the change, the time, and the new place of residence at least 30 days or more before the change. That allows the other parent to object, for discussion to occur, and if no agreement reached, for a court application to be made.

[52] I will make an order that if J.C.E. intends to change the place of residence of the children, she must provide 90 days' notice to C.D.G. The rest of the order remains the same.

[DISCUSSIONS]

[53] Ms. Tone will draft the order, which will be short because everything stays the same except for the one term, and then she will pass it to my office. I will review it and make sure it reflects what I have ordered, and then she will sign it on both your behalves and you will receive a copy of it.

[DISCUSSIONS]

[54] C.D.G., as I said in my decision, there is a concern with your application, with the written materials, and the oral submissions you made about a lack of insight into your past behaviours — and even current — and also a continual blaming of J.C.E., and a failure to take responsibility for your part in the conflict, and the effect that the whole course of events has had on the children. As I said in my decision, there has to be a change in that, along with the other things I said, before that trust level is reached and communication has truly improved.

[DISCUSSIONS]

[55] If you look at the case law, most applications for material change in circumstances are brought at least a year — in most cases, two or three years — after an order is made. I am not saying that that is the case in this case. I am not saying it has to take two or three years. I am saying in order for the best interests of the children to be met, a significant change has to be seen and has to be appreciated by J.C.E. She does not feel that there has been a change. She does not see the change.

[56] You think that you have made changes — and I agree that you have, I have said that in my decision — but she does not see the effects, and that was very apparent in her evidence about the joint counselling session.

[57] If you could provide more information, as I said, on the nature of the counselling you are receiving, your progress, that would be helpful, and, in particular, how it may affect the relationship with the children.

[DISCUSSIONS]

[58] As I said, changes are happening. You are doing the right things but more time needs to pass.

[59] C.D.G.: How much?

[60] THE COURT: I cannot tell you that.

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DUNCAN J.