SUPREME COURT OF YUKON

Citation: *M.J.K. v. J.N.L.*, 2020 YKSC 5

Date: 20200212
S.C. No. 18-B0041
Registry: Whitehorse

BETWEEN

M.J.K.

PLAINTIFF

AND

J.N.L.

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:
Kathleen M. Kinchen — Counsel for the plaintiff
H. Shayne Fairman — Counsel for the defendant

REASONS FOR JUDGMENT
(Material Change Application)

INTRODUCTION

[1] This is an application by the plaintiff father to vary a Consent Order, dated September 13, 2018 (the "Consent Order"), based on a mediated Memorandum of Agreement, permitting the mother to relocate with the child to Quebec City in January 2020 or later.

[2] On November 26, 2019, the father applied for:

1. an order that there has been a material change in circumstances sufficient to allow the plaintiff to make a further application to vary paragraph 13 of the Consent Order filed September 13, 2018;

2. in the alternative, that a material change in circumstances is not necessary;
3. in the further alternative if there has not been a material change in circumstances sufficient to allow a further application to vary paragraph 13 of the Consent Order that a further application be made to determine the plaintiff's access to the child of the relationship, L.E.L., born January 1, 2017 (the "child"), upon the child's relocation to Quebec City.

BACKGROUND

[3] The mother is 39 and the father is 27. They are not married and have never resided together but dated from May 2014 until May 2016, when the mother advised that she was pregnant. The father advised the mother that he did not want to be in a relationship with her but he wanted to be involved in the child's life. The father has remained consistent that he wants to be involved as a father only, but the mother has, to a certain extent, desired to have a continuing relationship with him.

[4] There is some dispute about the father's willingness to be involved with the child but I find as follows:

1. the father supported the mother during the pregnancy to the extent she permitted;
2. she did not allow him to be present at the birth of the child, but the father visited the mother and child the next day;
3. the mother and father entered into five written and signed agreements between January 14 and December 18, 2017, drafted by the mother. There were two Child Support agreements and three Child Custody agreements;

4. the father's conduct and support has been commendable in circumstances where the mother, not surprisingly, in the early stages of the child's life had very strict standards and permitted very limited access for the father;
5. the first Child Custody Agreement, dated January 15, 2017, gave the mother "sole and exclusive custody" of the child and all final decision-making for the child;
6. the second Child Custody Agreement, dated September 29, 2017, was very detailed and gave the father one 2-hour access period per week. It also contained the clause "If nothing changes, I will be planning to move back home in 2019." Based on the affidavit evidence, I interpret that to mean if the relationship between the mother and father did not change, she planned to move back to Quebec City in 2019;
7. the third Child Custody Agreement, dated December 18, 2017, similar in form to the first Child Custody Agreement, gave two hours of access a week and also contained the statement that if nothing changed, the mother will be planning to move back to Quebec City during the summer of 2018 or early in 2019;
8. while the father was not formally represented by a lawyer until March 2019, I am satisfied that he knew his legal rights with respect to custody.

[5] The father, understandably, was not satisfied with his limited access to the child and proposed mediation. They entered into a Participant Agreement to Mediate, which encouraged the parents to obtain independent legal advice. This is part of the Yukon Family Law Mediation Project, a government-sponsored project, encouraging parents to

resolve their differences by mediation rather than litigation. If a memorandum of agreement is reached, the parents bring the agreement to court in the form of a Consent Order prepared by lawyers for the parties or by the parties with the help of a support person at the Family Law Information Centre. The Consent Order must be approved by the lawyers or the parties. A Statement of Claim is filed to initiate the process to file a Consent Order but the parties are not in a classic litigious dispute at this point.

[6] In this case, the father and mother signed a Memorandum of Agreement, dated June 8, 2018, which was not to be legally binding until finalized either by a signed agreement or a Consent Order. Neither parent had a lawyer in the mediation or drafting the Consent Order, although the participation of lawyers was encouraged.

[7] The Memorandum of Agreement contained some improvements for the father:

1. They agreed to joint legal custody of the child; and
2. the father's access increased from two hours a week to one day of eight hours per week but no overnight.

[8] The Memorandum of Agreement, dated June 8, 2018 (the "Memorandum of Agreement"), contained the following clauses, among others:

> 10. *MOBILITY* We agree that [the mother] can move with [the child] to Quebec City in January of 2020, or later. If [the father] decides if he is also moving to Quebec City or the province of Quebec, we agree to plan a new timesharing schedule. If [the father] remains in Yukon, we agree to design a schedule of times throughout each year that [the child] can be with his father – either in Quebec or in the Yukon. We estimate that this would involve three times per year.
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> …

> 12. *NEW PARTNERS*
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> i) We agree that we will advise each other when we consider ourselves to be in a serious, committed relationship that will likely lead to moving in together and we are getting ready to introduce [the child] to our new partner. We do not want [the child] to get attached to any person who we are dating casually.
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> …
>
> 17 We understand that as our child gets older and his needs change, or changes occur in either of our circumstances, changes may need to be made to this agreement. We agree to openly discuss and work together to change or amend the terms of this Memorandum of Agreement. (my emphasis)
>
> …

[9] The Consent Order, dated September 13, 2018, was not prepared by a lawyer or the parties, but rather by a staff person at the Family Law Information Centre. Both parents consented to and approved the Consent Order. The Consent Order contains the major terms, but not every clause from the Memorandum of Agreement, as follows:

1. joint custody and decision making for the child with the mother having the final decision if there is no agreement;
2. the child primarily resides with the mother;
3. the father has one day of access per week, not overnight;
4. the one-day access per week will be reviewed on March 31, 2019, and on March 31 every year thereafter;
5. child support of $907 per month, which has not been an issue of concern;
6. in the event of new partners leading to cohabitation, the parties mutually agreed to introduce them to the child “per the MOU”.

[10] The mobility clause in the Consent Order states:

> 13. The Defendant shall be at liberty to move with [the child] to Quebec City in January of 2020, or later. The parties will determine a new access schedule which will depend on whether the Plaintiff moves to Quebec City, or remains in the Yukon. If in the Yukon, the parties foresee access occurring 3 times annually.

[11] Notably, the Consent Order did not contain the general review clause in paragraph 17 of the Memorandum of Agreement as the child gets older or the circumstances of the parents change.

[12] The father ultimately retained counsel in March 2019 to assist in increasing his access to the child and the mother also retained counsel.

[13] With the assistance of counsel, the parties agreed to gradually increase the father's access to 4 to 7 consecutive days every second week including overnight access for the first time commencing May 3, 2019. Counsel agree that the father's access is close to a shared custody regime.

[14] Counsel for the father filed this application on November 26, 2019, when the mother advised that she was making arrangements to sell her house and move to Quebec.

[15] The crux of this dispute arises out of the father's frustration with the access terms dictated by an overly anxious mother for 2 years and the mother's hostile attitude towards the father's new girlfriend who came on the scene in October 2017.

[16] The father has the following concerns:

1. his relationship with his girlfriend, now spouse, does not permit him to follow his son to Quebec;

2. the negative conduct of the mother, who lives just a few blocks away, confirms that she does not place any priority to his relationship with the child;

3. that the removal of the child from the Yukon, after the mother has resided here for 15 years, will permit the mother to undermine his relationship with their child.

[17] The mother, to her credit, acknowledges that her hard feelings about the father's unwillingness to maintain a personal relationship with her, has caused her to make statements and act in ways that she regrets.

MOBILITY LAW

[18] It is trite to say that the principle to be applied in child custody and access disputes is the best interests of the child.

[19] The *Children's Law Act*, R.S.Y. 2002, c. 31, adds many factors for the Court to consider, which include, among others:

> **Variation of court orders**
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> 24 The court shall not make an order under this Part that varies an order in respect of custody or access unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child.
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> …
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> **Best interests of child**
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> 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
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> (a) the bonding, love, affection and

> (i) each person entitled to or claiming custody of or access to the child,
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> (ii) other members of the child's family who reside with the child, and
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> (iii) persons, including grandparents involved in the care and upbringing of the child;
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> …
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> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessaties [as written] of life and any special needs of the child;
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> …
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live; and
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> (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
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> …
>
> (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.

[20] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 13, Justice McLachlin set out the most succinct and longstanding statement about the parameters for establishing a material change in circumstances:

> [13] … before entering on the merits of an application to vary a custody order the judge must be satisfied of:
>
> (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[21] It is also the case that a Consent Order makes the threshold test of a material change in circumstances more challenging to establish.

[22] Counsel for the father submits that there are three material changes in circumstances:

1. significant change in residential schedule;
2. deterioration in co-parenting relationship and increase in animosity to the father's spouse;
3. the father's relationship with his spouse.

ANALYSIS

[23] In my view, the focus in this case is on the third part of the test of *Gordon v. Goertz* and that is whether the alleged material change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. I also take into account that the judge signed this Consent Order as a desk order and had scant knowledge of the facts beyond the Memorandum of Agreement. Significantly, the father filed an affidavit attaching the Memorandum of Agreement stating: "[The mother] and I have decided that she will be able to move to Quebec City with [the child] in January of 2020, or after. We will adjust our access accordingly at that time." Thus, I place great importance on the fact that this Consent Order was based on a mediated

Memorandum of Agreement initiated by the father and confirmed by sworn affidavit of the father.

Significant Change in Residential Schedule

[24] It is a fact that the father's access to the child has increased dramatically from the one day a week in the Memorandum of Agreement and the Consent Order to an almost equal sharing arrangement in May 2019. Prior to May 2019, there was evidence that the mother's custody of the child was having a negative effect on the father's access.

[25] However, the increased access occurred before the filing of this application. While the increased access may have been lawyer-driven, it was a change in circumstances reasonably contemplated in the Memorandum of Agreement and the Consent Order. It was a change in circumstances addressed by the parents with counsel and something that the father had been raising throughout the child's early years. It is also undeniable that it improved the father and child attachment but it is not a material change to support a variation in the long-standing agreement that the mother could move to Quebec City in January 2020 or after.

Deterioration in Co-Parenting

[26] There is no doubt that there was a deterioration of co-parenting prior to the move to almost equal sharing of the time with the child and overnights for the father in May 2019. Up to that point, the mother became increasingly critical of the father and his girlfriend to the point where it appeared that the mother's custody arguably interfered with the father's access to the child.

[27] Fortunately for the mother, father and the child, that conduct improved considerably with the agreed upon move to almost equal sharing of time with the child. This beneficial result was clearly contemplated in the Consent Order which included a review of the access plan on March 31, 2019.

[28] The unfortunate aspect of the mother's conduct before May 2019 is that the father has lost confidence in the ability of the mother to continue to support his access to the child once she moves to Quebec City. But one would hope at this point that the mother understands that reasonable and generous access is in the best interests of the child and should not be used to negatively impact the father's access to the child.

[29] I conclude that the change in circumstances on this aspect is, in fact, a positive one at this point and not one that would affect the mobility agreement that the parents have consistently confirmed since September 29, 2017.

Relationship with the Father's Spouse

[30] The father's relationship with his partner is certainly a positive factor for the father and the child. The father now wishes to use the circumstances of his new spouse that restrict his ability as a single person to relocate to Quebec City and maintain a close relationship with the child. Again, the Consent Order anticipated that there would be new relationships for the father and mother as both parties agreed to advise each other of serious relationships to prepare the child and the other parent.

[31] I conclude that there has not been a material change in circumstances sufficient to allow the father to make a further application to vary the mobility clause permitting the mother to move to Quebec City.

Further Application to Determine the Father's Access

[32] I have concluded that despite not having established the material change in circumstances sufficient to allow the father to challenge the mobility clause in the Consent Order, he has sufficient grounds to make a further application to determine his access to the child upon the mother's decision to relocate to Quebec City. I grant this part of the father's application for three reasons.

[33] Firstly, the Consent Order contemplated a new access schedule upon the mother's relocation to Quebec City with the terms of that access to be addressed when the decision to relocate was made.

[34] Secondly, although the Consent Order stated that "the parties foresee access occurring 3 times annually" the father's access has increased significantly since the Consent Order and the child has an established relationship with him. This must be addressed before the mother's relocation to Quebec City.

[35] Thirdly, para. 17 of the Memorandum of Agreement, which did not become part of the Consent Order, contained an agreement to discuss and amend the Memorandum of Agreement as the child got older and his needs changed and the circumstances of the father and mother changed. In my view, it is appropriate to consider para. 17 of the Memorandum of Agreement as it is not inconsistent with the Consent Order and supports a further application to determine access.

CONCLUSION

[36] I therefore order that there has not been a material change of circumstances sufficient to allow the father to make a further application to vary the Consent Order permitting the mother to relocate to Quebec City. However, I order that the father may

make a further application to determine his access to the child prior to the mother relocating to Quebec City. The date for that application is February 26, 2020, at 10 a.m.

[37] Counsel may speak to costs in case management, if necessary.

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VEALE C.J.