IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *D.M.M.* v. *T.B.M.* 2005 YKSC 21 Date: 20050421
Docket No.: S.C. No.: 02-D3464
Registry: Whitehorse

Between:

D.M.M.

Petitioner

And

T.B.M.

Respondent

Appearances:
D.M.M. On her own behalf
Kathleen M. Kinchen For the Respondent
Laura I. Cabott Child Advocate

Before: Mr. Justice L.F. Gower

REASONS FOR JUDGMENT

Introduction

[1] These reasons follow a hearing on April 15, 2005, at which time four applications were argued. The first application by the respondent sought retroactive child support. The remaining three applications by the petitioner sought a variation in her specified access, interim joint custody and a stay of maintenance enforcement. Following the hearing of these applications, the parties proceeded with a pre-trial conference on the record. Trial time has been reserved in November and December 2005, commencing November 21st, for 10 days.

Retroactive Child Support

[2] The respondent has applied by a notice of motion filed July 16, 2004, for child support retroactive to December 1, 2003. He also asks that the petitioner pay her proportionate share of daycare costs commencing February 1, 2004, in accordance with the Federal *Child Support Guidelines*, SOR/97-175. The respondent has had interim interim custody of the child since a without notice order was made by Richard J. on November 14, 2003. Interim interim child support of $570 per month was ordered by Veale J. on July 21, 2004, commencing July 13th.

[3] Section 9 of the *Guidelines* states:

> "Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
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> (b) the increased costs of shared custody arrangements; and
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> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought."

[4] Section 7(1) of the *Guidelines* states as follows:

> "(1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> …
>
> (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child."

[5] The petitioner says the interim interim child support should be cancelled as of October 8, 2004, when I made an order granting her unsupervised specified access. She did not make any child support payments prior to the interim interim child support ordered by Veale J. on July 21, 2004, and has failed to explain why. The petitioner was apparently aware of the *Child Support Guidelines*, but did not consult them. She was represented by counsel, Mr. Fairman, in November and December 2003, then represented herself from January 2004 until some time in May 2004, when she retained Mr. Thompson. Presumably the petitioner would have been aware of the letter the respondent's counsel wrote to Mr. Fairman in December 2003, asking for a specific amount of child support based on her then annual income. She should also have been aware of the letter from the respondent's counsel to Mr. Thompson on May 20, 2004, which specifically made reference to the *Guidelines*.

[6] The petitioner concedes that she could have received her retirement allowance of $15,700 from the federal government in 2003 in the form of cash less taxes, rather than diverting it to a registered retirement savings plan (RRSP). She also concedes that she could cash the RRSP, pay the tax and have some money to pay retroactive child support. She would prefer not to do so, as the RRSP is an investment for her future.

However, I reminded her that her obligation to pay child support is her first priority, in law.

[7] According to her Notice of Assessment, the petitioner earned a gross income of $84,505 in 2003, which included her retirement allowance. I find that it is appropriate to use that amount as a basis for determining the amount of child support due in that year. According to the table in the *Guidelines*, she should have paid $691 for the month of December 2003.

[8] The petitioner has not filed a tax return or Notice of Assessment to establish her income for 2004. She estimates her income in that year was about $70,000. Recognizing her failure to respond to repeated demands by the respondent to provide the financial information required under section 21 of the *Guidelines*, I will impute income to the petitioner for 2004, pursuant to section 19(1)(f) of the *Guidelines*, in the gross amount of $70,000, roughly the same amount as she earned, less the retirement allowance, in 2003. Accordingly, the monthly child support to be paid in 2004 would be $584.

[9] The retroactive child support will commence December 1, 2003, and will be payable until the end of October 2004, acknowledging that the petitioner began to have access to the child at least 40% of the time from October 8th forward. On the other hand, I also recognize that section 9 of the *Guidelines* technically requires the spouse exercising access to the child to establish that they have done so for at least 40% of the time “over the course of a year”. The petitioner has not met this requirement, but I have attempted to strike a compromise by cutting off her child support obligations as of the

end of October, rather than requiring her to wait until she has exercised her current access for a full year.

[10] As a result, the petitioner is required to pay $691 in child support for one month and $584 for ten months, for a total of $6,531. According to the petitioner's affidavit #11, paragraph 25, she has paid $3,420 to date in child support. The respondent, in his affidavit #13, concurs with the amount. Therefore, the arrears of $6,531, less the $3,420 paid by the petitioner to date, leaves a balance due of $3,111 in retroactive child support.

[11] I will now turn to the issue of the daycare costs. The petitioner ceased her employment with the Yukon government on January 12, 2005, and has since been receiving employment insurance of $413 gross weekly, or $1,789.66 gross monthly. She is entitled to those benefits for a total of 45 weeks. The respondent claims that the petitioner is currently in arrears for one-half of the daycare costs for December 2004 and for January, February and March 2005. Following up on my order of November 16, 2004, in which I ordered the petitioner to pay one-half of the daycare costs, I order that the petitioner pay the arrears of her one-half share of these costs for December 2004 and January 2005, in the total amount of $300.

[12] According to the separation agreement signed by the parties on October 3, 2003, the respondent's gross annual income for 2002 was approximately $68,000. I was unable to locate more recent financial information about the respondent's income, but I am going to assume for the purposes of this application that his current gross income is approximately $70,000 per year. That compares with the petitioner's current gross

annual income of approximately $21,500, which is 30% of the respondent's income. Accordingly, I order that the petitioner pay 30% of the daycare costs of the child to the respondent each month, effective February 1, 2005. In that sense, I am varying paragraph 3 of my order of November 16, 2004.

[13] I further order that the petitioner pay to the respondent the arrears of child support and daycare costs at the rate of $150 per month until paid in full. Of course, the petitioner always has the option of cashing in the RRSP she purchased with her 2003 retirement allowance of $15,700, or as much of it as may be required after tax, in order to pay off these arrears in a lump sum.

[14] I do not accept the petitioner's claim of undue hardship: Firstly, because of the $15,700 retirement allowance which the petitioner received; and secondly, because of the number of her personal debts which she repaid from the proceeds of the sale of the house on July 29, 2004. Those were clearly choices the petitioner made in giving other matters priority over child support.

Variation in Specified Access

[15] In her notice of motion filed January 31, 2005, the petitioner applied to vary the specified access ordered by me on October 8, 2004. She wants to pick up the child from school on Wednesday afternoons at 3:00 p.m. On every second weekend she wants her access to continue through Sunday evening until Monday morning, when she would drop off the child at school.

[16] The respondent does not oppose the 3:00 p.m. Wednesday pick up from school, but says that if that is done, the child should be dropped off by the petitioner to the daycare at 3:00 p.m. on Fridays, rather than the current 5:00 p.m. return time every second weekend. The respondent also opposes Sunday evening access because he particularly values this time with the child.

[17] The newly appointed child advocate, a lawyer, has only had an opportunity to read some of the background material to date and has not yet interviewed the child. Nevertheless, she opposes any major change in the access schedule at this time, as there may be additional changes made to the access schedule as a result of the trial. The child advocate submits that it would not be in the child's best interests to make major changes at this time on an interim basis. However, she does not view the 3:00 p.m. school pick up on Wednesdays as a major change. As for Fridays, she suggests leaving the current access as is - that the petitioner returns the child to the respondent on Fridays at 5:00 p.m. The child advocate is opposed to the idea of Sunday evening access, as she would classify this as a major change.

[18] I agree with the child advocate on all three points. I will direct the clerk to prepare an order on behalf of the petitioner to reflect this minor variation.

Application for interim joint custody

[19] In her notice of motion filed April 8, 2005, the petitioner applied to set aside the order of Richard J. made on November 14, 2003, granting interim interim custody to the respondent. The petitioner asks for interim joint custody of the child until trial. She bases

her application primarily on the fact that she is a good mother and wants to participate in decision making for the child. She argues that no one has challenged her parenting ability.

[20] Collateral to my decision on October 8, 2004, granting the petitioner unsupervised specified access, the petitioner's fiancé, T.M., agreed to enter into a recognizance under section 810 of the *Criminal Code* (the "peace bond") to have no contact directly or indirectly with the child. Incidental to the petitioner's application for interim joint custody, she wants to set aside the peace bond, or in the alternative, she seeks interim supervised access for T.M. Although she acknowledges that the peace bond was initially put in place to guarantee the child's safety, she argues that there have been some negative unforeseen outcomes:

1. parents of the child's friends will not allow their children to come to the petitioner's home to play with the child because of fears that T.M. is a danger to others.
2. the peace bond has done damage to T.M.'s reputation.
3. the fact that the petitioner, T.M. and the child are not seen together doing family activities has led to gossip and rumours about their situation.
4. the petitioner has become pregnant with T.M.'s child and is due at the end of August. She wants to reintegrate the family prior to the child's birth, which necessitates access by T.M.

[21] The petitioner deposed in her affidavit #12, at paragraph 10, that she and T.M. met with Jane Bates, a social worker, in March 2005 and that Ms. Bates "stated she has no concerns regarding [the child's] safety around [T.M.]". However, Ms. Bates deposed in her affidavit #2 at paragraph 3 that when she met with the petitioner and T.M. on March 22:

> "I did not state to [the petitioner] and [T.M.] that I have no concerns regarding the child's safety. I have had no contact with the child, the petitioner or the respondent] since 2003 and as such have limited knowledge about the situation. … There have been several significant events since my involvement and I would have to complete a thorough assessment of the situation to make any statements regarding issues of safety at this time."

[22] I note that T.M. filed his first affidavit in this proceeding on April 14, 2005. In it he purports to deny or explain the allegations of violence by him against the petitioner in 2003 and 2004, as well as the offences in his criminal record. He attached to his affidavit unsworn statements from two of the female victims involved in certain of these offences. Beyond that, the statements of T.M. in his affidavit are largely self-serving and without corroboration, nor has he been subjected to cross-examination. Accordingly, I give this affidavit little or no weight at this interim pre-trial stage.

[23] The respondent is strongly opposed to any increase in access by the petitioner, as well as any access at all by T.M. As for the proposal about joint custody, the respondent says that simply will not work and that the respondent is in the best position to make decisions regarding the child's safety. The respondent's counsel argues that there is no new objective evidence indicating that T.M. is no longer a risk to the petitioner or the child. Further, there is a danger of emotional damage to the child if T.M. is again violent towards the petitioner. Most importantly, in my opinion, she argues that neither the petitioner nor T.M. believe that there have ever been any safety issues regarding the child and therefore they cannot be counted on to address safety in any meaningful way. I agree with these submissions.

[24] My reasons for judgment following my decision on October 8, 2004 (*D.M.M.* v. *T.B.M.,* 2004 YKSC 71), explain why I allowed the petitioner unsupervised specified access. I did so because she had demonstrated a track record of taking reasonable care in trying her best to ensure that the child did not come into contact with T.M. However, I also said to the petitioner at paragraph 76:

> "But I think you understand what the Court's concern is. Let me be very, very clear here. I don't see this as the thin edge of the wedge, in terms of T.M. re-establishing a relationship with [the child]. We are going to deal with one thing at a time. I don't know, frankly, whether six months from now you are going to be in a relationship with T.M., given your track record. So this is simply because I think it is in [the child's] best interest to have maximum contact with you, with T.M. out of the picture, and that is the reason for my decision. Let me be very clear about that."

[25] The respondent says that his position at trial will be that T.M. should not have any contact with the child. Without prejudging the point, it is important to state at this stage that, in deciding the issues of custody and access at trial, it may again become necessary to consider supervised access if this Court determines that T.M. should continue to be prohibited from having contact directly or indirectly with the child. If that is the case, then the petitioner will find herself in an extremely difficult position, especially given the fact that she is about to give birth to a child fathered by T.M. and that she and T.M. plan to marry. The petitioner has made choices about that relationship and will have to live with the consequences of those choices, whatever they may be. I would encourage her to read closely *Molloy* v. *Molloy*, [1996] W.D.F.L. 2221, attached to the respondent's affidavit #14, a decision about the custody of T.M.'s children from a former marriage.

[26] The position of the child advocate, without having had an opportunity to review T.M.'s affidavit, is that the existing issues of custody and access need to proceed to trial. She says the conflicting evidence needs to be tested before this Court makes any further interim orders. She submits that it is not in the child's best interests to make major changes to the status quo at this time. Accordingly, it would not be appropriate to change the custodial status of the child now, although it may be following the trial. Once again, I agree.

[27] I acknowledge that Richard J.'s order of November 14, 2003 was without notice to the petitioner and that the petitioner does not have to show a material change in circumstances to have that order set aside. However, the petitioner still has an onus as the applicant to persuade me that there is some justification for doing so. The petitioner has failed to meet that onus.

[28] I agree with the respondent's counsel that nothing has changed since the allegations of violence were made in 2003 and 2004, other than the mere passage of time. While, it may be correct to say that T.M. has not had any direct or indirect contact with the child since he entered into the peace bond (even here there is an allegation of indirect contact, as I will discuss shortly), that indicates that he is generally complying with the peace bond, not that he is no longer a risk to the child or the petitioner. That determination can only be made at trial, when the evidence suggesting violence can be challenged and tested.

[29] I also feel compelled to note that a copy of T.M.'s criminal record was attached to Affidavit #1 of Jane Bates. It shows 25 convictions between 1992 and 2002. Those

convictions include sexual assault (X2), assault causing bodily harm, common assault (X3), fraud (X6), attempted fraud (X2) and breach of probation (X9). Of course, to that list must be added T.M.'s most recent conviction for common assault upon the petitioner in 2004.

[30] Also, notwithstanding the no contact order, the respondent has made allegations in his affidavit #14, at paragraph 23, that the petitioner and T.M. continue to involve T.M. in the child's life. For example, the child has apparently indicated, on an unsolicited basis:

a) T.M. and the petitioner jointly purchased chocolate advent calendars for the child before Christmas 2004;

b) T.M. purchased soccer goalie gloves for the child;

c) T.M. set out Easter eggs for an Easter egg hunt for the child in March 2005;

d) T.M. and the petitioner jointly purchased a bicycle for the child to which T.M. attached training wheels.

[31] The petitioner received the respondent's affidavit #14 late, and only had a brief opportunity to reply. She stated that her failure to respond to all the allegations in that affidavit does not signify her agreement with them. Nevertheless, she went through the affidavit and made specific responses to various paragraphs. She particularly noted paragraph 23, but took no issue with the allegations, other than to generally complain that they were not being made in a timely fashion. If those allegations are true, they are very disturbing, as they indicate that T.M. is trying to ingratiate himself into the child's life, perhaps even trying to manipulate the child, in circumstances where he clearly should not be doing so: First, the order of Veale J. of July 14, 2004 clearly said the petitioner shall not speak about T.M. with the child or in his presence. Second, while in

Court on October 8, 2004, after I referred to the recommendation in the Custody and Access Report that the petitioner should refrain from pushing the importance of T.M. onto the child, I asked T.M. whether I needed to hear from him and he said:

> "Only to assure you in your mind and heart that I won't leave gifts or pass gifts or any indirect, so I will be out of that equation. What they do is between mother and son. I won't encourage any, I will put it that way, Your Honour."

Third, the gift giving, if proven, could constitute indirect contact under the peace bond.

[32] In short, what the petitioner and T.M. are asking me to do is precisely what I said I would not do when I made the order for unsupervised specified access on October 8, 2004, that is, they are attempting to open the door even wider by going from supervised access to the petitioner only, to unsupervised access and now to access by T.M., so that they can live together with the child as a family. In her submissions, the petitioner seems to suggest that this is almost a matter of right for her. However, as I remarked earlier, I strongly caution the petitioner against any preconceived ideas about this outcome. T.M. may well be prohibited from having any contact with the child on a permanent basis, regardless of the petitioner's familial situation.

[33] In summary, it is in the child's best interests that his custodial status remain as it is on an interim basis, that the petitioner's unsupervised access remain as it is on an interim basis, and that T.M. continue to be prohibited from any contact directly or indirectly with the child. Therefore, the petitioner's notice of motion filed April 8, 2005 is dismissed.

Application for stay of maintenance enforcement

[34] The petitioner applied by a notice of motion filed March 9, 2005, for a stay of proceedings to suspend a garnishment order entered by the Maintenance Enforcement Program. On March 15, 2005, Veale J. ordered a stay as it relates to the petitioner's employment insurance income on an interim basis until this hearing. The stay will continue, providing the petitioner pays the child support arrears and daycare costs, as I previously ordered, either by instalments or a lump sum.

The Peace Bond

[35] It was a condition of the peace bond that T.M. not attend at the premises of the child's school. Although the petitioner applied in her notice of motion filed April 8, 2005, in the alternative, to vary the terms of that peace bond, I agree with the respondent's counsel that she did not have standing to make that application. Nevertheless, at my invitation, T.M. confirmed at this hearing that it is his intention, as evidenced by his affidavit #1, to apply for a variation of the peace bond. The reason is that he and the petitioner want to attend a "Nobody's Perfect" parenting program which is being held at the child's school in the evenings, commencing Wednesday, April 20, 2005, and each Wednesday following for a period of six to eight weeks. Sitting as a Territorial Court Judge, and noting the lack of opposition from the respondent on this point, I allowed the recognizance to be amended accordingly.

Costs

[36] The respondent's counsel seeks party and party court costs in these applications. I note that the *Divorce Rules* state that the *Rules of Court* are applicable, except as otherwise provided. Rule 57(9) of the *Rules of Court* generally provides that costs of a proceeding shall follow the event, unless the Court otherwise orders. I note that this action has been ongoing for a significant period of time and multiple applications and cross-applications, as well as numerous conflicting affidavits have been filed by both parties. On this particular hearing, I have been asked to decide three separate applications by the petitioner and one by the respondent. The respondent has been largely successful in three of these applications and accordingly I award him costs for those commenced by the notices of motion filed July 16, 2004, January 31, 2005 and April 8, 2005. The petitioner is awarded costs for her notice of motion filed March 9, 2005.

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GOWER J.