

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *G.M.S. v. R.D.G.*,
2003 YKSC 65

Date: 20031105
Docket: S.C. 03-D3545
Registry: Whitehorse

Between:

G.M.S.

Petitioner

And:

R.D.G.

Respondent

Before: Madam Justice M.T. Moreau

Appearances:
Samantha Wellman
Elaine Cairns

For the Petitioner
For the Respondent

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] MOREAU J. (Oral): This in an interim motion to address the continuing care of the children and where they will reside pending further steps being taken on that particular issue in this proceeding.

[2] There are some factors in the history of this matter which do influence me in attempting to determine, on the basis of the rather limited and controverted information that I have before me, what would be in the best interests of the children for the time being.

[3] The mother, as indicated by counsel for the father, signed a letter before a notary public in September of 2002, wherein she confirmed that custody of the two children would be with the father with a right reasonable access to her for so long effectively as he was capable of caring for the children.

[4] The mother filed a petition for divorce in April 2003 from which it appeared that the confidence expressed in her notarized letter of some months before was continuing in respect of the father's ability to continue to care for the children. That is significant to me as she entrusted the children to him for a period exceeding some 13, months before intervening of a sudden, during her access period, to take the children from their residence with him.

[5] Apparently there is no dispute as to the assertion in paragraph 10 of the father's affidavit that the mother had phoned him during the summer of 2002 and indicated that she was abusing cocaine and alcohol, and requested his help. Ultimately that led to a transfer of the physical care of the children to him, and to the notarized letter that I refer to. It is indicative to me of some history of substance abuse to the point that led to the children going to their father.

[6] Of further concern to me is that the mother appears to have acted unilaterally on not one but two occasions in electing to take the children away from the husband's care without seeking some guidance or permission from the court in terms

of the status quo situation, in this instance, that had been established through her notarized letter, and through her petition for divorce, and it seems to me that this was a remedy of self-help that obviously there could have been alternatives for.

[7] I make no finding with respect to her initial move with the children in light of the allegations of violence on his part at that time, but what does appear to have been created in this instance is an attempt to establish a status quo in her favour. She indicates that she is concerned about violence, having spoken to the children, and concerned about the father's consumption of intoxicating substances. These are allegations that she indicates she has received confirmation of from the children.

[8] The question is whether or not the court is better suited, in the initial stages, to attempt to resolve these matters without the mother resorting to the self-help of removing the children suddenly from the father's care and relying on a dated order of custody in order to enforce a residential arrangement.

[9] I am also concerned regarding a peripheral matter to the custody issue, the matter of child support. There is an indication on the mother's part that she only received two payments whilst she was in British Columbia. It is clear from the materials that the father was able to muster on very short notice today, that this is incorrect and that, in fact, he made at least three payments that he is able to prove to me today. It is some indication of concern about credibility as it relates to the assertions in her affidavit.

[10] I have some concerns about how the children are doing in her care in that there is an assertion, that is not responded to specifically in her affidavit, that the mother had not yet returned on a Monday evening, presumably a school night. By

the time that the father was at her residence attempting to bring the children back to his residence, which was at about 9:00 p.m., the children were on their own, she having only returned sometime later. It gives me concern, that in the short-term, whether there is adequate supervision of children while in her care.

[11] The father's residential arrangements are arrangements that the children have become used to for over of one year. They appear to be suitable in that he has a three bedroom home, and he has extended familial support in the event that he is working.

[12] I note that, in terms of the children's recent history with their mother, there has not been a steady pattern of access. Now, that may well be the fault of one or the other of the parties, but the fact remains that this is what the courts are here for, to enforce access in the event that one party is not prepared to grant access, that is, the party who is caring for the children. I do not see a history on the court record of requests for access, with access having been withheld by the father.

[13] I am concerned that the affidavit from the R.C.M.P. officer who interviewed the children is "skinny" in Ms. Wellman's words; it is as she indicated, a bare-bones type affidavit. We do not have here, at least to my knowledge, a person who has had the benefit of, perhaps, some background in psychology or social work such as to give some framework to his questions to the children. Indeed, we do not have the questions before me. However, there is some measure of objectivity in the sense that he is not one of the parties reporting to the court what the children want. Of course that places these children in the very, very difficult position of, before one or the other of the parents, perhaps having to indicate what one or the other parent wants to hear. I am not of view that that affidavit from the R.C.M.P. officer settles

that issue by any means.

[14] However, the letter from the principal, in terms of dealing with the interim application, does indicate that in the principal's observation, the children were always rested and fed, warmly clothed, well clothed, and that the father, in fact, had been on site on a few occasions in the short time the children had been in school in Teslin. Again, this is a further objective indicator that in terms of child welfare concerns, the health and the basic needs of the children are being met by the father. There appears to be some reassurance in the letter from the principal.

[15] Of course, the father denies alcohol abuse, which is being alleged against him, and denies violence to his common-law spouse.

[16] I am of the view, in the situation, and having weighed the affidavits and recognizing the difficulty that is attendant upon attempting to weigh controverted allegations, that the history of this matter and some of the more objective evidence before me does weigh in favour of the father's position on an interim basis, and the court restoring that position, having regard to the manner in which the children were extracted from their environment. I have no doubt that the mother's motives were, in her own mind, good motives, but the courts are here to attempt to address emergency situations and should have been resorted to as a first alternative.

[17] I am, therefore, going to make the following order: that there will be interim custody of the children to the father and that means that they will be in his residential care. We will set a date for hearing in a moment.

[18] The mother shall have access to the children, pending further order of the

court, every other weekend. That will commence, not this weekend, but the weekend of the 12th of November. As suggested by Ms. Wellman, in terms of how the access is to work, the parties will meet on Friday at 5:00 p.m. at McDonald's in Whitehorse and the exchange of children shall occur there. I am sorry, I did not get your input.

[19] MS. CAIRNS: I am just concerned that because Mr. Grant works, that may be a bit difficult time.

[20] THE COURT: Well, can extended family perhaps, get involved because it is every other weekend.

[21] MS. CAIRNS: That would be November 14th, and not the 12th.

[22] THE COURT: Am I looking at the wrong calendar?

[23] MS. CAIRNS: The 12th is a Wednesday.

[24] THE COURT: Oh, that is 2004, you are quite right. I am sorry.

[25] MS. CAIRNS: My Lady, just one suggestion from the grandmother and that might be that the exchange be at Jake's Corner, which is a halfway point, between --

[26] THE COURT: I am aware of Jake's Corner, yes. All right.

[27] MS. CAIRNS: Perhaps 6:00 p.m., just because the

grandmother also works.

[28] THE COURT: All right. Ms. Wellman, is that satisfactory for the interim?

[29] MS. WELLMAN: Yes.

[30] THE COURT: All right. Madam Clerk, I am going to amend that. The first access will start with a meeting at Jake's Corner, November 14th at 6:00 p.m., and a return to Jake's Corner. How far is Jake's Corner from Teslin, in terms of the drive?

[31] MS. CAIRNS: About one hour.

[32] THE COURT: Okay. Return to Jake's Corner at 6:00 p.m. on Sunday evening, and thereafter each and every other weekend, the mother will have access to both children.

[33] Now, the next matter I wish to cover is that I do recommend the appointment of a child advocate. I wish also to make a recommendation that the child advocate retain a government-employed social worker from the Teslin area to address the children's desires with respect to where they wish to stay. This will give the children a voice not only through the child advocate, but will give the child advocate the tools he or she may need to determine the true desires of the children, that is, through a government-employed social worker or psychologist who has the necessary skill-set to deal with the true desires of the children.

[34] My next recommendation is that this court shall review the interim custody

situation once the child advocate has had an opportunity to receive input from the social worker or government psychologist, as I have indicated. The application can be brought for that review upon that information having been provided to counsel. So that is the provision with respect to review.

[35] Next, there will be no removal by either party of the children from the Yukon Territory without the written permission of the other party or court order, pending further order of this court.

[36] There will be an R.C.M.P. enforcement clause on both aspects of the coming and going of the children, that is that the mother will be responsible for returning the children on time. There will be a leeway clause because of weather in the winter, and I am not sure how counsel word it here, but I was thinking about a two-hour leeway before we start having police involved. Is that fair enough, counsel?

[37] MS. CAIRNS: That would be to deal with the storm conditions or --

[38] THE COURT: That is right, to deal with weather conditions or other emergency.

[39] MS. CAIRNS: That seems fine.

[40] THE COURT: All right. So there will be a two hour leeway on the police enforcement. This is particularly so because they are unable to contact each other via telephone readily. So there will be a police enforcement clause on the custody and access terms of this order with a two hour leeway clause in respect of

the pick up and delivery on access.

[41] Now, I am going to make a common order with respect to intoxicating substances, in that, while the children are in the care of either parent, there shall be no intoxicating substances on the premises, nor shall either of them consume intoxicating substances while the children are in their respective care.

[42] I believe that covers what I wished to do.

[43] MS. CAIRNS: The date of the return, you had indicated that you would go back to the date of the return; is that effective --

[44] THE COURT: Return of?

[45] MS. CAIRNS: The children to father. Is that effective today?

[46] THE COURT: Yes, thank you very much. Yes, how soon can they get back, Ms. Wellman? Today being Wednesday, let us activate it on Friday, that is, that the first exchange will be this Friday at 6:00 p.m. at Jake's Corner, so there should be a clause indicating that they must be returned by then by the mother.

[47] Counsel, I should advise you that I will be leaving the jurisdiction early tomorrow morning. I would like you to confirm with Madam Clerk to ensure that both of you have a full understanding of the order, that I have not missed anything, and that then you would be able to settle the terms of the order without my involvement,

because I can stay here certainly as long as that is needed.

[48] Madam Clerk, do you have any questions about my order?

[49] THE CLERK: No, I am fine, thank you, My Lady.

[50] THE COURT: I have a lingering feeling that I have forgotten something and I just want to go over my notes to determine whether there was anything that I might have missed.

[51] I am anticipating, counsel, that once we have child a advocate in place, that that is going to happen, and once there is some feedback from a social worker or child psychologist, that there would be an opportunity to review my order, because we will then be in possession of more information directly related to what the children wish to have happen, which is one aspect of the best interests issue.

[52] All right. With that then, court is adjourned. Are costs going to be spoken to in the cause?

[53] MS. CAIRNS: I don't think we will make issue of that.

[54] THE COURT: Very good. Thank you.

MOREAU J.