IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.D. v. U.S.D.*, 2004 YKSC 14

Date: 20031217
Docket: S.C. No. 01-D3375
Registry: Whitehorse

BETWEEN:

R.D.

Petitioner

AND:

U.S.D.

Respondent

Publication of the name of the child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act*

Before: Mr. Justice R. Veale

Appearances:
Malcolm Campbell — For the Petitioner
Peter Morawsky — For the Respondent

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): R.D. brings an application to vary the custody and access order made by Hudson J. on May 22, 2003. The application is brought pursuant to s. 17 of the *Divorce Act*, R.S. 1985, c. 3 (2nd Supp.). This is a very troubling case with considerable history. However, the starting point is the

judgment of Hudson J. after an eight-day trial in March 2003. The date of the judgment is May 22, 2003 in which Hudson J. ordered the following:

1. R.D. was granted permanent sole custody of K., born May 31, 1996. She is now seven years old.

2. U.S.D. was granted supervised access for a six-month period, for one visit per week for six hours.

3. At the conclusion of the six-month supervised access period, the supervised access was to be increased to two visits per week, one of six hours another of two hours.

4. On May 22, 2004, the issue of unsupervised and overnight access was open for application by either party.

5. R.D.was permitted to remove K. from the Yukon Territory at the end of the school term, in the summer of 2004.

6. Child support in the amount of $281 per month was ordered as well as spousal support of $750 per month, the latter being reduced to $500 per month from May 1, 2005 to April 1, 2007 when spousal support would terminate.

7. There was also an order that U.S.D. would pay $66,482.50 to R.D. as her share of the family assets. Such payment to be made within 30 days of the judgment.

8. All costs of access were to be paid by U.S.D.

[2] I will quote extensively from the judgment of Hudson J. under the heading, "Removal of the child from Yukon," which covers paragraph 62 through 65 in his judgment.

> The residence of the petitioner in Yukon constitutes a problem to the petitioner, as she says she is in great fear of the respondent. On balance, I am satisfied that this fear is real and not imaginary and that in the history of the parties there is justification for it. I so find notwithstanding that some of the allegations of abuse are either false or constitute exaggeration.
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> I also consider that the respondent, who claims to be presently unemployed, has shown a considerable ability and willingness to take up residence in either Alberta or British Columbia.
>
> There was no evidence given as to any concrete plans of the petitioner to move. There was only a vague reference to a desire to go to Southern Ontario, but no reason was given.
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> It is the court's expectation that upon the conclusion of these proceedings, the petitioner may, in the best interests of the child, see fit to remain in the Yukon, where the child is succeeding so markedly in her education.
>
> Considering all those matters, it is the court's order that the petitioner shall be permitted to remove the child from this jurisdiction, but only after the end of the school term, in the summer of 2004. It is my intention that the access provision above referred to will continue.

[3] I also read from paragraphs 43 and 44 of that judgment:

> The question therefore is whether or not on the evidence before me I can conclude that it is not in the child's interest that she has visits or contact with her father. The report of Mr. Powder is of some assistance. On page 2, paragraph 6 he quotes:
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> > "The young girl stated that she was sufficiently afraid of her father that she did not want to see him at all, even in the safety of the Family and Children's Services office,

> even with me always present. It seemed unfair to push her to do so, but I acknowledge that not seeing the father and daughter together limited the breadth of my view of the family."

[4] The application of R.D. to vary is twofold. Firstly, she wishes to remove the child from the Yukon prior to the summer of 2004. Secondly, she wishes that U.S.D.'s access to the child, K., be suspended until further order of the court. Her grounds are as follows:

[5] U.S.D. has not exercised the supervised access granted by Mr. Justice Hudson. R.D. did not agree to U.S.D.'s proposed access supervisor, which he put forward on May 26, 2003. R.D. did not nominate a supervisor until September 11, 2003, when she proposed a professional person at a cost of $25 per hour. U.S.D. states that he was not financially able to pay that along with the spousal and child support. He has made no further proposal, nor brought a court application to resolve the matter. Thus, U.S.D. has not exercised a supervised access for more than six months. I note that there has been no access exercised by U.S.D. since July 2001, when the matter first came to the attention of the court.

[6] R.D. remains in a woman's shelter in Whitehorse, where she has been since July 2001. U.S.D. is in arrears of child and spousal support in the amount of $14,515.55, which sum includes arrears arising both before and after the judgment of Mr. Justice Hudson.

[7] U.S.D. spoke of moving to Southern Ontario at the trial but now she has a firm intention to relocate to Brampton, Ontario, and enrol in the personal support

worker program at Sheridan College. She is presently upgrading her English skills to accomplish this. She has long-term plans to become involved in the Sikh community in Brampton and to sponsor her parents to emigrate from India to Canada to live with her or nearby.

[8] U.S.D. states that he loves his daughter and wishes to have a relationship with her. He did not indicate any intention to pursue supervised access with the proposed professional at $25 an hour.

[9] The law is not in dispute. Section 17(5) of the *Divorce Act, supra,* states as follows:

> Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs, or other circumstances of the child of the marriage occurring since the making of the custody order, or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take in to consideration only the best interests of the child as determined by a reference to that change.

[10] Madam Justice McLachlin, as she then was, stated the following in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, commencing at paragraph 12 and 13 of her reasons.

> What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parent to meet those needs in a fundamental way: Watson v. Watson (1991), 35 R.F.L (3d) 169 (BCSC.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: MacCallum v. MacCallum (1976), 30 R.F.L 32 (PEISC). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to

> occur at the time the proceedings took place": J.G. McLeod, Child Custody Law and Practice [1992], at page 11-5.
>
> It follows that 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.

[11] The first question is whether there has been a change in the condition, means, needs or circumstances of the child, which materially affects her? This change should represent a distinct departure from what the trial court could reasonably have anticipated.

[12] I am satisfied that a substantial factor in having R.D. stay in the Yukon until the summer of 2004 was to facilitate the supervised access of U.S.D. to the child. That access has not occurred nor has the financial support ordered by Hudson J. been kept up to date.

[13] This leads me to conclude that the threshold material change has been met. In my view, Hudson J. would not have contemplated keeping R.D. and the child in the Yukon, given the fear they expressed for U.S.D., if he was not going to make every effort to build a relationship with his daughter during that time so that he would be in a position to apply for normalized access in May of 2004. The failure to exercise the supervised access for financial reasons does not ring true given the findings of Mr. Justice Hudson with respect to the considerable assets of U.S.D.

[14] The question of the best interests of the child must be addressed. There is no doubt that Mr. Justice Hudson contemplated that R.D. and the child would be able to leave Whitehorse by the summer of 2004, in any event. There is no doubt that R.D. is the significant and only caregiver for the child. Advancing the date which the mother and daughter can depart, in my view, remains in the best interest of the child in the light of U.S.D.'s failure to exercise supervised access.

[15] However, I am concerned that the plan of R.D. is uncertain to the extent that she has not been accepted at Sheridan College in Brampton, Ontario. I am therefore ordering that R.D. can advance the date of removing the child from the Yukon, conditional upon providing the court with an affidavit confirming her acceptance by Sheridan College, and that should include some documentation from Sheridan College in that regard.

[16] With respect to the application to suspend U.S.D.'s supervised access, I am not satisfied that this term of the order of Hudson J. should be changed. Clearly, a move of R.D. and the child from the Yukon would make supervised access even more expensive for U.S.D. and perhaps less likely to be exercised. However, I cannot conclude that it is in the best interest of the child to have that access suspended, on the evidence before me.

[17] Anything arising, counsel.

[18] MR. MORAWSKY: Not from these reasons, My Lord.

[19] MR. CAMPBELL: With respect to the issue of costs of this application?

[20] THE COURT: I will reserve the issue of costs until further affidavit material is filed, if it is, Mr. Campbell, and at that time you can make a further application.

[21] MR. CAMPBELL: Thank you. So the issue of costs would be adjourned *sine die*?

[22] THE COURT: That's fair to say. Adjourned generally is the terminology we use in the modern day.

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VEALE J.