IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *S.J.M.* v. *J-L.R.,* 2005 YKSC 35

Date: 20050608
Docket No.: S.C. No. 03-B0053
Registry: Whitehorse

Between:

S.J.M.

Plaintiff

And

J-L.R.

Defendant

And

DIRECTOR OF FAMILY AND CHILDREN'S SERVICES

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

James Van Wart	For the Plaintiff
Susan Carr	For the Defendant, J-L.R.
Penelope Gawn	For the Defendant, Director of Family and Children's Services

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiff father for interim custody, or alternatively joint custody, of the child S., currently three years old. The father proposes reasonable and generous access to the defendant mother. The mother has cross applied for interim custody and supervised access by the father. The child has lived with the mother for

approximately two and half of the last three years. The father has been exercising specified access, but more recently that access has also been supervised.

[2] The global issue, of course, is what custody and access arrangements are in the best interests of the child. The more specific issues are:

(a) whether the father has met his onus in establishing that there is reason to change the child's existing living arrangements;

(b) whether this is an appropriate situation for joint custody; and

(c) whether the mother has met her onus for obtaining interim custody of the child.

BACKGROUND

[3] There was a great deal of conflicting evidence at this interim hearing. The matter was argued on May 18, 2004 and I reserved judgment. Both sides agree that the short relationship between them was stormy and tumultuous. However, beyond that they disagree on virtually everything else.

[4] The parties met in 2001 when the father was thirty-two years old and the mother was seventeen. They were together approximately three years, with a brief period of separation of approximately three months or more. After the couple finally separated in May 2003, the father unilaterally took the child from the mother's home into his home on June 5, 2003. About six weeks later, the Director apprehended the child from the father's care. The child was then placed in the custody of her maternal grandmother, D.R., for about seven months. At the end of January 2004, sitting as a Territorial Court Judge, I granted a six-month supervision order allowing the child to be returned to the mother's

care, with specified access to the father. That access was increased by my further order in May 2004. The supervision order expired in July 2004.

The Allegations of Sexual Abuse

[5] On January 22, 2005, the mother made a disclosure to the Director of Family and Children's Services (the "Director") of potential sexual abuse by the father towards the child. As a result, the Director advised the mother to deny the father access until the matter was investigated. In the interim, the father has been allowed supervised access, but the frequency of his access has been greatly curtailed from what it was previously. The Director also contacted the Royal Canadian Mounted Police ("RCMP") who interviewed the child. During that interview, the child said that her father was mean. When asked why she said that, the child spread her legs and said "he poked me". When asked where, the child pointed to her vagina and said "gina", which was the child's word for her vagina. When asked what he poked her with, the child held up her index finger and said "his finger".

[6] Although the Director has now concluded its investigation of these allegations of sexual abuse by the father, the RCMP has not. I understand the RCMP intend to conduct polygraph tests on both the mother and the father, with their agreement. At one time, it was suggested that these polygraph tests could be done by approximately the end of May 2005. In any event, I do not anticipate a lengthy delay in the administration of the tests. Presumably, if the father passes his test, the RCMP investigation will be concluded without a charge being laid.

[7] It is also important to note that the mother has made three previous reports to the Director of potential sexual abuse by the father. These were in May, July and November

2004. While none of those reports resulted in charges against the father, the November report did cause the assigned social worker to interview the child. She was asked by the social worker if anyone had touched her “gina”. The child said “yes”, and when asked who had done this, the child said “Daddy”. When asked what he touched her with, the child said “his finger”. When asked if it hurt, the child said “yes”. When asked whether her pants were on or off when her daddy touched her, she said “on”. When asked a second time if it hurt, she said “no”, and that they were playing at the time and that her daddy was nice and that she had fun with him.

The Positions of the Parties

[8] The mother alleges that the father has been physically violent towards her, has stalked her and continues to have an anger control problem, as well as a substance abuse problem. Counsel for the mother accuses the father of seeking custody solely because of his continuing hostility towards the mother, and using the child as a pawn in their power struggle.

[9] In addition to arguing that the father has not met his onus on his application, the mother’s counsel raised a number of additional points:

1. The father has never been the child’s primary care-giver, with the exception of the short period in 2003 when he unilaterally took the child from the mother’s home, following which the child was apprehended by the Director.
2. While the child and the father do have a bond and he no doubt loves and cares for her, beyond stating that he has appropriate accommodations for the child, the father has not deposed in his affidavits about any particular plans or aspirations about his anticipated life or lifestyle with the child. This is

consistent with the mother's argument that the father is simply using this litigation as a means for furthering the power struggle between the parties.

3. The father has no apparent medical problems and yet has not been employed for some time. Further, at the age of thirty-five, he still resides with his mother.
4. The background information on the file indicates that there have been concerns by the Director, not to mention the mother, that the father has a substance abuse problem. This apparently has not been accepted by the father, as it is not referred to or otherwise responded to in his affidavits. Further, according to the affidavit of Sharon Roberts, the father may have been drinking within the last six to eight months.
5. There are three criminal charges against the father, set for trial in June 2005, where the mother has alleged that he threatened to kill her and her current common-law spouse, and thereby breached his recognizance. In addition to the trial for uttering threats, the father is awaiting sentencing on an unrelated break and enter offence. As he has a criminal record, and has previously served time for other property offences, there is a risk of jail time being imposed. Obviously, that would interfere with his custodial plans for the child.
6. The father is currently on a 3:00 p.m. curfew (it is unclear whether that is pursuant to a probation order or a bail order), which again would obviously interfere with his custodial plans.

[10] The father concedes his criminal record, but denies that he has ever stalked or been physically violent with the mother. On the contrary, he alleges the mother is the one who has been the physical aggressor on previous occasions and that this can be

corroborated by other witnesses. He also accuses the mother of making the sexual abuse allegations in order to advance her cause in obtaining custody. His counsel described the mother's conduct in that regard as so "outrageous" that it should disentitle the mother to custody.

[11] The father argues that he should be entitled to custody or joint custody on the following five grounds:

1. He has appropriate housing for the child.
2. He is an able and loving father.
3. He resides with his mother, E.B., who also has a close relationship with the child.
4. He is willing to accommodate generous access by the mother.
5. Most importantly, he said in his first affidavit that this "is the only way [he] can continue to be part of [S.]'s life".

ANALYSIS

[12] The father says that the mother's "actions" in making repeated claims of sexual abuse have led to his greatly reduced and now supervised access. I challenged the father's counsel on this point, noting that the allegations of sexual abuse are not simply based on hearsay statements from the mother, but have also involved some statements directly from the child herself. The father's counsel replied that E.B., the father's mother, deposed in her affidavit that when she talked with the child on February 11, 2005, the child volunteered "Daddy was bad, Daddy did bad things". When E.B. asked the child what she meant, the child said "Mommy said to tell everyone that Daddy poked me, and if I don't she will punish me". Further, the father said in his first affidavit that on January

19, 2005, his daughter said to him, in E.B.'s presence, "Mommy says you are a grease ball and Grandma is a bitch".

[13] On the other hand, it is apparent from the rest of E.B.'s affidavit that she sides with her son in this custody dispute. Further, it is curious that E.B. did not corroborate the father's allegation that the child referred to him and E.B. respectively as a "grease ball" and a "bitch", since this was apparently said in E.B.'s presence only a few weeks before E.B.'s conversation with the child.

[14] The father is not required to establish a material change in circumstances, as this is the first time that the cross applications for interim custody have been heard. However, he does bear the onus of presenting evidence to show that the existing state of affairs with respect to custody and access (the *status quo*) is unsatisfactory and not in the best interests of the child.

[15] In *A.H.P.* v. *C.A.P.*, 1999 BCCA 203, the British Columbia Court of Appeal examined the situation where a party seeks to change the existing arrangements of a child and, at para. 23, quoted with approval Moore J. in *Tucker* v. *Tucker* (1994), 148 A.R. 306 (Q.B.), as follows:

> "… If all else is equal, it could not be in any child's best interest to substitute an uncertain situation for a certain one … The onus of adducing evidence that it is in the best interests of the child to alter the agreement or status quo rests with the person seeking the change."

[16] In *Eaton* v. *Eaton*, [1987] B.C.J. No. 2217, the British Columbia Court of Appeal suggested that, at the interim custody stage, the court should avoid moving children back and forth pending trial. At page 2, the Court said:

> "… There is a significantly different question on an interim custody application than on a trial itself. Where there is no

> reason to change an existing situation, that situation should normally prevail until trial. …"

[17] Here, the father's main argument is that obtaining some form of custody is "the only way" he can be involved in the child's life. That is an overstatement of his position. I acknowledge that there has been some bickering between the parties about access being missed by the father or denied by the mother for allegedly unsupportable reasons. However, in general, I find that the mother has not attempted to intentionally deny or restrict the father's access. On the contrary, she has routinely allowed access, providing the child is safe.

[18] I also reject the father's suggestion that the mother's conduct surrounding the report of potential sexual abuse is "outrageous" and solely designed to advance her in this litigation. While I do not intend to make findings about the credibility of the mother or the child in that regard, given the disclosures made by the child to both the social worker and the police, it would seem the mother acted reasonably and responsibly in bringing those matters to the attention of the authorities. I am certain that the father would have done the same thing if the child had made similar disclosures to him about the mother. And yet, the father, through his counsel, effectively suggests that I simply ignore the allegations and place the child in his custody, either solely or jointly with the mother, even though the investigation by the RCMP has not yet been concluded.

[19] It is also important that both the mother and the Director are of the view that the father has potential problems with anger and controlling and abusive behaviour. Indeed, the father agreed in the consent order made by me in January 2004 to complete the Family Violence Prevention Program. Yet, in his second affidavit he deposed that, while he attended that program in the winter of 2003 - 2004, he did not complete it. I find that

admission very disturbing. Further, in the affidavits of the social workers relating to the apprehension of the child in 2003 there were several references to the father's recalcitrant and oppositional attitude towards the Department of Family and Children Services. Indeed, it appears as though the father, at least at that time, was not inclined to recognize that he had any particular problems in that regard.

[20] This attitude surfaced again in the father's complaint in his first affidavit that he was denied access to the child on her third birthday, February 26, 2005, because of the sexual abuse allegations. Two days later he was told by a social worker that he could have a supervised access visit with his daughter at the social worker's office. He rejected that option because he believed the supervision was not necessary and referred to having very unsatisfactory dealings with the Department in the past.

[21] I agree with the mother's counsel's assessment of this situation. Rather than the father acknowledging that it was the right of the child to have access with him, whether supervised or unsupervised, and that it would be in her best interests to maintain contact with him, he unilaterally rejected the opportunity because of his oppositional attitude towards the Director's department. In that sense, he put his own concerns ahead of the child's.

[22] I challenged the father's counsel on the timing of his client's application for two reasons. First, the father is awaiting sentencing on a break and enter offence and may be sent to jail. Obviously, and as I said earlier, that will impact his ability to care for the child, let alone have access to the child. Second, the uttering threats charge is scheduled for trial next month. Presumably, if either or both of those charges are proven beyond a reasonable doubt, that may add support to the mother's credibility in this

litigation and consequently detract from the father's credibility. The father's response, as I understood it, was that this was felt to be the most appropriate time to bring the application precisely because the father is not sure what will happen in court later on. That, if correctly stated, is hardly a compelling reason to consider granting the father custody, whether solely or jointly with the mother.

[23] For all the above reasons, I find the father has not met his onus on application for interim custody.

[24] As for the father's alternative application for joint custody, the current situation is totally inappropriate for that relief. The British Columbia Court of Appeal in *Ness* v. *Ness*, 1999 BCCA 51, at para. 17, suggested that joint custody requires a certain degree of "mutual deference and respect" between the parties in order to create "a harmonious situation" for the child. Not only is that lacking here, but it has been displaced by antagonism and hostility between the parties. Joint custody is simply is non-starter.

[25] While the mother has the benefit of the historical and existing custodial arrangements for the child, she nevertheless bears her own onus on her application for interim custody. In that regard, I agree with points raised by her counsel:

1. There is independent evidence from the social workers, the mother's landlord and the mother's family doctor that the mother is apparently clean and sober and currently an able and competent parent. Further, the child appears healthy and happy in her care.
2. The mother was only seventeen years old when she began her relationship with the father. Clearly, the mother had problems during and after that

relationship, but she is now twenty-one years old and significantly more mature.

3. She is in a stable common-law relationship with J.G., who does not suffer from any substance abuse problems and has a large and supportive extended family of his own.
4. The mother has appropriate accommodation for the child.
5. She is upgrading her education and has good work prospects.
6. She has been the primary care-giver for the child for approximately two and half of the last three years, and is closely bonded to her.

[26] Counsel for the Director indicated that the Director's investigation of the January 2005 report of sexual abuse has been completed. Further, the Director supports access by the father and continues to be prepared to provide social workers to facilitate such access. While social worker, Trish Luet, said in her first affidavit that the Director would like the access visits to continue to be supervised "at least until the results of the proposed polygraph on [the father] are received", I understand that the Director is no longer insisting on such supervision. In that sense, their level of concern has downgraded significantly from what it was following the initial report of sexual abuse in January 2005. As a result, the Director does not feel the need to remain as a party to this litigation for any further proceedings. Given that both the mother and the father also seem to agree on that point, I order that the Director be removed as a party defendant and that the style of cause from this point on be amended accordingly.

[27] I order that the mother should have interim custody of the child and that the father shall have supervised access at such times and places as may be agreed between him

and the mother. I am not prepared to conclude at this time that it would be in the child's best interests to allow unsupervised access. While I appreciate that the results of the proposed polygraph tests would not likely be admissible in this or any other court proceeding, it would give me an added level of confidence if the father passes the polygraph and the RCMP close their investigation. I understand both the mother and the father are agreed that the termination of the RCMP investigation would constitute a material change in circumstances. In that event, the father can return to court and seek a variation back to unsupervised access. I note here that the mother has said through her counsel that she has no intention of opposing unsupervised access, once the police investigation is complete and, presumably, resolved in the father's favour.

[28] I am not ordering specified access, as there is considerable uncertainty about the father's immediate future. However, if the parties are unable to agree to unspecified access, they may return before me for directions.

[29] Since the Director is no longer a party, I cannot make any order with respect to the continuing involvement of the social workers within the Department of Family and Children Services. However, I clearly anticipate that they will be involved and that their cooperation will be required for the father to exercise access.

[30] I also note that the mother has agreed to the relief sought by the father in his chambers outline, with respect to the father's right to obtain information from third parties, such as teachers, counsellors, medical professionals and care-givers. I am prepared to include that as part of this order and I will leave it to the parties to draft appropriate wording.

[31] Similarly, the mother has agreed to advise the father of all significant decisions which have to be made concerning the child, including decisions about her health (except in emergencies), education, religious instruction and general welfare.

[32] As I understand it, the father is currently subject to an order in the Territorial Court not to have contact with the mother directly or indirectly. However, that should not preclude the mother from communicating with the father about these significant decisions, providing that it is in writing only. That could be done either by direct delivery, mail, e-mail or fax, until the matters in the Territorial Court are resolved.

[33] The mother's notice of motion also sought a restraining order against the father as well as term authorizing the RCMP assistance in enforcing the order sought. Both such terms are appropriate and are ordered.

CONCLUSIONS

[34] In summary, I conclude as follows:

1. The father's application for interim custody of the child is dismissed, as is his alternative application for joint custody.
2. The mother's application for interim custody of the child is granted.
3. The father shall have access to the child to be supervised by an independent third party, at his expense, at such times as can be agreed upon with the mother.
4. In the event the current RCMP investigation against the father is resolved in his favour, that will constitute a material change in circumstances for the father to seek a variation from supervised access to unsupervised access.
5. The father will be restrained from:

a. harassing, molesting or annoying the mother or the child, or attempting to do so;

b. communicating directly or indirectly with the mother, except in writing and for the sole purpose of arranging access to the child; and

c. from attending within 100 meters of the mother's home.

6. Any peace officer or RCMP officer having jurisdiction in the Yukon Territory who, on reasonable and probable grounds, believes that the father is in breach of the terms of this order, shall immediately arrest the father and bring him before this Court on the next court day following the arrest to be dealt with on an inquiry to determine whether the father has committed a breach of the order or is in contempt of court.

7. The mother shall provide information to the father concerning the child from third parties, including teachers, counsellors, medical professionals and care-givers.

8. The mother shall advise the father of all significant decisions which have to be made concerning the child, including decisions about her health (except in emergencies), education, religious instruction and general welfare.

9. The defendant Director of Family and Children's Services is removed as a party to this proceeding and the style of cause will be amended from this point on.

[35] As neither party spoke to costs, I make no such order at this time. However, I am prepared to consider the matter again at the request of either, upon notice.

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GOWER J.