IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *T.D.S.* v. *K.V.S.*, 2007 YKSC 58

Date: 20071116
S.C. No. 07-D3989
07-B0059
Registry: Whitehorse

Between:

T.D.S.

Petitioner/Plaintiff

And

K.V.S.

Respondent/Defendant

Before: Mr. Justice W.M. Darichuk

Appearances:

Susan Carr — Counsel for Petitioner/Plaintiff
No one appearing for the Respondent/Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Darichuk J. (Oral): The parties to these proceedings were engaged in a relationship from the summer of 1998 until their separation on October 4, 2007. There are two children of this relationship, viz: S.V.S., born December 20, 2001 and G.R.S., born December 24, 2004. The children have been in the care and custody of their mother, the applicant herein, since their births.

[2] On November 5, 2007, the mother filed a petition for divorce, as well as a notice of motion seeking, *inter alia*, interim custody of the children. On November 13, 2007,

she commenced a further action by way of a writ of summons and filed a further motion seeking interim comparable relief.

[3] The central issue on the ex parte hearing of these motions is that of jurisdiction.

[4] Immediately prior to the hearing of the motion on November 14, 2007, a faxed message was received by the court from a solicitor practising in Clinton, Ontario, seeking a dismissal of the proceedings on the basis of "… ongoing proceedings and a jurisdictional ruling that has already been made in Ontario by the Ontario Court of Justice." Failing dismissal of the proceedings, a request was advanced on behalf of her husband, by this solicitor, that the proceedings be stayed, pending the outcome of the proceedings in Ontario.

[5] A copy of the order granted on November 2, 2007, was included. It indicates the ordinary and/or habitual residence was determined to be within the Province of Ontario, that the hearing was adjourned to December 11, 2007 at 1:30 p.m. and that the applicant could file a response to the motion brought by her husband by December 5, 2007.

[6] The faxed message further reads as follows:

> "I can advise that although a decision on the issue of jurisdiction has been made, the court has granted Ms. Sweeney an opportunity to respond on or before December 5th, 2007, by affidavit, so that on December 11th, 2007, the issue of interim custody can be argued and decided based on affidavit evidence from both parties. Pending that hearing on December 11th, 2007, the Court in Ontario has indicated that it is disinclined to make any decision with respect to custody and therefore the status quo will continue until that date."

[7] By way of a telephone conference call, Mr. Malcolm Campbell, a solicitor who previously had represented the husband, reiterated the request for dismissal of these proceedings on the basis of lack of jurisdiction by this court.

[8] The affidavit filed by the applicant in both proceedings indicates that, since the age of 5 (aside from a 6-month period when she was 18 years of age), she has always resided in Whitehorse, Yukon, until July 18, 2007. On this later date, she moved with her family to Zurich, Ontario. The reason for the change in residence is set forth in para. 16 of her affidavit. It reads in part:

> "I hoped that a move to Ontario would be a fresh start, with employment opportunities for the Respondent and away from his Yukon drug connections. I told him if he abused drugs or alcohol again, I would return to the Yukon with the children. …"

[9] According to the applicant's affidavit, when the respondent, on October 4, 2007, came home in an intoxicated condition and threatened to hurt her, the police arrived shortly after she yelled out of her son's bedroom window for help. The respondent was arrested and charged the following day with mischief and uttering threats.

[10] On October 11, 2007, she returned with her children to Whitehorse, Yukon.

[11] Learned counsel for the mother submits that this court has the requisite jurisdiction to grant the requested relief under:

(a) the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.);
(b) pursuant to ss. 30, 31 and 33 of the *Children's Act*, R.S.Y. 2002, c. 31; and
(c) s. 49 of the *Children's Act,* supra, and/or its *parens patriae* jurisdiction of the court respecting children.

Jurisdiction under the *Divorce Act*

[12] Section 3(1) of the *Divorce Act*, *supra*, provides as follows:

> "A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding."

[13] The meaning of the phrase "ordinarily resident in the province" was considered by Estey and Rand, JJ., in *Thomson* v. *Minister of National Revenue*, [1946] S.C.R. 209. Rand J. states at p. 224:

> "The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application."

[14] At p. 231, Estey J. states:

> A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question.

[15] When the applicant left this jurisdiction on July 18, 2007, it appears that she did so with an element of permanence, not with the intent of a brief visit, holiday or sojourn

in Zurich, Ontario. Her evidence that “I hoped that a move to Ontario would be a fresh start …” militates against a finding that between July 18, 2007 and October 4, 2007, she was ordinarily resident in this community. Despite a real and substantial connection with this community, absent her uninterrupted residence for at least one year immediately preceding the commencement of the proceeding, the court is not clothed with requisite jurisdiction under s. 3(1) of the *Divorce Act*, supra. There is no provision in this legislation exempting time spent during a conditional relocation to another jurisdiction from the one year residency requirement.

Jurisdiction under the *Children’s Act*

[16] Learned counsel for the applicant submits, in the alternative, that there is evidentiary support for an order of custody of the children being granted to the mother pursuant to s. 37 of the *Children’s Act*, supra. The relevant portion thereof stipulates the prerequisites for such an order. It reads:

> “(1) The court shall only exercise its jurisdiction to make an order for custody of or access to a child if
>
> a) the child is habitually resident in the Yukon at the commencement of the application for the order; or
>
> b) although the child is not habitually resident in the Yukon, the court is satisfied that
>
> i) the child is physically present in the Yukon at the commencement of the application for the order,
>
> ii) substantial evidence concerning the best interests of the child is available in the Yukon,
>
> iii) no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,

> iv) no extra-provincial order in respect of custody of or access to the child has been recognized by a court in the Yukon,
>
> v) the child has a real and substantial connection with the Yukon, and
>
> vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in the Yukon.
>
> (2) A child is habitually resident in the place where the child resided
>
> a) with both parents;
>
> b) if the parents are living separate and apart, with one parent under an agreement or with the consent, the implied consent or the acquiescence of the other, or under a court order; or
>
> c) with a person other than a parent on a permanent basis for a significant period of time,
>
> whichever last occurred."

[17] The evidence does not satisfy the statutory criteria respecting habitual residence under s. 37(1)(a) of the *Act.* The children did not reside with both parents at the commencement of the application for the order nor with their mother pursuant to a court order of consent of their father.

[18] If the child is not habitually resident in the Yukon, the court must be satisfied that no application for custody or access is pending before the extra-provincial tribunal in another place. As previously noted, such an application is pending before the Ontario Court of Justice.

[19] Despite the prerequisites of s. 37 of this legislation, the court may grant an order of custody under s. 38 thereof. This section reads:

> "Despite sections 37 and 50, the court may exercise its jurisdiction to make or to vary an order in respect of the custody of or access to a child if
>
> a) the child is physically present in the Yukon; and
>
> b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,
>
> (i) the child remains in the custody of the person legally entitled to custody of the child, or
>
> (ii) the child is returned to the custody of the person legally entitled to custody of the child."

[20] Although the children are physically present in this jurisdiction, the evidence falls short or establishing that the children would suffer serious harm if returned to the custody of their father.

The Best Interests of the Children

[21] Although on order of custody of the children cannot be granted to the mother under either s. 37 or s. 38 of the *Act*, the best interests of the children, on a consideration of the totality of the circumstances, past and present favourably endorse the granting of a limited order of custody pursuant to s. 49 of the *Act* and/or the *parens patriae* jurisdiction of the court.

[22] The *parens patriae* jurisdiction can be invoked "… either because there is a gap in the legislation or it is necessary to do justice between the parties and the best

interests of the child." Per Prowse, Co.Ct. J. at p. 178 of *M.(S.J.)(Re)*(1990), 26 R.F.L. (3d) 173.

[23] The relevant portion of s. 49 of the *Children's Act*, supra, reads:

> "If the court may not exercise jurisdiction under section 37, or has declined jurisdiction under section 39 or 51, or is satisfied that a child has been wrongfully brought to or is being wrongfully detained in the Yukon, the court may do any one or more of the following
>
> a) make any interim order in respect of the custody or access the court considers in the best interests of the child;"

[24] The ultimate question for determination in any proceeding involving children is what is in the best interests of the child in all of the circumstances. Statutory recognition of this principle is set forth in s. 29 of the *Children's Act, supr*a. Some of the factors to be duly considered in determining the best interests of a child are set forth in s. 30 of the legislation. It reads:

> "(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
>
> a) the bonding, love, affection and emotional ties between the child and
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons, including grandparents involved in the care and upbringing of the child;

> b) the views and preferences of the child, if those views and preferences can be reasonably determined;
>
> c) the length of time, having regard to the child's sense of time, that the child has lived in a stable home environment;
>
> d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessaties of life and any special needs of the child;
>
> e) any plans proposed for the care and upbringing of the child;
>
> f) the permanence and stability of the family unit with which it is proposed that the child will live; and
>
> 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."

[25] The children have a real and substantial connection with this community. They were only resident in Ontario for a period of two and one-half months, while Whitehorse, Yukon, has been their home since birth. Since birth, the applicant has had care and custody of both children. Currently, the eldest child attends grade one at an elementary school in this community and is enrolled in a Reading Recovery Program. The younger child attends a day home he has attended since he was 6 months old.

[26] The children have a close relationship with, and support from the applicant's extended family in this community. They especially enjoy a close connection with their 9 year old half sister, K.S. Since her return to Whitehorse, the applicant has taken steps to improve her parenting skills and plans to continue with counselling support. She asserts she has no drug or alcohol addiction and has not used cocaine since 2004.

[27] Members of the immediate and extended family of the respondent are strangers to the children. It appears that one of the reasons for relocating to Ontario in July was for the children to meet the respondent's family. Absent contact and visit by any member of his family to Whitehorse, the children have no relationship or emotional ties with any of them. Since their return to this community, they are in a safe and stable environment.

[28] Significantly, no interim order as to custody was granted by the extra-provincial tribunal. As noted by the solicitor in his faxed message, "Pending that hearing on December 11, 2007, the Court in Ontario has indicated it is disinclined to make any decision with respect to custody and therefore the status quo will continue until that date."

[29] In the result, in the best interests of the children, pending final determination of proceedings in Ontario:

a) all proceedings instituted in this jurisdiction are stayed;

b) the applicant is granted interim custody of the children (subject to supervised access at all reasonable times by the respondent); and

c) absent written consent of the applicant, or further order of the court, neither child shall be removed from the Yukon.

DARICHUK J.