

SUPREME COURT OF YUKON

Citation: *D.M.M. v. T.B.M.*, 2008 YKSC 77

Date: 20080915
Docket: 02-D3464
Registry: Whitehorse

BETWEEN:

D.M.M.

Petitioner

AND:

T.B.M.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

D.M.M.

Kathleen Kinchen

Laura Cabott

Appearing on her own behalf

For the Respondent

Appearing as Child Advocate

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is the petitioner's (Ms. M.) application to vary the corollary relief order which was made on September 7, 2006, and amended by me on February 22, 2007. She has also filed a notice of motion seeking an update to the custody and access report. The way that part of her application is worded is significant and I quote from para. 3 of her notice of motion filed July 11, 2008.

"That an updated custody and access assessment be recommended and that contact be made with services to meet [R.]'s needs in Edmonton."

I will come back to that point.

[2] This type of an application can only be heard on its merits if there has been a demonstration by the applicant that there has been a material change in circumstances. Ms. M. claims that the material change is the fact that she and Mr. M. have been separated for some time, although they have had two young girls together, currently age three and about 18 months, and that Mr. M. continues to be involved in her life to some degree or other. Mr. M. is the petitioner's former common law spouse and is to be distinguished from the respondent, T.B.M. It is Ms. M.'s onus on the application and yet, surprisingly, there is nothing in her supporting affidavit (filed July 11, 2008) which clearly indicates in any unambiguous way that she has separated from Mr. M. The only thing she does say is at para. 7:

"My home and life is in Edmonton. I have a separate home where I live, where [R.] will be staying with me."

[3] Given the significance to this Court of Mr. M.'s involvement in Ms. M.'s life in the course of this litigation over the last five years, and the concerns that this Court has had about the potential for contact between Mr. M. and the child R., I would have expected something much more clear and much more unambiguous, perhaps with supporting corroborating material, to indicate that there has been a change in the relationship. There has been no such evidence filed. All I have are Ms. M.'s submissions on that point, which are not evidence. In that regard, I agree with the submissions of Ms. Kinchen on behalf of T.B.M., and Ms. Cabott, acting as a child advocate, that Ms. M. has not met the threshold of demonstrating a material change in circumstances.

[4] As for the suggestion that there be an update to the custody and access report, I would be prepared to consider making such a recommendation if there was evidence put forward by Ms. M. of significant changes in her life, particularly since her application of a similar nature was dismissed last July 2007. Again, there is no such evidence before me. I can only decide these matters on the basis of evidence, not on the basis of submissions.

[5] It is perhaps telling that not only did Ms. M.'s notice of motion refer to contact being made with "services" in Edmonton to meet R.'s needs, she also says in her affidavit, filed July 11, 2008, at para. 28:

"Given that authorities may have to be involved in Alberta, I am requesting that contact be made to seek out resources in Edmonton. These resources are not available in Whitehorse and could ease [T.]'s discomfort and clearly identify what is in [R.]'s best interest. An updated custody and access report that reviews the events of the past two years will provide information to the court on the success of the current access arrangement."

I am not entirely sure what Ms. M. is getting at there, but if the suggestion is that there are social service agencies or personnel who could be utilized in Edmonton to monitor any access between her and R. in Edmonton to alleviate T.B.M.'s concerns, while that may be an option, it is not sufficient for Ms. M. to simply suggest "that contact be made". Who is that contact to be made by? Certainly not by this Court. Nor is it something T.B.M. should be expected to put time and energy and money into exploring, and nor should it be the responsibility of the child advocate necessarily, at least in the first instance, until such time there is a reason to do so.

[6] Once again I come back to the fact that it is Ms. M.'s onus on these applications to put forward solid evidence as to changes and options that are available that might help alleviate the Court's concerns and those of T.B.M. She has not done that, and she needs to do that in order to have any hope of success.

[7] I am not going to go into the issues of telephone access and so on and so forth, because there has been no application made to make any variation or specific orders in that regard. I very much appreciate Ms. Cabott's involvement on this application and her previous attempts to mediate the telephone issue. I would hope that, if there are changes in Ms. M.'s schedule such that she needs to get new days or evenings each week when she can telephone R., then that can be agreed to without the necessity of a court application. But, as things stand, there is no court application before me to deal with it, and so I have no jurisdiction to move in that regard.

[8] In summary, both of Ms. M.'s applications are dismissed. I will now speak to the issue of costs sought by T.B.M. Do you have anything further in particular? Are you seeking lump sum costs?

[9] MS KINCHEN: I am, My Lord, seeking lump sum costs in the amount of \$1,000.

[10] THE COURT: Ms. M., do you have any submissions to make on the issue of costs?

[11] THE PETITIONER: Yes, Your Honour. I work three jobs. I have been attempting to get legal aid for two years. It is a financial hardship for me to pay those

kind of costs, and if T. would just try to give me access in Edmonton, then I wouldn't be here now. He had the opportunity to go to Child and Family Services. He had the opportunity to have resources that are involved. He chooses not to even do anything except go into court. I don't have many options open to me, Your Honour.

[12] THE COURT: All right, thank you. I am going to award T.B.M. lump sum costs in the amount of \$1,000, payable forthwith. Ms. M., I would say in closing to you that the next time you bring an application you are strongly advised to get legal advice.

[13] THE PETITIONER: Your Honour, I cannot get that legal advice.

[14] THE COURT: Thank you. Court is closed.

GOWER J.