SUPREME COURT OF YUKON

Citation: *S.A.G.* v. *C.D.G.*, 2009 YKSC 21

Date: 20090320
S.C. No. 08-D4109
Registry: Whitehorse

Between:

S.A.G.

Plaintiff

And

C.D.G.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Emily Hill — Counsel for the Plaintiff
C.D.G. — On his own behalf

REASONS FOR JUDGMENT
(Jurisdiction)

INTRODUCTION

[1] The applicant mother has been a victim of family violence at the hands of the father and once in the presence of the child while the child was habitually resident in British Columbia. Following the most recent assault, the mother has returned to the Yukon with the child to reside with her family.

[2] As the Yukon is not the jurisdiction of the child's habitual residence, the mother applies to have this Court exercise jurisdiction under s. 38 of the *Children's Act*, R.S.Y. 2002, c. 31, amended by S.Y. 2003, c. 21, s. 6; the exception for danger to the child.

To exercise jurisdiction, this Court must be satisfied that the child would suffer serious harm if returned to the legal custody of the father in British Columbia.

[3] The mother has filed her own affidavit and the affidavit of a social worker employed by the Ministry of Children and Family Development in British Columbia. The father has been given ample opportunity to retain Yukon counsel and file affidavit evidence. He has declined to do so, but he appeared at the hearing by telephone in the office of his Victoria lawyer who was present but not appearing for the father.

THE FACTS

[4] There is no dispute about the facts, as only the mother has filed affidavit evidence.

[5] The mother and father began their relationship in the summer of 2001 in the Yukon. They married in 2003 and the child was born in the same year in Whitehorse. They lived in Whitehorse until 2004, then moved to British Columbia where they resided until the mother and child moved back to Whitehorse in January 2009.

[6] The father has been employed on fishing boats which requires his absence for two to three months at a time. The result is that the mother has always been the primary caregiver for the child as well as for a 12-year old daughter from a different relationship. She has taken care of all the child's physical and emotional needs as well as ensuring school attendance and communication with the child's schoolteacher.

[7] The mother describes her relationship with the father as "very rocky". It was not helped by the fact that when the father returned from fishing, he treated his time at home as one big party while the mother had to maintain the regular schedule for the children.

[8] There have been three incidents of violence in the past. In approximately 2001, the mother and father had an argument which resulted in the mother slapping the father on the cheek while at her aunt's house. When they returned home, the father struck her in the face causing a large bruise. In another incident approximately 2 years ago, the father punched the mother in the face resulting in two black eyes. She did not report this incident to the police as she was hoping the father would change his behaviour.

[9] In the summer of 2008, the father was caring for the child while the mother was away. The father had been drinking and was driving with the child in his vehicle when he was stopped by the police to investigate impaired driving. He apparently blew over the legal limit. While there was no criminal conviction, this incident resulted in the Ministry of Children and Family Development becoming involved. The mother began to work with the social workers from the Ministry to address their safety concerns and satisfy them that she was able to provide a safe environment for the child.

[10] The most recent assault occurred in November 2008. The mother had been out drinking with a friend after work and the father, who was also drinking, was at home, caring for the children. The mother became suspicious that the father was having an affair and she threw his cell phone at him in the bedroom. The children were sleeping in other rooms. The father responded by pushing the mother down on the floor and holding her down. He punched the mother in the face giving her a black eye and refused to let her get up. Her older daughter heard her screams, came into the bedroom, and saw the father on top of the mother. The daughter called 911. The child was also present and saw the father holding the mother on the floor.

[11] The father left the house before the police arrived. Because the children were present during the incident, the RCMP notified the Ministry of Children and Family Development. The mother began to work with Kim McLeod, a social worker from the Ministry who recommended that she not allow the father to have any access to the children unless it was supervised by a supervisor approved by the Ministry of Children and Family Development. This recommendation was confirmed by Kim McLeod in her affidavit. In her investigation, she confirmed that the father acknowledged that the assault occurred with the children present in the home. The social worker also swore that she is still of the opinion that the father should not have any unsupervised access until he has completed a family violence program. The social worker confirmed that she encouraged the mother to create a support system and safety plan for herself and the children. She discussed with the mother the possibility of her return to Whitehorse and encouraged her in the move, as it was her hometown and she would have family support here. The social worker made the assessment that the mother was not safe in the current situation in British Columbia and advised her to do what she needed to do to keep herself and her children safe. The social worker also confirmed that she had no child protection concerns with respect to the mother and her care of the children. She also encouraged the mother to speak to the RCMP about charges, and the mother advises that a criminal charge for the 2008 assault has been laid.

[12] The Mother advised that, after the assault, the paternal grandmother began to care for the child on a regular basis and she did not object to the father exercising access supervised by the paternal grandmother. However, she does not know how much access the father exercised.

[13] The mother states that she is fearful of the father. He has never taken treatment for his violence towards her or acknowledged that it is a problem. In the past, he has threatened to kill her and take the child away from her if they ever separated.

[14] After moving out, the father agreed to pay the mother's rent instead of paying child support. He paid the December rent but only paid part of the January rent. The mother found it very difficult to remain in British Columbia from safety, support and financial points of view. She stated that she was not able to develop a safety plan or find people able to help her with the children, other than the paternal grandmother. She did not feel that staying in British Columbia was a positive long-term plan.

[15] In January 2009, she returned to Whitehorse with the children and now resides with her mother. The maternal grandmother provides babysitting and support. Both children are attending school. The mother is also three months pregnant. The father has commenced an action for joint custody and guardianship in British Columbia. There is no application pending in British Columbia and I have not been provided with a copy of any proceedings. There is no outstanding court order for custody of or access to the child.

THE LAW

[16] Like most Canadian jurisdictions, the Yukon *Children's Act*, in s. 29, specifically recognizes that the concurrent exercise of jurisdiction by judicial tribunals of more than one province, territory or state in respect of the custody of the same child ought to be avoided. The *Children's Act* has made provision that the court will, unless there are exceptional circumstances, decline or refrain from exercising jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal in another place with

which the child has a closer connection. As a result, the court is directed pursuant to s. 37(1)(a) of the *Children's Act* to only exercise jurisdiction if the child is habitually resident in the Yukon at the commencement of the application. There is also an exception in s. 37(1)(b) that is not engaged in this application, where the child has a real and substantial connection with the Yukon and there is no custody application in the other jurisdiction.

[17] This application is brought pursuant to s. 38, the exception for danger to a child, which states as follows:

> **Exception for danger to child**
>
> 38. 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.

[18] This Court cannot exercise jurisdiction in this case unless it is satisfied on a balance of probabilities that the child would suffer serious harm if returned to the father.

[19] The case law in this area is very fact specific and is often based upon the Hague Convention which provides the following in Article 13:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposed its return establishes that:

…

> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. …

[20] In *Thompson* v. *Thompson*, [1994] 3 S.C.R. 551, the Supreme Court of Canada considered the interpretation of Article 13(b). In that case, the mother had removed the child from his home in Scotland to visit her family in Manitoba. She decided to remain with her family in Manitoba and opposed the father's application under the Hague Convention for the return of the child to Scotland. The mother invoked Article 13(b) and submitted that she had been the child's primary caregiver during her 13-month stay in Manitoba and removing the child from Manitoba would cause the child to suffer a grave risk of physical or psychological harm.

[21] The Supreme Court of Canada concluded that the facts did not meet the threshold of harm contemplated by Article 13(b), as it did not amount to an intolerable situation. The court concluded that it must be a "weighty" risk of "substantial and not trivial psychological harm"; greater than was normally expected when taking a child from one parent and passing the child to another.

[22] La Forest J., speaking for the majority, addressed the issue of the different tests for harm in the *Child Custody and Enforcement Act*, R.S.M. 1987, c. C360, (the "Manitoba Act") and the Hague Convention. The Manitoba Act refers to "serious harm" whereas the Hague Convention refers to a "grave risk that his or her return would expose the child to physical or psychological harm …". He concluded that the inconsistencies between the Convention and the Act "are not so great as to mandate the application of a significantly different test of harm." This interpretation has been

followed in *Pollastro* v. *Pollastro* (1999), 43 O.R. (3d) 485 (C.A.) and *Rajani* v. *Rajani* (2007), 160 A.C.W.S. (3d) 294 (Ont.S.C.), and thus it is relevant to consider case precedents under the Hague Convention in this application. I note that s. 23 of the Ontario *Children's Law Reform Act* is similar to s. 38 of the Yukon *Children's Act.*

[23] In the case of *Pollastro* v. *Pollastro*, the father had applied for the return of the child to California. The mother relied on the Hague Convention's Article 13(b). There was evidence about the father's unreliability, drug use, uncontrollable anger, and violence towards the mother. There was specific evidence establishing significant physical bruising, the banging of the mother's head against the floor, and locking the mother in the bedroom. The child was found to be in an agitated state. The father made death threats and threats that she would never see her son again. The father also left many threatening phone messages, indicating an irrational state of mind. The trial judge ordered that the child be returned to California on the basis that the evidence of harm would apply to the custody hearing but not to a Hague Convention application.

[24] In the Ontario Court of Appeal, Abella J.A., in reversing the trial judge, stated:

> 33 Although every case depends on its own facts and the onus remains on the person resisting the child's return, it seems to me as a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm.
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> 34 On the facts of this case, the threatening phone calls reflect a continuing inability on the father's part to control his temper or hostility. This means that the mother, who would inevitably accompany the child if he is ordered to return to California, would be returning to a dangerous situation. Since the mother is the only parent who has demonstrated any reliable capacity for responsible parenting, Tyler's interests are inextricably tied to her psychological and physical security. It is therefore relevant in considering

> whether the return to California places the child to an intolerable situation, to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.

[25] Similarly, in the case of *Rajani* v. *Rajani*, cited above, Backhouse J. refused to return a child to Tanzania on the ground that the child would suffer serious harm based on the husband's physical and emotional abuse of his wife in Tanzania and the likelihood that he would continue it if she returned. The trial judge also found that the husband would intimidate the mother and psychologically abuse her in Tanzania in the child's presence. There was also evidence that the husband would use the custody order that he obtained in Tanzania to exclude the mother from the child's life.

[26] The British Columbia Court of Appeal has followed *Thompson* v. *Thompson*, *supra,* in *Chan* v. *Chow*, 2001 BCCA 276. In that case, Proudfoot J.A. found the child, who was physically present in British Columbia, to be habitually resident in Hong Kong. However, Proudfoot J.A. refused to return the child to Hong Kong as she found the applicant mother presented a grave risk to the child under the Hague Convention as she was very unstable, likely to have to leave Hong Kong in the very near future, and likely to prevent the father from exercising custody or access rights. The court then found that the British Columbia Court could exercise jurisdiction under s. 45(b)(ii) of the British Columbia *Family Relations Act*; the "serious harm" exception. Having found a "grave risk" of psychological harm if the child was returned to Hong Kong, it followed that the child would, on a balance of probability, suffer serious harm if removed from British Columbia.

[27] I summarize the following principles from the case law:

1. the test for determining “serious harm” under the provincial or territorial children’s legislation is similar to the Hague Convention test for “grave risk” of physical or psychological harm;
2. the test requires that there must be a weighty risk of substantial and not trivial physical or psychological harm;
3. removing a child from the primary care of a parent may not on its own satisfy the test for serious harm or a grave risk;
4. it is not necessary to find evidence of physical or psychological abuse directly to a child to satisfy the test;
5. returning a child to a violent environment, as a matter of common sense, exposes the child to a serious risk of physical or psychological harm;
6. where one parent would be returning with the child to a dangerous situation, the dependent child’s interests may be inextricably tied to that parent’s physical and psychological security.

DECISION

[28] The father submits that he is not seeking the return of the child to his custody as he recognizes that the British Columbia Ministry of Children and Family Development has recommended that he should not have access to the child unless supervised. Thus, he submits that he simply wants the case heard in British Columbia where he has filed his application and the child has an habitual residence and the most substantial connection. He submits that he is not seeking physical custody of the child but rather joint custody and guardianship.

[29] In effect, the father is taking the position that this Court cannot take jurisdiction under s. 37(1)(b) of the *Children's Act* because he has filed a court action in British Columbia and the child has no substantial connection to the Yukon. But at the same time, the father submits that the child would not be returned to his custody in British Columbia because of the British Columbia's Ministry of Children and Family Development recommendation of supervised access. However, no matter how the father states his position, he seeks the return of the child to his legal custody, albeit jointly with the mother. I do not accept the implicit argument of the father that this Court should not exercise jurisdiction because there is an informal arrangement to protect the child in British Columbia. His oral submission to this Court that he does not seek physical custody of the child in British Columbia is not an assurance to which I can attach great weight.

[30] In my view, the mother and child are in the Yukon because the mother fears for her safety and the trauma to her children from their exposure to the father's violence. I have concluded on the undisputed facts that this is not a case of wrongful removal and certainly not a case of child abduction. The social worker encouraged the mother to return to the Yukon.

[31] The question for this Court to determine is whether confirmed violence in the presence of the child would cause the child to suffer serious harm if the child was returned to the legal custody of the father. I agree with the common sense approach taken in the case law. The child would suffer serious harm hearing or witnessing the father physically assaulting the mother. That harm may have occurred already and it is

not necessary for this Court to wait and see if the father will change his violent behaviour.

[32] The British Columbia social worker gave evidence that the mother was not safe in her current situation in British Columbia. I digress at this point to say that I recognize that the mother was violent as well but to a far lesser degree. While concerning, I am satisfied that the social worker has considered this in her assessment that the father presents the risk to the child while the mother provides a safe environment.

[33] The father acknowledged his violence against the mother to the social worker. Nevertheless, he submits that he has never physically harmed the child and I confirm there is no evidence that he has. But that fact does not address the serious psychological harm or trauma that the child can suffer through witnessing abuse, such as learning unhealthy ways of expressing anger, attributing the violence to something they have done, learning gender roles associated with violence and victimization and regressive behaviour: see P. Jaffe, N. Lemon and S. Poisson, “Child Custody and Domestic Violence: A call for Safety and Accountability” (NJI/CAPCJ Conference in Enhancing Judicial Skills in Cases of Violent and Abuse in Intimate Relationships, Whitehorse, June 24 – 25, 2004) [unpublished]. The implications for long-term exposure to violence can be serious.

[34] In conclusion, there is no dispute about the following facts:

1. the father has been physically violent to the mother in the presence of the child;
2. the mother fears for her safety and the trauma to the child;

3. in the past, the father has threatened to kill the mother and take the child away from her if they ever separated;

4. the social worker, who has interviewed the father, has recommended that the father's access be supervised by a person approved by the Ministry, until he completes a family violence program;

5. the social worker made the assessment that the mother was not safe in the current situation in British Columbia; and

6. the social worker encouraged the mother to return to Whitehorse and have the support of her family.

[35] I am satisfied that the child would suffer serious psychological harm if returned to the custody of the father. Therefore, this Court shall exercise its jurisdiction to make a custody and access order for this child.

[36] The parties may speak to costs, if necessary. The mother may proceed with her application for interim custody and supervised access to the father by delivering her Notice of Hearing to the father's Victoria lawyer by fax. I have seized myself with this case and note that this Court is open to court to court communication in cross-border cases as contemplated in *Hoole* v. *Hoole*, 2008 BCSC 1248.

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VEALE J.