SUPREME COURT OF YUKON

Citation: *J.C.L.* v. *D.M.H,* 2010 YKSC 50 Date: 20100830
Docket S.C. No.: 10-B0035
Registry: Whitehorse

BETWEEN:

J.C.L.

Plaintiff

AND:

D.M.H.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:
Stephanie Schorr Appearing for the Plaintiff
Kathleen Kinchen Appearing for the Defendant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

INTRODUCTION:

[1] VEALE J. (Oral): This is an application by the mother and father of the child, P., who was born on November 6, 2006.

[2] Mr. L. applies for an order that the mother and father have joint custody of the child, P., and that the child reside equally with the mother and the father in Whitehorse on a week on, week off rotation.

[3] The mother applies for joint custody but primary residence of the child with her in Victoria, British Columbia, from September 2010 to September 2011 while she

completes her schooling at Royal Roads in Victoria. She also applies, and I take it there is agreement on this, that P. reside equally with Mr. L. and Ms. H. in Whitehorse commencing September 2011 on an alternating week schedule, and that P. start kindergarten in the French Immersion Program at Whitehorse Elementary in September 2011.

[4] Ms. H. also applies for a change of the surname of P. from L. to H.-L. and there is agreement with respect to that and that is ordered.

BACKGROUND:

[5] Ms. H. is 34 years old, as is Mr. L. They had a relationship commencing in 2006 and P. was born on November 6, 2006, and she is presently three years and nine months old. Mr. L. currently is a full-time Family Support Worker with the Government of Yukon and is earning, I believe the number you gave me was 50?

[6] MS. SCHORR: $54,100 is anticipated for 2010.

[7] THE COURT: $54,100. Thank you. Ms. H. is currently employed on a seasonal basis with the Wildland Fire Management of the Government of Yukon and that employment ended on August 23 of 2010, and she intends to attend Royal Roads in Victoria to complete her Bachelor in Commerce, which I gather would be completed in August of 2011. The parties historically had a dating relationship until Ms. H. was pregnant with P. and at that time they began to live together, and that relationship unfortunately was strained and it has turned out that, after P. was born, they have actually lived apart more amicably in terms of caring for P. The nub of this case is that in August of 2008, Ms. H. wished to continue her education, which had been put on

hold during the pregnancy and birth of P., and the parties entered into a parenting agreement in August of 2008 that continued the joint custody of P. but permitted Ms. H. to move to Vancouver to continue her schooling. The agreement had a number of clauses but the pertinent ones for this application were paragraphs 5.01 and 5.02.

> 5:01 D. and J. agree that D. may move to Vancouver, British Columbia with P. for the purpose of attending university to complete her undergraduate degree for a period of two and one half years commencing August 28, 2008.
>
> 5:02 D. shall return to Whitehorse, Yukon with P. upon the completion of the program and in any event no later than September 2010.

[8] That agreement worked out reasonably well in terms of the care and control of P. There was no child support paid by Mr. L. during this period of time as that money was essentially spent on his transportation to Vancouver for access to P. Unfortunately, the education program of Ms. H. did not work out as well and she explored the possibility of a nursing degree, but that has not panned out. She has been very resourceful in finding the Royal Roads Program, which will result in her completing a degree in commerce but not until August of 2011.

[9] Consequently, we have the two applications before us, and I should indicate that the parents are both good parents. There are no particular concerns with respect to P. psychologically, mentally or physically. She is a well-adjusted child and both parents are doing an admirable job in raising her. There is an agreement that there is a change in

circumstances as Ms. H. wishes to pursue her foregone academic training in Victoria for one more year.

ANALYSIS:

[10] The parties are in agreement with respect to the law to be applied to this application. It is based upon s. 30 of the *Children's Act*, which is now called the *Children's Law Act*, SY 2008 c.1, ss.199(1), which sets out that the best interests is the test in respect of custody or access to a child. The section then sets out a number of factors that should be considered. Taking those factors into consideration in addition to the case law, in *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27, and *Miglin v. Miglin,* 2003 SCC 24 (CanLII). They are as follows:

[11] The existing custody arrangement and relationship being between the child and the custodial parent. It is clear that the existing custody arrangement and relationship between the child and the custodial parent has been that, by agreement, Ms. H. has been the primary caregiver to P. and Mr. L. has been the access parent. However, there is no question that the parents have shared equal parenting of the child. This is indicated in the evidence, since May of 2010, when Ms. H. returned to the Yukon for her summer job, the parties have shared access on a week on, week off basis between May and August of 2010. So while it is fair to say that Ms. H. has been the primary caregiver for the past two years, there is no question that Mr. L. has been capable of being the primary caregiver and has shared primary caregiving in the last several months.

[12] The second factor is the existing access arrangement and the relationship between the child and the access parent. If we examine this from the perspective of the

two-year period, it is clear that Ms. H. was the primary caregiver and Mr. L. was the access parent. However, as I indicated before, in the past few months that arrangement has changed to one of equal parenting of the child.

[13] The third factor is the desirability of maximizing contact between the child's parents, and there is no question that wherever the child resides during this next year, I think both parents are committed to maximizing the contact of the child with the other parent, subject to the difficulties of transportation and the costs associated with that.

[14] The fourth factor is the views of the child and, in this particular case, with a child of less than four years, it is not particularly helpful to even attempt to get the views of the child, even if they were ascertainable.

[15] The fifth factor is the custodial parent's reason for moving and it is qualified with these words, "Only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child." I think it is fair to say that the reason for Ms. H. seeking to improve her education, in the long-term, is for the benefit of the child, undoubtedly. In the short-term, if one assumes an equal ability of Mr. L. to look after the child and care for the child, as has been indicated, then the reasons for moving are more associated with Ms. H.'s legitimate desire to improve her employability. So it is not a clear-cut situation that the reason for moving relates specifically to the child but there is no question that in the future, it would address the needs of the child.

[16] The sixth factor is the disruption to the child of a change in custody. While there is no question that Ms. H. has been the primary caregiver and there will be some disruption if the child stays in Whitehorse and Ms. H. continues her education, I am

satisfied that that disruption will be minimal and not harmful to P., because she has been in the joint custody of both parents, and for the past several months has been in the equal custody sharing arrangement. There is also the factor that the child's daycare arrangements will remain the same as they have been for the past three years.

[17] The seventh factor is the disruption to P. consequent on the removal from family and schools in the community she has come to know. That factor plays both ways in the sense that whether she moves to Victoria, which is a new community and somewhat of a disruption with a new daycare centre, or whether she stays in Whitehorse and she does not have the benefit of her mother's alternative weekly custody, either way there is going to be some disruption to P.

[18] On balance, I have concluded that there is a policy reason in addition to the factors that I have outlined and that is that agreements in the Yukon of this nature are often very difficult to reach, and I say that in recognition that the parents have reached this agreement. In my view, agreements where one party gives up an equal sharing of custody with their child to assist the other parent in improving their education, those agreements should be respected, because there is little likelihood of the agreements being entered into in the first place if it is established that as soon as the parent has established residency outside of the Yukon for the purposes of education, then there is an application to continue that custody outside the Yukon. Consequently, parties are reluctant to enter into those agreements. So, in my view, the agreements should be respected.

[19] I am also satisfied that Mr. L. has demonstrated his ability to parent P., and although P. will undoubtedly miss the weekly parenting of Ms. H., I am satisfied that that can be addressed by generous access, which I will set out, as well as the daily telephone and web cam access to P., should Ms. H. wish to go to Victoria, which I encourage.

DISPOSITION:

[20] My decision is that there will be joint custody of P. P. will reside equally with each parent in Whitehorse on a one week rotation basis. Whether or not Ms. H. goes to Royal Roads for 2010-2011, the complete year, or remains in Whitehorse, Mr. L. shall pay child support to Ms. H. in the amount of $500 per month. This will permit Ms. H. to have a monthly visit to P. while she is pursuing her education in Victoria. In the event that she does not go to Victoria, it will assist her as she seeks a new employment position in Whitehorse rather than continue her education. I also order that the monthly access that she is able to afford will be supplemented by three additional access periods, December 20 to 30, April 20 to 25 and June 12 to 18.

[21] In the event that Ms. H. remains in Whitehorse, as I have indicated, she will continue to receive child support until their incomes achieve some comparability. In that circumstance, the cost of the child care would be shared on an equal basis, but in the event that she goes to her education in Victoria, the cost of daycare will be borne by Mr. L.

[22] P. shall start French Immersion kindergarten in September 2011 and continue in French Immersion, subject to her circumstances and adaptability to that course of study.

[23] There will be daily telephone and web cam access to P. There will be no court costs and, as I have indicated, the surname of P. will be changed to H.-L.

[24] I should say to the parents that I think you have done a very admirable job of raising this child in difficult circumstances. Ms. H., to you, I appreciate that this decision is a difficult one for you but I encourage you to continue your education. You are going to have a relationship with this child for a long time, many years, and this is only one year in that relationship. It is a year that will come and go very quickly for both of you and you will be able to resume your 50-50 care of the child in September of 2011.

[25] Is there anything I have not made clear, counsel?

[26] MS. SCHORR: Maybe just with respect to the additional access; you said there will be three times and?

[27] THE COURT: Monthly access.

[28] MS. SCHORR: Yes.

[29] THE COURT: Plus those three additional ones, but the three additional ones would be the monthly access for the month that they occur, December, April and June.

[30] MS. SCHORR: But would that be J. flying P. down for those three additional visits?

[31] THE COURT: Well, no, the contemplation that I had was that he would be paying child support and that child support would be used by Ms. H. to return

to Whitehorse for those access periods. Now, the parties, as you know, can make any arrangement they wish. If it is a better circumstance for Ms. H. to remain in Victoria and Mr. L. to bring the child, I am prepared to consider that, but the parties can reach that agreement, but if they cannot but it appears to be the better arrangement, make your submission now, because that would be an alternative.

[32] MS. SCHORR: No, I was just thinking ahead --

[33] THE COURT: It contemplated that --

[34] MS. SCHORR: -- one or the other, $500 to child -- yeah.

[35] THE COURT: -- Ms. H. would return, but, you know, that is subject to the educational demands that she has. If those educational demands are such that it is better for Mr. L. to travel with the child to Victoria and facilitate access, he does not pay the child support that month but he brings the child down and Ms. H. has an opportunity to spend the time with the child.

[36] MS. SCHORR: Yeah, that’s fine.

[37] MS. KINCHEN: So if I could just be clear, there is the three weeks that you have mentioned and then monthly?

[38] THE COURT: There is a period each month.

[39] MS. KINCHEN: Right. Okay, each month.

[40] THE COURT: Yes. I am leaving it open in each month because I am assuming it is going to be like a four-day weekend or something of that nature, but in

December, that would be the period for that month, and the same for April and the same for June, but in the other months, it would likely -- and I have not put any number on that because I think the parents can work that out. Obviously, deference would be paid to Ms. H.'s situation because she is coming back and she is making the sacrifice this year. So if you have any difficulty drafting up the order let me know and we can speak to it in Chambers.

[41] Thank you, counsel. Thank you, by the way, very much, for the very professional and adequate job you did in putting this forward.

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VEALE J.