COURT OF APPEAL FOR YUKON TERRITORY

Citation: *D.M.M. v. T.B.M.*,
2010 YKCA 6

Date: 20100722
Docket: 09-YU639

Between:

D.M.M.

Appellant
(Petitioner)

And

COURT OF APPEAL
Cour d'appel
FILED / DÉPOSÉ
JUL 28 2010
of Yukon
du Yukon

T.B.M.

Respondent
(Respondent)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson

On appeal from: Supreme Court of the Yukon Territory, June 24, 2009
(*D.M.M. v. T.B.M.*, 2009 YKSC 50, Whitehorse Docket No. 02-D3464)

Appearing on own behalf:	Appellant
Counsel for the Respondent:	K. Kinchen
On behalf of the child advocate:	F. Jampolsky
Place and Date of Hearing:	Whitehorse, Yukon May 19, 2010
Place and Date of Judgment:	Vancouver, British Columbia July 22, 2010

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Madam Justice Saunders

Dissenting Reasons By:
The Honourable Madam Justice Bennett (page 12, paragraph 39)

Reasons for Judgment of the Honourable Madam Justice Garson:

[1] The appellant mother, who now resides in Edmonton, Alberta, appeals from the dismissal of her third unsuccessful application to vary the provisions of a February 22, 2007, order that requires access to her twelve year-old son to take place in Whitehorse, Yukon Territory, unless the parties otherwise agree in writing.

[2] At para. 22 of his February 22, 2007, reasons for judgment (*D.M.M. v. T.B.M.*, 2007 YKSC 12) Gower J. explained his reasons for restricting the location of the mother's access to Whitehorse:

> Having read the affidavit material referred to in submissions, as well as taking into account my familiarity with this file since December 2003, I am satisfied that it is in the child's best interests to vary para. 19 of the CRO, and any other related provisions which may have to be consequentially amended, such that the mother's access to R. shall take place in the City of Whitehorse only, unless otherwise agreed to in writing by the parties. I recognize that this will create significant hardship for the mother, as she has only just recently completed her move from Whitehorse to Edmonton and has taken up relatively lucrative employment there. Indeed, at the time the CRO was agreed to on September 7, 2006, the impending move by the mother was generally understood to be a major factor. On the other hand, the mother is the author of her own inconvenience and misfortune. She has known of this Courts concern, and the concern of the father, about T.M. for several years now. It is therefore beyond my comprehension how she felt she could allow R. and T.M. to be together under the same roof in the family home, without these kinds of consequences befalling her.

[3] On July 19, 2007, the appellant mother applied for a variation of the February 22, 2007, order so as to permit her to exercise access in British Columbia and Alberta. The application was dismissed.

[4] On July 24, 2008, the appellant mother again brought an application to vary the terms of access and, in particular, sought an order that she be permitted to exercise access in Edmonton, Alberta. That application was dismissed.

[5] A third application (the subject of this appeal), by the appellant mother to vary the terms of the access order and also for an updated access and custody report was made on June 8, 2009, and June 24, 2009. Gower J. found no material change in circumstances and dismissed the applications (2009 YKSC 50).

[6] The long history of this matter is described in a series of judgments of Gower J. at *D.M.M. v. T.B.M.*, 2003 YKSC 71; *M.(D.M.) v. M.(T.B.),* 2004 CarswellYukon 121, 2004 YKSC 71; *M.(D.M.) v. M.(T.B.)*, 2005 CarswellYukon 35, 2005 YKSC 21, [2005] W.D.F.L. 3765, [2005] W.D.F.L. 3704, [2005] B.C.W.L.D. 5549, [2005] B.C.W.L.D. 5525; *D.M.M. v. T.B.M.*, 2006 YKSC 9; *D.M.M. v. T.B.M.*, 2007 YKSC 12; *D.M.M. v. T.B.M.*, 2008 YKSC 77; *M.(D.M.) v. M.(T.B.)*, 2009 CarswellYukon 138, 2009 YKSC 50, [2010] W.D.F.L. 1023.

[7] Notwithstanding the order restricting access to Whitehorse, the mother has had some access to the child in other places: December 26, 2009, to January 3, 2010, in Vancouver, British Columbia, and March 7 to 13, 2010, in Vancouver and Victoria, British Columbia.

[8] The mother lives in Edmonton with her two young daughters. They are the daughters of her common law relationship with T.M. Although the mother no longer resides with T.M., it appears from the evidence that they remain close. He is involved in raising his daughters and they live near each other in Edmonton.

[9] The background to the dispute that has resulted in the order prohibiting access in Edmonton concerns the mother's relationship with T.M. T.M. has a history of violence towards the mother as well as the child. The learned chambers judge was not satisfied that the mother could or would ensure that T.M. have no contact with the child if the child were to visit her in Edmonton. Other than the mother's failure on at least one occasion to comply with previous orders prohibiting contact between the child and T.M., there are no concerns about the mother's parenting, nor is there any question about the fact that the child does wish to see his mother. At the hearing of the appeal the child advocate confirmed that she had recently met with the child and he confirmed that he does wish to see his mother.

[10] The appeal from the order of June 24, 2009, appears to be based on the following grounds:

1. that the learned chambers judge erred in law by not finding a material change of circumstances based on the age of the child and his desire to reconnect to the appellant;

2. that the chambers judge erred by failing to properly consider and apply the principle that it is in the child's best interest to have maximum contact with the non-custodial parent;

3. that the chambers judge erred in fact in relying on dated expert materials before the court and in relying on evidence advanced by the respondent father related to safety concerns surrounding access with the child in Edmonton, Alberta;

4. that the learned chambers judge erred in not acceding to her application for an updated custody and access report; and lastly

5. that the learned chambers judge erred in commenting on her status as an unrepresented litigant and in ordering costs against her.

[11] The respondent father submitted that the learned chambers judge was correct in finding that the mother had failed to meet the onus of establishing a material change of circumstances necessary for variation of the existing order, and that he similarly did not err in dismissing the mother's application for an updated custody and access report.

[12] The court appointed child advocate has been involved in this long-running dispute since 2005. At the hearing of this appeal, having recently interviewed the child, the child advocate advised the court that she supported a fresh application for either a new, or updated, custody and access report. She advised the court that the child had advised her that the two recent visits, mentioned above, went well and he liked being with his mother. The child advocate also submitted before this court that there is now more clarity about the end of the relationship with T.M. and that these two factors constitute a change in circumstances that would tend to support an application for an updated custody and access report. These submissions concern recent events and were not before the chambers judge. Likely as a consequence of these more recent developments, we were advised subsequent to the hearing of the appeal that with the consent of both parents and the child advocate, an application was made to a Supreme Court Judge for an updated custody and access report.

[13] I view the consensus of the parties and the child advocate, that an updated report is necessary, to be a positive development towards the important and necessary restoration of the relationship between the mother and her child.

[14] For the reasons explained below, I would allow the appeal in respect to the application for an updated custody and access report, and remit the application for the report to the Supreme Court. Similarly the application to vary access is remitted to the Supreme Court for reconsideration following receipt of the updated custody and access report.

Standard of Review

[15] The standard of appellate review in custody and access matters that I would apply in this case, was described in *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60. Bastarache J. said at para. 13:

> [A]n appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts.

[16] The British Columbia Court of Appeal described the standard of review in *Scheiber v. Phyall*, 2002 BCCA 409, 27 R.F.L. (5th) 182, at para. 9:

> [I]n the absence of such an error, it is not the function of an appellate court to reconsider and reweigh the evidence with a view to substituting its opinion of the best interests of the child for that of the trial judge. It is also important to note that these cases are largely fact-driven and that references to other authorities are often of limited assistance, except in so far as they state the basic principles to be applied.

Analysis

[17] The onus was on the appellant mother to establish, at the time of the application, that circumstances had changed since the prior order was made to such an extent that the existing access arrangements were no longer appropriate. She argued on the variation application that the age of her child, now 12, and the child's continuing desire to have a relationship with her, as well as her separation from T.M. established the necessary material change of circumstances.

[18] I turn now to a review of the chambers judge's reasons. It is clear that the controlling factor in his original decision, (as well as his three orders refusing to vary the original order terminating access in Edmonton), was the lack of assurances surrounding what the chambers judge saw as a risk of contact between T.M. and the child. The concerns regarding the risk of contact between the child and T.M are fully described in the numerous reasons for judgment given in respect to this matter and in particular: 2003 YKSC 71 at para. 16; 2006 YKSC 9 at para. 28; and 2007 YKSC 12 at para. 22. These concerns focus on T.M.'s assaults on the mother, his assault of the child in 2003, the mother's continued co-habition with T.M. notwithstanding his violence towards her, and the resistance of the mother to acknowledging any risk to the child.

[19] The chambers judge said that there was no evidence that T.M. and the mother do not now have a continuing relationship of some kind. The chambers judge said that even if T.M. and the mother are separated, there continues to be a relationship between them. At para. 16 he noted that:

> 1. They are co-parenting their two daughters within the City of Edmonton;
> 2. They are the joint tenants on title of two residential properties in the City of Edmonton; and
> 3. The mother acts as landlord for T.M. in managing the tenants that reside in the house where T.M. resides.

[20] The chambers judge found that there was a continued "co-mingling" of the life of the mother and T.M. He canvassed the various suggestions the child advocate had made to "try and find a creative solution to this problem" but he found that those suggestions did not meet his concern about the prospect of continuing contact between the child and T.M. He noted the mother's history of being complicit in allowing contact between T.M. and the child. He referenced his previous reasons at 2007 YKSC 12. He noted that the mother had, on previous occasions, put the child "in the situation of having to lie to the father about his contact with T.M. in order to protect the mother". In short, the chambers judge found no material change in circumstances insofar as there had been no new developments in the relationship

between the appellant and T.M. that would provide any kind of assurances there would not be contact between the child and T.M.

[21] As to the mother's application for an updated custody and access report, he noted the mother's submissions that there would be "'no harm' in a psychologist having a further assessment of the child in order to ascertain [his] views" (para. 26). The chambers judge found that that was "hardly the basis for this Court to recommend ... the expenditure of ... money" for such a report. He noted as well that the Court was fortunate in having the ongoing assistance of the child advocate and, thus having the benefit of the child's instructions and stated preferences.

[22] As to costs, the chambers judge held, after referring to the two previous applications to vary:

> [30] ... I strongly advised the mother, specifically after having made the award of costs, that the next time she brings such an application she should get legal advice. The mother continues to be self-represented on the current application.
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> ...
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> [35] What causes me to pause here is that in this case, although the mother's application may have been initially misguided in the sense that there was insufficient attention paid to establishing a clear material change in circumstances, there was a significant amount of what I take to be good faith effort by the mother in consulting with the child advocate and her agent in trying to come up with some creative options which would allow her to reconnect with the child. Some of those may yet bear fruit and be productive.
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> [36] The second reason for reconsidering the costs issue is that one of the things that came out of this hearing, which may ultimately be of significant benefit to both the mother and the child, is this concept of unlimited phone access, if it is initiated by the child.
>
> [37] So for those reasons, I am going to grant costs in favour of the father, but I am going to temper the amount and limit it to $1,000 in a lump sum, payable forthwith.

[23] In support of her application, the mother relied on her June 4, 2009, affidavit No. 30.

[24] In her affidavit the mother expresses concern that the present access regime fails to recognize the importance of her relationship with her son. She points out at para. 16 that "no one has indicated there is a concern about me or my parenting".

[25] She expresses concern that her two young daughters have not been able to establish a relationship with their older brother.

[26] She offered that her son could telephone his father on a daily basis to privately verify with his father that all was well. At para. 24 she states "... I want to make it clear that there are no concerns about T.M. being around children. He looks after our two daughters and another baby for his new family. I do not have a concern. He would not have the care of these three children if he was a child protection concern".

[27] At para. 32 she says:

> If we cannot reach agreement on the options I have outlined then I would ask for the custody and access report to identify how access can be exercised in Edmonton. Unfortunately there is no willingness to find a solution that I believe is in [R.'s] best interest. I once again have had to come to court to ask to see my son.

[28] The learned chambers judge found that there was no material change in circumstances. I infer from his conclusion that he was not satisfied, on the evidence of the mother, that there were in place sufficient safety precautions, nor was he satisfied that the appellant and T.M. did not have intermingled lives such that T.M. would be a presence at the mother's home. As noted in *Scheiber*, it is not the function of this Court to reconsider and reweigh the evidence. It is not the function of this Court to substitute its opinion for that of the chambers judge.

[29] The evidence adduced by the father about the appellant's tenant dispute was tendered by the respondent to prove that the mother and T.M. possibly continue to reside together. It was tendered to cast doubt on the mother's assertion that she was separated from T.M. The evidence of the tenants is hearsay and is not reliable, and ought not to have been admitted into evidence. The mother's response to the tenant dispute understandably did not detail the nature of her relationship with T.M.

in a way that would make it relevant to the custody dispute. If the basis of his finding that the mother's life remained "comingled" with T.M. was the evidence from the material gleaned from the unrelated tenancy dispute, he erred in doing so.

[30] Sections 17(5) and 17(9) of the *Divorce Act*, 1985, c. 3 (2nd Supp.), state the principles that are applicable to the applications before the court. They provide as follows:

> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
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> ...
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> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[31] I turn now to the question of the evidence before the chambers judge of a material change in circumstances, necessary to ground either of the applications before him.

[32] In summary, in 2007 the mother claimed to have been separated from T.M. for about one year. She had two young children, children of T.M. Both she and T.M. had moved from Whitehorse to Edmonton. There was evidence that the mother had permitted contact between T.M. and the child in breach of a court order.

[33] By June 2009, the time of the order under appeal, the child was now 12, and continued to communicate a desire to see his mother. T.M. had formed a new relationship and had a child with the new partner. Almost seven years had elapsed since the assault on the child.

[34] In my view this lapse of time and these changes in circumstances were sufficient to merit consideration by the chambers judge in the context of considering the mother's application for a custody and access report.

[35] While I recognize that the decision to order such a report is a discretionary one, that discretion must be exercised on a principled basis. In my view the chambers judge gave insufficient regard to the importance of the child's best interests in being afforded an opportunity to have some relationship with his mother. T.M.'s history of violence towards the mother and child is significant and justified the chambers judge's reluctance to reinstate unsupervised access in Edmonton without assurances gleaned from a further investigation. However, the mother's alternative application addressed a desire for further investigation to provide independent evidence to the court, and was also based on a change of circumstances including the length of time she claimed to have been separated from T.M. (about 3 years).

[36] As described above, the chambers judge gave brief reasons for his refusal to order a new or updated custody and access report. He ignored the evidence that regardless of whether the mother and T.M.'s lives were "comingled", they were separated. Importantly, he did not address the best interests of the child, and the statutory requirement to foster a relationship between the mother and the child. The apparent change in the circumstances of the mother as well as the age of the child required that he address the question of whether a new custody and access report might reveal a means to afford some safe access between the mother and the child. He erred in considering the application only on the basis of the mother's submission "that there would be no harm" in ordering such a report. The refusal to order such a report essentially leaves the mother and child in a hopeless position of not being able to see each other except rarely and away from a natural home setting, and then, in the absence of meaningful access, in not being able to satisfy the court that it may be in the child's best interest to be afforded access.

Disposition

[37] I would therefore allow the appeal in respect to the request for a custody and access report. I would remit the application to the Supreme Court to make the appropriate order for a custody and access report. I would remit the application to vary access to the Supreme Court for reconsideration following receipt of the updated custody and access report.

[38] I would set aside the order as to costs in the court below. I would make no order as to costs of this appeal.

The Honourable Madam Justice Garson

I agree:

The Honourable Madam Justice Saunders

Dissenting Reasons for Judgment of the Honourable Madam Justice Bennett:

[39] I have read the reasons by Madam Justice Garson, and with respect, while I agree that there was no error with respect to refusing to vary the order for access, I do not agree that the chambers judge erred in refusing to order a new custody and access report.

[40] As pointed out in Garson J.A.'s reasons, with the support of the child advocate, the parties have agreed that a new custody and access report should now be ordered. This application is pending in Supreme Court.

[41] This litigation has a long history. In order to understand the concerns of the chambers judge, who has been dealing with the litigation since 2003, it is necessary to set out the background in more detail.

[42] The parents had signed a separation agreement which included co-parenting of R., who was born in 1997. In October 2003, social services became involved because of concerns that T.M., the mother's new partner, was violent with R. In October 2003, the mother applied for an emergency intervention order and alleged that T.M. repeatedly assaulted her, including choking and strangling her. She said she feared for her life. R. was present when some of these incidents occurred. R. told social workers that T.M. had tried to force him to eat and had grabbed his hair, banging his head on a table.

[43] The mother later retracted her allegations of assault. However, in December 2003, a second complaint of assault was made, again with statements by the mother that she believed T.M. would kill her.

[44] An order for no contact between T.M. and R. was made as a result of this complaint; however, the mother admitted that she allowed T.M. to violate the order by staying with her in a motel room with R.

[45] In November 2003, Mr. Justice Richard ordered that the mother would only have supervised access with the child. Social services withdrew an application for intervention when the father received custody.

[46] In September 2004, T.M. pleaded guilty to assaulting the mother. This was his 26th conviction. His criminal history included two convictions for sexual assault and four convictions for assault and assault causing bodily harm.

[47] In 2004, the mother applied to amend the supervised access order. At the same time, the father brought an application pursuant to s. 810 of the *Criminal Code,* seeking to prevent T.M. from contacting R. T.M. consented to the application. As a result, the chambers judge amended the order and permitted the mother to have unsupervised access with R. A custody and access report had been prepared by the time this application was heard.

[48] In 2005, the mother applied for T.M. to have contact with R. During these proceedings, it became apparent that the mother was permitting some contact with T.M. and R. in violation of the s. 810 order. A similar application was made by the mother in 2006, to the same end.

[49] In 2007, the father brought an application to limit access by the mother to Whitehorse only. The application was brought as a result of the following: the mother and T.M. had moved to Edmonton. It had come to light that on two occasions, the mother had permitted breaches of the s. 810 court order by allowing T.M. to be overnight in the same home with R. Additionally, R. lied to his father regarding contact with T.M. in order to protect his mother. T.M. was charged and convicted of breaching the s. 810 order, and served a term in prison as a result.

[50] The child advocate supported the father's application to limit access to Whitehorse. The order also permitted access in other locations with the consent of the parties.

[51] The concern clearly was that the court could not trust the mother to enforce the no contact orders between T.M. and R. The mother and R. were both victims of abuse at the hands of T.M.

[52] In 2008, the mother sought to vary the order limiting access and sought another custody and access report. The child advocate did not support the mother's application. The application was refused.

[53] In 2009, the mother applied again to vary the order for access and sought an updated custody and access report. This is the order before us. The mother submitted that, "there would be no harm in a psychologist having a further assessment of the child in order to ascertain his views and whether they may have changed over time". The child advocate had interviewed the child prior to the application and told the court that the child wanted to see his mother. The child advocate offered a number of suggestions with respect to facilitating contact. The judge did not accept that R. would be safe in Edmonton while T.M. was there, but was willing to consider the other options. At the time, the mother was not enthusiastic about the other options. However, since then she has had access with R. in locations other than Edmonton and Whitehorse.

[54] The chambers judge concluded that there was no basis to expend public resources on a custody and access report. He said that one reason to order a report is if there is a material change in circumstances. It is this aspect of the reasons that I interpret quite differently from my colleague. A material change in circumstances, which can be established in a number of ways, is what is required to permit a court to consider whether to vary an order for access. I take from the comment by the chambers judge that if he found that circumstances had changed to the point where he would reconsider access, a custody and access report would then be beneficial.

[55] The mother was attempting to establish a material change in circumstances through a revised custody and access report, which is obtained at public expense. Although likely helpful, she does not require such a report to establish a material change in circumstances.

[56] The child advocate had provided the kind of information that the mother was suggesting would have been obtained from a custody and access report. The chambers judge found that the evidence did not sufficiently support a change that would justify the public expenditure to investigate whether T.M. was still a threat to R.

[57] The question of whether to order a custody and access report is a matter of discretion for the chambers judge. His discretion is owed considerable deference by the appellate court. The standard of review of a discretionary order is that there must be a material error, a serious misapprehension of the evidence or an error in law. It does not allow this court to reweigh the evidence or substitute our views for that of the trial judge. See *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12.

[58] The chambers judge was clearly alive to the predominant principle of, "the best interest of the child" as well as the need for maximum contact with both parents. These issues arose and were addressed repeatedly in his reasons commencing in 2003. However, the predominant theme throughout the litigation was whether R. was safe from T.M. Even when the parties were living in separate premises, the mother still permitted contact between T.M. and R., despite a court order to the contrary. The chambers judge had full and complete submissions from the child advocate who did not support the change as suggested by the mother.

[59] It has been suggested "that the refusal to order [a custody and access] report essentially leaves the mother and child in a hopeless position of not being able to see each other, and then, in the absence of meaningful access, in not being able to satisfy the court that it may be in the child's best interest to be afforded access". However, as the child advocate pointed out, since the application was dismissed in 2009, the mother has had access to the child over Christmas this past year and Spring break this year. In other words, the other options suggested by the child advocate in 2009 were being utilized, which in turn prompted the parties and the child advocate to now support an updated custody and access report, on the basis that there is, in their view, a material change in circumstances.

[60] I agree with the statement by the child advocate, that the mere passage of time does not trigger a right to an updated custody and access report. If that were the case, such reports would require constant updating at the public expense. This is not the situation where the parties are privately funding the report.

[61] I do not see that there is any error in law, any material error or a serious misapprehension of the evidence in the chambers judge's refusal to order an updated custody and access report in 2009. As indicated above, we cannot substitute our views for that of the trial judge.

[62] I would dismiss the appeal. I would not disturb the order for costs made by the chambers judge. Again, considerable deference is to be given to costs orders and I see no reason to interfere with the order.

[63] I do join my colleagues and the chambers judge in encouraging these parties to continue working together to restore R.'s relationship with his mother, which, in the long run, will be in his best interest.

The Honourable Madam Justice Bennett