SUPREME COURT OF YUKON

Citation: *C.S.* v. *J.G.*, 2011 YKSC 12

Date: 20110126
Docket S.C. No.: 10-D4290
Registry: Whitehorse

BETWEEN:

C.S.

Plaintiff

AND:

J.G.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Carrie Burbidge — Counsel for the Plaintiff
Shayne Fairman — Counsel for the Defendant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by the plaintiff for specified access to the child, J., who is about four and a half years old. The plaintiff and the defendant mother began dating in February 2008. Obviously, J. was the child of a previous relationship, and I am told that the biological father of J. has not been involved in her upbringing in any way.

[2] The relationship between the plaintiff and the mother became more involved over the period from December 2008 to April 2009. There is conflicting evidence of how much time the plaintiff spent with the mother and the child, who were then residing in

Vernon, British Columbia, but there were visits over those months. In May 2009, the mother and child moved to the Yukon to join the plaintiff with the intention of marrying, which they did in August 2009.

[3] Soon after relocating to the Yukon, the mother claims that there were problems in the relationship. She alleges that the plaintiff was abusing and was addicted to alcohol. She says he also had an anger management problem and often went into fits of rage in her presence and in the presence of the child. In February of 2010, the mother left the Yukon with the child and remained in British Columbia until late March or early April, 2010. She returned for approximately two weeks, and then left again. The plaintiff did not object to the mother's moves away from the Yukon with the child.

[4] The plaintiff then voluntarily enrolled in an eight-week alcohol treatment program in the Edgewood facility in Nanaimo, British Columbia, and there were further communications between he and the mother. The mother and child visited the facility on a couple of occasions while the plaintiff was in treatment. However, the mother apparently continued to remain in Vernon, British Columbia, only returning to the Yukon for another brief period of about two weeks in October 2010, apparently in an effort to make a last attempt at seeing if the marriage could be saved. She determined that it could not be, and moved back to Vernon.

[5] The plaintiff has not had any face-to-face contact with the child since October 2010, although there was some intermittent telephone access agreed to between the parties over the Christmas period and into January 2011. The mother then suspended that contact because of certain comments which she says the plaintiff made to the child

which were inappropriate. These comments were about such things as the plaintiff referring to "our home" in the Yukon, referring to the plaintiff perhaps having a face-to-face visit with the child, and bringing her toys which she still had at the plaintiff's residence in Whitehorse. I agree that those comments were inappropriate and justify the mother's concerns.

[6] This is an interim application and, accordingly, there has been no testing of the allegations made on both sides, or the denials, in certain cases. It is therefore very difficult to distil what is true and what is not. In order for the Court to get to the bottom of the conflicted and contradictory allegations, there really does need to be a trial of some sort, or some testing of the affidavit material. That puts the Court in a very difficult position at this interim stage.

[7] I do not think there is much dispute about the nature of the law in this area. I reviewed a number of relevant cases of non-parents seeking access, in *G.N.* v. *D.N.*, 2009 YKSC 75, at paras. 7 through 11. Firstly, it is clear from the case law I referred to there that the onus is on the plaintiff in this situation to demonstrate that the proposed access is in the child's best interests. The specific access that he proposes is one telephone call with the child per week, plus one overnight visit with the child per month, and such other access as may be agreed.

[8] Secondly, it is also clear that the custodial parent has a significant role, and that the courts should be reluctant to interfere with a custodial parent's decision to deny access, unless it is satisfied that the interference would be in the child's best interests.

[9] Thirdly, it is generally not in the best interests of a child to be placed into circumstances of real conflict between the custodial parent and a non-parent. While courts must be vigilant to prevent custodial parents from alleging imagined or hypothetical conflicts as a basis for denying access to non-parents, in cases of real conflict and hostility, the child's best interests will rarely, if ever, be served by granting access. It is repeated in a number of other cases that significant deference must be given to the views of the custodial parent and their ability to decide what is in the child's best interests, and that the limits of a court's deference will be reached where the custodial parent is acting wilfully against the child's best interests.

[10] It also should be said that this is not a case of what is in the plaintiff's interests, but rather it is what is in the child's best interests. In many respects, at this interim stage, the plaintiff's application does smack of more a case of what he wants, rather than what is best for the child. Now, I congratulate the plaintiff's counsel for submitting all that could be said on the plaintiff's behalf, in terms of the evidentiary burden that he has on this type of an application. But at the end of the day, it is my view that the plaintiff has not met the threshold of establishing that it is in J.'s best interests for him to have even limited specified access at this time, given the overall context of the conflict between the parties. Although there is perhaps more of that evidence coming from the mother than is admitted by the plaintiff, it is not significantly disputed that such conflict continues.

[11] This is also a situation where the plaintiff has not been involved with the child for a protracted or extended period of time. Indeed, the amount of time that the child actually lived with the plaintiff under the same roof is relatively limited in comparison

with the time periods shown in some of the case authorities that have been filed. So while there no doubt has been some bonding between the child and the plaintiff, that is a limited factor in this case.

[12] There is also little evidence, although there is some, of the child being adversely affected by being separated from the plaintiff, and to an extent, that evidence is ambiguous. Now I realize that the plaintiff is in a difficult position in being asked to procure that type of evidence, because he does not have access to the child, but nevertheless, this does not strike me as a situation where the mother is simply imagining a hypothetical conflict between her and the plaintiff in order to justify a complete denial of access.

[13] At this interim stage, it is difficult for me to judge the plaintiff's situation vis-à-vis his alleged alcohol addiction or his anger management. However, having adjudicated these types of issues in previous cases, and being fairly familiar with alcohol addiction in the course of my experience as a lawyer and a judge, the types of statements that are made by the plaintiff in the various affidavits do seem to smack of denial: that there is not really a problem; that he only spent $19,000 or $20,000, plus lost wages and other expenses, to attend an eight-week alcohol treatment program "to make the [mother] happy"; and that he bought beer at the McCrae Chinese food restaurant on four or five occasions and took them to his crew, but did not consume any. Also, the extent of his aftercare work and effort following his alcohol treatment is unclear. He is not attending AA meetings. He has periodic meetings with peers from the program. I do not even know if that means the Alcoholics Anonymous program or other graduates from Edgewood or what, but the extent of that type of information is simply not before

the Court. There are only the plaintiff's own statements about his personal and daily habits that he has adopted since graduating from the program.

[14] It is clear on the plaintiff's own evidence that the efforts of someone coming out of the program after it is finished, to follow up with aftercare and to follow up on working the program, are as important for long-term success as the in-patient treatment. Therefore, there has to be a genuine commitment by the patient to that follow-up, and that evidence is sorely lacking here.

[15] What does that have to do with the mother's denial of access? Well, it does give the mother a reason to have a concern that continued contact between the child and the plaintiff is not in the child's best interests. Now, whether that is borne out at the end of the day following a trial or some other testing of the evidence remains to be seen. However, in my view, the mother's affidavit material is more compelling on the issue of conflict between the parties and, as I said earlier, it is beyond being imagined or hypothetical.

[16] Therefore, in all of the circumstances it seems appropriate, at this interim stage, to deny the application.

GOWER J.