SUPREME COURT OF YUKON

Citation: *D.T.B.* v. *L.A.R.A.* 2011 YKSC 14

Date: 20110207
Docket S.C. No.: 10-B0084
Registry: Whitehorse

BETWEEN:

D.T.B.

Plaintiff

AND:

L.A.R.A.

Defendant

Before: Madam Justice S.L. Martin

Appearances:
Debbie Hoffman — Appearing for the Plaintiff
Malcolm Campbell — Appearing for the Defendant

A SUMMARY OF WRITTEN REASONS FOR JUDGMENT DELIVERED FROM THE BENCH AND EDITED FROM THE TRANSCRIPT

[1] MARTIN J. (Oral): This is a very difficult matter. The presentations have been excellent, the materials have been helpful, and I have read them all.

[2] There is extensive contradictory testimony and were this primarily an adjudicative process on the merits, there would need to be a testing of that testimony by cross-examination. However, my job is to determine where any such adversarial process will take place. The key issue is whether it is appropriate for the Yukon to exercise jurisdiction over this dispute.

[3] The children have resided in British Columbia with their mother as their primary residence between 2002 and 2010. There have been many disputes about custody and access, over a long period of time before the British Columbia courts. Some disputes were resolved by court order in 2009, and most importantly and most recently, there was a consent order in May, 2010.

[4] It was argued that the wording of that order was problematic, but I have no difficulty understanding what the parties both said and meant. It may be more difficult for lay people to understand what it means, but I think at the time that it was written, it clearly contemplated three things: First, there would be shared custody with the primary care of the children going to Ms. A. Second, s. 2(e) states:

> in the event the parents cannot reach agreement with respect to any major decisions despite their best efforts the custodial parent shall have the right to make such decision;

In my view, that "custodial parent" has to be the person who was given, by the terms of their agreement, the primary care of the children: namely Ms. A..

[5] Third, s. 2 (f) sets out that:

> the non-custodial parent shall have the right, under s. 32 of the Family Relations Act [in British Columbia], to seek a review of any decision which the parent considers contrary to the best interests of the children;

In my view, the parties themselves, in a consent order, have contemplated that they may not agree on important decisions respecting the children, and have themselves determined how those controversies will be resolved. They have provided that the custodial parent, who in that context means Ms. A., shall have the right to make such

decisions; and that to the extent Mr. B. challenges those decisions, that is to be done under s. 32 of the *Family Relations Act*, [RSBC 1996] c. 128.

[6] This is an agreement that was put in place after a great deal of discussion and with the assistance of counsel. The agreement captured in the May 2010 consent order did not have an end date. It established the legal framework of the relationship between the parties into the future.

[7] The parents were free to agree to change where the children lived after the summer access in 2010 was finished. While there is contradictory evidence as to whether the move to Dawson was on a trial basis or intended to be permanent, people that have shared custody can make those consensual type of decisions. However, when agreement fails there is to be discussion. When discussion cannot produce consensus the matter is governed by the terms of the May 2010 consent order. That Ms. A and the children actually resided in the Yukon for a period of time does not modify or change the terms of this agreement. The agreement exists, and it continues to exist, until agreed otherwise by both of them or modified by court order.

[8] The first part of the legal test for determining whether the Yukon has jurisdiction over this matter is to ask whether the children were habitually resident here. Perhaps they were but again perhaps their connection was simply temporary. Even if they are habitually resident here, in my view, the Yukon must decline jurisdiction on this matter for the simple reason that the parties themselves agreed, as recently as May 2010, that there would be a dispute resolution mechanism involving British Columbia. On a balance of convenience, in my view, it is simply not appropriate to have this matter

determined here.

[9] The bulk of the children's evidence concerning their progress, their activities, and their best interests, from 2002 to the summer of 2010, is based in British Columbia. The most important factor in reaching my decision is however, the agreement of the parties, which gives Ms. A. the ability to make a determination as to the residence of the children, and, if disputed, Mr. B. can challenge that decision in British Columbia.

[10] If I am wrong that the appropriate jurisdiction is British Columbia, I nevertheless, on an alternative basis, allow Ms. A. to return to British Columbia with the children. She retains primary residency. There was disagreement as to which parent had the children for how many hours. However, nothing has modified or changed the legal document and the consent order gives primary care to the mother. There has been an allegation of a change in circumstance, and that change of circumstance may have occurred here, but the Court is also very mindful of the fact that parents who have joint custody should be allowed the widest berth to try things that are in the best interests of the children. But in attempting to see whether something works, (like moving to Dawson so the father can have greater access) there was no agreement to change their consent order. What I see occurring here is, unfortunately, the father using the mother's willingness to consider greater access as potentially a weapon in realigning their agreement, and I do not think that is in the best interests of the children.

[11] The father argued that the children should not be moved back to British Columbia because they are under stress and a move would increase that stress. I have no doubt that the children experienced grave stress. I cannot imagine that there was an *ex parte*

application, enforced by the RCMP in the presence of the children, against a mother who was, in her view and in mine, exercising what the parties had agreed were her rights as primary parent. Those children must have been terrified. They were certainly traumatized. And if they have any stress, it is, on my reading of this evidence, grounded in the controversy and actual disputes that are occurring in this jurisdiction. The children, it would seem to me, need to be settled, and that involves being in a peaceful situation in a place where they have known security and stability for a long amount of time. That place is British Columbia.

[12] In conclusion, I decline jurisdiction in favour of British Columbia. The agreement between the parties prevails, such that Ms. A. has primary care, that is what the document states, and in the event that agreement cannot be reached, she gets the right to make the decision about where the children live. If Mr. B. wants to challenge that decision, he is obliged by the terms of his consented to document to go under s. 32 of the *Family Relations Act*, *supra*. If I am wrong, then there is an interim order allowing the mother to return to British Columbia and that interim custody is given to Ms. A. She is given decision-making rights according to the contract signed, and the agreement signed by the parents, and consented to by the Court.

[13] I do not accept the argument that there is somehow an attornment to this jurisdiction through the December *ex parte* application. It is my view that such an application should never have been taken on an *ex parte* basis, especially when there is known counsel in Campbell River, and there is no evidence of any attempt by the father to try to resolve the matter short of the most invasive manner of dealing with this, which is a without notice order. Even if it is an emergency, notice can at least be attempted.

Given the overall circumstances, it cannot be thought that someone was thinking of the best interests of the children when such an apprehension of the children was made, requiring them to spend four days in a shelter away from their primary caretaker.

[14] That being said, there is controversy. I had more evidence before me than was available to the decision maker on the *ex parte* application. There are concerns in both affidavits about smoking, and about drinking, but I am mindful that in this jurisdiction there are no reported concerns of any child welfare matters. I note that any such matters that existed are dated, being in 2007-2008, and the parties themselves, as well as the Court, have seen fit, with full knowledge of those previous difficulties, to come to the order of May 2010. It should be enforced.

J. Martin

MARTIN J.