SUPREME COURT OF YUKON

Citation: *H.A.P.* v. *D.B.C.*, 2011 YKSC 66

Date: 20110825
Docket 04-B0060
Registry: Whitehorse

BETWEEN:

H.A.P.

PLAINTIFF

AND:

D.B.C.

DEFENDANT

Before: Mr. Justice L.F. Gower

Appearances:

Kathleen Kinchen	Counsel for the Plaintiff
Andre Roothman	Counsel for the Defendant
Laura Cabott	Child Advocate

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by the mother to allow the child, J., who is currently 14 years old and will be turning 15 in mid-January of next year, to attend an all girls private school in Victoria, B.C., commencing in the 2011-2012 academic year, and for as long as she wishes to attend.

[2] The mother also made a companion application in the course of the hearing: if J. is allowed to attend this school, then any decisions to be made in connection with her attendance there are to be made by both parties in consultation with each other;

however, if they are unable to agree, then the mother wants the authority to make those decisions without the father's consent, subject to the father's right to apply to this Court for a review of such decisions.

[3] This is not a classic mobility case such as *Gordon* v. *Goertz*, [1996] S.C.J. 52, but it shares many of the same features. One of those features is that it is a very difficult type of decision for a court to make. Such cases are among the most difficult for courts because there is often a balancing between the importance of the maximum contact principle, whereby each parent should have the maximum opportunity to spend time with their child, with the possibility of denying a parent, or in this case the child, a positive opportunity through a move or relocation of some kind.

[4] *Gordon* v. *Goertz* and the *Children's Law Act*, R.S.Y. 2002 c. 31, make it clear that the first thing that I must be satisfied about is whether there is a material change in circumstances which justifies examining a potential variance of any existing order. In this case, an order was made by Justice Veale in 2005, essentially giving joint custody of both children, J. and K., to the parties, and specifying that the residence of the children will be shared equally between the parties. I am told that in recent years that has been on a week on, week off basis.

[5] The mother seeks a variation of that in order to allow for J.'s attendance at the private school. For me to even get into considering whether that is in J.'s best interests, I must first be satisfied that there has been a material change in circumstances since the 2005 order. I am satisfied that there has been such a change in two respects. One of those is conceded by the father's counsel, Mr. Roothman, although he says it is

insufficiently connected to the issue of the school. This change is that there has been a significant deterioration in the relationship between the child and the father over the last three years. The situation has come to the point where the child has been expressing since 2009 a desire to have her primary residence with the mother. As I will come to shortly, I am satisfied that this change in circumstances is sufficiently interrelated to the school issue to merit consideration.

[6] The other fact which I am satisfied constitutes a material change in circumstances is that the maternal grandmother has made an offer to essentially pay for all of the school fees, the registration fees, and room and board for the child's attendance at the private school, which is a significant sum of money in excess of $30,000 a year. The issue of child support and other issues set out in the mother's notice of application have been adjourned generally. However, until child support is determined, the grandmother has also indicated an intention to cover J.'s transportation costs and any other initial costs that have to be incurred in connection with that education.

[7] I am satisfied that the grandmother's offer in this case does constitute a material change. In examining the meaning of that phrase in *Gordon* v. *Goertz*, it is something which must be a change in the condition, means, needs or circumstances of the child. I am satisfied that the offer is (1) a change in the circumstances of the child; (2) which materially affects the child (because it is a potentially enriching opportunity for her); and (3) that it was not foreseen or could not have been reasonably contemplated when the original order was made in 2005. All of those criteria are met here.

[8] The next stage of the analysis is to determine whether allowing J. to attend the school would truly be in her best interests. In that regard, I am to pay attention to the considerations in s. 30(1) of the *Children's Law Act*, which includes (and I am paraphrasing here), the views and preferences of the child, the bonding love and affection and emotional ties between a child and her parents, the ability and willingness of each of the parents to provide the child with guidance, education and the necessities of life, and any special needs of the child.

[9] With respect to *Gordon* v. *Goertz*, I am also to have regard to the following principles. Each case turns on its own unique circumstances. The only issue is the best interests of the child in the particular circumstances of the case. I am to undertake an assessment of the entirety of the circumstances of the parties and the child, recognizing the interrelationship between the many factors to be considered in such an application. The focus is on the best interests of the child and not the interests and rights of the parents.

[10] I am also to consider the existing arrangement under the 2005 order and the relationship between the child and each of her parents. I am to consider the desirability of maximizing contact between the child and both parents, as I mentioned earlier. I am to consider the views of the child, the reasons for wanting to attend the school, which is tantamount to a move in this case. Finally, I am to consider the disruption to the child by virtue of the move, and by virtue of the fact that she will not be residing in Whitehorse, which is her home community, for ten months of each year.

[11] In this case, the child is 14 and a half years of age, and is represented by

counsel. Counsel has put her client's views before the Court in the form of an affidavit. It is very clear from that affidavit, from the other affidavits that I have reviewed and from the submissions I have heard from counsel, that this is not a spontaneous or impetuous decision. This is something that J. has had an opportunity to think about since she was in Grade 7, and it is pretty clear that J. has given this opportunity a good deal of thought. She has weighed the pros and cons of being away from her father, her brother, and her mother for the school year, and she has set that off against the potentially enriching experience of attending the school where, in particular, she hopes to study business and the Mandarin language.

[12] J. is currently in Grade 8, and she has had a difficult year. However, with the assistance of her grandmother she has been able to pull up her marks at her current school, and has apparently satisfied the pre-conditions for attendance at the private school, as she has been accepted for attendance there conditionally on being allowed, through this application, to do so.

[13] One of the things that has been raised by the father as a reason to oppose the attendance at the school is his assessment of J.'s maturity. He points to J. having experienced some difficulties in her own school with other girls, whom she allegedly refers to as "bitches." He feels that she is not very mature for her age, and that if she is in an environment many miles away from home, she will have too much freedom and not enough stability.

[14] The father's counsel also points to some difficulties that J. had when she was active with her Facebook account, allowing things to be posted on her wall which were

of an inappropriate sexual nature, and potentially made her a target for predatory sexual behaviour. That problem has been resolved by the mother, and I am satisfied in all of the circumstances, based on the evidence, that while it is an example of poor judgment, it is not one which is out of the norm for the type of poor judgment that you might expect from a 13 or 14-year-old teenager (we do not know exactly when these things were posted). I would say the same thing about her conflicts with other students in her existing school. On the other hand, I have the submission from her counsel that J. is deemed to be trustworthy enough to handle cash at her present job at a local fast food restaurant, that she is of average level of maturity and that she is "quite an insightful" young woman, who will be turning 15 this coming January.

[15] So, I think those latter points off-set any concerns that the father has regarding J.'s maturity. In any event, it is also important to note that J. will have the support of her grandmother, who will be residing for the winter months in Victoria and can keep an eye on her. Presumably, the grandmother could be contacted on short notice if there are any difficulties in that regard.

[16] Other reasons that have been raised by the father in opposition to the private school are that his relationship will be harmed by her absence from the Yukon, and that there is a risk that J. will be further alienated from him by virtue of negative influence from the maternal grandmother. It does not seem to be disputed that there is a certain level of animosity between the maternal grandmother and the father. However, there is no evidence beyond pure speculation that the grandmother is likely to do anything to alienate J. from the father. In addition, there is evidence from J. herself that if I do not allow her to attend the private school, then she would want to proceed with the other

aspects of this application, which include seeking an order that she be able to live primarily with her mother, as opposed to an equal week on, week off relationship with each parent.

[17] I agree with the mother's counsel, Ms. Kinchen, that in all of the circumstances, having some distance and time away from the father may in fact set the stage for an improvement in their relationship, rather than lead to a further deterioration of it. However, that will depend in large part on the attitude that the father brings to any future discussions with J. about her attendance at the school.

[18] I do not fault the father for not immediately agreeing to this option as a good one for all concerned, because it is a dramatic change in the circumstances, as Mr. Roothman points out. The problem that I have is that the father, rather quickly, dismissed this as something that was not worthy of consideration and there was no further discussion between the parties about it. The alternative for him would have been to act in such a way as to show J. that he was genuinely interested in this as a potentially positive opportunity for her, and to at least engage in some debate or discussion about the potential pros and cons so that an informed decision could be made. Unfortunately, that discussion has yet to take place. Nevertheless, I am hopeful that the father's attitude in that regard in future discussions after today's order will be on a more positive note.

[19] The other reason that the father has made clear about opposing this change is that the decision, he says, was made unilaterally. I simply disagree with that suggestion. This is a case where the grandmother initially got information about the school in

October of 2010. She visited the school in January of 2011. She came to Whitehorse in March of 2011 and discussed the matter with the mother and J. That was about the time that J. was starting to experience some problems with her grades in her current school. The idea was raised and, very shortly after, the mother met with the father on April 1st and April 7th to pursue the discussions. At that point, no clear decision had been made. Yet, as of the April 7th meeting, when the additional issue of child support came up and certain documents were presented to the father, his reaction was not only to refuse to enter into any discussion, but also to throw the documents on the floor. So, if there has been a lack of communication between the parties on this, it is my view that the father has to bear the lion's share of the responsibility for that.

[20] Another argument that the father put forward is that J.'s academic performance is insufficient to justify her attendance at the school. He says she is not the sort of student who is likely to do well there. That argument is undermined by the simple fact that the school itself has already seen fit to accept J. conditionally. Presumably they have knowledge of her academic performance over the last year and, notwithstanding, they have accepted her as a student. Beyond that, I am satisfied that J. has demonstrated an ability to overcome the difficulties that she had in this past year, with the assistance of some tutoring by her grandmother. She has demonstrated an ability to commit, to work hard on her academics, and no doubt she has been motivated by the prospect of attendance at the private school in that regard.

[21] Further argument made by the father is that it would be unfair to allow such a luxury opportunity for J. without giving equal treatment to her brother, K., who is nine years of age. That argument is simply speculative at this stage. Because K. is so young,

we simply do not know what opportunities might be available to him when he reaches his teenage years and what his interests might be. So, this argument does not have any persuasive impact.

[22] Another thing that the father is concerned about is the potential financial impacts on him, anticipating that there will be expenditures for airfare and other costs associated with J.'s attendance at this school, which the grandmother is not covering. However, because the entire issue of child support has yet to be decided, and I have no financial information from either of the parties, that again is a speculative concern. In any event, it is not one which I find is capable of fitting into the "best interests" analysis, because it is a concern of the father, and not one which relates directly to the best interests of J.

[23] The father's concern that the relationship between J. and her brother may be harmed by her absence from the Yukon is a legitimate one and one which I do take into account. But, as I have said, *Gordon* v. *Goertz* directs me to take all of the circumstances into account and to do a balancing of them in coming to the final result.

[24] I am particularly puzzled about one aspect of the father's conduct. There is evidence he met with J. on April 5, 2011, at Tony's Pizza, after the idea of the school was first presented to him by the mother. It is alleged that he sat down with J. and asked whether she still wanted, (a) to live primarily with her mother, and (b) to attend the private school. When J. responded positively to both and confirmed that those were her wants, he said that she could do one or the other, but not both.

[25] Now, I do not fault the father for not specifically denying everything in the mother's first affidavit, because he retained Mr. Roothman on short notice, and it is

understandable that he would not have had the time and opportunity to address all the details raised by the mother. However, the April 5th meeting is a point which directly impacts on the one issue that the father is prepared to deal with, and that is the attendance at the private school. If the meeting did not occur, or if it did not occur in the fashion that the mother has deposed to (presumably based on what J. told her), then I would have expected the father to have addressed it in his affidavit. Not having addressed it, I am left with the inference that the meeting did occur as described by the mother. Thus, if the father was prepared to allow J. to attend the school on the condition that she not pursue primary residence with the mother, then a question arises in my mind as to whether his current objections are somewhat disingenuous.

[26] For all of those reasons, I am prepared to make the order sought regarding J.'s attendance at the private school. I am also prepared to make the order sought regarding the decision-making authority of the mother in relation to J.'s attendance at that school, for as long she attends that institution. That is, the mother will make every effort to consult with the father on such decisions, but in the event that they are unable to agree, she has the default decision-making authority, subject to the father's right to apply to Court for a review.

[27] Counsel, is there anything that I have not addressed that needs to be addressed?

[28] MS. KINCHEN: We should just state, perhaps in the order, that the balance of the relief sought is adjourned generally, and then my friend and I can work that out.

[29] THE COURT: So ordered. Anything else on your end, Ms. Cabott?

[30] MS. CABOTT: No.

[31] THE COURT: Thank you.

GOWER J.