IN THE SUPREME COURT OF YUKON

Citation: *E.A.G. v. D.L.G.*, 2011 YKSC 74

Date: 20111004
Docket No.: S.C. No. 09-D4166
Registry: Whitehorse

Between:

E.A.G.

Plaintiff

And

D.L.G.

Defendant

Before: Mr. Justice Veale

Appearances:

Debbie Hoffman — Counsel for the Plaintiff
Henning Weibach — Counsel for the Defendant

REASONS FOR JUDGMENT
(Application to vary custody and access)

INTRODUCTION

[1] The father, D.L.G., applies to vary the custody and access order made June 4, 2010 with respect to the two children of the marriage, both five years old at the time of the application. The father also applied to vary spousal and child support, but that was not the focus of the application.

[2] The mother opposed the variation and applied for an order that she be at liberty to prepare an independent Custody and Access Report for trial.

[3] In my ruling on June 24, 2011, I denied the application of the mother to have another Report prepared. I ordered that interim custody of the children remain with the mother and that the father be granted additional unsupervised access to the children for one week in July and one week in August, with no change in child or spousal support. The maternal grandmother's access was also ordered to be unsupervised. These are my reasons.

Background

[4] My Reasons for Judgment in *E.A.G. v. D.L.G.*, 2010 YKSC 21, set out the history of this high-conflict case. The trial is set for November 14 to December 2, 2011.

[5] The mother left the family home with the two children in September 2009. She obtained an Order Without Notice granting her interim interim custody with specified access to the father. The Order Without Notice, which included a no-contact order with respect to the matter, remained in place but was not enforced to the extent that the mother and father attempted to reconcile. The mother used a separate apartment owned by the father for a three-month period and received financial support from the father.

[6] This arrangement broke down in January 2010 and the mother moved to another residence with the children. The father was placed on notice that the September 2009 order would be enforced. The father received supervised access to the children but wished to have unsupervised equal sharing of the children.

[7] The father had some difficulty retaining counsel but the issues of custody and access were heard on March 25, 2010. The hearing was not completed and I ordered that the September 2009 interim interim custody order remain in place. I increased the father's interim interim supervised access at the daycare centre and granted the paternal

grandmother unsupervised access on each Tuesday. I also ordered Judy Laird, a social worker, to monitor the father's access and report to the Court at the April 21, 2010 hearing. The hearing in this matter has proceeded on affidavit evidence only, which is the practice in this court for interim applications.

[8] The affidavit evidence was contradictory. Ultimately, for the 2010 application, I relied on the evidence of Judy Laird who recommended that the children's environment remain as consistent and predictable as possible as they were under stress and starting school in the Fall. I concluded that the mother was the primary caregiver and should continue in that role. I found the father, while demonstrating a loving and genuine interest in the children, to be verbally and emotionally overpowering when in conflict with the wife. The result was that I found he had a negative influence on the children. Although this summary somewhat sanitizes the actual evidence given, I will not repeat it as the case is going to trial and the trial judge will no doubt hear the evidence directly from the parties and their witnesses.

[9] The father is seeking to vary the order I made on June 4, 2010, the terms of which are as follows:

1. The mother shall have custody of the children;

2. The father shall have supervised access at the daycare Mondays, Wednesdays, Thursdays and Fridays from 11 a.m. to 12 noon;

3. The paternal grandmother shall have access to the children each Tuesday from 10 a.m. to 5 p.m., which is exclusive to her with the father not present. The pickup and drop off shall be arranged by N.T.;

4. Neither the mother nor the father shall leave the Yukon with the children without the written consent of the other parent or order of the court;

5. The mother may include the bar and bar stools in the items that she can retrieve in paragraph 5 of the Order Without Notice dated September 24, 2009;

6. The father shall pay for two counselling sessions per month for the children by Judy Laird.

[10] The father made his first application to vary the order dated June 4, 2010 on September 13, 2010. The father's application sought generous and unsupervised access for the father and paternal grandmother, as well as the appointment of Dr. Allan Posthuma to prepare a custody and access report. The appointment of Dr. Posthuma to prepare a report was agreed upon, and I declined to make any change to the June 4, 2010 order except to limit the access of the father and paternal grandmother to the children at the daycare centre to supervised access at certain hours.

The Report of Dr. Posthuma

[11] The Report of Dr. Posthuma, dated November 8, 2010, involved the interviewing and testing of both parents and observations of them interacting with the children between October 3 and 7, 2010. Dr. Posthuma is a registered psychologist in British Columbia and holds diplomate status in clinical and forensic psychology. Dr. Posthuma was specifically ordered to provide a recommendation as to whether the father's supervised access should continue to the trial date, then set to commence on May 25, 2011.

[12] The main conclusion of Dr. Posthuma's Report was that the alleged abusive behaviour of the father towards the children and the children's fear of the father were

either unfounded or out of context of the children's life experience with the parents. Dr. Posthuma based this conclusion on his observation that the children were "well behaved, happy, spontaneous and comfortable" when he observed them with their father.

[13] Dr. Posthuma's Report consists of 19 pages and I propose to deal with the highlights only. From his discussion with Judy Laird, Dr. Posthuma advised that she stated that the children have never expressed worry about their safety, or disclosed abuse or other negative association with the father. Dr. Posthuma described the father as having great sensitivity and softness with the girls when playing his guitar with them. He described it as an "unusual reaction" for the children to scream excitedly and run downstairs to get their clothes on to see their mother when she came to pick them up.

[14] Dr. Posthuma used the MMPI-2-RF psychological test which did not indicate significant problems in the clinical scales but did indicate the likelihood that the father had "attempted [to] convey more virtue in his personality than is probably true". With respect to the same test with the mother, Dr. Posthuma found a similar positive bias but also an indication of self-deception. As to the mother's allegation that unsupervised access would allow the father to say "negative and crazy things" in front of the children, Dr. Posthuma found this to be inconsistent with the behaviour of the children with the father. He stated that the negative reactions of the children were much more likely to be "direct or indirect negative reactions of their mother towards their father".

[15] Dr. Posthuma also interviewed Dr. Stewart, a psychologist who saw both parents together about five times around February 2010. He reported that:

> "Dr. Stewart states that he was reluctant to work with them together because he felt the relationship was abusive, and to continue to work together would put [the mother] at risk. He saw the mother as frightened and afraid of her husband and

> the father as rigid, controlling and abusive. He did not work with the children, but has no concerns about the mother's parenting abilities, and appears to believe the mother's allegations of the father's abusiveness, anger and controlling nature would be to the detriment of the children."

[16] The essence of Dr. Posthuma's recommendations is based upon his conclusion that the mother's allegations are unlikely to be accurate given the loving manner in which the children interacted with the father. He discounts Dr. Stewart's view as "looking for more psychological sophistication" in intimate relationships. Crucial to Dr. Posthuma was his personal observation of the father as follows:

> "... During the time the examiner was in Whitehorse, he was driven to various schools and appointments by [the father]. He observed not only [the father's] conversation on cell phones and the radio telephone in his vehicle, but also his interactions with the employees around his home. It would not be accurate to characterize [the father] as a rigid authoritarian employer as he did demonstrate diplomacy and flexibility in dealing with the many demands which were occurring concurrently, with the examiner's investigation. ..."

[17] Dr. Posthuma concluded that the children are at an age where an alternating weekly residency between both parents would be appropriate.

Dr. Korpach's Review

[18] By letter dated March 26, 2011, Dr. Korpach, a Registered Psychologist, provided a review of Dr. Posthuma's Report. Dr. Korpach is limited by the Code of Conduct of the College of Psychologists of British Columbia to commenting on the procedures, methods and processes used by Dr. Posthuma. Dr. Korpach's ten-page Review contains a number of comments on Dr. Posthuma's Report, and I will only mention a few.

[19] Dr. Korpach points out that Dr. Posthuma did not adequately address the issue of an abusive relationship or alienation and manipulation as alleged by the mother. To the

extent that it was confirmed by Dr. Stewart, Dr. Posthuma appears to discredit Dr. Stewart's view as he had not performed any psychological tests.

[20] In general, Dr. Korpach points out that Dr. Posthuma appears to have done more extensive interviews of the father's collateral witnesses than the mother's, which may be explained by the fact that Dr. Posthuma was also conducting an assessment with respect to father and a previous spouse. Dr. Korpach questions whether the forensic scrutiny applied to the mother was the same for the father, suggesting a concern about bias.

[21] Dr. Posthuma replied in a letter dated May 18, 2011 to the father's lawyer that Dr. Korpach's issues are speculative and argumentative. He referred to his interview with Dr. Stewart but did not address the issue of the father's behaviour except for the following:

> "This is not to say, however, that the Court on hearing of other evidence, could not conclude that the father's behaviour is detrimental to the children. However, a psychologist is limited to providing scientific evidence on violence potential or on any topic. The problem is there are no valid psychological test results to discuss this issue. The mother's complaints against the father will be thoroughly examined by the Court, and unlike Dr. Korpach's claim in the penultimate paragraph on Page 3, an expert report to the Court, cannot rely on speculation. Clinical opinion is notoriously unreliable and unscientific."

Judy Laird's Letter

[22] As a result of Dr. Posthuma's Report, the mother agreed to move towards unsupervised access for the father to the children. She agreed to the husband having unsupervised access every second weekend starting in February 2011. The children were also seen by Judy Laird once a week between June 2010 and February 2011. I have ordered the involvement of Judy Laird for the benefit of the children.

[23] Ms. Laird provided the following letter dated June 16, 2011 at the request of counsel for the mother:

> "This letter is in response to your email of June 14, 2011. For the past four months, 2011 [the father] has exercised unsupervised access to his children ... every second weekend. Previous to this, [the father] had supervised access at the children's daycare due to parental conflict and reported high anxiety at transitions (sic) times with the children.
>
> Children need consistency and predictability to ensure their sense of security. When children have experienced parental conflict it takes a significant amount of time to regain and maintain that security. That amount of time is at least one to two years. As it has only been four months since their father's access has been changed, I would recommend that it remain the same until the November court date."

[24] Dr. Posthuma responded to Judy Laird's letter as follows:

> "It is the opinion of this examiner that Ms. Laird's letter does not represent an expert opinion and does not accurately portray the research, cited below, on the issues she describes in her letter. Her letter forms only an advocacy role for the mother's position.
>
> ... It is in violation of psychological research on these issues that Ms. Laird is recommending the father continue to have limited access until November of 2011, over two years since these children's parents separated.
>
> The examiner saw the children and their interaction with their parents in October of 2010. He reported on the enthusiasm and comfort these children had with their father at that time. Ms. Laird has never worked with the father and the children and has no basis of comparison in making statements with regards to the best parental arrangement of these children. Such statements are unprofessional and damaging to these children's welfare.
>
> Given Ms. Laird's letters in this matter, the examiner would recommend that she not continue to work with these children as she is operating on mistaken beliefs that are contrary to the

> best interests of the children. A new counsellor should be obtained who can work with both parents and the children, who understand (sic) the research that speaks to the best interests of the children."

Disposition

[25] I would first like to address the test to be applied on applications to vary interim custody or access orders. The *Divorce Act*, R.S.C. 1985, c. 3, has not made any provision for the variation of interim orders. The courts have generally relied on their inherent jurisdiction to vary interim orders on the same basis as provided for permanent orders under s. 17, i.e. that they should only be varied where there has been a "material" or "substantial" change in circumstances: see for example *D.G. v. H.F.*, 2006 NBCA 36. Other courts have considered a "compelling" change of circumstances. It should also be noted that the *Children's Law Act,* S.Y. 2002, c. 31 (as amended by S.Y. 2008, c. 1) appears to have applied the material change test to both interim and final orders in s. 34:

> **Variation of court orders**
> 34 The court shall not make an order under this Part that varies an order in respect of custody or access unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child.

[26] The reason for applying a high threshold to vary an interim order is clear. Interim orders are meant to be established in a summary procedure subject to a merits decision at trial. The reality in this Court is that interim orders often become final without cross-examination or oral evidence. This is because spouses cannot afford lengthy and expensive pre-trial disputes. Given that a trial will hear the issues based upon oral evidence, the preservation of interim orders pending trial preserves the resources of litigants as well as judicial resources. The test is always the best interests of the children,

but there must be a compelling reason to vary an interim order: see *Torres v. Marin,* 2007 YKSC 29.

[27] In my view, *Gordon v. Goertz*, [1996] 2 S.C.R. 27 provides the appropriate test at para. 13:

> [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: Watson v. Watson (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: MacCallum v. MacCallum (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, Child Custody Law and Practice (1992), at p. 11-5.
>
> [13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[28] As to this application to vary the interim custody and access order, there is no compelling reason or material or substantial change in circumstances that indicates the custody of the children should be changed. The filing of an expert report does not provide such a change in circumstances, particularly where there remains a significant disagreement among the professionals involved in this case. The fact that Dr. Posthuma disagrees with the opinion of Dr. Stewart that the father's abusiveness, anger and controlling nature would be to the detriment of the children is merely a disagreement

among professionals and does not provide any compelling factual basis to vary this interim custody order. Dr. Stewart observed the husband and wife together and believes the allegation of abuse. Dr. Posthuma does not. Neither view is scientific.

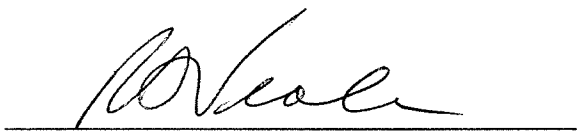
[29] Dr. Posthuma also takes great issue with the view expressed by Judy Laird, the social worker, who has spent more time with the children than any other professional and observed their interaction with the father. Dr. Posthuma believes that Judy Laird should be removed from the children as her "statements are unprofessional and damaging to these children's welfare", a highly controversial statement that may not be in the best interests of the children at all.

[30] I have concluded that the variation application, to the extent that it seeks a 50/50 sharing of custody, should be dismissed. The mother shall continue to have interim custody, subject to the agreed upon unsupervised access by the father every alternate weekend. The paternal grandmother shall have unsupervised access every Tuesday from 9:30 a.m. to 5:00 p.m. I am also granting the father one week of unsupervised access in July and one week in August. There will be no change to spousal and child support. The father shall also continue to have unsupervised access at the daycare at the previously ordered times.

[31] Finally, I should explain why I have refused to order another Custody and Access Report as requested by the mother. High-conflict family law cases often degenerate into a battle of experts, which increases the costs of litigation and unnecessarily extends the length of trials. In this case, we have the opinions of two psychologists, a critique from a psychologist and the recommendations of a social worker. That is sufficient to assist the trial judge in her determination of the custody and access issues. I have also indicated to

counsel for the mother that she may call Dr. Korpach as a witness, but in my view it is not appropriate to put the children under another assessment. I am also mindful of the fact that the parties initially consented to the appointment of Dr. Posthuma, a practice which should be encouraged to preserve the resources of litigants and enhance the principle of judicial economy. As Dr. Posthuma is a court-appointed expert under Rule 33 and Dr. Korpach is the mother's expert under Rule 34, it is not necessary for the experts to confer under Rule 34(18) as their points of difference are quite apparent.

[32] There is one outstanding matter that I have asked counsel to address. I ordered on September 24, 2009 and on June 4, 2010 that the mother be permitted to retrieve her personal belongings, toys, and children's clothing from the family home. To the extent that this has not occurred, I ask that counsel ensure that it is accomplished.



Veale J.