

SUPREME COURT OF YUKON

Citation: *F.S. v. T.W.S.*, 2019 YKSC 25

Date: 20190516
S.C. No. 17-D4962
Registry: Whitehorse

BETWEEN

F.S.

PLAINTIFF

AND

T.W.S.

DEFENDANT

Before Madam Justice S.M. Duncan

Appearances:
Kathleen M. Kinchen
Michelle K. Chan

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT (Admissibility of Recordings)

INTRODUCTION

[1] The issue of the admissibility of two audio recordings into evidence arose in an application by the defendant for a variation of an interim custody order and other relief in the above-noted matter. I advised I would issue my reasons first on this point before ruling on the merits of the application.

[2] This is a high-conflict case. The plaintiff and defendant were together for 21 years before separating in February 2017. They have seven children together. The

application concerns the three youngest children, currently living with the mother and her parents, in a Yukon community. Interim custody of the three children was awarded to the mother by Court order dated October 31, 2017. The father lives in Langley, British Columbia and now seeks interim custody of the three children based on a material change in circumstances.

[3] The plaintiff and the defendant each claim parental alienation by the other. The application contains conflicting affidavits not only from the plaintiff and the defendant, but also from the oldest daughter, in support of the father, and the mother's parents, in support of the mother. The defendant father seeks to admit two audio recordings, one made by him and one made by the daughter, for the purpose of impugning the credibility of the grandparents and to support his argument that they are not acting in the best interests of the children.

[4] I have not listened to either recording but have received a description of their contents by counsel, and have seen references and descriptions in the affidavit material.

[5] I decline to admit the recordings for two reasons:

1. their probative value does not outweigh their prejudicial effect;
and
2. the recording by family members of other family members in the family home, especially in situations already fraught with conflict, such as this one, should be discouraged.

LAW

[6] As noted by the Alberta Court in *E.T. v. G.T.*, 2018 ABPC 147, Canadian courts are divided about the admission of surreptitiously obtained evidence in family law cases. Further, over the last 15 years, judicial views have changed. Such evidence was more often admitted in the past, and more frequently excluded in recent years. The Ontario Court in *Scarlett v. Farrell*, 2014 ONCJ 517, concluded that even the cases with different outcomes can be reconciled on the basis of the following analysis. The Court wrote at para. 31:

... All the cases recognize the general repugnance which the law holds toward these kinds of recordings. However, at the end of the day, the court must consider what the recordings themselves disclose. And if the contents of those recordings are of sufficient probative value, and if ... the probative value outweighs the policy considerations against such recordings, then the court will admit them into evidence. It will do so having regard to the court's need to make decisions about the best interests of the children based upon sufficiently probative evidence that may be available to the court.

[7] The policy considerations against admitting surreptitious recordings into evidence were described in earlier cases as well. In *Seddon v. Seddon*, [1994] B.C.J. No. 1729 (B.C.S.C.), the Court called surreptitious recordings of household conversations in the home among family members, an "odious practice" (para. 25). In stating that surreptitious recordings of telephone calls by litigants in family law matters should be strongly discouraged, the Court in *Hameed v. Hameed*, 2006 ONCJ 274 ("*Hameed*"), noted there was already enough conflict and mistrust in family law cases without the parties worrying about whether the other is secretly taping them (para. 11).

[8] Whether or not to admit such evidence requires a weighing of the policy considerations against the probative value of the evidence. The party seeking its admission should establish a compelling reason for doing so (*Hameed* at para. 13).

[9] The most recent Yukon decision, *B.D.C. v. B.J.B.*, 2012 YKSC 64 (“*B.D.C.*”), addressing the question of whether a surreptitious recording is admissible as evidence notes first that a determination of relevance is required. The Court then applied the principle set out above requiring a finding that the recording’s probative value outweighs its prejudicial effect (para. 8).

Recording #1

[10] In this case, the first recording is of an incident described by the grandfather, J. C-R., in his Affidavit #1, dated October 17, 2017. This affidavit was initially filed in support of the mother’s application for interim custody in October, 2017. The mother included it in the current application to provide context for her response to the father’s application.

[11] The father states that his recording of the incident shows a different perspective than the description in the grandfather’s affidavit. The incident described by the grandfather was the children lined up beside their father in the kitchen to tell the mother they wanted to live with their father and did not want to see her again. This occurred a few months after the separation. The father’s surreptitious recording of the family group conversation, including the mother, the grandfather and four of the children, tells a different version of the same incident that contradicts the grandfather’s description, according to the father.

[12] The father seeks to introduce this recording now to cast doubt on the reliance by the Court on the grandfather's affidavit as 'relatively objective evidence' about this incident, in granting the October 2017 order of interim custody to the mother.

[13] Although this 2017 affidavit evidence was introduced and relied upon at this hearing, other affidavits were included to provide current information. While context and background are important considerations in this application, they are not the only considerations. The question for determination in this application is a variation of the order based on a material change in circumstances since October 2017. Evidence since October 2017 therefore is most relevant to the decision on the merits of this application. Thus, the relevance of this affidavit to the determination that must be made in this case is diminished.

[14] Further, this recording was made surreptitiously by the father, of a conversation primarily between the children and the mother, without the consent of any of them. This is presumptively illegal according to s. 184 of the *Criminal Code* (see *B.D.C.*, paras. 11 and 18). This is a significant prejudicial effect.

[15] As a result of the absence of real probative value of the recording in this application and because of the prejudice created by the surreptitious and probable illegality of the recording, I decline to admit this recording.

Recording #2

[16] This recording was made by the eldest daughter, N., of a telephone conversation she had with her grandmother, D. C-R., after N. and the other children received a suicide note from the mother, by email from the grandfather. According to the affidavit of N., the recording shows that the grandmother told N. that the grandfather blamed S.,

one of the three younger children, for the mother leaving home, and brought her to tears while telling her this. This contradicts the affidavits of both grandparents in which they state that at no time did they ever blame S. (or the other younger siblings) for the mother leaving their home.

[17] While the credibility of the grandparents is put in issue by this recording, and so it is relevant to the determinations required in this application, the prejudicial effect outweighs the probative value of the evidence. The policy concerns raised by surreptitious recording of family members by other family members in the midst of family law disputes, especially about custody and access, are too significant to warrant encouragement of this activity. As a result, I decline to admit this recording.

DUNCAN J.