

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *D.M.M. v. T.B.M.*, 2005 YKSC 63

Date: 20051114
Docket: S.C. No. 02-D3464
Registry: Whitehorse

BETWEEN:

D.M.M.

Petitioner

AND:

T.B.M

Respondent

Before: Mr. Justice L.F. Gower

Appearances:
Thomas Molloy
Kathy Kinchen
Laura Cabott

Appearing as agent for the Petitioner
Appearing for the Respondent
Appearing as Child Advocate

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] GOWER J. (Oral): This is an application by the petitioner for an adjournment of the trial which was scheduled to commence on November 21st of this year and for which 10 days of trial time have been reserved. This trial date was set at a pre-trial conference in April of this year. The principal reason for the adjournment is that the petitioner gave birth to a daughter on September 5th, 2005, and is now claiming to suffer from certain medical problems which seem to be connected to that birth.

[2] In her affidavit 16, she deposed in para. 22:

"After meeting with my doctor for a post-natal check-up, I am unable to meet the demands at this time for either work or a trial. I am following up with her regularly for medical care."

Later at para. 23:

"I have obtained a letter from my doctor. She stated that I am not able to go ahead with the trial at this time."

[3] The doctor that the petitioner was consulting with at that time, I understand, was Dr. Buchanan, since the petitioner indicated in her notice of motion that she anticipated receiving an affidavit from Dr. Buchanan. However, that was not obtained. What was obtained by the petitioner was a single page letter dated November 10, 2005, from Dr. Breitreutz. I am advised by Mr. Molloy, who has been acting as the petitioner's agent on this application, that Dr. Breitreutz and Dr. Buchanan share a practice in a job-sharing system. Dr. Breitreutz said in her letter:

"Due to medical reasons, I recommend that [the petitioner] is unable to prepare for trial on November 21. She has asked me to clarify that her medical condition does not affect her ability to parent her children."

[4] The respondent opposes the application, saying that the medical evidence in support is vague and does not provide any information about the basis for the medical opinion. The respondent's counsel further says that trials are stressful inherently and that it would be expected that the petitioner would be suffering from some degree of stress in any event. Counsel for the child advocate is not opposed to the adjournment, despite the vagueness of the medical letter from Dr. Breitreutz. She said that it is fair to read into the letter that Dr. Breitreutz is stating her opinion as a medical professional

and it clearly says in the letter that it is for "medical reasons" that Dr. Breitzkreutz recommends the petitioner is unable to prepare for trial.

[5] The law in this area gives me a significant amount of discretion. I have reviewed the case of, *Cal-Wood Door, a division of Timberland Industries Inc. v. Olma*, [1984] B.C.J. No. 1953 (QL), a decision of the British Columbia Court of Appeal where Hutcheon J.A. said at para. 13 about this discretion:

"...The paramount consideration that must be maintained in the exercise of that discretion is to ensure that there will remain a fair trial on the merits of the action...."

[6] The British Columbia Court of Appeal also dealt with adjournments in the decision of *Sidoroff v. Joe*, [1992] CanLII No.1815. At paragraph 8 of that decision, Lambert J.A. talked about the discretion in granting an adjournment and said:

"...it is a discretion that has to be exercised in accordance with settled principle. The settled principle is that the interests of justice must govern whether to grant an adjournment. The interests of justice always require a balancing of the interests of the plaintiff and the defendant."

[7] In this case, the prejudice to the respondent will be in a number of respects. Firstly, he has arranged to take time off work at the Yukon College to attend the trial and arrangements have been made to have a substitute person in his position for that period. Secondly, he has made arrangements to bring in a witness from Alberta and that witness' plane ticket is being covered by the respondent. It is unknown at this time whether the ticket is refundable or whether it can be changed to other dates, and if so, what the cost of that might be. Thirdly, this is a trial date that has been set for some time. It is ten days of trial, which will be difficult to get on a timely basis and if the trial is

not rescheduled on a timely basis, there is a likelihood that the petitioner will continue to bring on further pre-trial motions, such as the nine interlocutory motions that she has made to date.

[8] Ms. Cabott, the child advocate, does not ignore any of those concerns, but says that the refusal of the adjournment would clearly also prejudice the petitioner and possibly the child. The reasons for that are presumably self-evident, accepting that the medical evidence is correct and that the petitioner would be unable to properly prepare her case. Thus, it would be unfair to her to force her to proceed. To use the language from the *Cal-Wood Door* case, to refuse the adjournment would be tantamount to denying the petitioner a fair trial on the merits of the action.

[9] I have to say that I am distressed by the extent of the evidence before me on this application regarding the medical reasons for the adjournment. The notice of motion, as I said, promised an affidavit from Dr. Buchanan which was not provided. Affidavit 16 of the petitioner said that she had obtained a letter from her doctor, but that was not attached to the affidavit. The letter that was provided from Dr. Breitzkreutz was only provided to the other parties and to the Court at the outset of this hearing today and it is very, very thin in terms of the background for the doctor's opinion and the facts upon which that opinion is based. Mr. Molloy, on the petitioner's behalf, tried to expand upon that by explaining that this may be a matter of post-partum depression and he gave some details about medication and so on that the petitioner has recently begun to take for that condition, but none of that is clearly *in evidence* before me.

[10] It is, therefore, only by the slimmest of margins that I am prepared to accept medical evidence and not put the parties and the doctor to the further inconvenience of having to come to court to be examined about the basis for her medical opinion, because I expect that at the end of day the opinion would not change. As a result, it would be unfair to expect the petitioner to proceed with the trial in seven days time.

[11] I am therefore granting the adjournment on the following condition; that any thrown-away costs that will be borne by the respondent, whether it is through his arrangements made at the Yukon College or through the arrangements that will have to be made to re-book the flight for his witness. Those costs can be presented as disbursements on a bill of costs and they will be payable, after assessment, by the petitioner. It is my intention that the respondent, with the exception of his legal fees, should not be out of pocket as a result of this adjournment.

[12] Now, to be clear, there are other items that were raised in the notice of motion. Those items are all to be adjourned generally and I would expect that item 4, based on affidavit 15 of the respondent may be capable of resolution and would not be necessary to be litigated any further. My comments about item 4 would also apply to item 6, as I read the respondent's responding affidavit.

[13] As for item 5, I would urge the petitioner to reconsider whether it is truly necessary, and in the child's best interests, to proceed with that application, given the material in the respondent's responding affidavit. I say that particularly, because Mr. Molloy, on the petitioner's behalf, has made the allegation that it has only been necessary for her to bring on these nine interlocutory applications to date because the

respondent has not been reasonable and prepared to discuss these matters. I would question that submission on this issue about the dental treatment for the child, given the fairly extensive material that has been provided by the respondent in his 15th affidavit. I would ask the petitioner to reconsider whether it is truly necessary to continue to litigate that issue.

[14] As for new trial dates, I can indicate to the parties now that we have a possibility of ten days of consecutive trial time commencing March 13, 2006. Rather than having everybody check their calendars, I am going to leave it to counsel and the petitioner to confirm with the trial coordinator as soon as possible whether those dates are going to work, and if they are not, then you should discuss alternate dates with the trial coordinator. I assume that will also give the petitioner time to consult further with her doctor as to whether her medical problems will be manageable by that time. Have I left anything out, counsel?

[15] MS. KINCHEN: My Lord, I am wondering if there is -- if you could give some direction in terms of future interlocutory applications. Perhaps we could set another pre-trial somewhere down the road and if there were other issues that needed to be dealt with, they could be dealt with at that one time rather than us continuing to have to make applications.

[16] THE COURT: I see. Mr. Molloy?

[17] MR. MOLLOY: Not to interrupt, but I do not think that the motions have necessarily been frivolous in any way. If Ms. Kinchen's concern is that there is going to be a raft of them, the petitioner's ability to handle even this motion, this

[22] THE COURT: Right, and that should be when? Before the end of December, or what are you suggesting?

[23] MS. KINCHEN: I do not have a particular time in mind and I will not know until, what I would suggest, until I know when the trial dates are. If they are in March, then I would think probably January would be a time to get back together, have any pre-trial motions that need to be addressed done then, and anything else.

[24] THE COURT: Okay. You are not able to say right now whether those March dates will work for you?

[25] MS. KINCHEN: They will work for me.

[26] THE COURT: Oh, they will? That's good. Ms. Cabott, what about you?

[27] MS. CABOTT: Yes, I believe those dates work for me.

[28] THE COURT: Okay. Well, that is great. Will you call the trial coordinator, Madam Clerk?

[29] THE CLERK: And get her up here?

[30] THE COURT: If you can, yes.

[31] THE CLERK: I have to excuse myself to use the phone.

[32] THE COURT: Yes.

[33] MR. MOLLOY: Is it appropriate to ask a question now or should I wait?

[34] THE COURT: Just wait.

[35] THE CLERK: She is on her way, Your Honour.

[36] THE COURT: Thank you. Yes, Mr. Molloy?

[37] MR. MOLLOY: Your Honour, I am just trying to make a comment with regard to if what is being suggested is not to meet with yourself in the form of -- until January at some point. The one matter which I can personally, given it's now the 14th of November, I can work on myself with some input from the petitioner, with regard to the adjournment regarding the point number three, that a second custody and access report be prepared. I would like the opportunity to argue that as soon as possible, say within two to three weeks, if that is in agreement with everybody. I know we have the right to make a motion. I do not want to just blindsides anybody, but I will be able to get all of the case law and all the materials for you and for the Court, and for Ms. Cabott and Ms. Kinchen, by that point. So my choice would be not to wait until January for that particular item, as well as [the child's] dental care.

[38] If need be, I'll pay for [the child's] dental care out of pocket, but there is a full dental plan in place that is of no cost to the respondent over and above what he contributes through his employer, the family plan. I know that, Your Honour.

[39] THE COURT: All right. Well, you will have to decide if you want to go ahead with that particular aspect of your application.

[40] Madam Trial Coordinator, we need time for a motion/continuation of a motion/pre-trial conference. I would think about an hour sometime in the next two to three weeks?

[41] TRIAL COORDINATOR: The week of November 28th was blocked for this trial.

[42] THE COURT: All right.

[43] TRIAL COORDINATOR: I would suggest perhaps the Wednesday is the best day, the 30th?

[44] THE COURT: The 30th? The 30th of November, will that be enough time for you?

[45] MR. MOLLOY: That will be fine, Your Honour.

[46] THE COURT: All right. Ms. Kinchen?

[47] MS. KINCHEN: I did have that blocked off, but I will be available.

[48] THE COURT: Okay, and I assume that is okay for you, Ms. Cabott, as well?

[49] MS. CABOTT: Yes, that's fine. Did you set a time?

[50] THE COURT: Let's say 2:00 p.m.

[51] MS. CABOTT: That is fine, thank you.

[52] THE COURT: All right, and then we will also need, we may as well get some additional time for a pre-trial case management conference in January.

[53] TRIAL COORDINATOR: We can either do it very early January or the latter part of January, My Lord.

[54] MR. MOLLOY: Very early would be good, because we will have the knowledge of a lawyer, or not, and some dates. Also, medical updates can be provided to the court at that time.

[55] THE COURT: What is available in early January?

[56] TRIAL COORDINATOR: January 3rd, which is the Tuesday following the Monday holiday. That afternoon would be available.

[57] THE COURT: All right. How does that suit, counsel?

[58] MS. KINCHEN: Fine.

[59] MS. CABOTT: That is fine with me.

[60] THE COURT: All right. We will just reserve about an hour for that.

[61] TRIAL COORDINATOR: 2:00 p.m., My Lord?

[62] THE COURT: Yes. All right, is there anything more that we need to address today?

[63] MR. MALLOY: No, thank you, Your Honour. We have adjourned everything else and we will try and deal with Ms. Kinchen's office regarding some settlement issues before that date.

[64] THE COURT: All right. Thank you.

[65] MR. MOLLOY: Thank you.

[66] THE CLERK: Ms. Cabott, will you appearing by telephone on the November 30th?

[67] MS. CABOTT: No, I will be there.

[68] THE CLERK: Thank you.

GOWER J.