

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *D.M.M v. T.B.M.*, 2006 YKSC 41

Date: 20060616
Docket No.: S.C. No. 02-D3464
Registry: Whitehorse

Between:

D.M.M.

Petitioner

And

T.B.M

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

D.M.M.
Kathleen Kinchen
Laura Cabott

On her own behalf
For the Respondent
Child Advocate

MEMORANDUM OF RULING

[1] This memorandum arises from a pre-trial conference held June 15, 2006. In my Reasons for Judgment filed February 2, 2006, I recommended that a second Update to the Custody and Access Report be prepared, pursuant to s. 43(2) of the *Children's Act*, R.S.Y. 2002, c. 31. That recommendation was formalized in an order filed April 11, 2006. The trial is scheduled to commence September 5, 2006. It has already been adjourned once and neither party nor the Child Advocate would welcome a further adjournment.

[2] At the pre-trial conference, I was informed by the Child Advocate that Geoffrey Powter, the author of the original Custody and Access Report and the Update to that report dated September 15, 2005, was expected to be in Whitehorse in mid-June 2006.

Apparently, the Child Advocate had received a letter from Family and Children's Services (the "Department") that, due to the demands on Mr. Powter's time, he is no longer able to complete the necessary Update until the third week of August 2006.

[3] I was informed by the Petitioner that her expectation, which I took to be based upon correspondence she had received from the Department, was that the second Update to the Custody and Access Report was originally expected to be completed by July 9, 2006. She has since been told by Patricia Fortier, whom I understand to be an official with the Department, that although the second Update was originally to be prepared in June 2006, in order to ensure that it would be ready for the trial, it is now not going to be done until August.

[4] The Petitioner's concern is that if she does not receive the completed second Update until the third week of August, she will have insufficient time to complete her preparation for the trial. The Petitioner says that if Mr. Powter includes reference to new sources in the second Update, not previously identified in the original Custody and Access Report or the first Update, then she may be called upon to subpoena those individuals as witnesses to clarify points in their evidence. The Petitioner may also wish to call rebuttal expert evidence, which will be difficult, if not impossible to do, if she only receives the second Update on the eve of trial. The Petitioner is of the view that if Mr. Powter is unable to complete the second Update sooner, then another psychologist should be retained to do so.

[5] The Child Advocate has similar concerns to those of the Petitioner, however, she is opposed to anybody else completing the second Update. In particular, the Child

Advocate says that it will be next to impossible to file or call rebuttal evidence to the second Update, should that be required.

[6] It is common ground between the parties and the Child Advocate that the second Update is likely to be a pivotal piece of evidence at the trial.

[7] Both the Petitioner and the Child Advocate urged me to make a further recommendation to the Department to make whatever arrangements are possible to complete the second Update as soon as possible. The Child Advocate would ideally like Mr. Powter to do it while he is in Whitehorse on other matters this month, in order to have the completed second Update filed in a timely fashion prior to the upcoming trial.

[8] While I recognize that it is entirely within the Department's discretion to prepare the original Custody and Access Report, pursuant to s. 43(2) of the *Children's Act*, that may not be the case where "the director consents to or has given a prior written report". Nevertheless, I accept that the arrangements for retaining the author of such reports and the timing of the preparation and completion of same is entirely within the Department's discretion. Having said that, I would once again *strongly recommend* to the Department that the second Update be prepared as soon as possible, and in any event, that it be completed prior to the third week of August 2006.

[9] I direct that a copy of this memorandum be provided to the Director of Family and Children's Services, the Petitioner, counsel for the Respondent and the Child Advocate.

GOWER J.