

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *D.W.T. v. C.D.T.*, 2005 YKSC 69

Date: 20050805
Docket: S.C. No. 05-D3755
Registry: Whitehorse

BETWEEN:

D.W.T.

Petitioner

AND:

C.D.T.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:
David Christie
(Agent for Emily Hill)
Peter Morawsky

For the Petitioner

For the Respondent

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] GOWER J. (Oral): The respondent mother in this case applies for an interim order for custody of the child of the marriage, L.P.P.T., whom I will refer to as L., and also an interim order that the petitioner father's access to the child be suspended or, alternatively, supervised until such time as the father's health issues are addressed.

[2] The father has cross-applied for access to L. on a specified basis on August 5th, 8th and 10th and then continuing pursuant to the previous order of Mr. Justice Foisy of this Court made July 22, 2005. That order was for specified access, which was unsupervised.

[3] The main issue is whether the father should continue to have unsupervised specified access, as previously ordered, or whether the access should be supervised or even suspended. Both applications were triggered by an incident between the father and daughter this past Friday, July 29th, one week ago. Until that incident, the parties were able to agree on shared custody of the child and, more recently, on primary care by the mother with specified access by the father. There have been some problems with access and concerns have been raised by both parties over the care of the child, but those have generally been resolved by an agreement and two consent orders.

[4] That is not to say that there has been general agreement between the parties in their respective affidavits and those from the mother's three witnesses; quite the contrary. In the eight affidavits filed to date, there are several points of contradictions between the positions of the mother and father. This case, unfortunately, like many in family law custody disputes, has become a battle of affidavits.

[5] Without the benefit of cross-examination, for the most part, at this pre-trial stage, it is very difficult to make assessments of credibility as between the parties because their conflicting allegations are simply of the "he said, she said" variety. In such cases it is very helpful to have evidence from other witnesses who, although they may have certain potential biases by virtue of being friendly or associated with a given party, nevertheless add a level of objectivity to the conflict.

[6] One of those witnesses, R.A., who observed the July 29th incident between the father and daughter, made himself available for cross-examination before me by the father's counsel on the contents of R.A.'s affidavit.

[7] R.A.'s evidence in his affidavit was that on the morning of Friday, July 29th, he was on his balcony, which is in an apartment building nearby the Super A store in Riverdale. It is about 150 feet away from the bus stop in front of the Super A store on Lewes Boulevard. He saw the father and the daughter standing around the bus stop. He saw the father take a hair band out of the daughter's hair and she seemed angry at him and squatted behind the bench at the bus stop. He heard the father scream at the daughter at the top of his lungs for her to stand up and when she did not stand up, he proceeded to lift her to her feet by her hair. He heard the daughter scream and the father did not let go. Then she said, "Let me go." The father hesitated for a moment and then let her go. R.A. continued to watch the couple until they got on the bus. He did not observe the father doing anything else. He confirmed that he clearly heard the father state the words, "Stand up," and clearly heard the daughter state the words, "Let me go."

[8] In cross-examination, he said that he did not witness the daughter crying, but he could not tell whether she was for sure. He confirmed again that the father had his voice raised, although the father did not swear at the daughter or call her names or make any specific threats. He said that they were both upset and, again, confirmed that the father had pulled the daughter to her feet by her hair with his left hand from a squatting position and held her there for a few seconds, although her feet remained on the ground. Nothing else happened after that and the entire incident took approximately three minutes in total. He then said he went inside his apartment and immediately told a friend, initials K.C., what he had observed. He then tried to call the daughter's mother at her workplace, but could not get through. He eventually told the mother when she

arrived home at about 5:00 p.m. R.A. lives in the mother's apartment with the mother and daughter.

[9] Admittedly, R.A., who is 16 years of age as I said, lives with the mother and she is friendly towards him and is seeking to become a foster parent to him. Clearly, R.A. has a potential bias in favour in the mother. However, he was unshaken on cross-examination as to what he claims to have observed. He even testified that immediately after witnessing the incident, he told his friend, K.C., who was in the apartment at the time, what he had just seen and heard.

[10] I cautioned R.A. prior to him taking the witness stand about whether he wanted independent legal advice and about the negative consequences for him if it was subsequently shown that what he said under oath was untrue. Therefore, I take R.A.'s reference to K.C. as significant because K.C. could easily be subpoenaed or questioned to confirm or deny what R.A. claims to have told him. In other words, if R.A. was lying, he risks being exposed by checking his story with that of K.C.

[11] The father's version of what happened on July 29th is that he went to the daycare, which is in the same apartment building as the mother resides, in the morning to pick up the daughter. He then went to the bus stop with her and while waiting for the bus the daughter became upset as the tie in her hair became tangled and she could not get it out. He says he tried to assist her, but she became increasingly frustrated and told him that she wanted to do it herself. When he reached for the hair tie she wiggled away and yelled at the father and again said she wanted to fix it herself. However, she was unable to remove the hair tie and it became even more tangled. At this point, the

daughter was crying and threw herself on the ground in a temper tantrum. The father says he told her to stop behaving in that manner and that his voice was raised, but he was not screaming. He said he bent down and took the daughter by the arm, pulling her up to her feet, told her to calm down and to let him help her. She continued to cry, but he was able to remove the hair tie from her head, as it had become quite tangled. It pulled some of her hair as it came out, which also upset the daughter. However, after her hair tie was removed and he had spoken calmly to her, she regained her composure. She stood quietly while he put her hair in a new ponytail. Shortly after that, the bus arrived and they entered and proceeded downtown.

[12] I am satisfied on a balance of probabilities that R.A.'s version of what happened with the daughter on July 29th is the more accurate one. The father's counsel, however, rather boldly submitted that even if I accept R.A.'s version that would still not justify supervised access because, as I understood her, supervised access is simply not appropriate in the overall scheme of the circumstances here. I disagree.

[13] The July 29th incident shows me that the father continues to exhibit an anger control problem, which may in turn be indicative of more deep-seated mental health problems. The father says in his second affidavit, at para. 37: "I deny having an anger problem or a mental illness."

[14] However, this complete denial seems internally inconsistent with the father's admissions at para. 4 of that same affidavit, that he has previously been treated for anxiety and depression. It is also inconsistent with his admission at para. 11 that he

was medicated with prozac from August 2004 until June 2005, despite his statement that his sleep apnea diagnosis was made in the fall of 2004.

[15] The father's complete denial of any personality or mental problems is also externally inconsistent with the evidence of Ms. K.C., an adult female friend of the mother and not the K.C. previously mentioned. In her affidavit at para. 9:

“On one occasion in the Riverdale Super A I had to bring L. back to him since she had run off when he wasn't paying attention. When I did bring her back he started screaming at her about how next time he would just let her go and let somebody hurt her for running off on him.”

[16] The father responded to this allegation in his second affidavit at para. 35:

“In response to paragraph 9 of Ms. K.C's affidavit, the incident that she is describing occurred when L. was playing a trick on me and hid in another section of the store. I went looking for her and found her after a few minutes. I was confident that she was in the store and had just slipped away. Ms. K.C saw this incident, but she did not assist me, as we were no longer friends.”

[17] Thus, the father did not deny what K.C. claims he said to his daughter. I find that very disturbing and inconsistent with his extensive denials and explanations for other alleged incidents, such as the one referred to in the affidavits which occurred on May 4, 2005. I do not accept that the father implicitly denied K.C.'s allegation about the Super A incident and his failure to do so is reason for me to accept it as proven on the balance of probabilities.

[18] Further, such behaviour is unacceptable, abusive and indicative of an anger control problem at the very least and perhaps more.

[19] I note that Ms. K.C. also deposed in her affidavit, at para. 5, that she has heard the father become very upset with the mother on several occasions over small matters. She is of the opinion that the father controlled the relationship through outbursts of anger directed at the mother, that the father has a very loud voice and can act very aggressive.

[20] At para. 8, she said that she feels that the father is very controlling of the daughter; that he gets upset with her over small things. At para. 12, K.C. said that on one occasion she heard the father become upset with the daughter about something and began yelling at her. The daughter then began screaming, "I don't want to die."

[21] At para. 13, K.C. said that the daughter was left outside unsupervised by the father while the mother was at work and when the father did appear, and the daughter did not instantly obey him, he became extremely upset.

[22] At para. 21, K.C.'s opinion was expressed that the father has anger problems and that she is very concerned that he will hurt the daughter if he has her for any extended periods of time.

[23] At para. 22, she says that she does not know whether the father has a mental illness, but that the behaviour that she has observed is not normal.

[24] While these allegations are more specifically denied by the father they are nevertheless relatively objective and corroborative of the mother's suggestion and concern that the father has ongoing untreated personality and/or mental health issues.

[25] There is also the evidence of the mother in her first affidavit, at para. 38, where she says that:

“L. loves her father, but she is not comfortable around him. He yells and screams too much at her, or around her. He is too unpredictable for her to be comfortable around him. I ascribe those problems to an ongoing and inadequately treated mental illness.”

[26] At para. 26, the mother deposed that the father started taking prozac more regularly in the fall of 2004 and seemed to be getting better. During that time Dr. Shehata-Fouad told us that in her opinion, he was demonstrating some of the symptoms of Bi-Polar Disorder. That was before he went down to UBC Hospital for the sleep study in November 2004.

[27] I conclude from that reference to the sleep study, that that was about the time that he was diagnosed with the sleep apnea problem. Yet the father continued to take prozac until June 2005, which indicated to me that he had a need for medication and when he did stop taking the prozac, he did so without his doctor's advice. He admits in his second affidavit that he simply consulted a pharmacist about discontinuing that medication.

[28] There is also the reference in the mother's first affidavit, at para. 37, about the owner of the daycare where the daughter stays:

“I have been advised by Cyndi Desharnais, the owner of the daycare where L. stays, that she is uncomfortable with having the petitioner coming around to pick her up, because he is so unpredictable. She has told me that she has to ask him to leave since he was upsetting the other children.”

[29] In response to that, the father said in his second affidavit, at paras. 20 and 21:

“In response to paragraph 37 of the respondent's affidavit, I have always had a positive relationship with Cyndi Desharnais, the owner of L.'s daycare. Before the respondent and I separated, I usually picked L. up from daycare, so I would speak with Ms. Desharnais with how L. was doing, any changes in her routine and any concerns that either of us had. Since the separation, Ms. Desharnais has been put in a difficult position, as the daycare has been the pick-up and drop-off spot for access and the respondent lives directly above the daycare.”

[30] Paragraph 21:

“Because the respondent has not wanted to have any contact with me, I believe the time I spend at the daycare and speaking with Ms. Desharnais has upset the respondent. As a result of her concerns, I have told Ms. Desharnais that I cannot speak with her for long periods when I pick-up and drop-off L. I limit the pick-up and drop-off times to 15 minutes. I have told Ms. Desharnais that we will have to have any further discussions about L. over the phone or through my lawyer.”

[31] I find that latter paragraph particularly a strange response and it does not deny the allegation of the mother that Ms. Desharnais finds the father unpredictable. It is also strange because it would seem that Ms. Desharnais, on the face of it, assuming that the relationship with the father is truly positive, is one of the few witnesses who could provide supportive evidence for the father, yet there is no such evidence from her.

[32] I also note the evidence of T.S., another friend of the mother, at para. 3, where she expresses the opinion that the father and daughter's relationship is dysfunctional, at best. She says that she has witnessed the father when he is with the daughter and that he shouts and yells at her, instead of talking to her. Again, that is corroborative of the mother's concerns about the father's anger and mood swings.

[33] The father has not yet provided any independent evidence regarding his mental health status, other than his self-reporting. He could, of course, volunteer such information. He could obtain a doctor's letter, undertake a psychological or psychiatric assessment or even an anger management assessment. He could seek out the assistance of his family doctor or the Family Violence Prevention Unit or Social Services. No doubt, such information would be of great assistance to the author of the custody and access report expected to be done this September or October. It could also be of assistance to this Court in dealing with the interim access issue. The father may be given a clean bill of health on that front and his own opinion of his current well-being may be objectively supported. But, until that evidence is provided, I find I have no alternative, as unsatisfactory that it may be for the parties, to order that continuing access be supervised in order to protect the child's best interests.

[34] I make the following order:

1. Interim interim custody of the child will be awarded to the mother. I note here that I have considered interim custody, but in that case, the father would have to establish a change in circumstances in order to vary that order. While a custody and access report may constitute a change in circumstances, it also may not. Therefore, out of an abundance of caution, I am making this an interim interim custody order since we are at the pre-custody and access report stage and I feel it best not to require the father to demonstrate a change in circumstances in order to vary.

2. I order that interim interim reasonable access to the child be granted to the father to be supervised by a supervisor agreed upon by the parties. Communications between the parties regarding supervisors and access will be pursuant to the terms of the recognizance which the father is currently on, but in the absence of the mother's approval, communications may also take place through a social worker or an adult probation officer.
3. I recommend the appointment of a child advocate, pursuant to s. 168 of *Children's Act*.
4. I further order that the father shall exercise his access with the daughter by picking her up from the daycare at the beginning of the access visit and returning her to the daycare at the end of the access visit and not to remain at or attend at the daycare after 5:15 p.m.

[35] I note from the father's second affidavit at para. 45:

“Since I have been seeing L. and spending entire days with her at the daycare, I have become concerned about other aspects of the respondent's care for her.... “

Et cetera.

[36] I take it, from that allegation, that the father, in the absence of another supervisor being identified, would be able to have access to the daughter at the daycare since

Ms. Desharnais will be present to serve in a role of a supervisor. That, of course, will require the agreement of the mother, which I expect will not be unreasonably withheld.

[37] Are there any further matters which need to be addressed?

[38] MR. MORAWSKY: Sorry, My Lord, Could I just ask Your Lordship to go through the interim interim reasonable access provision again? I just want to double check that I got my notes correct. I have interim --

[39] THE COURT: Let me just explain, I made it reasonable, as opposed to specified, because a supervisor will now have to be involved. I did not want to make it more rigid. I wanted to keep it flexible and so that is my reasoning for not sticking with the specified access from Justice Foisy. So I will just repeat what I said, that interim interim reasonable access to the child is granted to the father to be supervised by a supervisor agreed upon by the parties, and that communications between the parties regarding supervisors and access will be pursuant to the terms of the recognizance, but in the absence of the mother's approval. By that I am referring to the terms of the recognizance, communications may also take place through a social worker or an adult probation officer.

[40] MR. CHRISITIE: Yes, Your Lordship, I should have stated at the beginning for the record, that David Christie appearing as agent for Emily Hill, who is counsel for the petitioner, if I may just ask if it be possible to have a clarification on the petitioner's behalf with respect to the approval of the access supervisor?

[41] THE COURT: Yes.

[42] MR. CHRISTIE: If I may request or suggest that in the event that the petitioner feels that such approval is unreasonably withheld, that he may bring another application to the Court? He just said to me, and obviously I am limited in my knowledge of this case, but given the order that Your Lordship made, I think that is a reasonable request.

[43] THE COURT: Yes, I agree.

[44] MR. CHRISTIE: Perhaps with a standard amount of notice, two days notice, would that be appropriate?

[45] THE COURT: Yes. Did you hear what Mr. Christie said, Mr. Morawsky?

[46] MR. MORAWSKY: I understood that was leave granted to apply, My Lord.

[47] THE COURT: In the event that the father feels that consent is being unreasonably withheld.

[48] MR. MORAWSKY: Thank you, My Lord.

[49] THE COURT: Is there anything more that needs to be addressed?
Thank you.

