IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Hutlet* v. *Leonard*, 2004 YKSC 53 Date: 20040706
Docket: S.C. No. 01-B0024
Registry: Whitehorse

Between:

PAUL ANDRE NORBERT HUTLET

Plaintiff

And:

GABRIELLE LEONARD

Defendant

Before: Mr. Justice R.S. Veale

Appearances:
Paul Andre Norbert Hutlet — On his own behalf
H. Shayne Fairman — For the Defendant

MEMORANDUM OF RULING
DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): Firstly, I want to say that any of the comments that I am going to make and the Order I am going to make do not reflect on either of the parents in terms of their ability to care for Faith. Certainly, Mr. Hutlet has made considerable efforts to increase his time with his child, and Ms. Leonard has agreed to that. I am going to deal with each of the items that Mr. Hutlet has raised. Firstly, the issue of custody, there was an Order by Madam Justice Kenny in 2001, giving Ms. Leonard interim custody of Faith. That Order was presumably made with consideration being given to s. 30(4) of the *Children's Act*, R.S.Y. 2002, c. 31, which some say

creates a presumption in favour of joint custody. I am not making any ruling on that issue at this time but just to draw to everyone's attention the fact that the law would have been before Madam Justice Kenny when she made the Order.

[2] To Mr. Hutlet's credit, there has been a change in circumstance since that date in the sense that he has increased his time with his child; and that is to the credit of both Mr. Hutlet and Ms. Leonard. The question, though, is whether or not joint custody should be awarded in the circumstances. This Court is often very disposed to making joint custody orders, but it all, of course, depends on the conduct of the parents; and although I have found that Mr. Hutlet has made some great strides with respect to his time with his child, I was not impressed with his going to a doctor and raising the issue of physical abuse of Faith in circumstances where it could have been dealt with directly between himself and Ms. Leonard, if, indeed, they had that kind of relationship. It appears to me they did not have that kind of relationship, which would be the normal relationship where a joint custody order would flow and that would be that the parties would discuss it, and there would be an explanation.

[3] Mr. Hutlet has also become involved in discussions with the gymnasium that Ms. Leonard attends, as well as the Government office that deals with childcare subsidies, with the result that her childcare subsidy is now in jeopardy. Those actions of Mr. Hutlet, to my mind, militate against a joint custody order in spite of the fact that his other actions, in terms of his involvement with his child, would be in favour of it; but on balance, I am not persuaded that there should be a change in the Order made by Madam Justice Kenny in 2001.

[4] With respect to the surname of the child, I am also not persuaded that that should take place, but I will order that Ms. Leonard provide Mr. Hutlet with a letter that can be used while Mr. Hutlet is travelling with Faith, and also a letter that can be used when he is seeking medical care for Faith, as well, to avoid any embarrassment in those situations.

[5] With respect to child support, the most recent information from 2003 with respect to Mr. Hutlet's income is that he earned $68,342, which would result in a child support payment of $571. In my view, that is the income that should be imputed to him. In the event that his income declines in the year 2004, that can be taken into consideration at the end of 2004 for the subsequent year.

[6] Ms. Leonard's income should be imputed at $25,000. In my view, an income of $25,000 with a single parent and one child, much less two children in the Yukon Territory, is below the poverty line. Mr. Hutlet's income is more than double Ms. Leonard's income, and I am of the view that under s. 9 of the Child Support Guidelines, Mr. Hutlet should continue to pay $400 per month, commencing February 1, 2004, with credit for the $1200 that he has already paid by Court Order. I do so based on the recent decisions in the British Columbia Court of Appeal to ensure that Faith has the best standard of living that she can have at both residences.

[7] I am going to make an Order that the daycare expenses be shared by Ms. Leonard and Mr. Hutlet in proportion to their income, with the result that Mr. Hutlet will pay 73 percent of any daycare obligations that Ms. Leonard has in excess of a subsidy or if there is no subsidy.

[8] MR. FAIRMAN: Thank you, My Lord. The last point that I would like to address, then, is with respect to the issue of costs. It's my submission that for the most part, Mr. Hutlet's application to the Court was not successful; but substantial success was achieved by Ms. Leonard. In that circumstance, it is ordinarily the Rule that the costs follow the successful party. I would submit, My Lord, that that's certainly the case here. I can indicate that we had many discussions with Mr. Hutlet about attempting to resolve this matter, attempting to establish a reasonable level of child support. I gave indication to Mr. Hutlet that I would be drawing to the Court's attention the level of child support, which we had proposed to him be accepted by him but which he refused; and that level of child support was $350 a month, plus 73 percent of Section 7 expenses. And Mr. Hutlet was given a Calder bank letter to the effect that that would be drawn to the Court's attention. So, that is a further indication that my client was substantially successful and that this matter could have been resolved for something more beneficial to Mr. Hutlet than he was willing to accept, and then, what the outcome of the Court is. In those circumstances, My Lord, I would seek that my client be awarded her costs of this application. I would, though, My Lord, be prepared to concede that that could be an award made in any event in the cause but would not be payable immediately by Mr. Hutlet.

[9] MR. HUTLET: Well, what are your costs?

[10] THE COURT: Just so I understand it, you're saying, Mr. Fairman, costs in any event of the cause, the result being that there would be no costs paid by Mr. Hutlet if this were the end of the matter. If it goes to trial and ultimately Ms.

Leonard was successful, then she could have her costs, including the trial and these applications.

[11] MR. FAIRMAN: My understanding of that term is that if it went to trial and even if she were unsuccessful at trial, then she would still receive costs for this application; but you're right, if no further steps are taken or if the matter never proceeds to trial, I don't expect -- my client might expect me to pursue or to assess the costs of this application just to know what it would be, but I think to put it mildly, she's had enough. I do think, though, that it's reasonable and important, My Lord, that costs of this application are, in fact, awarded to my client; and I think it's in deference to Mr. Hutlet's stated financial position that we're saying we won't be seeking to recover those immediately.

[12] THE COURT: Mr. Hutlet, do you have a submission to make?

[13] MR. HUTLET: What are the costs?

[14] THE COURT: Well, the costs would be probably in excess of $5,000 I would expect, but I don't know. What he's seeking is that I make an Order that costs are to Ms. Leonard in any event of the cause, which means that if this is the last we hear of the matter and you don't come back for a trial, that's the end of it, you'll never have to pay costs. If the matter goes on to trial, then at the end of the trial when costs are assessed, these costs would be assessed. I don't know if Mr. Fairman's position is quite correct that he gets them in any event of the cause. I'm sorry, it is in any event of the cause. It's not costs in the cause. You're not familiar with these terms?

[15] MR. HUTLET: No, I'm not familiar with those terms.

[16] THE COURT: If I ordered costs to Ms. Leonard, you would have to pay what we call "party and party costs," and I don't know what that would be, but it would be in the thousands. He's not seeking that Order.

[17] He could also seek an Order of costs in the cause, which means if you go to trial, whoever wins would get the costs of these events. What he's asking for is costs in any event of the cause so that if you go to trial, she would get the costs of this; but if you were successful in your application at trial, you might get the costs of trial.

[18] MR. HUTLET: And if I drop it today and don't go anywhere further, nothing --

[19] THE COURT: You won't hear anything about costs. Well, I think that, quite frankly, I would probably be disposed to saying that costs to Ms. Leonard; and in the circumstances, I will make an Order of costs to Ms. Leonard in any event of the cause.

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VEALE J.