IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Van Bibber* v. *Bradasch*, 2004 YKSC 41 Date: 20040609
Docket: S.C. No. 91-01468
Registry: Whitehorse

Between:

WILMONICA VAN BIBBER

Plaintiff

And:

MICHAEL ERIK BRADASCH

Defendant

Before: Mr. Justice L. F. Gower

Appearances:
Wilmonica Van Bibber On her own behalf
James Van Wart For the Defendant

MEMORANDUM OF RULING
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is my ruling. The plaintiff originally filed her application in this matter on October 2, 2003. Some of the relief sought in that application was dealt with by Mr. Justice Veale on April 13, 2004. At that time, both parties had legal counsel, and Christina Sutherland appeared as a child advocate and made representations to the Court.

[2] The clerk's notes from that appearance indicate that there was to be an Order regarding access, and Ms. Sutherland was to draw up the Order in terms she proposed, with an additional term that access not be exercised at the child's home. Later in those proceedings, the notes indicate that there was an Order

that the child's residence shall be in the Yukon, as agreed upon, subject to 45 days notice to the child advocate and Mr. Bradasch of any change in that status.

[3] The balance of the matter was adjourned, and the outstanding issues were child support, retroactive child support and the restraining order.

[4] The Order resulting from the hearing on April 13th was approved in writing by all three counsel and the final version was filed on June 8th, at the hearing of the application before me. Paragraph 1 of that Order says that the interim residence of the child "shall be in the Yukon Territory, as agreed upon." Paragraph 5 says that the defendant shall have access to the child, subject to her wishes and the following conditions:

> (a) in the company of her sister, S.B.;
>
> (b) in a public place;
>
> (c) at such dates and times as can be arranged between the child and the defendant by email, and;
>
> (d) pick-up and drop-off of the child shall not occur at the plaintiff's home.

Finally, paragraph 6 says that the balance of the relief sought in the plaintiff's application was to be adjourned for the purpose of fixing a trial date.

[5] The inference that I draw from paragraph 5 of that Order is that the defendant would have access to the child at times when she is residing outside his home. It does not purport to prevent the child from moving into the defendant's home if agreed upon by the parties.

[6] The plaintiff said in her most recent Affidavit, #4, at paragraph 9, that as was explained in the child advocate's letter, she accepted that the child was of sufficient age and maturity to make her own decisions about access, as well as her place of residence. In addition, she said that whatever arrangements were made regarding access must not allow for any contact between the defendant and the plaintiff.

[7] The child is currently residing with her paternal aunt, J-L.C., and has been since May 31, 2004. According to the defendant's Affidavit #5, he said that the child moved in with him on or about May 3rd; then, on or about May 31st, the child moved in with his sister, J-L.C., in Whitehorse. And also, that the child had told him that she wishes to reside with him again when he arranges for larger accommodation, which he is presently doing. I therefore assume that if the child decides to move back with her father, the plaintiff will be deemed to agree, based on what she said in her Affidavit #4, subject of course to her right to apply again to the Court to vary the Order.

[8] In the defendant's Affidavit #2, he said at paragraphs 27 and 28, that he loves his daughter, that he recognizes she is [at that time] almost 16 years of age and "is able to make her own decisions about the frequency and nature of access that she wishes to have with me." He says that he will respect the child's wishes with respect to what sort of access she wishes to have with him. He says he is not a threat to her. Again, I assume from this that if the child decides to move back with her mother, the defendant will be deemed to agree to that, also subject to his right to apply to the Court for a variation of the Order.

[9] I will just note that I questioned the defendant's counsel and the child advocate why the Order of Mr. Justice Veale did not specify a residence for the child, other than to specify that it would be in the Yukon Territory as agreed upon. The child advocate said she was not sure, but according to the clerk's notes, she was the one who apparently drafted the Order. And clearly, all three counsel signed the Order in the form that it was drafted.

[10] In any event, I turn to the matters which are now before me, and those are the issues of child support, retroactive child support and the restraining order. Firstly, with respect to child support, this is the first time the issue has been litigated since the application was filed on October 2, 2003. The plaintiff has made an application to vary the existing child support in the Order of Mr. Justice Meyer, which was made in August, 1992, from $200 to $344 per month, based on an alleged current income for the defendant of $40,000 per year. In the meantime, since the application was filed, the child has moved in with her father, as I have noted, and currently resides with her paternal aunt. Therefore, in the current circumstances, I find that it is premature to make any Order for the payment of child support from either parent until the child decides to take up residence with one or the other on a relatively permanent basis. Accordingly, that aspect of the plaintiff's application is dismissed.

[11] Secondly, with respect to retroactive child support, the plaintiff's Notice of Motion claims lump-sum retroactive maintenance for the period from September 1, 2001 to August 31, 2003, based on $200 per month. She made a similar claim in her Affidavit #2, at paragraph 36. However, when she filed her Affidavit #4 on

June 4, 2004, she said at paragraph 62, under the heading “Retroactive Child Support”:

> I am also asking for an Order that the Defendant pay me lump sum retroactive maintenance for the child ***for the period of February 2002 to April 2004***, in the amount of $2,862 (that is, $106 X 27 months).
>
> [emphasis added]

[12] I did not note that at the time I heard the submissions from the parties, and I was not able to question the plaintiff about it. However, it would appear that the plaintiff may have amended her claim for retroactive child support to that extent. In any event, in Exhibit “C” of the plaintiff’s Affidavit #2 there is attached a document entitled *Yukon Maintenance Enforcement Program Statement of Account-Claimant*. This is a document which reports entries running from October 6, 1992 up to January 21, 2002. According to the defendant, this shows that he paid approximately $23,000 in child support for the child over that period. I have not checked the math, but I am going to assume the representation from the defendant’s counsel in that respect is accurate.

[13] What is significant is that on the entry under January 7, 2002, there is a notation that says, “Creditor withdrew/file closed.” There is a negative entry of $1,138.50, and then, the next entry on January 21, 2002, shows that there is a zero balance owing to the claimant. On its face, then, it would appear from the plaintiff’s own evidence, since this was part of her Affidavit, that there are no arrears owing from September 2001 until the date that the file was closed on

January 7, 2002 by Yukon Maintenance Enforcement. Therefore, there is no basis for retroactive child support over that period.

[14] Further, after January 7, 2002, the plaintiff did nothing to bring this matter back to court to re-enforce the child support until her Notice of Motion was filed October 3, 2003. In other words, this was the first notice to the defendant that the plaintiff intended to claim for retroactive child support over the interim period from January 7, 2002. In those circumstances, I conclude that it would be unfair to the defendant to make such an order, and I decline to order retroactive child support from the period from January 7, 2002, to date. That part of the plaintiff's application is also dismissed.

[15] I will turn to the third outstanding issue, which is the matter of the restraining order. The defendant's counsel has said that it would be inappropriate to make this Order, because it was not pleaded in the original Writ of Summons and Statement of Claim, and he is correct in that regard. However, it would appear that the evidence in support of this particular claim for relief allegedly arose since the Writ of Summons and Statement of Claim was filed in 1992. Rule 19(6) of the *Rules of Court* says:

> A party may plead a matter which has arisen since the commencement of the proceeding.

[16] Ordinarily, if the Plaintiff was represented by counsel, and she currently is representing herself, I would grant her leave to amend the Writ of Summons and Statement of Claim and add this to the relief claimed. I would then direct that she

file and serve the amended Writ of Summons and Statement of Claim upon the defendant. However, in this case the defendant on this application has received ample notice of this claim and cannot argue that he has been prejudiced. And, this is only an interlocutory application and not a trial. Therefore, I am prepared to consider the issue and make a ruling. However, if this particular relief is sought at trial, assuming there is a trial, then I will expect the plaintiff to have amended the Writ of Summons and Statement of Claim accordingly, prior to the delivery of her Notice of Trial.

[17] On the merits of this part of her application, the defendant says that I should give little or no weight to the plaintiff's allegations of his involvement in a "cult" in Haines Junction. The plaintiff originally said in her Affidavit #2, at paragraphs 21 and 22, that the defendant was involved in a strange cult-like organization in Haines Junction. She said the elders of the Champagne and Aishihik First Nations have investigated the group and have determined that it is a cult. She said they have issued warnings to the community, and several people that she knew had expressed fears to her.

[18] The defendant denied that allegation in his Response and in his Affidavit #4. At paragraph 2, he referred to the allegation and attached as an exhibit a letter from one Lilly Smith, who was the registrar of the Champagne and Aishihik First Nations Elders Council. That letter is dated April 13, 2004, and I quote from it:

> As to your request of the CAFN Elders Council investigation of cult activities in the Haines Junction

> area - this letter is [to] verify [as written] there have been no formal requests to the Champagne and Aishihik First Nations Elders Council to investigate cult activities within the Haines Junction area. As the coordinator of the CAFN Elders Council meetings, there has been no request of this sort as an agenda item for their meetings.

[19] The Plaintiff then responds, in her Affidavit #4, at paragraph 30, that Lilly Smith is an elder support worker for CAFN and not a justice worker. She says,

> The elders and residents of Haines Junction are intimidated and have been intimidated for over 20 years regarding the behaviour of Mr. Bradasch and his family.

[20] So, in paragraph 30, she does not specifically address or refute what Ms. Smith has said in her letter. She simply says that Ms. Smith is not a justice worker, which is apparently of some significance to the plaintiff but not to the Court. Therefore, I agree with defendant's counsel that I can give little or no weight to those particular allegations.

[21] However, the plaintiff has also said in her Affidavit #4, at paragraphs 45, 46, 49 and 52, that the defendant has been at her house and has uttered threats to her; that the defendant and his family have been at or near her parking lot and at or near her place of residence at least once per week; and that, on more than a dozen occasions, the defendant has uttered threats against her since this file started. She alleges that there was one occasion in February 2004 when the defendant entered her home without her permission, and when she returned, he

threatened her. She alleges that she is afraid of the defendant. She says, at paragraph 52:

> I do not want to communicate with him, except in writing as suggested by the Child Advocate. I do not want him to be within 100 meters of my home.

[22] Now it is not clear to me when this Affidavit was provided to the defendant. The defendant's most recent Affidavit #5 was sworn also on June 4th, which was the date of the plaintiff's Affidavit. The defendant's Affidavit #5 does not specifically deny the allegations of threats, et cetera. However, the defendant may not have received the plaintiff's Affidavit at that time, in which case it would be unfair to make too much of his lack of a specific denial. In any event, I'm satisfied on the balance of probabilities that the plaintiff has made a sufficient case on the surface to justify the following Order:

1. That the defendant not attend within 20 meters of the plaintiff's home,

2. That the defendant not communicate with the plaintiff, except in writing on paper and not by e-mail, and only for purposes of arranging matters of access to the child or the child's residence.

[23] There will be no Order as to costs.

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GOWER J.