SUPREME COURT OF THE YUKON

Citation: *K.R.G*. v. *R.R*., 2009 YKSC 40

Date: 20090513
S.C. No. 02-B0028
Registry: Whitehorse

BETWEEN

K.R.G

PLAINTIFF

AND

R.R.

DEFENDANT

Before: Mr. Justice E.D. Johnson

Appearances:

Emily Hill: Counsel for Plaintiff

Debbie Hoffmann: Counsel for Defendant

Susan Carr: Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Applicant Plaintiff ("father") seeks a variation of the interim order granted by Hudson J. on September 5, 2002 ("order") awarding sole custody of H.G. ("child") to the Respondent Defendant ("mother"). He requests the court to change the order to joint custody with H.G. residing with each parent every other week.

[2] H.G. is 11 years old and is the only biological child of the common-law relationship between the mother and father. The Child Advocate supports the joint

custody proposal of the father because it is the wish of the child to spend more time with the father. The mother opposes it.

[3] The issue I have to decide is whether the father has satisfied the material change in circumstances requirement of s. 34 of the *Children's Act*, R.S.Y. 2002, c. 31 (the "*Act*").

FACTUAL BACKGROUND

[4] The father has filed two additional affidavits besides the affidavit filed in support of the motion to vary. The mother has filed two affidavits in response. There is a conflict in the affidavits about the alleged alcohol abuse of the mother. The other major conflict is about who was responsible for the sporadic access of the father.

[5] The father and mother began a common-law relationship in 1996 and the child was born the following year. The parents separated in July 2002.

[6] The father has a five-year old daughter from a subsequent relationship and has had legal custody of her since August 9, 2007.

[7] The mother has a 21-year-old daughter and a 16 year-old son (D.C.) from a previous relationship who also lived with her during her relationship with the father.

[8] Hudson J. awarded sole custody of the child to the mother after a contested hearing with both parties represented by counsel. At the time of the order both the mother and father resided in Whitehorse. The court granted the father access to the child every other weekend and on Tuesday and Wednesday every week from 4:00 p.m. to 7:00 p.m. The court also granted access every year for the month of July and for one half of the Christmas school vacation period.

[9] In February 2003 the father moved from Whitehorse to Fort St. John. He obtained employment and lived there until January 2008 when he moved to Carcross. His employer required him to remain in Fort St. John for the first six months and he did not return to Whitehorse for visits. During this period he did not exercise his access rights but did maintain regular telephone contact with the child.

[10] However, from the fall of 2003 until his return to Carcross in 2008 he worked for two weeks and then had one week off. He exercised sporadic access during his week off as he frequently visited family members in Whitehorse. During this period he exercised his access rights every July but only exercised his Christmas rights twice.

[11] The relationship between the father and mother until the fall of 2008 has been difficult. Both acknowledge problems in communication about access but primarily blame the other party for the difficulties.

[12] The mother believes the father caused most of the problems because he did not provide adequate advance notice of his visits to Whitehorse. He was irregular in requesting access and made many of his requests at the last minute. As a result she often found it hard to accommodate him and had to interrupt plans she had made for the child.

[13] The father believes the mother was inflexible in dealing with his requests. He often did not know when he would be in Whitehorse because his employer rarely provided more than two days notice.

[14] The father exercised his weekend access from March until October 2008 as well as his access for the month of July. Through the efforts of counsel, the mother agreed to expand access to include from Thursday afternoon until Friday morning on the week

following the weekend access. This arrangement started in October and continued to the date of the hearing on April 15, 2009.

[15] The father has a positive relationship with H.G. that has grown with the regular increased access since October 2008. He and H.G. have developed regular routines during the access periods. They participate in swimming, tobogganing and snowmobiling. They also regularly visit with the father's mother, J.G. (grandmother), and other members of his family. He has become more active in H.G.'s schooling and attended the parent-teacher interview in November 2008. He tries to set regular bedtimes for H.G. at 8:30 p.m. when she is with him but some nights he does allow her to stay up until 9:30. On weekends she does stay up later as she and the father often play video games.

[16] The father has completed the "For The Sake of the Children" workshop and received a certificate dated January 21, 2009.

[17] The father now permanently resides in Carcross and works for the Yukon Housing Corporation. He plans on building a house soon on land that he has obtained from the Carcross/Tagish First Nation. He hopes that H.G. will attend Golden Horn Elementary School, which is between Carcross and Whitehorse.

[18] In mid-July 2008 the father learned from a friend of the child that D.C. had sexually abused the child at some time since the separation. The father reported the abuse to the police and Child and Family Services. The Department investigated and found the allegation was true. It consisted of one incident of inappropriate touching. The police charged D.C. with sexual assault and placed him on an undertaking that

prohibited contact with H.G. The court diverted him under the *Youth Criminal Justice Act* and the condition was removed in December 2008.

[19] The father also discovered the child had revealed the abuse to the mother about one month after it occurred and that she had not reported it to Social Services. The mother did not tell the father about the abuse because H.G. pleaded with her not to tell him. The incident also occurred shortly after the separation when the communication between the mother and father was at its worst.

[20] On August 7, 2008, the father applied to vary the order by giving him sole custody of H.G. The father has since abandoned the request for sole custody and is now seeking joint custody.

[21] Veale J. appointed the Child Advocate in September 2008.

[22] In August 2008, the mother took the child on a ten-day trip in a motor home. They attended two five-day healing conferences at Ross River and Teslin and spent time dealing with the child's feelings. When the mother picked up the child for the trip she could see she was stressed. Through tearful discussions with her she learned that she was feeling guilty and confused about what was happening to D.C. and was afraid he was going to go to jail. By the end of the trip the child was almost back to her old self and was happier and lighter.

[23] September to December 2008 was a difficult time for the child. Besides the investigation and criminal charges the child also participated in a Grade 5 program called "intensive French". She enrolled in a full French immersion program for one semester and had to cram her academic subjects into the period between September and December.

[24] The child also had to adjust to the extra access with her father and to the stress caused when the police charged D.C. with sexual assault in the fall. The charges hurt and upset H.G. She was particularly upset because she was unable to have contact with D.C. She was often in tears and she experienced nightmares, confusion, and difficulties at school. H.G. was happy when contact resumed with D.C. in December 2008.

[25] H.G. is receiving counselling for the sexual assault and is following a treatment plan. The mother and her new partner are working with the therapist and D.C. who visits every second weekend. H.G. is happy about the contact with D.C. and her schoolwork has stabilized.

[26] Finally the mother, her partner and the other children living with them came down with a bad flu in the fall and winter of 2008. As a result the child missed some time at school.

[27] Although the child struggled with her academic subjects at school the mother worked closely with her teacher and her math assistant. Homework is a crucial part of H.G.'s academic plan and she needs constant stable routines that allow her to have enough sleep every night so she does not fall behind.

[28] H.G. has an individualized education plan. The mother participates as part of the team and in the fall of 2008 worked with her 3 hours per night to prepare her to rewrite a test. Her marks improved significantly on the rewrite; she has an excellent chance of starting regular unmodified grade 7 for the 2009/2010 school year. H.G. received the school Academic Improvement Award in 2008 and is expecting to receive it again in June 2009.

LAW

[29] As noted by Gower J. in *D.M.M. v. T.B.M.*, [2006] Y.J. No. 10, 2006 YKSC 9, in interim applications the judge makes his or her decision on affidavits and is unable to make a final determination of the issues. Where there are conflicting affidavits on the main issues that require the judge to assess the credibility of the witnesses, the determination should generally await the trial. The trial judge may come to a different conclusion when he hears the witnesses in court.

[30] The test I must apply in an application by a party to vary an interim order is set out in s. 34 of the *Act*. It states:

> "The court shall not make an order under this Part that varies an order in respect of custody or access unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child."

[31] Courts should be cautious about varying interim orders. The court should only make substantive changes after a trial. The party seeking to change the status quo must present evidence to prove the existing state of affairs is unsatisfactory and that it is in the best interests of the child to make a change. The court considering the variation should focus on the stability of the life of the child and be careful about substituting an uncertain situation for a certain one. As stated by Gower J. in *D.M.M.*:

> "[27] In general, when looking to the health and emotional well-being of a child, courts will almost always prefer those circumstances which will create "the most stable, least disruptive environment for the child" (A.H.P., at para. 23) and one which carries the least risk for the child (Prost v. Prost, [1990] B.C.J. No. 2487 (B.C.C.A.))."

[32] As I noted in *B.L. v. K.L.,* 2005 NUCJ 26, in a variation application the court must decide if there has been a "sufficient" change of circumstances. The court will intervene if it believes the best interests of the child require a change in the parenting regime that

cannot wait until trial for correction. The test the court applies when varying interim orders is less rigorous than for permanent orders because the court is working with incomplete information and is focused on the short-term. Courts will intervene and vary an interim order when the court believes there is a threat to the short-term welfare of the child.

> "[25] On the other hand, with an interim order, there may be new information that indicates the short-term welfare of the children is threatened. In *Thind v Thind*, [1994] B.C.J. No. 1131 (BC.S.C.), evidence of violent behaviour by the Respondent convinced the judge to change the interim custody order. Similarly, in *Fowler v. Fowler*, [1995] O.J. No. 3168 (ON. C.J. (G.D.)), changes in the relationships of both parties also resulted in a change to the interim custody order. In *Clarke v. Clarke*, [1994] O.J. No. 121 (ON. U.F.C.), the Applicant was granted custody of the children under the DA. Three years later, when she was suffering from a substance abuse problem, she agreed to place the children in the de facto care of the Respondent while she was in treatment. The Respondent applied and was granted interim custody. After recovering and maintaining a substantial period of sobriety, she sought the return of the children but the Respondent refused to return them. The Applicant applied to dissolve the interim order. In granting the motion of the Applicant, Steinberg J. ruled that the Respondent was required to make an application under the DA and prove there was a material change in circumstances."

ARGUMENT

A. Father

[33] The father argues the sexual abuse incident, his return to Carcross and the abuse of alcohol by the mother satisfy the material change of circumstances.

[34] The father argues the sexual abuse incident had a significant impact on the welfare of the child that requires intervention by the court.

[35] He argues the mother's failure to tell him and report the incident to Social Services coupled with her problem with alcohol suggest deficiencies in her parenting abilities that justify a change in the original order.

[36] Finally he argues that a change to joint custody is now much more practicable because he now lives in Carcross and the parties are communicating better. The present access is working well and a move to full joint custody is a natural progression that is in the best interests of the child.

[37] The father relied on s. 34 (4) of the *Act* that specifies there is a rebuttable presumption of joint custody.

B. Child Advocate

[38] The Child Advocate also believes that the court should change the order to joint custody. She told the court that H.G. wants to try the joint custody arrangement.

[39] She told the court that H.G. is a lovely child who has felt the burden of being an only child with loyalties to both parents. She wants to spend equal time with both parents to see if it works. If it does not work then she will go back to the present access arrangement. She has reacted positively to the new relationship that has developed with her father. H.G looks forward to spending time with his extended family. H.G. wants both parents to be more flexible and to communicate better. She wants to know they can talk to each other and share both good and bad news.

[40] The Child Advocate's opinion is the parties have made huge strides in communicating and cooperating about access. There have been no access difficulties since October 2008 and she could find no evidence to support the allegations about the mother's alcohol abuse.

C. Mother

[41] The mother argues the evidence does not support the allegations of the father about the access problems between 2002 and 2008. She blames the father for his sporadic access arguing that it was a result of his lack of interest and life style. She attached letters to her last affidavit to illustrate the problems caused by the father's last minute requests for access and lack of planning for the access visits.

[42] She believes that much of the access that did take place was because she facilitated it. This included some Easter access although the court did not include it in the order. The father's allegations about her lack of cooperation about access frustrate the mother. She believes the father and his family have ignored her efforts to allow access for the past five years.

[43] The mother strongly disputes the allegations of alcohol abuse and believes the father and his family has influenced the reactions of H.G. to the occasional use of alcohol by her and her partner. She believes that H.G. has become hyper-vigilant and critical of her because of the influence of the father.

[44] The mother strongly believes that a change in access now is not in the best interests of H.G. because it will impact negatively on her academic progress. She has had trouble adjusting to the new schedule with the father since October 2008 and his new consistency in exercising access. She believes this is not the time to begin experimenting now that H.G. has rediscovered her father.

[45] The mother believes the father is still irresponsible. She notes he has not provided the financial information on his income that she has requested since 2003. So far he has only provided notices of assessment for 2005 and 2006 and is still delinquent

about 2002, 2003, 2004 and 2007. She believes that for most years he has earned more than the $32,000 the court imputed to him in calculating the initial maintenance of $281 per month.

[46] Finally the mother argues the problems of communication that are obvious from the affidavits do not provide a good basis for a regime of joint custody. She believes there has to be a slow rebuilding of trust before any change to joint custody. At this point her trust is low because she believes the father exploited an advantage to regain the custody he lost when the court made the first order. She believes the father is manipulating H.G. about changing schools and the move to joint custody. She argues the court should discount the opinion of the child.

ANALYSIS

[47] The father started this action on July 2, 2002 and requested joint custody of H.G. The Statement of Claim admits the mother was the primary caregiver for H.G. between her birth in 1997 and the date the father started the action. This fact was likely a significant factor in Hudson J.'s decision to grant sole custody to the mother in September 2002.

[48] The court order gave the father access every other weekend from Friday to Monday morning and Tuesday and Wednesday every week between 4:00 p.m. and 7:00 p.m. The order also gave him access for half the Christmas school vacation period and the month of July every year.

[49] The exercise of the full access specified in the order was problematic between 2002 and the fall of 2008. Economic circumstances forced the father to obtain employment in Fort St. John. He left Whitehorse in February 2003 and lived in Fort St. John until January 2008. He remained there for the first six months and communicated

with H.G. by phone. However, he did not tell the mother of the change and had his mother pick up the child for the scheduled access giving the impression that he still resided in the Yukon.

[50] The move to Fort St. John resulted in the father being unable to exercise the weekly access reflected in the order. However, I am satisfied the mother accommodated the requests for access made by the grandmother for the five years between 2002 and 2008. The grandmother has resided in Carcross all her life and had access to H.G. once a month throughout the five-year period. The mother also accommodated other requests by the grandmother for birthdays or special occasions such as weddings, funerals and births. They developed an ability to communicate that was lacking with the father.

[51] Unlike the father, the grandmother communicated and cooperated with the mother and provided timely advance notice of the request for access so the mother could prepare and address the expectations of H.G.

[52] The father visited his mother occasionally in Carcross when she had H.G. with her but did not tell the mother about the visit. H.G. told the mother about the visits with the father when she returned home. The mother could see that H.G. was upset and confused by the visits with the father. I accept her belief that H.G. was feeling rejection and abandonment each time the father appeared because she did not know when the next visit would occur.

[53] The mother tried to accommodate the last minute access requests of the father during his occasional visits to Whitehorse. However, sometimes she was unable to do so because she had already made plans for H.G. Her letter of April 14, 2003 to the

father clearly explains the problems caused by the actions of the father. She provided some tentative solutions to the problems such as using a neutral person to arrange access given the negative feelings of the father toward the mother. However, it appears the father did not respond.

[54] The father was lackadaisical about his July and Christmas access as indicated in the letters of the mother dated June 9, 2003 and March 15, 2005. This attitude continued when he returned to Carcross in January 2008 as he did not seek the weekly access that has been occurring until October 2008.

[55] I am satisfied the father is responsible for most of the access problems up to the fall of 2008. I believe there is likely some substance to the belief of the mother that the father remained angry and resentful toward her because he lost the first application. Because of this it was difficult for the father to communicate with the mother.

[56] While exercising his access in July 2008 he discovered the one abuse incident. Because of his feelings toward the mother he did not talk to her about it and went to Social Services. He refused to meet with the social worker and the mother to talk about the problem and considered not returning H.G. However, after some discussion with the social worker he accepted her finding there were no child protection concerns.

[57] Nevertheless, the father immediately started an application for sole custody that he has since abandoned. That application brought new counsel into the picture, and they have had a positive influence on the parties in developing the smooth access that has occurred since October 2008.

[58] The orderly access that was absent in the past has also resulted in an improvement in the relationship between the father and H.G. She is happy about this

change in her life and naturally wants to rebuild and expand the relationship with the father and his extended family. He is now back in her life regularly and she can rely on this continuing. His parenting style is different from her mother who has been her caregiver for 13 years and she has more freedom.

[59] The father is also happy about the regular access and wants to make up for time lost over the past five years. Both understandably want to move quickly to full joint custody.

[60] On the other hand the mother is reluctant to move too quickly because she knows best what the child needs. She has been her main caregiver for 13 years. She wants H.G.'s life to remain stable and predictable as she adjusts to the many changes and traumas that have occurred over the past year. Although H.G. has made great progress in school the mother believes she needs more time to adjust to the changes. She does not rule out an eventual move to joint custody but believes now is not the right time.

[61] I am satisfied the mother has been a responsible and caring parent to H.G. and reject the allegations of the father that she was deficient as a parent. I am satisfied that she does not abuse alcohol. She is largely responsible for the quality child who made the strong impression on the Child Advocate. She has acted in a mature fashion in dealing with the hostility of the father toward her that emerged during his inconsistent access requests. She did nothing to undermine the relationship between the father and H.G. despite the difficulties she had with the father.

[62] I am satisfied the father also overreacted about the sexual abuse incident. It occurred when H.G. was much younger and the father was largely out of her life. Given

his hostility toward the mother and refusal to communicate it is not surprising the mother did not tell him about it. The mother honoured the request of the daughter and no doubt would have dealt with it in due course. Instead of working with the mother and social services the father immediately went to the police and created a crisis atmosphere that was harmful to the child. The timing of the application for the change of custody does give some credence to the mother's belief that the father is eager to seize any opportunity to further his custody objectives.

[63] The father did not cooperate with the mother to work out an acceptable plan of action with the social worker. The mother and her partner have worked with social services and have participated in counselling that appears to have been successful.

[64] The mother's parenting skills are obvious in the way she managed the problem and it is largely through her efforts the child has weathered the crisis and is now back on track. Through her efforts the child has caught up on her schoolwork and is ready to move onto the next grade.

[65] The major problem behind the litigation is the attitude of the father toward the mother. His discussion with H.G. about changing schools and the failure to tell the mother about the parent-teacher interview show his refusal to accept the major role the mother plays in the life of the child. Counsel have helped in making the father more cooperative with the mother and he has benefited in the increased access. However, the father has much more work to do to undo the distrust felt by the mother. Joint custody requires a history of cooperation between the parties. If the father hopes to move to joint custody he will continue to cooperate and show his good faith. A good way

to start would be to comply with his financial obligations. He is delinquent in providing the financial information and should remedy this problem as soon as possible.

[66] I believe the current arrangement is in the best interests of H.G. and there is no reason for judicial intervention now.

[67] I am satisfied the father has not met the test for a material change of circumstances for an interim application. I deny the application and award the mother party-party costs.

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JOHNSON J.