SUPREME COURT OF YUKON

Citation: *D.M.M. v. T.B.M.,* 2011 YKSC 7

Date: 20110125
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.	Appearing for herself
T.B.M.	Appearing for himself
Laura Cabott	Child Advocate

CASE MANAGEMENT ORDER

[1] The petitioner mother wants to proceed to a trial on an amended notice of application filed December 29, 2010, which seeks a variation of a previous consent order made September 7, 2006, as amended by my further order on February 22, 2007. The latter order requires that the mother exercise her access to the child R., currently 13 years old, in Whitehorse, unless the parties otherwise agree in writing. Since I made that order, the mother has made four consecutive applications for a variation to allow her some other option than having to travel to Whitehorse to exercise access with R.

Essentially, the mother seeks unsupervised access in her home city of Edmonton, Alberta. Three of the mother's applications have been unsuccessful. The fourth is the amended notice of application which the mother wants to have set down for trial.

[2] Prior to filing the amended notice of application, the mother made an application asking me to recuse myself from further hearings on all matters pertaining to this case, based on a reasonable apprehension of bias. For the reasons cited at *DMM v. TBM*, 2010 YKSC 68, I dismissed that application.

[3] On December 3, 2010, the mother filed a notice in the Court of Appeal, appealing my decision refusing to recuse myself.

[4] At a case management conference on January 19, 2011, the mother continued to ask for a trial date on the amended notice of application with the full knowledge that, as it is the practice of this Court to remain seized of complex and difficult family matters, I would be the assigned trial judge. The mother's apparent rationale for asking for a trial date prior to her appeal on the recusal issue being heard, is that she desires access to the child in Edmonton as soon as possible and she is not content to wait until after the appeal proceedings are completed.

[5] The respondent father and the child advocate both oppose setting the amended application for trial prior to the recusal appeal being disposed of. The obvious concern is that, if a trial proceeds and the Court of Appeal ultimately agrees that I ought to have recused myself from this matter, then regardless of the outcome, the result of the trial will be a nullity. I share that concern.

[6] I also conclude that to proceed to trial now would be an inefficient use of judicial resources and would potentially give rise to a situation of unfairness for the father. While,

given the outcome of the recusal application, there is no reason I cannot hear the trial, were I to rule against the mother on the access issue, it is conceivable that she could proceed to the Court of Appeal on both the access and the recusal issues. Although that might be preferable for the Court of Appeal, in the event that the mother is successful in her appeal of the recusal decision, it would put this Court in the position of running the access trial twice. I note that when this trial proceeds, it will likely last two or three days at a minimum and require the appearance of a number of witnesses. Not only does this represent significant Court time, but the father will also suffer by having to take substantial time away from his work and family to prepare for and attend the trial.

[7] In the circumstances, it is preferable to refuse to set this matter down for trial until the recusal appeal is disposed off. In summary, I do so for three reasons:

(1) It is more logical to proceed in that fashion;

(2) It is a better use of judicial resources; and

(3) It avoids the potential unfairness to the father of having to go through the same exercise twice.

[8] The Court of Appeal is scheduled to sit in Whitehorse in May. I would strongly encourage the mother to file her appeal materials in a timely fashion so that the appeal hearing can take place at that time, if not sooner.

[9] The mother's application to have a trial date set on the amended notice of application is denied. Since this is an order arising out of a case management conference and not a formal application in court or chambers, there will be no order as to costs.

[10] I would ask the Child Advocate to prepare and file the formal order resulting from these reasons. The signatures of the mother and father approving its form and content is dispensed with, but the draft should come to me for review before it is issued.

Gower J.