SUPREME COURT OF YUKON

Citation: *S.C.M. v. M.G.P.*, 2014 YKSC 36

Date: 20140626
S.C. No. 13-B0049
Registry: Whitehorse

Between:

S.C.M.

Plaintiff
(Applicant)

And

M.G.P.

Defendant
(Respondent)

Before: Mr. Justice L.F. Gower

Appearances:

Norah Mooney — Counsel for the Applicant
Malcolm E.J. Campbell — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the mother to move to Vancouver with the three-year-old child, B.A.M-P., born May 31, 2011, while the mother attends law school at the University of British Columbia. The mother is planning to attend from August 2014 until May 2017, but will be returning to the Yukon during the four-month summer breaks in each year. The father opposes the child's move.

[2] Technically, there were separate cross-applications by each party leading up to this hearing. The father had filed first in time, on February 27, 2014, and sought a continuation of the existing week on/week off shared residency of the child, as well as specified time during certain public holidays. He also sought a number of other forms of relief, but as those were all premised on the continuation of the equally-shared residency of the child, and as none were specifically argued at the hearing, I decline to deal with them here, with the exception of financial disclosure, which I will return to later.

[3] The mother's notice of application was filed on March 28, 2014, seeking an order that she be granted primary care and permission to move with the child. She also sought some relief with respect to an item of family property and financial disclosure from the father for the previous six years.

[4] Pursuant to an order made on April 2, 2014, the parties were granted interim interim joint custody and guardianship of the child, with each party having residential time with the child on a week on/week off basis. The order confirmed the previous arrangement between the parties on equally shared residential time. The father claims that this arrangement has been in place since September 2013, while the mother says that it has only been in place since Christmas 2013. In any event, it is clear that the child has been alternating between the homes of the parties on a week on/week off basis for at least the last six months, and will continue to do so for July and part of August, until the mother commences law school on or about August 26, 2014.

[5] In this application, the parties are agreed that joint custody and guardianship of the child should continue.

[6] The global issue here is whether it would be in the child's best interests to permit the mother to move with the child or, alternatively, whether the child should remain with the father in Whitehorse while the mother attends law school.

[7] The remaining issues will have to be decided later.

LAW

[8] This is what is known as a mobility or relocation case. The leading case in this area is *Gordon v Goertz,* [1996] 2. S.C.R. 27. In that case, the mother had been awarded custody of the young daughter, who was seven years old at the time the Supreme Court issued its reasons. The father was exercising generous access with the daughter. The mother then applied to vary the original custody order to allow her to move to Australia to study orthodontics. The variation was allowed by the trial judge, despite the father's objections. That decision was upheld by both the Saskatchewan Court of Appeal and the Supreme Court of Canada.

[9] Although *Gordon* involved an application to vary an existing custody order, it has been accepted as applicable to situations where a mobility issue arises in the first instance. Further, because *Gordon* was a variation case, there was an initial issue meeting the threshold of determining a material change in circumstances. There is no such threshold in the case at bar, as the order for joint custody and equally shared residential time, made on April 2, 2014, was on an interim interim basis only. Finally, the principles in *Gordon* are expressed in terms of the "custodial parent" and the "access parent". Because the parties in the case at bar have joint custody and equal residential time with the child, these terms are inapplicable. Accordingly, I will paraphrase the

applicable general principles summarized by McLachlin J., as she then was, at para. 49, as follows:

1) The only issue is what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the respective abilities of the parents to satisfy them.
2) Each case turns on its own unique circumstances.
3) The rights and interests of the parents, except as they impact the best interests of the child, are irrelevant.
4) The court should consider, among other things:
    a) the existing custodial arrangement;
    b) the relationship between the child and each parent;
    c) the desirability of maximizing contact between the child and both parents;
    d) the views of the child, if applicable;
    e) the moving parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the child's needs;
    f) the disruption to the child if there is a change in the child's residential time with each parent; and
    g) the disruption to the child consequent on removal from family, day care and the community she has come to know.

[10] Further, because the couple were never married, Part 2 the *Children's Law Act*, R.S.Y. 2002, c. 31, s.1, (the "*Act*") applies. Section 29 states that one of the purposes of Part 2 of the *Act* is to ensure that applications for custody and access are determined in accordance with "the best interests of the child". Section 30(1) of the *Act* then goes on to

state that, in determining the best interests of a child for the purposes of an application for custody or access, the court is required to consider:

> "… all the needs and circumstances of the child including
>
> (a) the bonding, love, affection and emotional ties between the child and
>
> (i) each person entitled to or claiming custody of or access to the child,
> (ii) other members of the child's family who reside with the child, and
> (iii) persons, including grandparents involved in the care and upbringing of the child…"

Subsections 30(2) and(3) continue:

> "(2) The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the conduct is relevant to the ability of the person to have the care or custody of a child.
>
> (3) There is no presumption of law or fact that the best interests of a child are, solely because of the age or the sex of the child, best served by placing the child in the care or custody of a female person rather than a male person or of a male person rather than a female person."

FACTS

[11] The mother is 40 years old and the father is 36. The parties commenced a common-law relationship in the summer of 2006. Although the mother maintains that the relationship ended in December 2012, she concedes that there was an attempt to reconcile, including an intermittent sexual relationship in the spring of 2013, which she says ended in May 2013. The father claims the separation date was June 18, 2013, although nothing turns on this dispute.

[12] The mother has two sons from a previous marriage which ended in 2006. The boys are 13 and eight years of age. The mother presently has a very good relationship

with the boys' father, H.K., and the two apparently share custody and residential time with the boys on a week on/ week off basis. The father has a 13-year-old son, A., from a previous relationship, who also resides with him on a week on/ week off basis.

[13] The mother has been employed for the last five years as Director of Education for her First Nation. She has a Bachelor of Education degree from 2003. She is involved in a number of prominent community committees. The mother's First Nation is supporting her attendance at law school. The mother says that after she obtains her law degree, she intends to return to the Yukon to practice.

[14] The father is two courses short of completing a Multi-media Communications Diploma from Yukon College. He hopes to complete that diploma through night classes in the fall of 2014. He is presently employed as a construction manager for a local company, earning $25 an hour. Before returning to college to pursue his diploma, the father operated a satellite dish installation business for two years and claims that he was "the number one installer in the Yukon" over that time. He has had previous employment with a delivery company, a local car dealership, a transportation company and a body shop.

[15] The father has been an active student at Yukon College, and has been involved in numerous student events. In April 2014, he was awarded a Student Community Award for his efforts at the Yukon College. The father also participated in a fundraising drive which helped raise $28,000 towards a second bridge across the Yukon River, to improve access to the Whitehorse General Hospital.

[16] The mother claims to have been the primary caregiver for the child during the course of the relationship between the parties. While the father does not expressly

dispute this, he does take significant issue with the mother's suggestion that he was an uninvolved parent. Once again, I am not sure that a great deal turns on the conflict in the evidence here, as there is no dispute that the father has been more significantly involved in the child's life since the parties have agreed to week on/week off residency. The father says he plays with the child in the sandbox, walks with her on the Millennium Trail, takes her regularly to the Rotary Park, and is teaching her how to ride a bicycle and how to bake. He also says that he takes her and his son fishing and camping. The father is also teaching the child how to speak French, which I understand is his native language.

[17] The mother says that it would not be in the child's best interests for her to remain in Whitehorse with the father while the mother attends law school. Her principal reason for taking this position is that the father has a track record of psychological and emotional instability. She claims that the father was a regular consumer of alcohol and marijuana during the relationship and was chronically changing his employment. The mother alleges that the father's substance abuse became worse after the tragic death of their other child in 2010. She claims the father has failed to pursue counselling to deal with his grief in that regard. The mother says that the father was hospitalized for depression in March 2013 and has threatened to commit suicide. She points to a number of text messages between the parties in July 2013 indicating that the father was in a fragile emotional state, fluctuating from extreme highs to extreme lows. The mother also notes the fact that the RCMP and Family and Children's Services have been contacted from time-to-time as a result of the conflict between the parties. Indeed, there was an Emergency Intervention Order ("EIO") in place for a period of time in the summer of 2013.

[18] The father concedes that he did not deal with his grief over the death of his son, and relied too much on alcohol and withdrew into himself. He also concedes that when he and the mother were separating, his behaviour led to the mother to obtaining the EIO. However, he claims that, by late autumn 2013, he and the mother were dealing with their problems in a more mature fashion and the EIO was terminated early. The father also says that he stopped drinking alcohol and smoking marijuana in June 2013, and stopped smoking tobacco in February 2014. Although he denies being addicted to either, the father says that he realized through counselling and the support of friends and family how alcohol and marijuana were negatively affecting his life. He claims to have attended the counselling sessions through Alcohol and Drug Services, Hospice Yukon, and the counselling services available at Yukon College.

[19] The father's counsel stressed that, since the parties have gone to the week on/week off residential arrangement, the mother has had few if any complaints about the father's behaviour. However, the mother's counsel emphasized an incident on March 23, 2014 when the mother went to the father's residence to pick up the child and got into a dispute with him. The mother said the father called her a "bitch" in front of the child. She said she was scared and upset and ended up calling the RCMP to see if they could help stop the father from texting her. The mother also said that, two days later, she was contacted by Family and Children's Services about the incident.

[20] In the father's responsive affidavit, he concedes that he called the mother a bitch, but deposed that he" immediately apologized for using the word", and that he tries not to swear or use bad language in front of his children. He also deposed that the child was not scared or upset during the incident. He says that the child was in the mother's arms

when they left, was smiling at him, waving and saying “Bye-bye Daddy”. The father also deposed that he recognizes he and the mother need to work on their communication skills, as there have been incidents where both of them have acted inappropriately and the police or Family and Children’s Services have been involved.

[21] The father’s counsel also stresses that the child has a close relationship with her half-brother, A., as well as her two half- brothers from the mother’s former marriage. The father has deposed that he attempts to arrange his week on/week off residential time with his son, A., at the same time as he has the care of the child, so that the two can maximize their time together. The father also deposed in his first affidavit that the mother’s two sons reside with her on a week on/week off basis at the same time that the mother has the care of the child. This was unchallenged by the mother in her responsive affidavit. Indeed, she deposed that the child “is close with all of her brothers”.

[22] In general terms, the father deposed that the child “has a wide, stable and loving family” in Whitehorse. Unfortunately, he did not provide a lot of detail in this regard. Besides referencing the child’s half-brothers, the father also says that the child has a “very close” relationship to A.’s grandmother, whom she views as family. He also says that the child has “lots of friends at her daycare”. The father says that he is presently single, although he is dating.

[23] The mother also apparently has other family in Whitehorse. For example, in his second affidavit, the father deposed that when the mother originally decided to enrol in law school, her initial plans were to have the child share her residential time equally between father and the mother’s cousin, D. S.. This allegation was unchallenged by the mother at the hearing.

[24] The mother deposed that she has five cousins in Vancouver. However, she provided no information as to whether the child is close with any of these people. The mother has also been in a relationship with her current fiancé, R.C., since July 2013, and he will be living with her in Vancouver. She says that the child and R.C. "have a close and loving relationship." The mother also says that R.C.'s mother, who lives in Victoria, has stated that she "would love to come to Vancouver from time to time to help out and visit."

[25] The mother deposed that she believes it is in the child's best interest to live with her in Vancouver while she attends law school. However, she provided little in the way of concrete evidence as to why that would be the case. The mother says that she is a healthy and emotionally stable person, has never had any alcohol or drug addiction issues, and has strong family values and ethics. Beyond that, the evidence of her actual plans following the relocation are rather sketchy. She says she has applied for housing at the University of British Columbia, but is on a waiting list. She says is also looking at other housing options. The mother deposed that she is looking for a Montessori school for the child that will teach in both English and French, but also claims to have applied for on-campus childcare. She said that she is going to apply for a scholarship to the Yukon Law Foundation, and also has the support of her First Nation to attend law school. The mother says that she will purchase passes with Air North, so that she and the child can return to the Yukon "frequently". She intends to encourage the use of Skype between the child and the father while she is in Vancouver. In addition, she says that the father could have the child with him for long weekends, such as Thanksgiving and Easter, as well as

during university breaks at Christmas, reading week and for a longer period during the summer.

ANALYSIS

[26] There were several areas where the parties were in disagreement in their respective affidavits. On an interim application such as this, it is difficult, if not impossible, to resolve those disagreements without cross-examination or other independent evidence. There is little or no independent evidence in this case, with the exception of the text messages exchanged between the parties and a letter from the mother's ex-husband, H.K. While I acknowledge that the text messages are concerning, I also note that they are all from the month of July 2013. At or about that time, the conflict between the parties was apparently at its peak. That was also about the time of the EIO and the father has properly and candidly conceded that his bad behaviour led the mother to obtain that order. Since then, it would seem that matters have significantly improved. As for H.K.'s letter, he is supportive of the mother's plans, but expressed a somewhat disparaging opinion regarding the parenting ability of the father, stating:

> "In my opinion, [the father] lacks the responsibility to maintain permanent employment and I am not certain he is capable of maintaining a healthy, stable and safe environment for his daughter."

This echoes the central argument of the mother as to why the child should be with her in Vancouver and not with the father full-time in Whitehorse.

[27] It bears repeating here that the mother has agreed to the father caring for the child half-time from at least Christmas 2013 until the mother's departure for Vancouver in late August this year. For most of that time to date, the father appears to have been parenting appropriately. Admittedly, there was a temporary set-back with the swearing

incident on March 23, 2014, but in comparison with the overall history of conflict and difficulty between the parties, the matter appears to have been short-lived and of a relatively minor nature.

[28] I will not go into further detail on the other conflicts in the evidence, as I have been unable to resolve those matters and accordingly can give them no weight in coming to my decision.

[29] It is significant that both the mother's counsel and the father's counsel agree that the child has 'strong bonds' with each of her parents and her three half-brothers. While the mother continues to have concerns about the father's emotional and psychological stability, those concerns are based on what is now historical conduct. In any event, her concerns have not risen to a level where they have caused the mother to renege on her agreement to equally share the care of the child with the father.

[30] As for the child's bond with the mother, she is now three years old and will be 3 ½ before the end of the mother's first semester of law school. In my view, the child is now of an age where longer periods of separation from the mother are less likely to adversely affect the child's attachment with her mother: see also *D.B.J v .L.A.J.,* 2005 YKSC 65, at para. 33.

[31] It is also significant to me that the child's siblings, with whom she is close and spends regular time, reside in Whitehorse. She is also close to A.'s grandmother and apparently has many friends at her daycare. Thus, I would expect the child to experience significant disruption if she is allowed to move with the mother from Whitehorse to Vancouver.

[32] The mother's reason for moving is laudable. She seeks to improve the status of her employment by becoming a lawyer. Over the long term, that may ultimately work in favour of the child's best interests. However, in the immediate term, the mother's reason for moving is unlikely to have any benefit for the child. Indeed, it appears that the mother's financial resources while she is attending law school will be significantly less than what she was earning as a Director of Education for her First Nation. I also have concerns about the extent to which the mother's need to study in the evenings may have an adverse impact on the quality of her parenting time the child.

[33] On the topic of finances, much is up in the air. The father's notice of application requests that the mother produce financial disclosure and pay child support. Since the former has not yet been done, it is premature to consider the latter. There are also family assets which have to be accounted for. Finally, as of March 28, 2014, the mother deposed that she was filing for bankruptcy.

[34] On the topic of maximizing the contact between the child and each parent, I repeat that the mother has indicated she would purchase Air North passes so that she and the child could return to the Yukon frequently. She also suggests that this would be done twice or three times each semester, including the travel to Whitehorse for the Christmas and summer university breaks. However, if the mother was to travel with the child on each such occasion, a total of four one-way passes would be required. On the other hand, if the mother travels to Whitehorse on her own, or together with her fiancé, to visit the child here, then she will save at least two air passes per round trip. Thus, the simple economics favour the child remaining in Whitehorse, as that will theoretically allow the mother more frequent trips here to spend time with the child.

CONCLUSION

[35] Mobility cases are among the most difficult decisions for judges in family law. This case is no exception. The mother will be attending law school in Vancouver regardless of whether the child accompanies her. If I allow the child to do so, then her relationship with her father may be significantly and adversely impacted. If I require the child to remain in Whitehorse, the same may happen with the child's relationship with her mother. There will be disruption to the child either way.

[36] The unpleasant history of the relationship aside, each parent presently has a strong bond with the child and each seems to respect the ability of the other parent appropriately. The status quo is that the child has resided equally between the parents on a week on/week off basis for approximately 6 months. By the time the mother moves, that will have increased to almost 8 months. That is a significant amount of time for a child who just turned three. In my view, it would be unduly disruptive to the child's relationship with her father to allow her to move to Vancouver with her mother.

[37] I am also reinforced in that view by the fact that the child's immediate family, with whom she is very close, will continue to be available to her in Whitehorse. This will include not only the father, but also her three half-brothers and A.'s grandmother.

[38] The father's counsel has indicated that his client is prepared to facilitate access by the mother while she is in Vancouver attending law school. This can be done by Skype, Face Time devices and telephone. Photographs, videos and other information can also be exchanged by email, cards and letters.

[39] Further, based on the mother's own evidence, I expect that she will be able to travel to Whitehorse two or three times each semester to spend time with the child.

When the mother returns to Whitehorse during the summer university break, there will be a further opportunity for extended contact with the child.

[40] I will leave the drafting of the terms of the order arising from these reasons in the hands of counsel, in the hope that they can address any details which I have failed to mention, and upon which they will hopefully be able to agree. However, it is my intention that the week on/week off shared residency of the child will continue until the mother departs from Whitehorse for Vancouver to commence her first semester of law school. I will not make any further specific orders regarding the mother's access to the child during the school year, as I would expect the parties to be able to agree in that regard. Obviously, if that is not the case, then I will retain jurisdiction to hear any such further application.

[41] Similarly, as all of the submissions at the hearing were focused on whether the child should be permitted to move, I heard nothing about potential residential arrangements during the summer university break. I expect the default would be that the parties would resume their week on/week off residential arrangement. However, I would hope that the father might agree to the mother having longer periods of time with the child to offset decrease in contact during the school year. In any event, I will leave it to the parties to try and work out agreement in this regard. Once again, if they are unable to do so, then I will remain seized for the purposes of resolving any outstanding issues.

[42] I expect that the issue of potential child support will need to be resolved sooner rather than later. I note that the father has already provided his income tax return information for 2007 through to 2012. He deposed that he is awaiting the return of his 2013 tax filing. I direct that he provide a copy of that return, to the mother, together with

a sworn financial statement, no later than July 31, 2014. According to the information on the court file, the mother has not yet provided any financial disclosure to the father. I direct that she produce such disclosure, including a sworn financial statement and income tax returns (or notices of assessment) for the last three years to the father no later than July 31, 2014.

[43] Lastly, given the difficult nature of the mobility issue in this case, it is my view that it is appropriate for each party to bear their own costs.

_____

Gower J.