SUPREME COURT OF YUKON

Citation: *M.S.A. v. K.M.L.*, 2017 YKSC 39

Date: 20170629
S.C. No. 09-B0074
Registry: Whitehorse

Between:

M.S.A.

Plaintiff

And

K.M.L.

Defendant

Before Mr. Justice T.A. Heeney

Appearances:

M.S.A. — Appearing on his own behalf
Kelly Labine — Counsel for the Defendant

REASONS FOR JUDGMENT

[1] The matter before me involves a request by the defendant ("the mother") for an interim order returning the child, L.S.-L.A. ("L."), born October 11, 2007, to Whitehorse, to her mother's care. The child was effectively abducted by the plaintiff ("the father") in November 2016, and relocated to British Columbia, 2,400 km by road from Whitehorse, where the child was born, raised, lived and had gone to school until the father's unilateral action.

[2] A final order had been made on consent by Veale J. on January 27, 2011, which placed the child in the joint custody of both parents, under a shared parenting arrangement whereby the child spent alternate weeks with each parent. That status

quo remained in effect for almost six years, until the events that bring this matter to court.

[3] In September 2016 the father moved to British Columbia. His reasons for moving largely relate to his personal preferences, and certainly do not include career advancement. He had been working for a tire company in Whitehorse, and resumed working for a different branch of the same company at his new location in British Columbia. When he left, he agreed that the child would remain in the mother's primary care in Whitehorse.

[4] In November 2016 he arranged for the child to visit with him for a week, and promised to return her to the mother at the conclusion of the trip. However, he refused to do so, and unilaterally assumed sole custody. The child has not been back to Whitehorse since, and had no chance to say goodbye to her mother or anyone else.

[5] After the fact, he commenced an application in this court in Whitehorse for custody. He did not do in the proper form, and did not seek a variation of the existing order on the basis of a material change in circumstances, and concedes in argument that he is unable to demonstrate a material change in circumstances.

[6] He obtained an interim, interim Order from Gower J. on November 22, 2016 that permitted him to register the child in school in British Columbia, and gave him interim, interim primary residence of the child. That Order was, however, made at a time when the mother was unrepresented and had not filed any responding material. The mother has now retained counsel and commenced an application seeking a restoration of the status quo. The Order of Gower J. was confirmed by Order of Moen J. dated April 28, 2017, until the settlement conference or court date decision concerning custody and

access. A settlement conference was held but was unsuccessful in resolving the matter.

[7] The matter is now before me for a decision. Both parties agree that an order should go requesting that the Public Guardian Trustee appoint counsel for the child, and I agree that such an order is appropriate. Pending the involvement of child's counsel, and pending a trial, I am prepared to make an interim order regarding where the child should reside, which will replace the interim, interim order previously made.

[8] The leading case on mobility is *Gordon v. Goertz*, [1996] 2 S.C.R. 27. At paras. 49 and 50, McLachlin J. (as she then was) summarized the law that applies when a parent wishes to change the residence of a child:

> The law can be summarized as follows:
>
> 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
>
> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
>
> 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
>
> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
>
> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
>
> 6. The focus is on the best interests of the child, not the

> interests and rights of the parents.
>
> 7. More particularly the judge should consider, *inter alia*:
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;
>
> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[9] In this case, the threshold requirement for a material change in circumstances has not been made out. The affidavits filed by the father do raise a number of complaints against the mother. He states that her home had been vandalized on multiple occasions, which included having bear mace sprayed into it. However, the mother can hardly be blamed for the criminal acts of third parties. She is on public assistance, and resides in subsidized housing. She was living in the house assigned to her when these incidents occurred. In any event, she moved out of that residence into

a better neighbourhood on November 1, *before* the father unilaterally assumed sole custody.

[10] He also complains that the child was repeatedly absent from school. However, the most recent report card filed, for the year ended June 2016, shows only 15 days absent for the entire year. While not commendable, it is not atrocious either, and there is no way of knowing whether some of those absent days occurred during the weeks that the child was residing with the father. In addition, her absenteeism has been relatively consistent throughout all of the years for which report cards have been filed, so this does not amount to a material change in circumstances.

[11] He also raises the mother's psychiatric issues. She has a generalized anxiety disorder, obsessive compulsive disorder and borderline personality disorder. However, she has had those disorders for virtually her entire life, to the knowledge of the father, and controls them with medication. Once again, this does not amount to a material change in circumstances.

[12] Finally, he relies on the fact that the mother was arrested and charged in early November relating to a domestic dispute with her then-partner. That appears to be the precipitating event that prompted the father to refuse to return the child to Whitehorse. However, those charges were withdrawn, and the mother has no criminal record. Her relationship with that partner has ended. Once again, this does not amount to a material change in circumstances.

[13] Since the threshold requirement for a material change in circumstances has not been met, there is no need for the court to engage in a fresh inquiry into the best interests of the child.

[14] It is important to recognize that the father is seeking what amounts to an interim variation of a final shared parenting order, whereby the father seeks an order permitting the move to British Columbia in advance of a trial on the merits. In *Plumley v. Plumley*, [1999] O.J. No. 3234 (Ont. S.C.J. Fam. Ct.), a decision which has been repeatedly followed by other courts, Marshman J. provided the following guidance as to how the matter should be approached, at para. 7:

> It appears to me that the following factors are or ought to be important in deciding the mobility issue on an interim basis:
>
> 1. A court will be more reluctant to upset the status quo on an interim basis and permit the move when there is a genuine issue for trial.
>
> 2. There can be compelling circumstances which might dictate that a justice ought to allow the move. For example, the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial or the best interests of the children might dictate that they commence school at a new location.
>
> 3. Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong probability that the custodial parent's position will prevail at a trial.

[15] In the case before me, a consideration of all of those factors militates against permitting a move in advance of a trial. There is a genuine issue for trial as to whether such a move is in the child's best interests; no compelling circumstances have been demonstrated to justify the move; and, there is no strong probability that the father will prevail at trial. Indeed, the opposite is probably true.

[16] In arriving at this conclusion, I consider the following factors:

- The father took the child in clear breach of a shared parenting order, and only thereafter sought the permission of the court. The court should be reluctant

to encourage such self-help. Where such a significant change is contemplated, a variation order should be sought from the court before any unilateral action is taken;

- Whitehorse is the only home the child has ever known. She was born and raised here, and attended school here. She has many friends at school and other ties to the community that have been completely severed by the move. Furthermore, the father took her to British Columbia in the middle of November, thereby disrupting her school year;
- The status quo was in place for almost six full years. Given the child's need for continuity and stability, compelling reasons are needed to justify changing such a well-established custodial regime;
- The move virtually terminates the child's opportunity to have regular contact with her mother, with whom she had resided on alternate weeks for almost six years;
- The father has taken no steps since assuming sole custody to ensure regular contact between the child and her mother, which causes me to doubt whether he will ensure maximum contact if the child were to remain in British Columbia. Given that it was he who put 2,400 km between them, it was incumbent on him to take reasonable steps to ensure ongoing access and the continuation of a mother/child relationship. In fact, the opposite has occurred. He has never brought the child back to Whitehorse to visit with her mother. On the one occasion since last November when the mother was able to raise sufficient money to fly to British Columbia to visit, she was allowed to spend

only a total of 8 hours with the child, under supervision. As an aside, the father's insistence on supervision is entirely unwarranted, given that the child had been residing with the mother on alternate weeks, unsupervised, prior to the abduction;

- The mother's competent parenting skills are attested to by M.H. an ex-partner with whom she has a child, R.H., who is currently four years of age. They have had a shared parenting arrangement for three years, and he has no concerns for R.'s care while he is residing with the mother. He attests that she is a loving and caring mother who does the best she can to care for her children. Furthermore, R. has developed a strong bond with his half-sister L., and once can presume that she has bonded with him as well. This sibling relationship has been destroyed by the move to British Columbia;
- The father says that he has numerous relatives within a 20 km radius from where he is living, whom the child now has the opportunity to meet and get acquainted with. Be that as it may, it is clear that those members of his extended family did not form part of the child's life when she was living in Whitehorse. It is significant that his mother (the child's paternal grandmother) J.C. and her spouse reside in Whitehorse. Relocating the child to British Columbia has cut off L.'s regular contact with her grandmother, who is clearly an important person in her life. This loss to the child far outweighs any benefit she might gain from meeting new members of her extended family in British Columbia. I take the mother at her word when she indicates that she

fully supports ongoing contact between the child and her paternal grandmother once she returns to Whitehorse.

[17] Various cases have been filed by both parties, but it unnecessary to refer to them. The legal principles are clear, and each case turns on its own facts. On these facts, I am satisfied that no material change in circumstances has been demonstrated which would justify the disruption of a six-year status quo and the relocation of the child 2,400 km from her home. I am satisfied that the best interests of the child require that she be returned to Whitehorse. Given that the child is about to finish her school year, I am prepared to accede to the father's request that he not be required to return her sooner than July 20. That will give him the opportunity to spend part of the school summer break with her, which is necessary since his ability to exercise regular access thereafter is uncertain, given his unwillingness to move back to Whitehorse himself. The mother is content with that date.

CONCLUSION

[18] An order will, therefore, go as follows:

1. The plaintiff will, at his expense, return the child to Whitehorse, to the defendant's care, by no later than July 20, 2017;
2. The parties will have joint custody of the child;
3. If the plaintiff relocates to Whitehorse, the child shall reside with each parent on alternate weeks, and the terms of the order of Veale J. dated January 27, 2011 shall continue to apply;

4. If the plaintiff does not relocate to Whitehorse, the child shall reside in the primary care of the defendant. The plaintiff shall have reasonable and generous access to the child, as arranged between the parties;
5. The Public Guardian and Trustee is requested to appoint counsel for the child.
6. The requirement for the plaintiff to sign the Order is dispensed with.

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HEENEY J.