SUPREME COURT OF YUKON

Citation: *L.F.G. v. M.O.,* 2019 YKSC 7

Date: 20181108
S.C. No.: 09-B0043
Registry: Whitehorse

BETWEEN:

L.F.G.

PLAINTIFF

AND

M.O.

DEFENDANT

Before Mr. Justice R.S. Veale

Appearances:
Gregory Johannson — Counsel for the Plaintiff
Norah Mooney — Counsel for the Defendant

REASONS FOR JUDGMENT

[1] VEALE J. (Oral): I have read the material and I thank counsel for their submissions.

[2] I have a slightly different view on how this matter has proceeded. I do not say this is necessarily the final word on the matter, because the Court is a believer in parents having access to their children, but there are certain circumstances in this case that I am going to refer to that concern me.

[3] X.O. was born on October 14, 2005. He is now 13 years old. The court order filed indicates that on August 5, 2009, which was after the separation of L.F.G. and M.O., an interim joint custody of X.O. to both L.F.G. and M.O. but it also directs that

X.O.'s primary residence would be with M.O. and that L.F.G. would have reasonable and generous access.

[4] An order dated September 10, 2013 suspended L.F.G.'s access until the next hearing of October 29, 2013.

[5] At that hearing, October 29, 2013, it was ordered on an interim-interim basis that L.F.G. should have no access or contact with X.O.

[6] That, as I understand it, is essentially the order you are trying to vary.

[7] L.F.G. filed an affidavit on May 15, 2018, in support of this application, but he made no reference to the "spanking incident". However, he said at para. 6:

> 6. It was determined by the professionals involved with [X.O.] that my involvement in [X.O.]'s life was too stressful for him, so an order was made on April 1, 2014 that in the interim I have no access or contact with [X.O.].

[8] He also says he has abided by this order. I take some issue with that but I will get to that.

[9] Paragraph 6 is all that is before the Court until November 6, in terms of his application.

[10] On November 6, 2018, M.O. filed an affidavit. A draft of that affidavit was provided to counsel — which I think is excellent, to allow people to be ready for the proceeding — and she says at para. 2:

> 2. I am opposed to the Plaintiff's application for access with [X.O.]. As outlined in previous affidavits, the Plaintiff was charged with assaulting [X.O.] in October 2011. Family and Children's Services ("F&CS") were involved and took the position that the Plaintiff's access with [X.O.] should be supervised. A letter written January 20, 2014 was attached to Affidavit #4 of Tina Lermo filed January 21, 2014. I worked

> closely with F&CS and their file was closed when we moved to Alberta.

[11] In response to that, L.F.G. filed an affidavit. It sort of takes issue with M.O. bringing up an incident that occurred in 2011.

[12] The point that I want to make — and I want to make it very clear to counsel — is when you have an application of this nature — and I am not suggesting you had anything to do with this application when it was brought — but when you have a history on the file like that you have to address it.

[13] If I had read this application and M.O. did not get served or she did not respond or something, I would say, "Well, what the heck. This is all past. It is all history." But the fact is that that is a big incident. It is set out in L.F.G.'s affidavit. He does, indeed, go into the fact of there being an incident that occurred at his son's birthday party, talks about that, and talks about Family and Children's Services. But, once again, it is an incomplete affidavit. When you are coming to the Court and you have got an order that you cannot have access to children, you have to come to court and you have to lay it all out. That was not done.

[14] In para. 9, he says:

> 9. Family and Children's Services contacted me the next day about this incident. I told them what happened. To the best of my understanding, Family and Children's Services eventually closed their file. Since that time there, to the best of my understanding, Family and Children's Services has not investigated me for any other matter. (as read)

[15] Excuse me?

[16] He was charged with an assault. We have to deal with that. That is not the kind of disclosure that is acceptable in this court.

[17] I am going to go through the letters that have come in from Family and Children's Services because that is what this case is about and that is what has to be responded to.

[18] On August 23, 2013 — and I am going to read these letters in full because these are the letters that have to be responded to. Tracy-Anne McPhee, who is now the Minister of Justice but then she was the legal counsel, wrote this:

> I am writing to outline the concerns of the Director of Family and Children Services with respect to contact between [L.F.G.] and [X.O.]. I am sending this letter directly to L.F.G. As I understand, he is self-represented in the matter.

[19] He has had a copy of this.

> The Director's position, expressed in earlier meetings and correspondence to [M.O.] and [L.F.G.] that [X.O.] may be at risk in the presence of [L.F.G.], is based on the investigation completed jointly by the RCMP and Family and Children's Services which resulted in [L.F.G.] being charged with assault against [X.O.], pursuant to the *Criminal Code*. The Director is aware that those charges were resolved by way of a no contact order. [L.F.G.] was required to complete 10 hours of counselling after which the criminal charge was stayed on June 4, 2012. However, the child protection concerns have been substantiated, pursuant to the standards of Family and Children's Services. The risk assessment completed on this file, during the period of time that FCS has worked with this family, indicates that the risk of harm to [X.O.] remains for the following reasons:
>
> 1. [X.O.] is highly vulnerable; he has extreme behaviour challenges and complex mental health problems.
>
> 2. [X.O.] has been diagnosed with Asperger's Disorder which is comorbid with both Conduct Disorder-Childhood Onset Type and Attention-Deficit/hyperactive Disorder, Combined Type.
>
> 3. In May 2013, after consultation with a child psychiatrist, [X.O.]'s case was considered serious and unique enough that he was referred to a psychiatric unit of a children's hospital outside of the Yukon . It

was recommended by Dr. Hawkins-Clark, at that time that it would probably be in [X.O.]'s best interest to remain in the south for an extended period of time, if possible, to receive treatment that is not available here for this unique and worrisome case.

4. [L.F.G.] has not demonstrated that he understands the seriousness of the medical, psychological, and behaviour challenges faced by [X.O.]

[20] It continues to this day.

5. During his last access visits in early 2013, [L.F.G.] was not able to recognize [X.O.]'s important behavioural cues, nor was he able to understand [X.O.]'s needs or respond to those needs in an appropriate way.

6. Based on previous assessments, [L.F.G.] faces his own psychological functioning issues that should be re-evaluated and assessed at this time.

It is the Directors [as written] position that [M.O.], as the custodial parent and primary caregiver, has demonstrated her ability to make positive choices for [X.O.] and to act in his best interest. The Director recommends that the concerns set out above could be mitigated by:

1. [X.O.] receiving all of the medical, and psychological and behavioural treatment as recommended by Dr. Hawkins-Clark and others.

2. A psychological assessment be completed with a focus on parenting and access. It is recommended that such an assessment be completed by a qualified psychologist capable of taking into account [X.O.]'s psychological and behavioural issues. Any such assessment should examine the functioning of the parents and how this functioning may or may not present risks factors to [X.O.], and proposing recommendations as to how the risk could be addressed.

3. Supervised access to [X.O.] by [L.F.G.] in order to ensure that the access visits are successful and not harmful to [X.O.].

> 4. A term in any order or agreement for the care and access visits with [X.O.] that requires that the Director of Family and Children's Services be advised in the event that custody/primary care of [X.O.] is changed from being with his mother and/or [L.F.G.] be granted unsupervised access to [X.O.]
>
> In the event that no steps are taken to mitigate the child protection concerns and [L.F.G.] is granted unsupervised access with [X.O.], the Director of Family and Children Services will be required to intervene. The purpose of such intervention will be to assess whether or not [X.O.] is in need of protective intervention, assess the risk of harm to him at that time, and to determine the ability of [M.O.] to protect [X.O.] when he is in her care.

[21] Strong language.

[22] On January 20, 2014, Tara Grandy, legal counsel, writes a letter to Mr. Christie and Ms. MacDiarmid, who were counsel on the previous file.

> I write further to our letter of August 23, 2013 at which time the Director of Family and Children Services expressed concern about [L.F.G.] having unsupervised access with [X..O.].
>
> I can inform you that the Director's position regarding access between [L.F.G.] and [X.O.] remains unchanged. The Director would intervene if [L.F.G.] were to have unsupervised access with [X.O.] given the severity of the child protection concerns as outlined in the August letter.
>
> Since April 2013, [L.F.G.] has had no involvement with the Director. To the best of the Director's knowledge, [L.F.G.] has not undergone any psychological and behavioural treatment or counselling or psychological assessment, nor has he had any contact with [X.O.] since January 2013. As such, the Director is of the belief that the child protection concerns involving [L.F.G.] have not been mitigated.
>
> It should be noted that even when [L.F.G.] was working with the Director from October 2011, the time of the assault, to April 2013, he did not take responsibility for physically abusing [X.O.], nor did he demonstrate that he understood the seriousness of the medical, psychological and behavioural challenges faced by [X.O.].

[23] [DISCUSSION OFF RECORD]

> On the contrary, [M.O.] has worked closely with the Director towards mitigating the child protection concerns as identified in earlier correspondence to [M.O.]. The Director is of the belief that [M.O.] has demonstrated the ability to make positive choices for [X.O.] and act in his best interest. The Director has been impressed with [M.O.]'s ability to rise to the challenge of parenting [X.O.], especially in light of [X.O.]'s complex needs. The Director believes that [M.O.] has made use of all the best medical, psychological and psychiatric services available for [X.O.] and found a school that suits [X.O.]'s needs.
>
> Based on the foregoing, the Director supports [M.O.] having full care and custody of [X.O.]. The Director is closing their child protection file involving [X.O.] as they trust that [M.O.] will keep [X.O.] safe from harm.

[24] You have to address these issues, counsel, and you have to address them

L.F.G.

[25] The other thing that concerns me is para. 6 in M.O.'s affidavit of November 6,

2018. I am going to read it into the record as well.

> 6. On April, 2014 the Court ordered that the Plaintiff was to have no interim access or contact with [X.O.]. In the spring of 2013 I changed my contact number as the Plaintiff was trying to contact us. I also blocked him on Facebook at the same time. I do not wish the Plaintiff to know where I am living. Each summer since 2014 [X.O.] has spent some time with his maternal grandmother....

[26] — who I believe is in the court today —

> ...They have attended the "Mud Bog" event each summer in Whitehorse. Every time the Plaintiff has made his presence known to [X.O.] and my mother. The Plaintiff has gone out of his way to be near, stand in front of or walk back and forth in front of [X.O.] and my mother. This past July, the Plaintiff videotaped [X.O.] and my mother during the event. It was very upsetting to [X.O.]. My mother made a complaint to the RCMP. The Plaintiff also had one of his young

> children sit beside [X.O.] and try and engage [X.O.] in conversation which he refused to do. The Plaintiff put the video on Facebook and posted about it. Attached as Exhibit "A" is a copy of the post.

[27] I have to tell you, sir, that that would be contempt of court if someone brought that in front of me and presented that and asked for a contempt of court order. Do you understand?

[28] L.F.G.: I don't at the time but I understand what you're saying.

[29] THE COURT: That is contempt of court. This Court has ordered no contact, no access, no communication. What do you not understand about that?

[30] L.F.G.: May I explain?

[31] THE COURT: I do not want an explanation, sir. You have had your affidavits, you have had your opportunity, and you gave no explanation for any of the past history. It was not until M.O. raised it in her affidavit that there was a criminal assault charge against you that you came down and you gave the incident that led to it. You would have had this Court misled on this issue.

[32] L.F.G.: Not intentionally, Your Honour.

[33] THE COURT: I appreciate that may be the case, sir. I do not want to come down on you too hard in that sense because I think children should have access to their father. But when there is a court order, you do not mess with it.

[34] L.F.G.: Yes, sir. Yes, sir, I understand what you're saying.

[35] THE COURT: And that child comes back to this town with his grandmother, you stay away because if you have contact of this nature in para. 6, you are going to be before this Court with a contempt application.

[36] L.F.G.: All right, Your Honour. I have five other children here in Whitehorse and I take them to the "Mud Bog" every year. This past year, my nine-year-old son seen my other son X.O. and said, "Dad, my brother is here. I'd like to go see my brother, please."

[37] THE COURT: Yeah, that is one thing, but it is another thing for you to start videotaping it; okay?

[38] L.F.G.: There was quite some obscenities and swearing and bad language in front of my children that I wanted to document.

[39] THE COURT: Look, it is great to give this affidavit information out now in a verbal way, but you have not disclosed to the Court what this is all about. You have not addressed any of the issues that are presented — none of them — and they require serious consideration, your state, your son's state, and whether or not it is even appropriate.

[40] No apology. No apology. That was serious information that was given in those two letters that I read out. No apology whatsoever. No acknowledgment except to say: Well, you know, it was a spanking incident. Maybe it was more than that, sir, because they go a long ways when somebody is doing more than that. Laying a criminal assault charge for a parent against a child is an unusual event.

[41] If you want to bring an application in front of this judge, you have to disclose all that in your affidavit and you have to make it clear what you have done to change things — and that requires a psychological assessment of you and a psychological assessment of X.O. It's no easy thing. This is a very unusual case, but it is not dealt with by an application where you suggest nothing ever happened.

[42] L.F.G.: Your Honour, as you're addressing me, may I have an opportunity to speak, please?

[43] THE COURT: No, sir. I am dismissing your application. You can speak to the Court again in an affidavit, if you wish, but I am dismissing your application, sir, and I am ordering $500 in costs to be paid to M.O.

[44] There will be no further application until you have addressed that costs order. Do you understand?

[45] L.F.G.: Your Honour, I'm on social assistance.

[46] THE COURT: Do not tell me your problems now, sir. You had an opportunity to make full disclosure to this Court about what happened in this incident and you pretended nothing happened. It is not acceptable, sir.

_____
VEALE J.