W. v. D., 2002 YKSC 54

Date: 20020805
Docket No.: S.C. 99-B0038
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

C. J. L. W.

Plaintiff

AND:

A. M. D.

Defendant

Kathy Kinchen — For the Plaintiff

John Laluk — For the Defendant

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

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[1] VEALE J. (Oral): Mr. W. has made an application to vary the court order of August 14, 2000, granting Mr. W. and Ms. D. joint custody of their daughter, D., born October 10, 1991. Pursuant to that order, D. has been residing with each parent for one week on an alternating basis, until Mr. W. decided to complete his education, which was an anticipated event, as set out in paragraph 1(v) of my order of August 14, 2000. That paragraph reads as follows:

> The choice of school and religion have been established and the next major decision with respect to D.'s best interests may occur when either parent wishes to leave the Yukon. Both [the plaintiff and the defendant] are open to considering moving to a mutually acceptable community to continue their shared parenting. I trust that they will avail themselves of mediation facilities, as they have in the past, with respect to disputes that may occur. In the event that mediation is not successful, an application can be made to court. Neither [the plaintiff nor the defendant] shall permanently remove D. from the Yukon Territory without the written consent of the other or an order of this Court.

[2] Mr. W. moved to Ottawa for eight months, from September 2001 to April 2002, and completed a Bachelor of Education degree. He and his spouse returned to the Yukon in May 2002, and the alternate week sharing continued until Mr. W. permanently moved to the Ottawa area to prepare for his admission to the University of Ottawa medical school in the fall of 2002.

[3] D. is presently residing with Mr. W. and returning to Whitehorse on August 24, 2002, for school.

[4] Mr. W.'s application reads as follows:

1. D., born October 10, 1991..., reside with the Plaintiff in Ottawa/Gatineau for the months of January through to and including June, 2003 and for the full school years of 2004/ 2005, and 2006/2007;

2. The Child spend the first half of Christmas holidays, 2002 with the Defendant and the second half with the Plaintiff;

3. The Child spend Christmas holidays 2003, and 2005 with the Plaintiff and Christmas holidays 2004, and 2006, with the Defendant;

4. The Child spend two weeks at spring break 2003, 2005 and 2007 with the

Defendant and spring break 2004 and 2006 with the Plaintiff;

5. The Defendant pay child support to the Plaintiff in accordance with the *Child Support Guidelines*;

6. The Child have telephone contact with her extended families;

7. The Defendant shall organize and pay for the child's access visits with her and the Plaintiff shall organize and pay for the Child's access visits with him.

...

[5] I am not going to set out the detailed background of this matter, but I will repeat the agreed statement of facts, filed at trial in July 2000:

1. Mr. W. and Ms. D. met in September 1990 in Halifax, Nova Scotia where Mr. W. was a second year undergraduate student at Dalhousie University and Ms. D. was the lecturer of one of his classes.

2. Mr. W. and Ms. D. began an intimate relationship and Mr. W. moved in with Ms. D. Ms. D. became pregnant.

3. Mr. W. was born on April 21, 1970 in Saint John, New Brunswick and is 30 years old.

4. Ms. D. was born in Montreal on November 7, 1952 and is 47 years old.

5. Mr. W. is presently a health promotion co-ordinator for the Yukon Territorial Government and earns $60,608 per annum, including the Yukon Bonus.

6. Mr. W. has a Bachelor of Arts degree and is in the qualifying year for a Master of Science degree in Community Health and Epidemiology.

7. Ms. D. is a policy analyst for the Public Service Commission, Yukon Territorial Government and earns $67,000 per annum, including Yukon Bonus. For the past year, ending in June 2000, Ms. D. only worked part time while working to complete her Ph.D. dissertation.

8. Ms. D. has a Bachelor of Arts degree from Carlton University, a Master's

degree in English Literature from Carlton University and a Master's degree in English Literature from Princeton University. She is presently working on her doctorate in English Literature from Princeton University.

9. Mr. W. and Ms. D. moved to Whitehorse in May 1991 and Ms. D. accepted a position with the Yukon Territorial Government in September 1992.

10. D. was born on October 10, 1991.

11. D. was diagnosed, before her birth, with a heart condition known as Wolff-Parkinson-White syndrome, and was induced at 37 weeks. D. was treated for this condition and has not had any problems with the condition since she was a baby.

12. Mr. W. and Ms. D. continued to share a home after D.'s birth until July 1992 when D. was about nine months old.

13. Since Ms. D. and Mr. W. stopped living together, they have both continued to care for D. under various schedules.

14. Mr. W. filed a Petition on April 8, 1993, seeking custody of D.

15. Following Mr. W. commencing a court action, in 1993 and 1994, Mr. W. and Ms. D. attended mediation with John Wright and reached agreement on a day to day schedule for sharing D.'s care.

16. The details of D.'s schedule have changed from time to time but the basic schedule, for the last few years, has been as follows:

    a) Monday, Wednesday, Friday and Saturday until 6 p.m., D. resides at Mr. W.'s home.

    b) Tuesday, Thursday, Saturday from 6 p.m., and Sunday, D. resides at Ms. D.'s home.

    c) On statutory holidays, including Christmas Day, D. changes homes at 2:15 p.m.

17. On August 18, 1999 Mr. W. filed a Writ of Summons and Statement of Claim, seeking custody of D. On April 28, 2000, Ms. D. filed a Statement of Defence and Counter Claim seeking custody of D.

18. On August 23, 1999 Mr. W. filed a Notice of Motion seeking to have a Custody and Access Report prepared and Ms. D. consented to an Order that a Custody and Access Report be prepare

19. D. has attended Christ the King Elementary School since kindergarten. She just completed grade three.

20. Mr. W. lives in a house he owns in Whitehorse with his common law partner. They have lived together since 1996 and have no children.

21. Ms. D. lives in a house she owns in Whitehorse.

22. Over the past 8 years, both Ms. D. and Mr. W. have taken D. on holidays with them, including extended vacations up to one month in length.

23. The arrangement between Mr. W. and Ms. D. regarding D.'s clothing is that D. has a wardrobe in each home and clothing is sent back to the home where it belongs each weekend.

24. No child support has been paid to or by Ms. D. or Mr. W. for D., and some costs have been shared.

[6] I have no difficulty finding that a threshold material change of circumstances is met by Mr. W. moving permanently to Ottawa to pursue his medical studies. The question now shifts to a determination of what is in the best interest of D. according to the factors set out in paragraph 49 of *Gordon v. Goertz,* [1996] 2 S.C.R*. 27.*

[7] Other changes have occurred to both Mr. W. and Ms. D. since July 2000. Mr. W. intends to marry his common law spouse, with whom he has resided since 1996. D. will be involved in the wedding. They now have another child, who was born in Ottawa on March 27, 2002, while D. was visiting.

[8] Ms. D. also has a relationship. The interaction of both spouses with D. is positive and is not an issue. D. is now a well-adjusted ten-year-old who will be entering Grade 6 at Christ the King Elementary school, in Whitehorse, in September. She has attended the same school since kindergarten and clearly benefits from it. She is remarkably insulated from the disputes of her biological parents, and is most fortunate in attending a small school, where her school counselor appears to be the

same person that ran the Rainbows Program at the time of trial in July 2000. Rainbows is a program run in conjunction with her school, designed to support children whose parents have separated or divorced.

[9] D. is also very interested in dancing and has a close relationship with her dance instructor. I must say that I was impressed with Mr. W.'s affidavit evidence in that he did not spend time criticizing Ms. D. and her relationship with D. Rather he focused on what he and his spouse could offer D. in Ottawa. I am very much in favour of D. having as much time as possible with both her parents as they have very different parenting styles. Mr. W. promotes both D.'s education and extracurricular activities, while Ms. D. has D. involved in fewer extracurricular activities and focuses more on her school work.

[10] I still have a great concern that Ms. D. has a manipulative influence on D. in that she expresses her negative feelings about Mr. W. This undoubtedly has a negative impact on D. However, she is a devoted mother and clearly has D.'s best interests in mind. I am not at all pleased that this matter was not referred to the same chartered psychologist who provided the original Custody and Access Report. Unfortunately, Ms. D. retained a qualified psychologist who had only one side of the story and was, consequently, not of great assistance to the court, except for his reference to the "child development perspective" from research in the area. He quoted from a recent report entitled "The Spotlight on Applied Research: Families on the Move (2002)" as follows, and I quote:

> Children who have changed schools frequently face many challenges academically in that they need to adjust to a new school building, new teachers, and new friends and they need to try to make sense out of the discrepancy between what they are learning at the old

> school and what is being taught at the new school. These gaps in education are particularly clear in math and reading where highly mobile students are likely to end up below grade level. High mobility is associated with overall lower student achievement... Children from families who move frequently are more likely to experience behavioral, emotional, and/or social problems than children who never or seldom move...

[11] While Mr. W. has a reasonable plan, it does involve D. moving between school systems in Ontario and the Yukon. The natural consequence for D. is that she will develop new friends and then move away again. While D. certainly appears to be strong and resilient, there is potential for negative impacts on her scholastic achievement, as well as her social and emotional stability. In addition, Mr. W. has a strong and healthy relationship with D. which will not be destroyed by periods of separation, as might occur with a much younger child.

[12] I am also persuaded by D.'s own wishes, which have been agreed upon by both Mr. W. and Ms. D. D. would like Mr. W. to stay in Whitehorse so that she can continue to attend school in Whitehorse with her friends. I am also of the view that the support she receives at Christ the King Elementary is quite independent of both parents and, I believe, very important to D.

[13] I am of the view that D. should remain in the joint custody of Mr. W. and Ms. D. but with her primary residence with Ms. D. while Mr. W. pursues his medical career. I will continue the order that neither Mr. W. nor Ms. D. shall permanently remove D. from the Yukon Territory without the written consent of the other or an order of this Court. Mr. W. shall have the care of D. as follows:

1. For six weeks each summer, consisting of the last three weeks of July and

the first three weeks of August;

2. For ten days at Christmas, including Christmas Day 2002, and alternating Christmas Days thereafter;
3. For two weeks during spring break, which I understand to involve D. missing a few days of school, until she reaches high school when it shall be for the actual days of spring break;
4. Mr. W. shall also have the opportunity to care for D. for one week covering the Thanksgiving or the Remembrance Day long weekend each fall, with D. missing the days of school to accommodate this. I say the opportunity to care for D., as this short access may not be financially feasible. This access shall terminate when D. reaches high school.
5. The parties are at liberty to vary these times as they mutually agree;
6. Costs of access shall be borne by Mr. W.

[14] Counsel had little time to address the issue of child support, as Ms. D. wished it to be on the basis of Mr. W.'s former salary, and Mr. W. says, as a student, he will be hard-pressed to cover the access costs. I ask counsel to make these submissions in writing to be filed by August 30, and replies by September 13, 2002.

[15] Costs of this application to Ms. D. on Scale 3, but there shall be no recovery for the cost of the child psychologist report. One-sided reports of this nature are not helpful.

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VEALE J.