SUPREME COURT OF YUKON

Citation: *L.A.B.* v. *M.B.T.*, 2010 YKSC 01

Date: 20100105
S.C. No. 05-D3773
Registry: Whitehorse

Between:

L.A.B.

Petitioner

And

M.B.T.

Respondent

Before: Mr. Justice E.W. Stach

Appearances:

L.A.B. — Appearing on her own behalf
Stephanie Schorr — Counsel for the respondent

REASONS FOR JUDGMENT

[1] L.A.B. and M.B.T. married in 1999. They separated in 2005 and divorced on October 4, 2007. They have one child, a daughter, A., born July 11, 2000. In this application L.A.B. seeks variation of a previous court order made on consent at the time of the divorce. She now asks the court to permit A. to relocate from Whitehorse to Haines Junction in order to live with her there on a one year on - one year off basis.

Previous Court Orders

[2] At the time of the divorce in 2007, the parents consented to an order for shared custody of A., and to an arrangement that saw A. live on a more or less equal basis in the respective homes of her parents in Whitehorse on a rotational basis. That rotation

continued until L.A.B. moved to Haines Junction in 2009. In the period since then A. has lived in the home of her father in Whitehorse from Monday through Friday. L.A.B. has access with A. in Haines Junction and Burwash Landing from Friday after school to Sunday night. This altered basis for A.'s residence and for access to her was formalized in an order of this court dated October 26, 2009. The matter was then adjourned to December 4, 2009 to permit hearing of L.A.B.'s variation application.

[3] L.A.B. is self-represented. She has filed a number of affidavits, the last of which was served on M.B.T. on December 4, 2009, the day of the hearing. Because of the numerous attachments to her affidavits as exhibits, I reserved judgment on the application to permit me to read the voluminous attachments. I have now done so.

Joint Custody

[4] There is no dispute here that A. has a close relationship with each of her parents or that she loves them and that each of them in turn loves her. Neither of the parties seeks any variation in the status of joint custody.

Material Change In Circumstances

[5] L.A.B. moved from Whitehorse to Haines Junction in 2009. She is attempting to establish a business there. She has established a relationship with G.D. in Haines Junction. Despite an annual income of $40,000.00 imputed to her in the court's order of October 2007, her financial circumstances have altered. She deposes that she has absolutely no income in 2009; nor does she know at this stage what income she will have from the business venture she is embarking upon at Haines Junction.

[6] There is no dispute that there has been a material change in circumstances since the consent order made by Justice Veale in October 2007.

The Factors To Be Considered In This Application

[7] The court's only focus on the application must be the best interests of the child. Among the factors relevant to that focus are:

- the existing custody arrangement and relationship between the child and the custodial parent;
- the existing access arrangement and the relationship between the child and the access parent;
- the desirability of maximizing contact between the child and both parents;
- the views of the child;
- where it is relevant to the ability of that parent to meet the needs of the child, the reasons of the custodial parent for moving;
- disruption to the child from the change proposed

Child Advocate

[8] In her Notice of Application filed August 27th , 2009, L.A.B. asks in para. 1 that a child advocate be appointed for A. M.B.T., the child's father also favours appointment of a child advocate. The order of Veale J. made September 22, 2009 similarly recommends that a child advocate be appointed.

[9] Inasmuch as A. is now 9 years and 5 months old, it is reasonable to expect she may have views that she may be willing to impart to a truly independent advocate whose sole obligation is to look out for her interests. In circumstances like those present here I am persuaded that a child advocate is the only truly reliable means of gleaning the views of the child. There was no child advocate in place at the time of this hearing.

[10] I discern from the record before me that a number of candidates were actively considered as a child advocate for A. but none was appointed. Although it is essential that a child advocate have no conflict in the matter to be determined, I get the sense from the record and from the submissions made by L.A.B. that she rather overstepped her role by attempting to involve herself actively in the 'selection' of a child advocate here. I choose not to characterize her involvement in that process as borne of malice. I suspect it is the result of the challenge many self-represented litigants face in pursuing the proper course of procedure in a complex justice system. The upshot of all of this, however, is that the court was left without a reliable means of knowing A.'s views.

A.

[11] A. is enrolled in the French Immersion program at the Whitehorse Elementary School. She has lived in Whitehorse since birth and she has attended that school since kindergarten. She is now in grade 4.

[12] A.'s report card from grade 3 indicates that she has a very positive attitude towards learning. Nevertheless her academic performance appears average. Ongoing difficulties with her reading and writing in both languages are apparent. Because of her problems with language, she participates in the Wilson Program, a remedial program for students who have some difficulties with language/literacy in English. The Whitehorse Elementary School also provides a remedial tutor to her for her French reading. She requires the support of both tutorial programs in English and French in order to meet the expectations of her curriculum. She is a keen participant in the fine arts program at her school including drama, music, and art in all of which she exceeds expectations.

[13] The record before me indicates that the decision to enroll A. in French Immersion was a decision jointly made some years ago by her parents. A.'s ongoing struggle with language suggests to me that the earlier parental decision to enroll A. in French Immersion ought perhaps to be revisited.

[14] Of great concern to both her parents is an unnamed health condition that has plagued A. for a long time. That condition compromises A.'s ability to process oxygen. From time to time it reaches critical proportions and requires emergency hospitalization. Her health condition also results in significant absences from school. I note, for example, that in grade 3 A. missed 32 ½ days out of a school calendar of 175 days. Despite this condition, A. is not to be regarded as a "sickly" child. While in grade 3, A. participated in Brownies dance, drama and art camp. She is involved currently in wolf cubs, rock climbing and swimming.

[15] A. has lived in Whitehorse since infancy. She has extended family here. Her enrollment at the Whitehorse Elementary School since kindergarten results in her having developed many friendships with children her own age, several of whom she spends time with outside of school.

[16] L.A.B.'s move to Haines Junction in 2009 has resulted in circumstances where A. lives with her father from Monday to Friday each week and has access with her mother from Friday evenings to Sunday. Haines Junction is a community approximately 1 ½ hours by road away from the city of Whitehorse.

The proposal of L.A.B.

[17] In her Notice of Application dated August 27, 2009, L.A.B. did not specify the date upon which her request for variation was to become effective. In her oral submissions to

the court on December 4, 2009, she asked that her request for variation be effective at the commencement of the next following school year i.e. September 2010, and that A. live with her in Haines Junction on a rotational basis, one year on and one year off. In short, she now asks that the court vary A.'s living arrangements so that the child will reside with her in Haines Junction for one year from September 1, 2010 on a rotational basis, and that A. live with her father, M.B.T., in the year following from September 1, 2011. Neither her material nor her oral submissions particularized access to the non-custodial parent during the year that the child is to spend in the home of the other parent.

Discussion

[18] The move to Haines Junction was a deliberate choice by L.A.B., made for lifestyle, career, business and personal relationship reasons. Although she concedes that the living and co-parenting arrangements that were in place for A. since the separation of the parents in 2005 were working out well for A., L.A.B. asserts that moving to Haines Junction and living with her will be in the child's best interests, and will provide a safer environment more intimate with a natural and outdoor-oriented way of life.

[19] L.A.B. says that her prospective home in Haines Junction will be across the road from the school A. would attend, that a skating rink is adjacent to the school, and the public library one block away from the skating rink. She says that this compares favourably by comparison with the Northland Trailer Court in Whitehorse where M.B.T. resides with A.. She also asserts that A.'s health-care concerns are adequately addressed in Haines Junction.

[20] L.A.B. says that A. has already made some friends in Haines Junction as a result of her access visits there. She says that A. has developed a close relationship with G.D., and that a sense of 'family' has already been established.

[21] I infer that the request of L.A.B. to defer the proposed change in the residence of the child until September 1, 2010 is intended to avoid any current disruption in A.'s school year and an attempt to limit the disruption that may flow from a change in schools.

[22] The position of M.B.T. on this application is succinctly set out in his affidavits of September 15 and October 19, 2009. He submits in short that A.'s best interests are served by denying the request for variation. He says that her lifelong residence in Whitehorse, and the stability that has accrued to her from extended family in Whitehorse, his bonding with her and the stability that flows from both specialized educational and health services in Whitehorse cumulatively support the proposition that it is in A.'s best interest to maintain the current arrangement.

[23] The law is well established that in circumstances like the present both parents bear the evidentary burden of demonstrating where the best interests of the child lie.

[24] In the record before me, the circumstances in Whitehorse in relation to A. are relatively well established. The circumstances that will obtain for A. if she were to change her residence to Haines Junction are far less certain.

[25] At the time of this hearing the business and residential premises of L.A.B. in Haines Junction were not yet completed. The success of her business venture in Haines Junction is unknown. She has no current income and her prospects of her earning business income there continue to be speculative.

[26] Although the serious condition respecting A.'s health appears to be intermittent, there are at least 3 occasions when her condition has reached a critical stage and required emergency hospitalization. In her material, L.A.B. heaps praise on the critical care that A. has received at the Whitehorse hospital. In the context of A.'s health history the court has a lingering concern over timely access to critical care in Haines Junction in the event of another serious health event involving A..

[27] A. has extended family and a network of friends in Whitehorse with whom she spends time. There is perforce some uncertainty how a transition to Haines Junction would work out for her.

[28] L.A.B. is laudatory of the accomodation established for A. at the Whitehorse Elementary School and is equally impressed with A.'s teachers there. Whether the same or a similar level of accomodations are available to A. at a school in Haines Junction and whether the same or similar programming is available to her there depends solely on the say-so of L.A.B..

[29] In some situations involving separated parents and a pre-school child, it is not uncommon to see a rotational care order for a child, usually on a one week on – one week off basis. Nor is it rare to see such an order for a school-aged child where both parents reside in a community of modest size and the child can attend the same school. Indeed, the latter is the situation that obtained in this case until August 2009. I find it most unusual, however, to contemplate a care order for one year on – one year off involving different communitites and a child of elementary school age, especially where the child is already experiencing educational challenges at the elementary school level.

[30] The proposal placed before the court by L.A.B. includes no specific plan for A.'s access with her father during the year commencing September 2010. Presumably she assumes that there will simply be a 'flip-flop' of the current arrangement.

[31] Finally, there is no reliable evidence before the court as to A.'s views regarding the proposed change in her residence.

Conclusion

[32] L.A.B.'s circumstances in Haines Junction are fluid. In the face of well established conditions for the child in Whitehorse as against the lingering uncertainties that remain in regard to the child's proposed residence in Haines Junction - and in the absence of any reliable expression of the child's views - I am constrained to dismiss the application of L.A.B..

An order dismissing the application of L.A.B. will issue.

[33] This is not a case for costs.

Precatory addendum[1]

[34] In this addendum I am mindful of the fact that L.A.B. made the deliberate choice to relocate from Whitehorse to Haines Junction in 2009. Nevertheless, I discern from the court orders previously made and from the materials and submissions of the parties that M.B.T. has to this point both understood well and acknowledged the importance of maintaining meaningful ongoing contact between A. and her mother. My concern is that the existing order of access – from Friday to Sunday – has little practical meaning during the school year if L.A.B. lacks the means to fund weekend travel.

[35] Apart from reference to the proposition that L.A.B. has no earned income in 2009, no evidence was placed before me respecting the current incomes of the parties.

[1] Precatory: words of request recommending or expressing a desire in a non-binding way.

On the premise that M.B.T. has the means and the ability to do so he ought well to consider offsetting some of the expense or practical burden of travel during the school year until L.A.B. earns sufficient income to bear that expense.

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Stach J.