

SUPREME COURT OF YUKON

Citation: *MRM v BC*, 2016 YKSC 16

Date: 20160307
S.C. No. 15-B0071
Registry: Whitehorse

Between:

M.R.M.

Plaintiff

And

B.C.

Defendant

Before Mr. Justice L.F. Gower

Appearances:

Lenore Morris
Megan É. Whittle

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiff mother to move from Whitehorse to New Westminster, British Columbia, with her daughter, P., who is 5 years old. The principle reason for the move is so that the plaintiff can take care of her ailing mother, who is suffering from an aggressive form of brain cancer and is not expected to live much longer. The defendant father opposes P. leaving the Yukon principally because he claims to have a close relationship with her and does not think the move will be in her best interests.

[2] The parties were in a common-law relationship of about 5½ years duration, until they separated in November 2015. Neither has obtained a custody order as of yet, and both are equally entitled to custody of the child pursuant to s. 31(1) of the *Children's Law Act*, R.S.Y., 2002, c. 31, as amended.

[3] This application was heard in chambers on December 18, 2015, which was the last day our law courts were open before the Christmas break. Therefore, as time was of the essence, I gave a brief oral ruling at that time dismissing the application, but indicating that my written reasons would follow. These are those reasons.

BACKGROUND

[4] The mother is 39 years old and the father is 40. The mother was born and raised in the lower mainland of British Columbia, and was living in Victoria, BC when she met the father in 2008. The father was raised in Whitehorse. The father helped the mother move to Whitehorse in April 2009, following which they moved into an apartment, where the mother continues to reside today.

[5] The mother has a grade 12 education and has work experience as a jeweller, an aesthetician, a retail salesperson, as well as painting, construction and landscaping. She was working at a Shopper's Drug Mart store when she became pregnant with P. The father is a journeyman auto body technician, and is an employee of a local auto body company.

[6] The relationship soon became strained and the parties began sleeping in separate bedrooms in October 2009.

[7] The mother stopped working when she was eight months pregnant and has not worked outside of the home since then. The child was born on November 9, 2010. The

parties agreed that the mother would stay home to care for P. for the first five years of her life, until she was of kindergarten age. As a consequence of this decision, the family was entirely supported financially by the father's income and the mother was the child's primary caregiver.

[8] In December 2012, the father gave a ring to the mother and she subsequently held herself out on her Facebook page as being engaged.

[9] P. has several health issues, including bowel problems and chronic constipation, hyper joint mobility, anxiety, and sensitivity to loud noises. She also has exhibited symptoms of an eating disorder and difficulty with socializing with other children her age.

[10] The father and other close family friends have expressed concerns with respect to some of the parenting decisions the mother has made, which include:

- a) the mother and P. regularly sleeping in the same bed;
- b) P. still pooping in diapers (she does not wear diapers continually, but rather uses a diaper for the specific purpose of defecation);
- c) P.'s late bedtimes and sleeping in in the morning;
- d) P. not having adequate opportunities to socialize with other children;
- e) P.'s eating habits; and
- f) P.'s apparent lack of structure and discipline.

[11] The mother has expressed concerns about the father's ability to adequately parent P. based upon her assertion that he spent very little time with her while the family was together and consequently he has failed to learn how to cope with P.'s specific needs.

[12] In January 2015, the father broke his wrist, which limited his ability to work at his regular employment. However, it also allowed him to spend more time with P. and the mother on various outings and activities.

[13] The maternal grandmother first began experiencing medical problems in February 2015. She had surgery in June 2015 and began chemotherapy in August to treat her brain cancer. The plaintiff does not believe that her mother will live for more than another year, and possibly much less.

[14] Not long after the maternal grandmother became ill, the parties began discussing the possibility of the family moving to British Columbia to be closer to her. The father explored an employment opportunity in Powell River, B.C., however nothing materialized.

[15] The mother travelled with P. to New Westminster on October 7, 2015 in order to care for the ailing maternal grandmother. The visit was originally supposed to be for a two-week period, but was extended by the mother for an additional two weeks until November 11, 2015.

[16] During the first two weeks, the father had four video chats with P., but then had no contact with her until she returned home two weeks later. In particular, father had no contact with P. during her fifth birthday on November 9, 2015.

[17] The mother mentioned to the father that she was spending time with her friend, B., during the visit. The mother then changed her Facebook status from “engaged” and refused to talk to the father on the telephone.

[18] The mother and P. return to Whitehorse on November 11, 2015.

[19] On November 17, 2015, the couple attended a parenting after separation workshop, and began discussions about the mother potentially moving with P. to New Westminister in the near future, and possibly the father moving in British Columbia later. Also on that date, the mother told the father that she and her friend, B., were renting an apartment together in New Westminister, close to the residence of the maternal grandmother.

[20] On November 19th, the father saw a Facebook post indicating that the mother and B. just had their first month anniversary, indicating that she had been dating him since October 19, 2015.

[21] On November 20th, the father contacted a lawyer and made an appointment for November 25th.

[22] On November 26, 2015, the father moved out of the couple's apartment. The following day, his lawyer notified the mother's lawyer that the father no longer consented to her taking P. to New Westminister.

[23] By that time, the mother had already paid what I assume was her one-half share of the rental (\$1100 per month) of the two bedroom apartment in New Westminister for December, plus a security deposit.

[24] The mother has known B. since 2008 and deposed in her second affidavit: "We have not had a romantic or sexual relationship but it may be that one will develop." B. has two sons, seven and five years of age, who spend every second weekend with him. She also deposed that the plan was that B. would share one bedroom with his sons when they are there, and she would share the other bedroom with P.

[25] The mother has given evidence that P.'s behavioural problems diminished while she was in New Westminster with her. She also claims that the father was relatively uninvolved as a parent to P., until their separation on November 26, 2015.

[26] The father has given evidence that the mother is an overinvolved, overprotective and over-controlling parent towards P., and that this correlates with many of her behavioural problems. He has deposed that when P. is in his presence, she is much calmer.

[27] Each party accuses the other of problem drinking. The mother says the father is an alcoholic and the father says the mother has been a daily drinker since they moved in together. The mother admits to drinking "a glass of wine or two most evenings". The father admits that he drank once in the summer of 2015 and again over a two-week period in November 2015, but that he does not drink very often.

[28] The father also accuses the mother of having "mental health issues". The mother denies this, but admits to having taken medication for Attention Deficit Hyperactivity Disorder, as well as antidepressants from time to time.

[29] The plaintiff's father died in 2007. Therefore, the family which she has in British Columbia include her mother in New Westminster and a brother who lives in Victoria. P. is the maternal grandmother's only grandchild at the present time.

[30] The father's family in the Yukon include both of his parents, who are separated but now each in new relationships, as well as a younger brother and his girlfriend. The paternal grandfather's partner is also his fiancée. She seems particularly involved with P. and has filed two affidavits in support of the father's position on this application.

[31] The mother indicated at the hearing of this application that, if she is not permitted to move with the child, she will not move to New Westminster.

LAW

[32] The ultimate question in a relocation application such as this is: What is in the best interests of the child in all of the circumstances? The leading case is *Gordon v Goertz*, [1996] 2 S.C.R. 27. From that case, I also draw the factors which I must consider on this mobility issue, and I paraphrase:

- a) the existing custody arrangement, if applicable, and the 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, if applicable;
- e) the custodial (or moving) parent's reasons for moving only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
- f) the disruption to the child resulting from a change in custody, if applicable; and
- g) the disruption to the child resulting from his/her removal from family, schools and community.

[33] The views of the parent who has primary care of the child are to be respected, but there is no legal presumption in favour of that parent.

ANALYSIS

[34] In this case, given the recent separation date, there is no custody order in place. However, the *de facto* custody arrangement is that the child has been residing with the

mother in the original family apartment. As I understand it, the father has been exercising daily access, but has not had overnight access. Therefore, the views of the mother in this case, as the parent with primary care of the child, are entitled to respect. Nevertheless, there is no presumption in her favour simply because she is the primary care parent.

[35] Since there is no custody order, it would not be entirely appropriate to refer to the father as the “access parent”, but again, the *de facto* situation is that he has been exercising daily access with P. since moving out of the family apartment on November 26, 2015. Prior to that, the father made the uncontested assertion that he only spent four or five nights away from P. since she was born. He made particular mention of P. and him going for drives together in the summer of 2014 in his vintage 1965 Mustang automobile. Further, because of his broken wrist and unemployment in the summer of 2015, he and P. spent a great deal of time together doing things like going out to Kookatsoon Lake, Marsh Lake, the Transportation Museum, the Fish Ladder, and the Canada Games Centre.

[36] Further, the father has presented a good deal of evidence from other family friends to support his claim that he is a very close, caring and committed parent to P.

[37] The father asserts that P. is relatively calm when she is in his care and exhibits far fewer of the behavioural problems which the mother notes when P. is in her care. One piece of particularly objective evidence in this regard is found in the notes of Dr. B., one of P.’s family physicians, who recently examined P. in the father’s presence on December 1, 2015. Here the doctor’s notes include the following:

...[P.] is followed closely by the [Child Development Centre] for significant anxiety issues. This is the first time I have ever

seen [P.] and been able to examine her. Previous [appointments] have shown her to arrive screaming and agitated. In the past she has calmed down when her dad has sat with her. Today, she comes in calmly with her dad. She was well behaved and interactive with her exam....

[38] The desirability of maximizing contact between the child and both parents is a principle arising from the *Divorce Act*, but it applies to common-law couples as well, and is implicitly a consideration in determining the best interests of the child under s. 30(1) of the *Children's Law Act*. While it is not a paramount consideration, it is nevertheless very important in my assessment of this case.

[39] I am also concerned here that the mother has given very little attention to how she plans to facilitate access and contact between P. and the father while she is in New Westminster. For whatever reason, after her initial first two weeks in that city, the father had no contact with P. whatsoever, and was only receiving information by the mother sending texts. Further, in neither of her two affidavits did the mother say much if anything about how she planned to facilitate contact. This is to be contrasted with the father's plans to facilitate contact between P. and her mother, deposed to in his first affidavit, at a time when he assumed that the mother might move to New Westminster without P. The mother's attitude here is exhibited in the following statements in her first affidavit:

30. I need to be in British Columbia, and [P.] needs to be with me. I recognize that by moving with [P.] to New Westminster, I will be taking [P.] away from the community she has lived all of her life. I believe though that at her age, [P.'s] "home" really is wherever I am. Since [P.] was born, I have made her the centre of my life and I know that I am the centre of her's too.

[40] The views of a five-year-old child about such a potential move is likely of not much assistance to the Court. However the father deposed in his first affidavit, and this was uncontested in the mother's responsive second affidavit, as follows:

I have not discussed New Westminster with [P.] because I do not want to add more stress for her. On or about December 4, 2015, when we were leaving the Canada Games Centre, [P.] looked at me and said "Daddy I don't want to leave Whitehorse, I don't want to move from my home". Since this, she has told me on more occasions that she does not want to go. She often says to me that she loves the snow and is always commenting on the mountains.

[41] *Gordon v. Goertz* instructs me that the mother's reasons for wanting to move are only to be considered in the exceptional case where they are relevant to her ability to meet P.'s needs. Obviously, the tragic situation with the maternal grandmother's deteriorating health is a compelling reason for the mother to want to move. There may also be some benefit to P. in spending time and getting to know her grandmother in the last few weeks of her life. However, the overall circumstances of the mother's plan have not been well laid out, and indeed would seem destined to invite a fair degree of chaos into P.'s life.

[42] Firstly, the mother claims that her primary reason for wanting to move is to take care of the ailing maternal grandmother. However, the mother has provided little or no evidence about her plans for caring for P., while she is primarily occupied with caring for her own mother. For example, she has said nothing about whether P. would be placed in daycare.

[43] Secondly, although the mother has expressed confidence that she will be able to work at a Shopper's Drug Mart, in New Westminster, as of the date of the application, she had no confirmed employment in the community.

[44] Third, although the mother intends to have P. referred to specialists in the lower mainland area to assist with P.'s medical, physical and behavioural issues, I am not persuaded that she would receive any better care there than she is currently receiving in Whitehorse. Here I refer to the various professional and medical reports appended to the father's first affidavit.

[45] Lastly, and most importantly to me, the mother's intended living arrangements seem likely to be extremely stressful for P. The mother plans to share a two-bedroom apartment with B. and, every second weekend with his two sons, age seven and five. There is no evidence that P. has any previous relationship with either B. or his two sons. Therefore, she will have to quickly adapt to a very foreign situation in very close quarters. Further, she will have to share a bedroom with her mother. She will also likely have to cope with the additional stress from the uncontested fact that one of the boys has epilepsy, and possibly autism, and the other one is extremely high strung. Finally, if the mother and B. enter into a sexual relationship, which the mother acknowledges "may" develop, the sleeping arrangements in the small apartment could become even more awkward.

[46] It follows from the above that I expect the disruption to the child, if I permit the move, will be significant.

[47] Finally, I also find that there would be significant disruption to P.'s life if she is permitted to move away from Whitehorse where she has a close and healthy relationship with her father, as well a support network of other extended family and friends.

CONCLUSION

[48] I conclude that it is in P.'s best interests to remain in Whitehorse. Accordingly, the mother's application for permission to move with P. to New Westminster is denied.

[49] The father may have his costs for this application.

GOWER J.