SUPREME COURT OF YUKON

Citation: *A-MCM-L v JBL*, 2016 YKSC 34

Date: 20160725
S.C. No. 08-D4076
Registry: Whitehorse

Between:

A-MCM-L

Petitioner

And

JBL

Respondent

Before Mr. Justice R.S. Veale

Appearances:

Kathleen Kinchen and Megan Whittle	Counsel for the Petitioner
Lenore Morris	Counsel for the Respondent
André Roothman	Lawyer for the children

REASONS FOR JUDGMENT

INTRODUCTION

[1] The father applies for an increase in residential time with the children, M and G, based upon their request and a corresponding change to his child support payments pursuant to s. 9 of the *Child Support Guidelines,* which applies when the father has the children not less than 40% of the time.

[2] In a previous application by the mother for child support in December 2013, this Court denied the father's submission that s. 9 applied and ordered that he pay child support without a corresponding set off based on the mother's income. See *M-L v L,* 2014 YKSC 17.

[3] The mother vigorously opposes the application for increased residential time for M who is 15 years old but severely challenged, both cognitively and physically. She also opposes the application for increased time with G who is 13 years old. She claims both children are under pressure from the father.

BACKGROUND

[4] The existing Order made on February 7, 2014 (the "February 2014 Order"), is the following:

(a) The parties have joint custody of the children;

(b) The children spend eleven nights in each two-week period with the mother and three nights with the father;

(c) The children spend four of five after school time periods (3:00 p.m. to 6:00 p.m.) with the father each week;

(d) The father pays child support $1,148 per month for both children based on the father's 2015 income of $78,335 (not counting RRSP withdrawals);

(e) The father and mother share the special and extraordinary expenses equally.

[5] The father states that his daughter, C, from a previous marriage has returned with her boyfriend to live with him in June 2015. They are both working. The only change from the February 2014 Order is the father's view that both children have requested more time with him, which if granted would result in the application of s. 9 of the *Child Support Guidelines* and perhaps a set-off of child support. The mother appears to earn approximately twice as much as the father although there has been no finding in that regard.

[6] The father, supported by his son, T, who resides in British Columbia, and daughter, C, who resides in Whitehorse, says that both M and G have expressed the desire to spend more time with him. The mother says both children have been put under a great deal of stress by the father. The father says the mother is being rigid in refusing to agree to more time for him with the children.

[7] I note that the father's view that the children want to spend more time with him was expressed by the father in the previous application. In his affidavit #1 filed January 20, 2014, he stated the following:

> 22. The Petitioner is correct that we continue to have disputes as I have requested the opportunity to spend more time with the Children. For some time now, the Children have been expressing to me a desire to spend more time in my home. I have raised the Children's request with the Petitioner on a number of occasions and have been accused of encouraging or persuading the Children to ask for more time in my home which is not true.
>
> 23. The Children's request for more time with me has been spontaneous and persistent over the last couple of years.
>
> 24. The Children are becoming more overt in their desire to spend more time with me, more insistent, and it has led to some conflict between myself and the Petitioner when the Children have insisted on spending more time with me and she has objected.
>
> 25. The Report and Update both made recommendations for changes to the residential schedule that would increase my time with the Children.
>
> 26 Contrary to the assertions of the Petitioner, my desire to spend more time with my Children is not motivated by a desire to reduce or avoid my financial responsibilities for my Children. I believe that the Petitioner and I have had a shared residence arrangement for some time now and it is only in the

> last few months that I have been unable to continue to voluntary payments which have been made for the last few years.

[8] C, the father's daughter, confirmed that G expressed the following to her in the summer of 2014 (after the February 2014 Order):

> In the summer of 2014 when my dad and [G] and [M] were in B.C., I had a conversation with [G] in which he told me that he wanted to spend equal time at each of his parents' homes. He said he felt like he lives with his mom full-time and with his dad part-time. He wanted it to be equal. He also doesn't like the high number of transitions. He told me that just when he's getting settled in at his dad's, he has to go to his mom's.

[9] C states that her conversations with M and G were initiated by them. She added:

> M has asked me to speak to his mom, to tell her he wants to live with his dad, but given what I know about the history, I don't think that it would help and it might make things worse.

[10] Nicole Sheldon, the Registered Psychologist whose appointment was recommended by the Court, provided a very comprehensive Child Custody Assessment Report on November 15, 2010, and an update on December 21, 2012. I relied extensively on her reports in my decision in February 2014 and will do so again.

[11] In order to relieve the conflict between the parents and the stress on the children, Gower J., after initially declining to recommend the appointment of a lawyer for the children, made the recommendation on November 24, 2015, to provide an outlet for the children to express their preferences.

The Report of the Lawyer for the Children

[12] The lawyer for the children provided a written report. He indicated that he met the children separately. Not surprisingly, because of M's challenges, his meeting with M was brief (15 minutes) and M was distracted so that only five minutes was actually

spent on his residential arrangements and during that time, M was stressed, which was evident in his breathing and facial expression. The lawyer for the children described the conflicting wishes and information of M and concluded that M did not have “adequate insight to make a decision about his living arrangements.” He reported in Court that he could not take instructions because of M’s cognitive abilities but he nevertheless reported that M would like to spend more time with his father.

[13] With respect to G, the lawyer for the children had the distinct impression that he would have preferred not to “get dragged into this process.”

[14] He reported that G was able to give instructions and proposed an additional two nights a week for M and him with his father every second week. The lawyer for the children recommended this residential arrangement, which would add Thursday and Monday nights to the father’s residential time.

[15] The lawyer for the children was presented with the dilemma that G insisted that he wanted to have the same residential regime as M as they have a good relationship. The lawyer for the children expressed his recommendation for M as follows:

> The input that I received from [M] is of limited value and conflicting. However, I have no doubt that he wants to spend more time with his father. Even though he has the cognitive abilities of a much younger child, it would be fair to allow him the opportunities that is [sic] available to older boys, who normally prefers [sic] to spend more time (even the majority of time) with the father, once they have reached puberty. [M]’s situation is further complicated by the obvious strong attachment between siblings and the fact that he needs to follow the same residential regime as [G].

[16] The mother was very critical of the recommendation of the lawyer for the children. The lawyer for the children felt he could no longer continue to act in such a

high conflict situation. I granted his request to be removed upon completion of his report to the Court.

[17] The one thing that both parents agree on is that M will need their care and support for the rest of his life. He suffers from Tuberous Sclerosis Complex which produces many medical, mental and emotional challenges that require medication. He has cognitive delays, intellectual impairment, anxiety disorder and uncontrollable seizures.

[18] Gower J., in his written reasons on February 17, 2015, had a genuine concern about whether the children were really expressing a desire for change or whether it was the father's perception. He specifically stated that the father should not be encouraging the children, in the case of G, to write a letter or to encourage the children to confront the mother as it creates anxiety and stress for the children.

[19] Both parents have had discussions with M about his residential arrangements. The mother wrote the following e-mail on April 8, 2016, to the father:

> Over the past many weeks [M] has approached me on several occasions asking for clarification about conversations he tells me he has had with you and [C], regarding where he should live or things that happen at my house. During these conversations [M] expresses a great deal of confusion to me about the things he says he is told by you and [C] and has been very upset. His anxiety around the issue of where he should live and who gets to make that decision has come to the level where I am disturbed.
>
> I am worried about his emotional health to the point where I have to send you this note and hope that you will put your children's best interests first and stop having these conversations.

[20] The father replied, on the same date, among other things, that M had raised the subject with both him and his daughter, as follows:

> Thank-you for your email. I too was going to discuss with you my concerns about M's increased questioning and anxiety about his choice in wanting to live and spend more time at my home. M has spoken with C regarding his wishes. M has told me that he has had several discussions with you regarding his choice. M has told me that you do not support his choice.
>
> The conversation of him spending more time at my house came up while we were having a family movie night and watching Paddington Bear. During a scene where alcohol was being consumed M asked if alcohol was red or yellow referring to wine and beer. He then continued to tell me that it is consumed at a high rate in your home during which time he finds that you do not listen to him and conversations get loud. He expressed that he likes it at my house because our lives are substance free.
>
> I told him that he is always welcome to spend more time with us and that there will be someone he can speak to separately from mom and dad about this. <u>I told him that where he lives and who he spends the most time with is his choice.</u> M had told me that when he tries to discuss it with you that you tell him that it is not his choice and that he can only spend weekends and after school visits with me. (my emphasis)
>
> …

[21] I intervene here to say that these are precisely the conversations that Gower J. and Ms. Sheldon expressed concerns about. Because of his challenges, I do not share the father's view that M's residential arrangements are "his choice". It is also incorrect in that the court determines what residential arrangements are in the best interests of a child, taking the child's views into consideration where appropriate. This kind of parental influence on M is not only wrong but clearly causing great stress to M.

[22] The father has explicitly addressed the financial implications of increased residential time with him in his affidavit #7 filed June 21, 2016:

> 20. In Judge Veale's Reasons for Judgment after the Petitioner and I were in court in February 2014, he stated (at Paragraph 6), "both parents, in their calculations of hours spent with the children, have the father's time with the children at slightly below 40 percent."
>
> 21. If the children's schedule is varied as recommended by the children's lawyer, and sought by me in this application, the children will be with me more than 40% of the time. Therefore both parent's income should be considered in calculating child support. The Petitioner's income is much higher than mine, as it always has been since our separation, and I believe that she should pay support to me.
>
> 22. The money does matter to me, in particular because I would like to move to a larger home. In 2015 the Petitioner brought to the court's attention the deficiencies of my current housing. I have made modifications to my current home to make it work for all of us, but I agree that we could be more comfortable if there was more space. If I was able to stop paying child support, and even receive support, I would be able to afford a larger home.

[23] I watched and listened to a recording of M, taken by his mother, expressing his rage at his father on March 9, 2016. While I do not normally view video recordings by one parent or the other parent, this audio-visual left a strong impression of the negative impact that discussing the issue of increased residential time with his father has had on M.

[24] The mother indicates her view of the father's conduct as follows:

> 49. Since the Order of Mr. Justice Veale was made in February, 2014, the respondent has continued his fight for 40% residential time with the children in order to eliminate his child support obligations to me and to receive child support from me.
>
> 50. In his most recent efforts to ensure the children express to the Child Lawyer, their desire to live with

> him more, he has caused considerable stress to M which is clearly evidenced in the videos. M has never expressed a desire to kill his dad before March 9, 2016.
>
> 51. M should never have been involved in a process he does not have a hope of understanding. His involvement in this process has been detrimental to his emotional wellbeing and I am fearful for what may happen to M if the residential schedule is changed.

Reasons for Judgment, February 7, 2014

[25] In my Reasons for Judgment on February 7, 2014, I complimented the parents on the care and support they give for M and G. I also expressed my view as follows:

> [5] In my view, this contested application was triggered by the father's discovery that the mother has twice his income at a time when he is having financial difficulties. He had been voluntarily paying $1,025 per month to the mother and arbitrarily reduced it to $500 a month for May, June, and July of 2013, and then no payment except for $1,000 to this date.

[26] I relied a great deal upon the expertise of Nicole Sheldon in my February 7, 2014 decision. In her updated report of December 21, 2012, Ms. Sheldon reported that:

> Current Situation
>
> In the November 15, 2010 report, recommendations to support the children in this family were made. In a letter dated March 8, 2012 from Mr. Fairman to Bev Fouhse of Family and Children's Services requesting the update, Mr. Fairman noted that although parents have been able to address a number of issues, the issue of residential arrangements for the children remained. <u>It is noteworthy that parents had come to an agreement for a shared parenting schedule that was more generous than the one I had recommended in 2010.</u> (my emphasis)
>
> Following the 2010 assessment, parents decided that the boys would live primarily with [the mother] and spend every other weekend from Friday overnight to Monday morning with [the father]. In addition, the boys are picked up Monday

> to Thursday after school by their father and their mother picks them up from their father's home at 6:00 pm on those evenings.

[27] Ms. Sheldon remarked that the father did not seem to understand that he has prime time with the children seeing them for three hours, 8 out of 10 school nights. She described the mother's time as providing structure and ensuring predictability while the father's time was fun and relaxing. Ms. Sheldon stated that having the week on/ week off schedule proposed by the father would significantly undermine the sense of security and predictability that the current arrangement offers.

[28] I will repeat Ms. Sheldon's recommendations that still have relevance today:

> …
>
> 6. [G] could manage an extra overnight on Thursdays of the weekend that he would generally be at his father's anyways. The problem with increasing overnights and no bus service in this family is that it will always require a parent to do the driving. With [G] staying overnight at his dad's on the Thursday, this will mean that dad will need to drop [G] off at his mom's on Friday morning so that she can get both [children] to school and [the father] is still available to pick both [children] up after school. To increase overnights any more than this on school nights may start to have an impact on [G]'s sleep and would generally increase the stress on this family system
>
> 7. If the recommendation in #6 doesn't make sense or becomes too onerous, another option might be for the children to be overnight with dad whenever there is a professional development day at school the following day.
>
> 8. Yet another option might be three out of four Friday nights with dad. Although this would decrease mom's full weekend leisure time with the children, it might be an option for parents to explore. This is not to suggest that every single month there would be three weekends out of four that the children would spend the Friday night at their dad's, what it is saying is that this is a way to increase overnights without putting too much stress on the [children].

> 9. Absolutely no adult matters related to custody, access, or legal involvement should be discussed with the children. Both of these children are coping with anxiety, though both in different ways. Continuing to discuss these kinds of matters with the children would suggest that the parent who is doing so does not have a good grounding in what is best for the children and as a result, that parent's access to the children should be limited. (my emphasis)

ANALYSIS

[29] Applications for variations of custody are guided by s. 17(5) of the *Divorce Act,* R.S.C. 1985, c. 3 (2nd Supp):

> **Factors for custody order**
>
> **17(5)** Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

[30] In the case of *Gordon v. Goertz*, [1996] 2 S.C.R. 27, McLaughlin J., as she then was, stated in para. 13:

> It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. (my emphasis)

[31] The Court clearly stated that a variation application cannot amount to an appeal of the original order.

[32] In *Starling v. Starling,* 2006 BCSC 1268, Burnyeat J. considered the statement by a child that he did not want to live with his mother but wanted to live with his father, which was expressed prior to a previous consent order. He found that the statement of the child's preference standing alone was not sufficient material change in circumstances.

[33] I conclude that although the idea of G wanting to spend more time with his father is not new, it may be that he has been reluctant to voice it given his parents' conflict in these matters. G clearly expressed a desire to spend more time with his father when he spoke to C and the lawyer for the children after my order. And to be fair, the focus of the previous application was on whether the s. 9 threshold had been met and did not address the expressed preferences of the children in contrast to the parents' views of the children's wishes. However, the sole basis for the claim of the father that there has been a material change in circumstances is that the children are older than they were at the time of the February 2014 Order and that they have both expressed a wish to spend more time with their father. That is the same wish of the children that the father put forward in 2014, making this application more like an appeal of the original order.

[34] I remain convinced that Ms. Sheldon's recommendations remain relevant for this family. In 2012, she said this:

> … Updated evaluations are not the way to resolve conflicts. Mr. [L] has in the past and continues to need information reframed and presented appropriately for his consumption. There seems to be a vague focus on what is perceived as unfair, without a solid look at the bigger picture. The fact that the boys are doing well, that there is so much time that both parents see the boys on a daily basis, that in mom's house the boys have moved to increased independence in their bedrooms yet dad would have them go backward at his house and share a room, and the fact that dad

> acknowledges mom's strengths in organizing and coordinating all that needs to be done doesn't seem to be acknowledged or have been fully thought through by dad.
>
> I said in the past report and I'll say it again, both parents are very important in a child's life. Although parents have done a good job of paying attention to the messages shared in the previous assessment, Mr. [L] still seems to lack the level of trust in Ms. [M-L] that would support the healthy psychological development of the children. His distrust comes out in his interpretation of her disagreement with his ideas for increased time, when he asks the children if they've talked to their mom about sleepovers, and when he makes the assumption that her denial of increasing extra overnights is about her insecurity instead of how it might impact the boys. Although Mr. [L] talks and writes frequently about the "best interests" of the children, it would seem that those interests are based on his interpretation of what they should be rather than what would really be best for the children. What children need is calm, comfortable, and collaborative parenting team if they are to enjoy "best interests". Doubting the other parent or pushing for extra overnights without really thinking about what makes sense is not helpful.

[35] My view of this family and the best interests of M and G have not changed. I find that the father is fixated with the unfairness that he contributes to the care of the children almost everyday but is now paying $1,148 a month child support to the mother who earns approximately twice the income he does. I conclude that he has embarked on a campaign to increase his residential time to achieve a set off of child support which he sees as the mother paying child support to him, despite the fact that this may not be the result. The Supreme Court of Canada has stated the following at para. 49 of *Contino v Leonelli-Contino*, 2005 SCC 63:

> Hence, the simple set-off serves as the starting point, but it cannot be the end of the inquiry. It has no presumptive value. Its true value is in bringing the court to focus first on the fact that both parents must make a contribution and that fixed and variable costs of each of them have to be measured before making adjustments to take into account

> increased costs attributable to joint custody and further adjustments needed to ensure that the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought. Full consideration must be given to these last two factors (see Payne, at p. 263). The cliff effect is only resolved if the court covers and regards the other criteria set out in paras. (b) and (c) as equally important elements to determine the child support.

[36] The father very clearly expressed that it was the choice of the child as to where the child will spend his residential time and he has no doubt encouraged M and G to express their choices, despite the stress that both children experience as indicated by Ms. Sheldon and by the lawyer for the children.

[37] The role of a lawyer for the children is a challenging one in this case because M clearly cannot instruct a lawyer and G was reluctant to be involved. One parent or the other would attack a recommendation. In this case, I prefer the expert opinion of Ms. Sheldon to the recommendation of the lawyer for the children. In my view, assisted by the recording of M where he threatened to kill his father, which the lawyer for the children did not have the opportunity to see before his report, it would not be appropriate to change the residential arrangement for M. I add that it was not appropriate to express a personal opinion of what is in the best interests of M on such a limited interview, particularly when M is not capable of giving instructions and the opinion runs contrary to the expressed views of the expert in this case.

[38] I am of the view, like Ms. Sheldon, that M benefits greatly from the structure and stability he receives from his mother and that there shall be no change to his residential arrangements.

[39] There is no doubt that the father's application has the appearance of an appeal of the February 2014 Order. That said, I do accept that G expressed a preference for more time with his father to C after my February 2014 Order as well as to the lawyer for the children. In addition, Ms. Sheldon has not taken any exception to G spending one more night with his father. As I understand it, counsel for the mother did not oppose an additional overnight for G so long as there was no change for M's residential arrangement. While I am inclined to deny the application, as it is akin to an appeal of the February 2014 Order, there is room to consider G's wish for more time with his father as expressed to the lawyer for the children. Given that G does not want to be without M for any length of time, I order that he have an additional Thursday night on the weekend that he and M reside with the father.

[40] However, I must express the view that has now been stated by Ms. Sheldon, Gower J., and me that the continued pushing for extra time with the children by the father has to end. The emotional stress on the children and the resulting parental conflicts serves no one's interest and detrimentally affects the best interests of both M and G.

[41] Counsel have requested that I not address the child support issues until further submissions are made.

VEALE J.