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C. v. S., 2003 YKSC 42

Date: 20030801
Docket No.: S.C. 03-B0005
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

J.L.C.

Plaintiff

AND:

B.V.S.

Defendant

Malcolm Campbell

For the Plaintiff

Emily Hill

For the Defendant

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): This is a custody dispute regarding three children. My focus is less on the aspects of the dispute and more on what is on the best interests of the children.

[2] There are three children of this common-law relationship, their ages are thirteen, ten and eight. The children have been born and raised in the Yukon and they have attended school here.

[3] Prior to the separation of the parents in November of 2002, the children were doing extremely well in school, and led normal lives and were involved in extracurricular activities. Since the separation, the children are now very traumatized and I would describe the situation as "in crisis". They have failing grades in school. They are receiving sedatives from a doctor and they are taking counselling.

[4] The parents have had a common-law relationship for over 20 years. There is a great deal of dispute on the file and it begins with the determination of how long the common-law relationship has been going on. The father says since 1970 and the mother says since 1979. Nevertheless, they have had a longstanding common-law relationship.

[5] However, the mother in the fall of 2002, decided to terminate that relationship and she asked the father to leave the family home. The father refused to do so, and as a result she moved into her mother's home in Whitehorse in November of 2002. I should indicate that the grandmother is a very involved grandparent and, I believe, has exerted a stabilizing influence during a very disruptive time for the children. The mother's life is now stabilized since the separation and she has a new partner and resides in Alberta.

[6] The father is unemployed because of health reasons. I should indicate that the mother is 42 years of age, I believe, and the father is 58. The father, unfortunately, has a bad heart and has had a triple bypass as well as valve surgery. He also suffers from Hepatitis C and he has ulcers, irritated bowel disease and scoliosis. He treats his condition with marihuana. A brief doctor's note does not indicate that he is licensed to do so but rather it states:

He uses cannabis or marihuana for his condition.

[7] There is a great deal of conflicting evidence in the numerous affidavits that have been filed. I find, however, that I am able to make an interim order in this matter primarily because there is affidavit evidence independent of the parents' evidence. However, because of the high conflict in this matter, counsel for both parties sought a custody and access report and I am going to order that I recommend that there be a custody and access report prepared.

[8] There are two issues that I will address in my remarks, the first issue being whether or not the mother abandoned the children, and secondly whether or not the father actively prevented or disrupted access of the mother to the children.

[9] I find the following facts.

- 1) There has been no abandonment of the children by the mother. She had no option but to leave the family home and did so with reluctance. She has attempted to maintain a relationship with the children but has found that very difficult because the father has had difficulty accepting the separation. The father, in my view, has played a role in disrupting the relationship of the mother with the children.
- 2) I find that the father does have very severe health problems. As I have indicated, I have not seen a similar situation with a single parent with those kind of health problems trying to raise three children. It is an enormous task when one is healthy; when one is unhealthy it is almost insurmountable. Nevertheless, the father has made great efforts to look after the children since the date of separation.

- 3) As I indicated, the children have been traumatized by the separation. Certainly that occurs in any separation of parents. It is always traumatic to the children. However, in my view, the trauma in this case has been exacerbated or made worse by the father's refusal to accept the separation and his continuing to have a dispute with the mother in the presence of their children. I think that has been a factor that has been extremely disrupting and compounded the trauma that the children are suffering.
- 4) The care of the children, despite the best efforts of the father, is in some disarray. At best, the father has been overwhelmed with his health problems and having to look after the children on his own. At worst, the children have been subjected to some very bad parental modelling and anger directed by the father towards the mother.
- 5) There has been some evidence alleging alcoholism on the part of the mother. I am not satisfied that that is the case, although it does raise a concern and I will talk about that later.

[10] In a situation such as this, one has to weigh how the children are doing in the present care-giving circumstances of the father with the offer of the mother to take the children to Alberta, all in the context of the children having been raised and attending school in Whitehorse. In my view, the father, despite his efforts, has been overwhelmed in the care of the children.

[11] I am going to make an order that the best interests of the children will be served by having an interim joint custody order to the parents of the children. The

children shall have their primary residence with the mother, with reasonable access to the father. When I say primary residence with the mother, I mean in Alberta.

[12] I am satisfied that for the interim, until we have a custody and access report, that the children's interests will be best served by residing with the mother in Alberta. I say this because she has been a primary caregiver, and clearly left the relationship but has never given up trying to contact the children and continue in her role.

[13] The father has serious health problems which he has treated with marihuana. He has done his best to look after the children since the mother departed, but his health and his anger over the breakup of the relationship have convinced me that the children will be better off in the interim with the mother.

[14] A major issue in my deciding to have the children reside with the mother on an interim basis has been the unwillingness of the father to permit the mother to have unfettered access to the children.

[15] It is not unusual in contested custody cases to have some access denial or disputes with a variety of justifications. However, in this case I fear three things: Firstly, that the children will be denied the right to see their mother. Secondly, they will be denied the right of her parenting which has clearly served well in the past. Thirdly, that they will become estranged from their mother as a result of their father's anger over the breakup of their relationship.

[16] The father has made a great deal of the mother's alleged alcohol dependency. He acknowledges that she has controlled it in the past, but now alleges that it is out of control. I am not convinced of this on the affidavit evidence and I make no

conditions in this order in that regard. I do say to the mother that she must be sensitive to the fact that the children have obviously been told this and she should govern herself accordingly.

[17] To the father, I must say that the children learn from parental conduct and role modelling. Their lives will be affected by the things you say and do. Please remember that they want their parents to be civil to each other and despite the parental disputes that may occur, those should not be visited on the children in a negative way either directly or indirectly.

[18] I am making it a condition of this order that both parents shall refrain from making negative comments about the other spouse to or in the presence of the children.

[19] To conclude, I have ordered interim joint custody of the children to the parents with the primary residence of the children to be with the mother in Alberta with reasonable access to the father.

[20] The mother will have the obligation of discussing significant decisions with the father about the care, education, health (except for emergencies) and general welfare of the children. Discussions may be by telephone, mail or e-mail. If the parents cannot reach agreement on significant decisions, the mother will have the right to make such decisions.

[21] The father shall have the right to make an application to this court to seek a review of such significant decisions if he considers them to be contrary to the best interests of the children.

[22] Each parent shall have the right to obtain information about the children from teachers, counsellors and medical professionals.

[23] That is the end of my oral reasons, counsel.

[24] There are two issues that I would like you to address: one, is the timing of the transfer and the second issue is the re-introduction of the mother to the children. Do you want any clarification of my order? You do not need to respond at the moment, but if you have a concern you can raise it. Do you want to speak to your clients on that subject before I make my rulings? It would probably be appropriate to speak to your clients and see if there is agreement, and if not, I will make the appropriate order.

[24] Are you tied up, Mr. Campbell?

[25] MR. CAMPBELL: No. If we could even have even a ten minute --

[26] THE COURT: Let us take a 15 minute break and I think you could speak to your client.

(Proceedings adjourned)

(Proceedings reconvened)

[27] MR. CAMPBELL: My Lord, my friend and I have had some discussions between ourselves and with our respective clients. The plan is that Ms. S. would come up to Whitehorse, drive up to Whitehorse, sometime around the 15th of August. She would be here until sometime around the 20th of August, during

which time there would be re-integration, and then the children would drive down to Alberta in time for the school year which starts on the 2nd of September; is that right?

[28] MS. HILL: I believe just after Labour Day.

[29] MR. CAMPBELL: Yes, that would be the 2nd of September. So right after Labour Day.

[30] THE COURT: Do you think it is appropriate to put that in the order?

[31] MR. CAMPBELL: I am not sure that it would be appropriate to put the specific dates in because -- perhaps a term that says "The parties shall work towards the reintroduction of the children to the mother and the transfer of the children to Alberta during the month of August, and the children shall be in Alberta by the start of the school year." Something along those lines.

[32] MS. HILL: I think I agree generally with my friend, perhaps something just with a date "by no later than" by which they have left Whitehorse, just to make sure that they do have time to get settled. So they will leave by August 20th.

[33] THE COURT: Well, why do we not say then that children will be reintegrated with the mother during the month of August and will return to Alberta with her children no later than August 20, 2003. If any problems, of course, arise either party can come back to court.

[34] MR. CAMPBELL: No later than the 20th?

[35] THE COURT: Thank you for reaching that agreement.

[36] MR. CAMPBELL: My Lord, one of the terms of your orders was that information would be transmitted between the parties regarding the care, education -
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[37] THE COURT: You are right. It is really what I am talking about is significant decisions with respect to education, health, and general welfare of the children.

[38] MR. CAMPBELL: General welfare.

[39] THE COURT: In other words, the day-to-day care and control of the children will be exclusively in the hands of Ms. S., but when there are major issues about where they attend school, maybe there are religious issues, I do not know, but those should be discussed between the parents.

[40] The order should say, health, except for emergencies, obviously.

[41] MR. CAMPBELL: Yes. My Lord, my only question was that it was missing one of the headings that you --

[42] THE COURT: I see.

[43] MR. CAMPBELL: -- but I think it was general welfare that I had missed.

[44] THE COURT: Yes. I think I might have had the care in, but I do not know if that is appropriate, but it is really the significant decisions regarding education, health and general welfare.

[45] Anything else?

[46] MR. CAMPBELL: I had given my friend some summary legal advice, but I will just confirm with the court. The order of Mr. Justice Goodwin --

[47] THE COURT: That is an interim interim order?

[48] MR. CAMPBELL: That indicated that the children would be enjoined from removing the children from the Yukon Territory.

[49] THE COURT: What I should say then to make that complete is that I will order that order be terminated. Now is there anything arising out of order that you wish to address? They were both enjoined from removing the children from the Territory.

[50] MR. CAMPBELL: Yes. The exclusive possession should remain in place of the home.

[52] THE COURT: Yes. So we will terminate that order, but we will leave in the exclusive possession in place.

[53] MR. CAMPBELL: This order -- your order will have an exclusive possession?

[54] THE COURT: Yes.

[55] MR. CAMPBELL: I believe that is the only matter that was arising then.

[56] THE COURT: Thank you very much, counsel.

VEALE J.