

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Johnsen v. Leblanc*, 2005 YKSC 50

Date: 20050902
Docket No.: S.C. No. 01-D3418
Registry: Whitehorse

Between:

RICHARD ALLEN JOHNSEN

Petitioner

And

NANCY MARIE MANON LEBLANC

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Emily Hill, agent for Mr. David Christie
Malcolm Campbell

For the Petitioner
For the Respondent

MEMORANDUM OF RULING

INTRODUCTION

[1] This is an application by counsel for Ms. Leblanc to set aside a without notice order of Gower J. dated August 10, 2005, (the without notice order) ordering Ms. Leblanc to return Tommy Andrew Johnsen, born April 27, 1999, (Tommy), to Mr. Johnsen in Watson Lake, in the Yukon Territory, within seven days of being served with the order. Ms. Leblanc also seeks interim custody of Tommy and child support.

[2] The application is opposed by Ms. Hill, who is acting as agent for Mr. Christie. Mr. Christie is the lawyer who obtained the without notice order. Mr. Christie is out of the jurisdiction on business but expects to return September 6, 2005.

ISSUES

[3] The issues to be determined on this application are:

1. Which court has jurisdiction in this matter, the Supreme Court of the Yukon Territory or the Cour supérieure de Québec?
2. If this court has jurisdiction, should the without notice order be set aside?

FACTS

[4] I find the following facts:

1. The first Petition for Divorce was filed by Mr. Johnsen in this court on February 13, 2002. Both Mr. Johnsen and Ms. Leblanc were ordinarily resident in the Yukon.
2. Ms. Leblanc was served with the Petition for Divorce on February 19, 2002, along with an *Ex Parte* Order dated February 13, 2002, restraining her from removing Tommy from the Yukon Territory until further order of the Court.
3. The *Ex Parte* Order, dated February 13, 2002, was based upon an allegation of Mr. Johnsen that Ms. Leblanc was going to take Tommy to Montreal and she would kill anyone who tried to stop her. Ms. Leblanc denied that she had any intention of abducting Tommy but did say “that Tommy was everything that I have and that I would kill for him”, stated in a context of how strongly she was committed to his well-being.

4. Putting the matter as objectively as possible, both Mr. Johnsen and Ms. Leblanc have had and may have problems, with both drugs and alcohol.
5. They both characterized their relationship as violent and abusive, although Ms. Leblanc stated that she often fought back in self-defence. She described it as “a terribly dysfunctional relationship which has brought out the worst in both of us.”
6. They separated, after numerous previous separations, on June 29, 2001.
7. On June 28, 2002, Hudson J. read the affidavits of both parties and heard submissions from their counsel. He ordered, among other things that Mr. Johnsen shall have interim custody of Tommy with access to Ms. Leblanc for one week each month, four weeks during the summer and daily telephone access. Hudson J. also ordered Ms. Leblanc to abstain completely from the consumption of alcohol while exercising access. He also ordered that neither party shall remove the child from the Yukon Territory.
8. In her affidavit filed June 28, 2002, Ms. Leblanc admitted that she had abused narcotics and she was getting blood tests to prove she was free of narcotics. She offered to submit these to the Court and Hudson J. ordered that she have the blood tests and provide the results to the Court. There is no evidence in the court file to indicate compliance with this order.
9. Hudson J. also recommended that a Custody and Access Report be prepared. Dr. Joanne Tessier was retained for the Yukon assessment of Mr. Johnsen. She met with Mr. Johnsen on one occasion and reported that he did not show

up for any other assessment activities. She did not meet with Tommy. As a result, her report did not include any recommendations.

10. Marie-Josée Gamache s.w. was retained to do the evaluation of Ms. Leblanc. Ms. Gamache was at Les Centres Jeunesse de la Montérégie in Longueuil, Québec. She reported on February 24, 2003, that Ms. Leblanc did not show up for two scheduled interviews. She stated that she did not have the cooperation of Ms. Leblanc to do the evaluation.
11. The next activity on the court file is a fax from Mr. Johnsen at the Detox Treatment Centre at Lac La Biche, Alberta, on July 5, 2005, alleging abduction of Tommy by Ms. Leblanc and requesting copies of the court orders. Mr. Johnsen is on probation at the present time and charged with three counts of breach of probation. He is scheduled to appear in the Territorial Court of the Yukon Territory for plea on November 7, 2005.
12. On August 9, 2005, Mr. Christie brought a without notice application for an order returning Tommy to Watson Lake, Yukon. On August 10, 2005, Gower J. granted the without notice order and ordered that both his order and the order of Hudson J., dated June 28, 2002, be served upon Me. Gilles Ouellet, the Québec lawyer for Ms. Leblanc, by faxing it to his office in Thetford Mines, Québec.
13. Ms. Leblanc had limited access to Tommy who resided in the Yukon until July 2005. In June 2005, Mr. Johnsen left Tommy with his grandparents, Jean and Dave Johnsen, in Watson Lake, Yukon, in order to take alcohol treatment in Lac La Biche, Alberta.

14. After Mr. Johnsen's departure, Ms. Leblanc came to Watson Lake and asked if she could take Tommy to Whitehorse. Jean Johnsen consented on the understanding that Tommy would be in Whitehorse and returned to Watson Lake, Yukon.
15. Ms. Leblanc said that she planned her arrival in the Yukon and the Johnsen family agreed that she would be returning to Québec with her son. Ms. Leblanc specifically referred to "the Johnsen family" and not Mr. Johnsen.
16. On July 5, 2005, Mr. Johnsen was in telephone contact with Jean Johnsen and he became concerned when Jean Johnsen said that Ms. Leblanc had not telephoned from Whitehorse for three days. He called Ms. Leblanc in Québec and she admitted Tommy was with her.
17. Mr. Johnsen contacted Mr. Christie and obtained the without notice order to return to the Yukon.
18. Mr. Campbell, counsel for Ms. Leblanc since 2002, was not given notice of the without notice application. He filed an application on September 1, 2005, to have the without notice order of Gower J. set aside. On September 2, 2005, Ms. Hill appeared as agent for Mr. Christie who will be away until September 6, 2005.
19. On August 10, 2005, a duplication notice was received by the Court from the Central Registry of Divorce Proceedings indicating that a duplicate divorce proceeding was commenced on July 7, 2005, in Thetford Mines, Québec, in the same names as this proceeding commenced in the Yukon Territory on February 13, 2002.

20. An order was made in the Québec divorce proceeding granting temporary custody of Tommy to Ms. Leblanc until September 6, 2005.

There are numerous allegations and counter-allegations in this application. I have endeavoured to set out the salient facts for this specific application, leaving the merits of the application to be determined on another day.

DECISION

Issue 1: Which court has jurisdiction in this matter, the Supreme Court of the Yukon Territory or the Cour supérieure de Québec?

[5] It is quite clear in section 3(2) of the *Divorce Act*, R.S. 1985, c. 3, that the court in which a divorce proceeding was commenced first has exclusive jurisdiction and the second divorce proceeding is deemed to be discontinued.

Issue 2: If this court has jurisdiction, should the without notice order be set aside?

[6] Mr. Campbell, on behalf of Ms. Leblanc, applies to have the without notice order of August 10, 2005, set aside primarily on the grounds that it was improperly obtained in that it was not impracticable or unnecessary to serve him, nor was it a case of urgency, all of which is required under Rule 52(12.1) of the *Rules of Court*.

[7] Ms. Hill submits that the real issue is the breach of the Hudson order of June 28, 2002. She states that this Court has the jurisdiction in the custody matter and there should be no encouragement to Ms. Leblanc for breaching the Hudson order of June 28, 2002, especially when Tommy habitually resides in the Yukon.

[8] In my view, it is premature to set aside the without notice order of Gower J. without hearing from Mr. Christie. I am also of the view that Ms. Leblanc is in breach of

the order of Hudson J. of June 28, 2002. It is incumbent on Ms. Leblanc to return Tommy to the Yukon and have the merits of her application heard here.

[9] I was prepared to have the application of Ms. Leblanc set to be heard on a fixed date in the next two weeks. Mr. Campbell advised that he was not available, so I am adjourning his application to a date to be fixed within forth-eight hours of Tommy's return to the Yukon.

Veale J.