IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *L.J.H.* v. *L.J.P.*, 2004 YKSC 23

Date: 20040317
Docket No.: 01-B0054
Registry: Whitehorse

Between:

L.J.H.

Plaintiff

And

L.J.P.

Defendant

Publication of the name of a child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act*.

Before: Mr. Justice L.F. Gower

Appearances:
David J. Christie — For the Plaintiff
Debbie P. Hoffman — For the Defendant

REASONS FOR JUDGMENT

Introduction

[1] L.J.H. is the mother of W.P., who is currently eight years old and is a child with special needs. The father is L.J.P. The mother has applied to this Court for an order staying the current proceedings and declaring that Ontario, where the mother and child now reside, is the appropriate jurisdiction for resolving the outstanding issues.

Background

[2] The mother and father began living together in 1994 and were married on June 10, 1995. W. was born on January 19, 1996. The family began living year round in Atlin, British Columbia, in 1999. On September 3, 2001, the mother left Atlin with W. to live in Whitehorse. The parties separated on September 9, 2001. The father continues to reside in Atlin.

[3] This action was commenced by the mother on September 18, 2001, when she was residing with W. in Whitehorse. Although the parties are legally married, the mother did not start her action under the *Divorce Act*, R.S. 1985, c. 3 (2nd Supp.), but rather pursuant to the *Children's Act,* R.S.Y. 2002, c. 31, and the *Family Property and Support Act,* R.S.Y. 2002, c. 83. Presumably, this was because neither the mother nor the father were ordinarily resident in the Yukon for at least one year immediately preceding the commencement of the action, which is a requirement of the *Divorce Act.*

[4] The mother alleged verbal, physical and psychological abuse by the father towards her and the child, which she says caused her to relocate from Atlin to Whitehorse.

[5] The background of court proceedings is relevant to this application:

1) On September 19, 2001, an *ex parte* order granted the mother interim custody of W. with reasonable and generous access to his father.

2) On November 5, 2001, the above order was vacated and interim joint custody of W. was awarded to the mother and the father, with a condition

that neither party remove W. from the Yukon Territory on a permanent basis without a court order. It was ordered that W. reside with his mother during the week and his father on weekends.

3) On June 20, 2002, an order granted the mother the right to travel to Ontario with W. and return to the Yukon by the end of August 2002, to enrol W. in school in Whitehorse. On this visit the mother consulted specialists in Ontario regarding W.'s special needs.

4) The matter was set for trial in Whitehorse on October 15, 2002. However, the trial was adjourned to allow both parents an opportunity to retain and instruct new counsel. Just prior to that adjournment, the mother applied for an order to allow her to return to Ontario with W. for medical, developmental and speech therapy reasons. At that time, because of the pending trial, the Court had the benefit of a Custody and Access Report by psychologist Geoffrey S. Powter. It is clear that Mr. Justice Veale expected that the trial would proceed in due course and that it would be held in the Yukon. The application was granted in September 27, 2002 (the "Veale Order"). In the meantime, the father was granted specified access to W. in Ontario. The paternal grandparents, who also reside in Ontario, were granted reasonable access to W., as well as entitlement to receive information from the mother about W.'s progress.

The Mother's Position

[6] The mother's reasons for wanting to have this matter dealt with in Ontario are as follows. She has been residing there now with W. since approximately October 2002. She has enrolled W. in school in the town of Almonte and has arranged for him to attend a number of different programs, therapies and activities to meet his special needs. She argues, through her counsel, that if custody and/or primary residence is contested at the trial, then she intends to call a number of witnesses on those points, all of whom reside in Ontario. Therefore, she says the balance of convenience favours transferring the jurisdiction of this proceeding from the Yukon to Ontario.

The Father's Position

[7] The father's counsel argues that both parties acceded to the jurisdiction of this Court when this matter was commenced (Note: The original Writ of Summons was amended on February 8, 2002, and the father's Statement of Defence was filed June 18, 2002) and that the jurisdiction should not be changed without good reason. To be clear, there does not appear to be any question that the action was then properly brought before this Court: See, for example, s. 37(1)(b)(i) and (vi) of the *Children's Act*.

[8] Counsel for the father also refers to evidence of an assessment from W.'s school expected in the spring or early summer of 2004. The father said in his Affidavit #6, at paragraph 6, that he understood some recommendations would be made for W. in April 2004, and that an assessment would be completed later. The first sentence of that paragraph literally says that the father was advised by the professionals at W.'s school that "they will not do an assessment of W. when he has completed the school year in or

about June, 2004". Unfortunately, I did not spot this problem during the hearing of this application, but I conclude that this sentence must contain a typographical error. The last sentence of the same paragraph reads "… I believe it would be premature to change the jurisdiction of this issue without having the benefit of the assessment being completed". Further, the paternal grandmother, M.P., deposed in her Affidavit #1, at paragraph 10, that she anticipated a meeting in April or early May 2004, when W. was to be given that assessment and that recommendations would be made about whether he needs to stay in a therapeutic school or attend a regular school. This evidence, coupled with the submissions of the father's counsel at the hearing, leads me to conclude that the first sentence in paragraph 6 of the father's Affidavit #6 must be in error. I find that it was intended to state that W.'s school "… will not do an assessment of W. ***until*** he has completed the school year …" (my amendment), or words to that effect.

[9] The father's counsel emphasizes that it would be premature to stay the current proceedings without learning the outcome of W.'s pending assessment. On the one hand, the assessment might support an argument that W. should resume his primary residence with the father and reside in Atlin. On the other hand, the assessment might cause the father to drop the issues of custody and/or primary residence; if that were to be the case, then the mother's material witnesses may not be required at all.

[10] Further, says the father, in the event that custody is not an issue, access most certainly will be. In that regard, he says that he will be seriously prejudiced if the Yukon proceedings are stayed, because he will not have the ability to rely upon the Veale Order, which grants him and his parents specified and reasonable access respectively. His counsel says that this is of particular concern, as there is an indication from the

record that the mother intends to restrict, deny or generally cause difficulties with the father's access. At the time of the Veale Order, the mother appeared to take the position that the father should not have any access to W. to allow for a period of healing for her and the child. However, Mr. Justice Veale noted that this was completely contrary to the view of the psychologist, Mr. Powter, who recommended a visitation schedule for the father.

[11] In addition, counsel for the father refers to certain evidence from the mother which indicates her intention to restrict access. For example, in her Affidavit #8, the mother says at paragraph 25, that W. does not have a strong attachment nor a stable relationship with the father. Also, a letter faxed from the mother to her counsel on December 8, 2003 (see Affidavit of K. Briemon #1), questions why W. might be forced to spend time with his father, whom she suggests was a "perpetrator" giving rise to her (earlier?) need to apply for a restraining order. She also asks whether it would be possible to keep W. with her at home on the upcoming weekend. It is important to note that this was written while the father was in Ontario attempting to exercise his specified access to W..

[12] The father's counsel also points to the difficulties that the paternal grandparents have allegedly experienced in exercising their access to W. authorized by the Veale Order. And, in the Affidavit of M.P. #1, there is the additional complaint that the mother has not been providing the grandparents with weekly updates about W.'s progress with his special needs.

[13] Finally, counsel for the father argues that, since the mother raised the division of family assets as an issue in the Amended Writ of Summons, the trial of that issue will require evidence from witnesses in the Yukon. This favours the Yukon as the most convenient forum.

[14] Incidentally, the father's counsel noted the prospect of the father suffering considerable delay if the mother is allowed to control the action further by commencing it again in Ontario. On this last point, I would expect that any order of this Court declaring Ontario to be the most appropriate jurisdiction could include terms and conditions to minimize delay and the wasting of any steps taken in the Yukon to date: See *Boros* v. *Boros,* [1997] N.W.T.J. No. 77.

Analysis

[15] The main concern I have with the mother's application is that her evidence in support is now seriously dated. She relies upon her Affidavit #8 sworn June 19, 2003, which supported her original Notice of Motion (for this purpose) filed June 20, 2003. That Notice of Motion was amended and filed on February 5, 2004. However, no updated affidavit material was filed with the Amended Notice of Motion. The hearing of this application was heard on February 11, 2004, almost eight months after the mother's last Affidavit.

[16] I raised this concern with the mother's counsel. While I understand that he could not go into detail about the issue for reasons of solicitor and client privilege, it appears from his response that he may have had some difficulty in obtaining updated instructions from his client. That inference is supported somewhat by the letters faxed from the

mother to her counsel on December 8 and 15, 2003, which were attached to the Affidavit of K. Briemon #1.

[17] The lack of updated affidavit material is particularly important in this case, as it involves a relatively young child with special needs and for whom an assessment is pending. Without some current information as to W.'s present circumstances, I am inclined to agree with counsel for the father that it is premature to stay the Yukon proceedings and declare Ontario to be the appropriate jurisdiction. If the professionals assessing W. recommend that he remain with the mother in Ontario in order to continue to take advantage of the programs and facilities there, then the father may well withdraw his application for custody and primary residence. If that turns out to be the case, then the numerous witnesses relating to those issues referred to by the mother's counsel would not likely be required for the trial. Similarly, if access remains an issue, there does not appear to be any pressing reason why that could not be conveniently decided in the Yukon. Certainly, the issue of property division would more conveniently be tried in the Yukon.

[18] I also conclude that it would be prejudicial to the father to stay the current proceedings. He would then lose the benefit of the Veale Order, which grants him interim joint custody of W. and entitles him and the paternal grandparents to access to W. and information about his progress. Further, should the Yukon proceedings be stayed, the control of the litigation would fall into the hands of the mother. Even assuming she commenced fresh proceedings in Ontario in a timely fashion, the father would then be forced to relitigate in order to reacquire his current status. And in that regard, it is also reasonable to presume from the evidence on record thus far that the

mother would oppose or seek to restrict any application by the father for access, including access by the paternal grandparents.

[19] I therefore dismiss the mother’s application.

[20] Costs may be spoken to by the parties, if they are unable to agree.

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GOWER J.