IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Shelley* v*. Henley*, 2005 YKSC 27

Date: 20050425
Docket: S.C. 99-D3171
Registry: Whitehorse

BETWEEN:

DALE MARY SHELLEY

Petitioner

AND:

STACEY HAROLD HENLEY

Respondent

Before: Mr. Justice J.D. Taylor

Appearances:
David Christie — For the Petitioner
Emily Hill — For the Respondent
Christina Sutherland — Child Advocate

MEMORANDUM OF RULING
DELIVERED FROM THE BENCH

[1] TAYLOR J. (Oral): This is an application by the respondent father for orders that are intended to seek the return of four children to the Yukon. Originally this matter came before this Court as an application by the petitioner mother for orders dealing with child support, custody and other ancillary matters involving the respondent and the three children of the petitioner and respondent and a fourth child of another father with whom the respondent stood in the position of a parent.

[2] The respondent has also filed a cross-application as to his responsibility for child support, more significantly in terms of the matters before the Court today, to define his access to the children.

[3] On Thursday last, I heard a telephone application on the basis that the petitioner was believed to have either left the Yukon or was about to leave the Yukon with the children to the effect that she would not be in the Yukon for today's hearing. At that time I made an order restraining the petitioner's removal of the children from the Yukon if, in fact, they had not yet left or, in the alternative, that she return to the Yukon in the event she had, upon being served with the order in the manner that I provided.

[4] That order, pursuant to my ruling, was served substitutionally upon Mr. Christie, the petitioner's counsel, who informed me that he no longer had instructions from the petitioner, but was still counsel of record. It also was served upon the petitioner's father, Mr. Al Robinson, who lives in Whitehorse. That order was served by Deputy Sheriff Hall, and upon serving Mr. Robinson, he informed the Deputy Sheriff that the petitioner had recently been in Whitehorse without the children, but had since left the Yukon Territory and gone to Alberta.

[5] This morning the matter came on for hearing. The petitioner did not appear. Mr. Christie, however, did appear and sought to be declared as no longer counsel of record or that his office be the office or fax for service. Given that the petitioner had signed, in his office, a notice of intention to act in person, a notice that, regrettably, contains no address for service if the petitioner was to, in fact, act in person, I made such a declaration. In that affidavit in support of this application at paragraph 3 is the

following statement: "Dale Shelley [the petitioner] advised me that she wanted to withdraw her court application." Upon Mr. Christie's withdrawal in this and another companion action involving a Ryan Minet, the father of the youngest child, I dismissed the petitioner's application for want of prosecution.

[6] That then left the earlier application of the respondent with regard to the matter of access and the application that had been filed on the 15th of April that sought custody orders as well as the restraining orders to which I earlier referred made last Thursday.

[7] Ms. Sutherland, counsel for the children, who has, at least prior to her last meeting with them on or before the 1st of April, been able to obtain instructions from the elder two children, and with respect to the latter younger two children was able to act, as she put it, "in their own best interest", has not been able to see any of these children since sometime shortly before or around the 1st of April. She has no knowledge as to where they are.

[8] Ms. Sutherland agreed with Ms. Hill, counsel for the respondent, that the children should be returned to the Yukon and that the affidavit to the respondent as to the petitioner's conduct in terms of, at one point, wanting the respondent to have all the children then changing her mind, suggests of a bizarre and inconsistent behaviour on the part of the petitioner. Ms. Sutherland, however, did not agree that there should be any orders made at this point in time, either for sole or joint custody as sought by the respondent, given the lack of information as to the children's whereabouts and current circumstances presuming them, for the moment, to be in Alberta. She suggests that once the petitioner is located, the respondent can then apply for a custody order upon

the petitioner failing to return the children to the Yukon within a reasonable period of time once she has been notified as to the existence of the proceedings as they now stand.

[9] She expressed this view on the basis of the emotional affect upon each of children should they be ordered, at this stage, into the respondent's custody either by way of an interim or joint order given the dearth of evidence as to their present circumstances and the inconsistencies and variations that appear to occur between the various children in terms of their desire to be with or see the respondent. In effect, she seeks to avoid the potential of a whipsawing of the children back and forth between their parents until the circumstances of each can be more fully inquired into such as was hoped for today by way of the cross-examination of the parties upon their affidavits.

[10] Counsel for the respondent concedes that even with a police attendance order, such enforcement of a change of custody order is problematic in terms of the police actually removing the children from the petitioner and turning them over to the respondent.

[11] It is Ms. Hill's position that if the respondent is given interim custody, that will force the petitioner to return to this jurisdiction if she wishes to assert continued custody for herself and restrict, if that is her wish, the access of the respondent to any or all of the children.

[12] The reason for this earlier order that was made in this matter requiring both the petitioner and the respondent to appear for cross-examination on their affidavits, which was the purpose of this morning's hearing, is because of a substantial conflict in factual

assertions contained in the affidavits of each that affect custody and access issues. Without such a cross-examination, it would appear that a determination of issues would be significantly hampered, notwithstanding the plaintiff's somewhat bizarre flip-flop on the question of custody and access issues.

[13] But apart from ordering that cross-examination, this Court has no basis to order the petitioner herself to return to the Yukon for that or any other reason. Her failure to return is but an aspect to be considered in the context of what is in the children's best interests. This Court's jurisdiction is to be exercised in the context of the dispute that exists between these parties. It would be trite to say that the physical presence of the children in the Yukon would as contemplated by respondent's counsel be a means of getting her before the court. Failing that, it would provide the respondent with a basis for a default order in his application for custody.

[14] I am not satisfied at this point an order for custody to the respondent would be in the interests of these children given the conflicting nature of the evidence and the materials, notwithstanding, the petitioner's election not to appear this morning. Having said that, I am not prepared that the petitioner should simply be able to hijack these proceedings by decamping to Alberta. On the evidence, these children have resided here in Whitehorse since at least February of 2004 to sometime on or about the 1st of April, 2005. There appears to be nothing in the evidence to suggest any intention that such a residence would be changed and it is safe to say that the Yukon is their habitual residence but for unilateral move of the petitioner to Alberta, if in fact that is where she has gone.

[15] The change that did occur was precipitated by these proceedings moving towards a resolution as was contemplated for this morning. The petitioner's move to Alberta, of course, has frustrated that. But that alone is not a proper basis to alter what has been the longer term custody of these children, particularly given the conflicts in the evidence. There is in place the order made the 21st of April requiring her to return the children to the Yukon or in the alternative she had not left the Yukon, that she not remove them from the Yukon.

[16] While service was effected pursuant to the terms of the order that I made on the 21st of April, there is no evidence (a) as to the petitioner's whereabouts or that of the children other than by inference of their being in Alberta or that (b) the petitioner knew of the order other than, again, by inference that her father may have told her that. There is no evidence in fact that he did, and all that is left is his statement to Deputy Sheriff Hall.

[17] It is too early to make either those inferences on the evidence before me, such as it is, no matter how logically appealing the making of those inferences may be. In my view, before an order can be granted that provides the respondent with interim custody of the children, the petitioner must first be located and the petitioner personally served with the order of the 21st of April that compels her to return the children to the Yukon. If the petitioner should fail to return the children to the Yukon, in particular Whitehorse, within seven days of so being served, and notifying the respondent of her having done that and where they will be residing pending resolution of the custody access issues still before this Court, then, in my view, it would be appropriate for this Court to hear the application of the respondent to have interim custody changed from the petitioner to herself, as she will have demonstrated by her failure to comply with the order as acting

other than in the best interests of the children in terms of the relationship with the respondent, a part of which is permitting him to have access, as well as their own counsel, Ms. Sutherland, who must be in a position to take instructions, at least from the elder two of the children, so she can advise this Court with respect to the children's interests as she perceives them with respect to all four of the children. Such an application would, suffice it to say, include an application to include a requisite assistance order.

[18] Accordingly, for these reasons, the application of respondent respecting custody is adjourned generally to be brought on forthwith after the lapse of seven days from the time of personal service of the April 21st order upon her. A notice of the hearing date absent the petitioner filing a notice of intention to act in person with a proper local address for service may be served at her father's residence. There is some evidence that petitioner is required to appear before the Territorial Court on the 4th of May. Hopefully, that will be the latter date upon which any service of the 21st of April where it would be affected upon her,

[19] Anything further, Ms. Hill?

[20] MS. HILL: I am wondering, perhaps, for ease of dealing with third parties, would it be correct to state the orders that were made last Thursday with regard to the children shall be returned all in one order along with these provisions.

[21] THE COURT: Well, I've referred to that order. I can order that a copy of that order be appended to any reasons that I have given for clarity.

[22] I also wish to direct a transcript of these reasons be prepared so that when the matter comes before the court next, what I have said today will be before whoever hears the matter.

[23] Thank you.

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TAYLOR J.