Date: 2010 03 09
Docket: S-0001-FM 2010000022

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WINNIE GREENLAND and CHARLIE GREENLAND

Applicant

- and -

MARIA SCHAFER

Respondent

Corrected judgment: A corrigendum was issued on March 31, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT

[1] The applicants seek an order to have the Order of the Supreme Court of the Yukon, dated February 29, 2008 recognized pursuant to s.34 of the *Children's Law Act*, S.N.W.T. 1997, c. 14 to have this Court assume jurisdiction in this custody dispute and to order the return of the children to the Northwest Territories to the custody of Winnie Greenland.

[2] I will not embark on an assessment of this matter on the merits but it is convenient to set out some of the relevant background.

Background

[3] The Applicant, Charlie Greenland (the "father") and the Respondent, Schafer (the "mother"), are biological parents of two children, a boy age 7 and a girl who will soon be 6, both born in Whitehorse. They had lived for several years in a common law relationship at various times in Yukon and the Northwest Territories at Ft. McPherson and Inuvik. The mother is a Gwich'in person from Old Crow and the father is also Gwich'in, from Ft. McPherson. The Applicant, Winnie Greenland (the "grandmother") , also a resident of Ft. McPherson, is Charlie Greenland's mother. The Gwich'in settlement area includes lands in both the Yukon and western Northwest Territories.

[4] In March, 2007, the mother gave the children into what was to be the temporary custody of Cindy Scheffen, a family friend, in Whitehorse where she was then living seemingly because the mother acknowledged she could not care for the children while dealing with her alcohol addiction. At the time, the father was incarcerated in Yukon for having assaulted the mother. In July of that year, the mother wanted the children returned to her but Scheffen refused. Upon his release from prison, the father and grandmother wanted to take the children back to Ft. McPherson. Again, Schaffen refused and commenced a custody application on July 25, 2007. Ultimately, the contesting parties were Scheffen and the grandmother.

[5] On February 29, 2008, Veale J. of the Yukon Supreme Court ordered that the grandmother have interim custody of the children and, among other things, that her interim custody "shall not be relinquished to either of the [mother or father] except upon application by either of [them] to this Court." (Emphasis mine)

[6] I note that despite the knowledge that the children and their lawful custodian would be living in a different jurisdiction, the Yukon Court emphasized that any change in custody involving the mother or father had to be sanctioned by a court and the Supreme Court of the Yukon Territory in particular. I doubt the intention was to foreclose any possibility of the Northwest Territories ever having or assuming jurisdiction in the matter but the wording discloses the assumption, if not expectation, of the court that the interim custody arrangement would not be long-lasting and that despite the geographic location of Ft. McPherson, the Yukon would continue to have a very close connection with the matter. In the Yukon case of *T.T.T.M. v. E.E.Q.* , 2008 YKSC 37, Veale J. stated at paragraph 39:

> In the Yukon, where parents frequently move in and out of the jurisdiction, that could lead to jurisdiction disputes taking precedence over the determination of the child's best interests. In some cases, where a child is removed from the jurisdiction on a temporary basis or by court order, this Court specifically indicates it is retaining jurisdiction to discourage strategic applications to transfer jurisdiction.

[7] Having reference to this passage, it seems rather clear that, in the case at bar, Justice Veale did intend that the Yukon Supreme Court retain jurisdiction in order to avoid the precise situation that presents itself here.

[8] The children lived in Ft. McPherson until June of 2009, when the mother took them (or perhaps only the daughter) with her and went to Old Crow where she resides at this time. While in Ft. McPherson, the children alternated residences between that of the mother and grandmother. In March of 2009, the mother was sentenced to 3 months in jail for uttering threats against the grandmother. Shortly thereafter, she says that with the consent and cooperation of the father and the grandmother, the children were delivered into the custody of Schafer's father who had travelled from Old Crow to Inuvik to collect them.

[9] Subsequently, the Applicant father went to Old Crow but left to return to Ft. McPherson with the daughter some time later while the son stayed in Old Crow. The evidence in relation to the son's place of residence over the ensuing months is conflicting and confusing as it is concerning the circumstances under which the mother left Ft. McPherson in June.

[10] First the mother says that when she left Ft. McPherson in June, the son was already in Old Crow where he had been since March, inferring that this was with the acquiescence of the Applicants. She said she had the agreement of the father to leave and that, while she did not have the express consent of the grandmother, she felt it was not required because of:

> -the father's acquiescence
> -the fact he had told her that the daughter had been living with him and not the grandmother while she was in jail and
> - the fact he had planned to join the family in Old Crow within a short period.

[11] The Applicant father says he merely thought he was agreeing that the children could go to Old Crow for a visit of uncertain length. The grandmother attests to having had the same belief. Without directly addressing the precise location of the son at the time, both Applicants refer to the mother as having removed the "children" from Ft. McPherson in June of 2009. While the son's whereabouts at the relevant time are in question, it is my view that I cannot and need not resolve the issue for the purposes of this application.

[12] On December 17, 2009, the mother applied to the Supreme Court of Yukon to vary the previous Order by, among other things, awarding her custody of the children. The Originating Notice of Motion here was filed on February 5, 2010 in response to the Yukon application.

Issues

[13] Should the Court recognize the Order of the Supreme Court of Yukon of February 29, 2008?

[14] Does the Court have jurisdiction to hear this matter?

[15] If so, should the Court assume jurisdiction or decline so that it might be dealt with in Yukon on the merits?

Analysis

[16] Under s. 34 of the *Children's Law Act* a court is required to recognize a custody order made by an extra-territorial tribunal if satisfied that enumerated criteria in the section do not apply as set out as follows:

> 34. (1) On application by any person in whose favour an order for the custody of or access to a child has been made by an extra-territorial tribunal, the court shall recognize the order unless the court is satisfied
>
> (a) that the respondent was not given reasonable notice of the commencement of the proceeding in which the order was made;

> (b) that the respondent was not given an opportunity to be heard by the extra-territorial tribunal before the order was made;
>
> (c) that the law of the place in which the order was made did not require the extra-territorial tribunal to have regard for the best interests of the child;
>
> (d) that the order of the extra-territorial tribunal is contrary to public policy in the Territories; or
>
> (e) that, under section 25, the extra-territorial tribunal would not have jurisdiction if it were a court in the Territories.
>
> (2) An order made by an extra-territorial tribunal that is recognized by a court shall be deemed to be an order of the court and enforceable as such.
>
> (...)
>
> (4) A court that has recognized an extra-territorial order may make such further orders under this Division as the court considers necessary to give effect to the order.

[17] Having regard to those criteria, I consider it appropriate to recognize the Order of Veale J. of February 29, 2008 and, as such, it becomes an order of this Court and is enforceable in the Northwest Territories. But I do not understand recognition of the Order to mean that this Court automatically assumes jurisdiction and must enforce it.

[18] For that determination, I must consider ss. 25, 27, and 35(1) and (2) of the *Act* which are set out as follow:

> 25. (1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where
>
> (a) the child is habitually resident in the Territories at the commencement of the application for the order; or
>
> (b) the child is not habitually resident in the Territories, but the court is satisfied that
>
> (i) the child is physically present in the Territories at the commencement of the application for the order,

(ii) substantial evidence concerning the best interests of the child is available in the Territories,

(iii) no application for custody of or access to the child is pending before an extra-territorial tribunal in another place where the child is habitually resident,

(iv) no extra-territorial order in respect of custody of or access to the child has been recognized by a court in the Territories,

(v) the child has a real and substantial connection with the Territories, and

(vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in the Territories.

(2) A child is habitually resident in the place where he or she last resided with

(a) both parents;

(b) one parent under a parental or separation agreement or a court order or with the consent, implied consent or acquiescence of the other, if the parents are living separate and apart; or

(c) a person other than a parent on a permanent basis for a significant period of time.

(3) The removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing process for the return of the child by the person from whom the child is removed or withheld.

(...)

27. A court having jurisdiction under this Division in respect of custody or access may decline to exercise its jurisdiction where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside the Territories.

(...)

> 35. (1) On application, a court may make an order that supersedes an extra-territorial order in respect of custody of or access to a child where the court is satisfied that there has been a material change in circumstances that affects or is likely to affect the best interests of the child and
>
> (a) the child is habitually resident in the Territories at the commencement of the application for the order; or
>
> (b) although the child is not habitually resident in the Territories, the court is satisfied that
>
> (i) the child is physically present in the Territories at the commencement of the application for the order,
>
> (ii) the child no longer has a real and substantial connection with the place where the extra-territorial order was made,
>
> (iii) substantial evidence concerning the best interests of the child is available in the Territories,
>
> (iv) the child has a real and substantial connection with the Territories, and
>
> (v) on the balance of convenience, it is appropriate for jurisdiction to be exercised in the Territories.
>
> (2) A court may decline to exercise its jurisdiction under this section where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside the Territories.

[19] Having considered the evidence, I am of the view that the children could prima facie be considered as habitually resident in the Northwest Territories under s.25(2) in that they last resided in Ft. McPherson with the grandmother pursuant to a lawful court order for a significant period of time.

[20] However, there is a live issue with respect to whether there has been acquiescence here or undue delay in commencing process for the return of the children. Where a person from whom a child has been removed has acquiesced in the change of the child's residence, a prima facie determination of habitual residence will be negated.

[21] Relevant to this question is the evidence of the grandmother to the effect:

> - that she spoke to Schafer's mother, Marion, in Old Crow and asked her if the children were safe and was told they were fine and living with the mother in a trailer they had provided to her.
>
> - that she asked Marion to make sure that Schafer did not take the children to Whitehorse because that is where the trouble began the last time.
>
> - that she asked Marion to "keep an eye on the children to make sure they were okay."
>
> - that during the summer and fall she worried about the children and the fact that Schafer had phoned her before Christmas and sounded heavily intoxicated and was harassing her to the point she had to change her phone number because of it.
>
> - that now that the mother has applied for custody in Yukon, she feels torn as to what to do and has been reluctant to take them away from the mother but feels she must intervene again to do that which is in the children's best interests which would be to live with her.

[22] The grandmother's evidence is to the effect that she was concerned for the well being of the children when they were not returned to her. She called Schafer's mother, Marion, and sought reassurance that she would " keep an eye on them". After receiving notice of the mother's application filed on December 17, 2009, she continued to feel torn as what to do and was hesitant or reluctant to assert her custodial rights but ultimately decided it was in the children's best interests to do so. Even the alleged harassing phone call before Christmas where the mother was intoxicated did not stir the Applicant to take immediate action. At no time did she request that the mother return the children to her custody. She never saw fit to take the seemingly logical, efficient and practical step of applying to the Court in Yukon for an Order to enforce her custodial rights.

[23] What may or may not constitute acquiescence or undue delay in a given case is dependent on the facts. There is no set time table or expiration date for action to be taken to assert the right to custody. In *R. v. Bernard*, 2004 SKCA 101, the Court of Appeal considered whether a six week delay in the assertion of parental custodial rights constituted acquiescence. On the facts in that case, the Court found that it did not but reviewed at length and cited with approval the authoritative case in the area, namely, *Katsigiannis v. Kottick-Katsigiannis* (2001), 55 O.R. (3d) 456. The Court there held that acquiescence is synonymous with tacit, silent or passive consent although it may be "inferred from conduct" or "evidenced by statements made in clear and unambiguous terms". The Court also stated that "it is a question of the actual subjective intention of the wronged parent." [see paras. 47 and 48]

[24] In this matter, it was open to the grandmother to apply to the Yukon Court to have her custody rights enforced upon learning that the children had been removed to Old Crow or upon coming to the realization that they were not going to be returned. Although this would have been a pragmatic and relatively efficient process, this avenue was not taken.

[25] By the grandmother's own evidence, I find that she wavered and, not without misgivings, decided to allow the mother to maintain custody of the children in Old Crow and not to intervene for the time being. Her assertion of her custodial rights comes not as a result of her taking the initiative but rather in response to the action taken by Schafer in applying for custody in the Yukon.

[26] For these reasons, I am not satisfied that at the commencement of these proceedings the children were habitually resident in the Northwest Territories. Although, it may be unnecessary to consider other factors, I think it would be useful if I commented on some of them.

[27] In her affidavit sworn February 18, 2010, the mother attached as exhibits several letters of support from friends, family, a person she shares office space with, a teacher, and social workers. Counsel for the Applicants object to the Court receiving evidence in this form and says it should be properly contained in sworn affidavits. Further she argues that the body of Schafer's affidavit is rife with opinion and hearsay where the basis for the knowledge and belief has not been stated and says that the Court should reject the affidavit in its entirety under R. 375 of the Rules of Court.

[28] I agree that it would be preferable to have had this evidence set out in affidavits but I do not consider it crucial that this was not done in this case. Much of what is contained in this material is potential evidence that would go to the merits of the case; that is, whether the mother should be awarded custody of the children. On the issue before the Court here, the only relevance I attach to this evidence is to note that there appears to be counselling available for the mother and children in Old Crow and that the family unit has established a substantial connection in the community.

[29] With respect to the body of the affidavit, I have avoided relying on any assertions that are wholly self-serving or disputed. Accordingly, I will exercise my discretion under R. 374 to allow the affidavit to be used in this proceeding notwithstanding that there are some irregularities in form.

[30] Under ss. 27 and 35(2), the Court may decline to exercise jurisdiction where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside of the Northwest Territories.

[31] Should this matter proceed to trial, there are a considerable number of individuals in Old Crow and the Yukon who could offer substantial evidence concerning the best interests of the children. Despite having lived in Ft. McPherson for more than a year, the children had and continue to have a substantial connection with the Yukon.

[32] I note further that the former family friend, Cindy Scheffen, has applied for custody in the Yukon action. She is a resident of Whitehorse. The Yukon Supreme Court made the initial order in this matter fully intending to maintain jurisdiction and specifically decreed that no change in custody to Schafer or Charlie Greenland would be made without an order of that Court. It is familiar with the background of this matter. Scheffen and Schafer both have counsel retained to represent their interests on the motion before the Court in Yukon. The grandmother had counsel previously and seemingly could retain counsel again. Having this matter heard in Yukon would be considerably more efficient than if it were to proceed in the Northwest Territories. The children are now living in Yukon.

[33] The Yukon is, in my view, the most convenient and appropriate jurisdiction to deal with this matter.

Conclusion

[34] I have found that the Applicant, Winnie Greenland acquiesced in the change of residence of the children to Old Crow and that, accordingly, the children are not habitually resident in the Northwest Territories. If I am wrong in this assessment, I would, nevertheless, exercise the discretion given to the Court under ss. 27 and 35(2) to decline jurisdiction as I consider that the Yukon is the more appropriate jurisdiction to hear this matter for the reasons above-mentioned.

[35] The issue of jurisdiction here was a legal question. Because of that and because, from the affidavit evidence of the Applicant grandmother, I can conclude that she may incur considerable expense in participating in this action in Yukon, I decline to make an order with respect to costs.

[36] I direct that certified copies of the Originating Notice of Motion, all relevant affidavits (excluding affidavits of service), the formal Order herein and this Memorandum of Judgment are to be conveyed by the Clerk to the Supreme Court of Yukon.

"D.M. Cooper"
D.M. Cooper
J.S.C.

Dated this 9th day of March, 2010.

Counsel for the Applicant: K. Winton

Counsel for the Respondent: D. Large, Q.C.

Corrigendum of the Memorandum of Judgment

of

The Honourable Justice D.M. Cooper

Paragraph number 17 was amended to change the date “February 8, 2008" to read February 29, 2008:

17. Having regard to those criteria, I consider it appropriate to recognize the Order of Veale J. of February 29, 2008 and, as such, it becomes an order of this Court and is enforceable in the Northwest Territories. But I do not understand recognition of the Order to mean that this Court automatically assumes jurisdiction and must enforce it.

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