S.W. v. C.M., 2011 NWTSC 21

Date: 2011 04 27
Docket: S-1-CV-2004000391

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

In the matter of the *Children's Law Act* of the Northwest Territories

BETWEEN:

S.W.

Applicant

- and -

C.M.

Respondent

MEMORANDUM OF JUDGMENT

[1] Dale and Bonnie Wheaton ("the grandparents") seek leave of this Court to make an application for joint custody of and access to their granddaughter, who is now 6 years old. The grandparents are the parents of the child's mother.

[2] This application is brought pursuant to the *Children's Law Act*, S.N.W.T. 1997, c. 14. Subsections 20(1) and (2) of that *Act* provide as follows:

> 20.(1) A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.
>
> (2) A person other than a parent may not make an application under subsection (1) for an order respecting custody of a child or determining any aspect of the incidents of custody of the child without leave of the court.

[3] The *Act* does not say what factors a court is to consider in deciding whether to grant leave under s. 20(2), but other cases decided in this jurisdiction have taken into

account whether the applicant has played the role of a caregiver to the child for a substantial period of the child's life, whether the applicant has a parental-like connection to the child in the sense of providing care, nurture and support, whether the application for custody or access is devoid of merit or patently tenuous: *W.L. v. K.D.H.,* 2007 NWTSC 38.

[4] The rationale for the requirement for a parental-like connection to the child was explained by Vertes J. in *G.D. v. G.M.*, [1999] N.W.T.J. No. 38 as follows:

> In my opinion, the best interests of a child are not served by frivolous or ill-founded applications for custody or access. Not everyone who merely has an interest in the child should be allowed to force the custodial or biological parent into court. There must be a connection to the child that can be almost equated to a parental one in the sense of care, nurture and support.

[5] The *Act* does not give anyone who is not a parent of the child rights to custody or access. Anyone other than the parents is thus considered a "legal stranger" to the child. It is generally left to the custodial parent (or parents, if they have joint custody) to decide which legal strangers should have access to the child, even if they may have had access in the past. This is relevant to whether standing should be granted by the Court as explained by Sparks J. in *Stewart v. Macdonnell*, [1992] N.S.J. No. 612 (Fam. Ct.) in comments adopted by Vertes J. in *G.D. v. G.M.*:

> It seems to me that before standing should be granted by the court, the legal stranger to the child must establish, at the very least, a prima facie case connecting the welfare of the child with continued visits. This may be proved by demonstrating a lengthy and meaningful prior relationship, positive bond with the child and a substantive reason for disregarding the contrary wishes of the custodial parent.

[6] In this case, the mother has sole custody of the child pursuant to an interim order granted January 21, 2005 in this action, which was brought by the mother against the biological father.

[7] The grandparents bring their application because the mother has not allowed them to see the child since October. They have seen the child only at the child's recreational activities and events, which they have attended contrary to the mother's wishes.

[8] Some of the facts are in dispute, but for purposes of this application there is some common ground. It appears that up until the fall of 2010, the grandparents saw the child often. The mother and child lived with the grandparents for periods of time in the past and when not living with them, the child often spent weekends with them. She also went on holidays with them from time to time.

[9] In the early summer of 2010, the child disclosed that she had been molested by the 12-year-old son of the mother's boyfriend. The mother and the boyfriend contacted the police and child protection services. The boy is now facing charges and is living with family members in another province. The mother made the grandparents aware of what had happened.

[10] The mother's efforts to deal with this traumatic situation apparently did not satisfy the grandparents, who, as I gather from the grandmother's affidavit, feel she has put the boyfriend and his son before her daughter. This led the grandparents to arrange what is sometimes called an "intervention", whereby the mother was called to their home so that family members could tell her what they felt she should be doing in her child's best interests. By the account of both the mother and the grandmother, this was an extremely emotional and upsetting event, which the mother fled from, and which culminated in a confrontation outside the mother's home in the presence of the child.

[11] The mother says in her affidavit that she was shocked, frightened and very upset by her family's actions, so much so that she spoke to the police about what happened. She decided that the grandparents will not see the child until the conflict has subsided and their behaviour has changed. Part of their problematic behaviour, she says in her affidavit, is that they have said things to the child, which the child has subsequently repeated to the mother, and which have made the child uncomfortable and caused her stress. The mother also says she had the child see a counselor and information and advice she received as a result of that helped her decide that it would be best for the child not to see the grandparents for awhile. She is also unhappy that it has been relayed to her by family members and other individuals that the grandparents have spoken to them about the child having been molested, thus breaching the child's privacy.

[12] The grandparents say they have a loving relationship with their granddaughter and wish to continue the same kind of contact they have had with her in the past. Although the grandmother says she has been concerned since before these events about

the mother's mental well-being, the information she provides about the mother suffering from depression is quite dated. The only other concern she expresses is about the mother's relationships with men and that she believes the mother is giving priority to her relationship with her boyfriend and his son rather than her daughter.

[13] The biological father of the child, who lives outside the Northwest Territories, supports the grandparents' application. It is unclear, however, how much involvement he has had in the child's life and how much knowledge he has of the relationship between the grandparents and the child. Because of that, I do not give his affidavit evidence any weight.

[14] Looking at the factors to be considered, it is clear that the grandparents have had a lengthy and meaningful relationship with the child. She has spent a great deal of time with them in the past, both when she and her mother have lived in their household and when they have lived elsewhere. While the mother has been the child's primary caregiver, the grandparents have acted as caregivers from time to time throughout the child's life and have provided care, nurture and support for her. In my view, it is the fact that the relationship involved care, nurture and support that is important; whether their support in the form of purchasing clothing and other items was actually necessary is not determinative. The mother does not really question that there has been a strong bond between the grandparents and the child.

[15] If one were to ask who would have cared for the child if the mother had been sick or otherwise unable to do so for an extended period of time, on the evidence before me it would most likely have been the grandparents.

[16] I am satisfied therefore that there is a sufficient parental-like connection, a caregiver relationship between the grandparents and the child. The next issue is whether the application for custody or access is devoid of merit or patently tenuous.

[17] In their notice of motion, the grandparents seek joint custody and access. In argument, counsel for the grandparents indicated that their main concern is access. Quite apart from that, I find there is no merit to the claim for joint custody. There is no evidence that the mother is unable or unwilling to look after the child properly. She is 27 years old and has been employed full-time for the past seven years. She has taken appropriate steps to deal with the child's disclosure. There is simply no evidence before the Court that supports the grandparents' claim for joint custody.

[18] In considering the merits of the claim for access, I bear in mind that at this stage I am only looking at whether the claim can be said to have no merit at all. If it has no merit at all, then standing should not be granted. If there is at least an arguable case for access, then standing should be granted so that the grandparents can make their argument and the mother make hers and a decision rendered on the merits.

[19] On the merits of the claim for access, I find helpful the principles listed by Gower J. in *G.N. and Y.N. v. D.N. and E.P.*, 2009 YKSC 75 at paragraph [8] (paraphrasing *Parmar v. Parmar*, [1997] B.C.J. No. 2094). One difference that must be noted between the law in Yukon and the law in the Northwest Territories is that s. 33(1) of Yukon's *Children's Act*, R.S.Y. 2002, c. 31 gives grandparents legal standing to apply for custody or access, they do not have to apply for standing.

[20] The principles set out by Gower J. may be summarized as follows (I have added a reference to the Northwest Territories' *Children's Law Act)*:

> 1. Grandparents do not have a legal right to custody of or access to their grandchildren.
>
> 2. If grandparents are successful in obtaining access, their entitlement is different from the right and entitlement of a parent.
>
> 3. The best interests of the child are paramount. In determining the best interests all the needs and circumstances of the child must be considered, including, amongst other factors, the love, affection and emotional ties between the child and the person seeking access and any blood relationship between the child and the person seeking access (s. 17, *Children's Law Act*).
>
> 4. In normal circumstances, it is in the best interests of children to have contact with their grandparents and extended family members.
>
> 5. Considerable weight should be given to the wishes of the custodial parent.
> 6. Generally speaking, grandparents have to accommodate themselves to the parent's decision regarding the amount and type of access.

> 7. The child's preference should be considered, if appropriate considering her age.
>
> 8. When the court finds it appropriate to grant specified access, the amount allowed is ordinarily quite limited.

[21] The applicants are the grandparents of the child and so generally contact with them should be considered as in the child's best interests. In this particular case, it can be said that the lengthy and close relationship the grandparents have had with this child is a relationship that has been and is likely to be of value to the child. All of this suggests there is merit to their claim for access.

[22] On the other hand, the grandparents' reaction to the child's disclosure and the intervention they arranged has caused problems between the mother and the grandparents. That tension, and the mother's observation that the child was upset by things the grandparents said to her, all suggest that the mother had legitimate reasons for discontinuing access when she did. She did not take that step until approximately a week after the intervention so it appears that she gave the matter some thought and did not act hastily.

[23] However, it has now been more than six months since the mother discontinued contact. That is a long time for a young child not to have contact with grandparents she was accustomed to spending time with on a regular basis. The mother also indicates in her affidavit that she has plans to leave Yellowknife for Ontario in the near future. If normal contact between the child and the grandparents is to be re-established, it is reasonable to think it will be easier for the child if it happens before, rather than after, the move. These circumstances may be found to constitute "a substantive reason for disregarding the contrary wishes of the custodial parent" per Sparks J. in *Stewart v. MacDonnell*. It will be up to the judge hearing the access application to decide whether they do or not or whether there are other considerations.

[24] On balance, therefore, I cannot say that the grandparents' application for access is without any merit. I therefore grant them standing for purposes of the access application only. At the same time, and bearing in mind the considerations I have listed above, I strongly encourage the parties and counsel to try again to resolve this difficult matter without the necessity of a further court application.

[25] An issue was raised at the beginning of argument as to whether the grandparents' application ought to have been brought in this action, which was originally an application by the mother against the biological father for custody and child support. That application has not progressed beyond the interim order granted in 2005. Had the grandparents started a separate proceeding, in my view they would have had to name both the mother and the biological father as parties because custody has not been determined as between them by way of a final order. Because of that, I think no harm is done by the fact that the grandparents brought their application within this action, although they could also have done so in a separate proceeding since the action between the parents appears to be in abeyance.

[26] As a result of the grandparents being granted standing to bring their application for access, I direct that they be added as respondents in this action and the style of cause be amended accordingly.

[27] Should counsel wish to speak to costs, they may provide their available dates for that purpose to the registry or, if they agree, they may propose a schedule for filing and exchanging written submissions.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
27th day of April 2011

Counsel for Dale Wheaton
and Bonnie Wheaton: Betty Lou McIlmoyle

Counsel for S.W. : Margo Nightingale

Agent for C.M.: Garth Wallbridge

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