Powless-Jones v. *Jones,* 2013 NWTSC 56

Date: 2013 08 14
Docket: S-1-FM-2013 000026

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARINA POWLESS-JONES

Applicant

-and-

GARRET JONES

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION

[1] The parties are involved in a dispute regarding custody, access and child support relating to their two sons, who are now 4 and 5 years old. The parties separated in March 2011. The children have been in the care and control of their mother since the separation.

[2] As far as the circumstances of the relationship, the events surrounding their separation, and what has transpired since, the parties agree on very little. They have each filed lengthy affidavits. Virtually every matter of significance to the issues in this litigation is the subject of diametrically opposed accounts of events. The conflict in the evidence is such that barring the parties being able to resolve matters, there will certainly need to be a hearing with *viva voce* evidence so that a Court can assess the evidence, make factual findings, and dispose of the issues raised in this matter in accordance with those findings.

[3] The matter was spoken to in regular Family Chambers on May 23rd, 2013. An Interim Consent Order was issued on that date dealing with child support and

disclosure of financial information. The matter was in Family Chambers again on June 20, 2013. On that date, another Interim Order was issued by consent. The terms of that Interim Order were as follows:

> 1. The Respondent shall have access in Yellowknife, conditional upon being sober;
>
> 2. Neither party will allow the children to be exposed to drugs or alcohol;
>
> 3. The Respondent will not remove the children form Yellowknife, until further order of the Court;
>
> 4. The Respondent will provide a telephone number and an itinerary of where he will be with the children; and
>
> 5. All matters, including access, are adjourned to July 25th, 2013 at 10:00 a.m. to be spoken to.

[4] The matter was back in Family Chambers on July 25. On that date, while the parties agreed that the Interim Order should continue, there was considerable disagreement about what its terms should be.

[5] The areas of disagreement are the following:

1. The father seeks to have a condition added stating that the mother cannot take the children outside the Northwest Territories without leave of the Court. The mother takes the position that this is unnecessary because she has no plans to travel outside the jurisdiction at this time.

2. The father is asking that the payment schedule for the child support be modified so that he can be permitted to make payments twice a month; this would better align his child support obligations with his pay schedule. The mother is opposed to this. She wants the full amount to continue to be payable at the start of each month.

3. The mother seeks to have a term stating that the children are in her care and control, so that the Order reflects the current situation. The father takes the position that this is not necessary.

4. The father seeks the removal of the condition requiring that access takes place in Yellowknife. The mother is opposed to this.

B) ANALYSIS

1. Access

[6] The parties disagree about almost every fact relevant to this matter, but this much is clear: the children have been residing with the mother since the separation. Currently, they live with her in Yellowknife.

[7] The father resides in Hay River with his current partner, who has three children, aged 10, 7 and 3. At the time of the July 25 appearance, his partner was pregnant and was expected to give birth to their child within a matter of days or weeks.

[8] The father acknowledges that he has struggled with alcohol and substance abuse issues, although he deposes that those issues were never as serious as what the mother claims. He alleges that the mother has also had substance abuse issues and that at times, this has compromised her ability to care properly for the children. As far as his own situation, he says that he has taken treatment and that he has been completely clean and sober since September 2012.

[9] As I have already mentioned, for the most part, the evidence filed is completely contradictory, and the parties' positions and views are very polarized. This is also true of the evidence most relevant to access.

[10] The mother deposes that the father missed some of the opportunities that had been arranged for him to exercise access in Edmonton when she lived there with the children. She says on one occasion he did not show up. On another occasion, a visit had been planned at the Edmonton airport while the father was passing through. The mother says that when she arrived at the airport with the children and called the father, he was in a licensed premise in the secure area of the airport, and sounded intoxicated, so she left.

[11] The father denies being intoxicated at the time the visit at the Edmonton airport had been arranged. He says that what happened on that day was that the mother got the times of his flight mixed up. He says this was why his opportunity to see his sons was missed. He says that on another occasion, he travelled to Edmonton for a funeral and tried to contact the mother to arrange a visit but she did not answer the phone.

[12] The other area of contention has to do with some of the access that has taken place in Hay River since the parties separated. In her affidavits the mother outlines concerns she has about those visits. She deposes that during the Christmas season

in 2011, the children spent 9 days in Hay River, and during that time the father abused drugs and alcohol and caused damage to his home. The father denies this. He deposes that he did occasionally drink during the period of time when the children were visiting, but that he only did so when the children were out of the house, visiting their grandmother at her house.

[13] The mother also deposes that after access visits in Hay River in September and October 2012, her youngest son displayed inappropriate behaviour, rubbing his genitals against his older brother. When she intervened, her oldest son told her that the eldest of the father's step-children had done this to them. She reported the matter to Social Services and asked them to look into the matter. Social Services, she says, also got the police involved. The mother deposes that ultimately no action was taken because the child in question was too young to be the subject of criminal charges. She deposes that the social worker advised her to seek sole custody and not allow the children to be in that home.

[14] The father disputes this allegation and says that it is a complete fabrication. He deposes that the access visit that gave rise to the mother's complaint to Social Services did not take place in the fall of 2012, but rather, in early January 2013. He deposes that this complaint was retaliation because he had reported the mother to Social Services following an incident that took place in Yellowknife on Christmas Eve. As for the alleged events in Hay River, he deposes that after investigation, Social Services deemed the complaint unfounded.

[15] Those are just a few examples of the kinds of contradictions in the evidence. It is simply not possible to resolve these types of evidentiary conflicts by picking one version over the other on the basis of affidavit material. The matter is further complicated by the fact that the affidavits filed by both parties include a significant amount of hearsay.

[16] In her first affidavit, the mother deposes that she wants access to be supervised. The evidence shows, however, that the access that has taken place to date has not been supervised, including the most recent access that took place earlier this summer in Yellowknife. The issue, at this point, is not whether access should be supervised or not supervised. The issue is where the access should take place.

[17] It is not difficult to understand why the father would prefer to have the option of exercising access in his home, considering he has a partner, step-children, and has or will very soon have a new baby. But of course, the overriding consideration in making any decision related to custody and access is not what one

or the other parent prefers or finds more convenient. The overriding consideration is what is in the best interests of the children.

[18] The difficulty at this stage of the proceedings is that both parents allege things against each other that, if proven, will be relevant to the determination of what is in the best interest of the children. But much of that is contested and will have to be resolved at the hearing, unless of course the parents are able to come to a resolution on their own.

[19] The mother's opposition to access taking place in Hay River is based, in part, on her concerns about the father's past history of substance abuse and erratic behaviour. The father acknowledges that he has struggled with significant substance abuse issues and that it was only within the last year that he has been able to get those issues under control.

[20] Exhibit "B" to the mother's Supplementary Affidavit, (a Facebook message reportedly sent to her in March 2012 by the father's current spouse), appears to support the mother's claim about the father engaging in erratic behaviour. I recognize that it is hearsay, but on its face it offers some corroboration that his past behaviour has been of concern.

[21] As for the allegations arising from the access visits that led to the complaint to Social Services (whether it was in the fall of 2012 or later on, during the holidays season that year), I am unable to make findings about it on the basis of the evidence that has been submitted. In particular, the parties report very different things about the outcome of the investigation by Social Services. The mother claims she was advised not to let the children be in that home. The father claims that Social Services deemed the complaint unfounded.

[22] There is a world of difference between those two versions. Presumably, whoever was involved from Social Services could shed some light on which version is most accurate. But what I am left with is evidence that, on its face, raises some concerns about access taking place in Hay River.

[23] Even assuming that I was satisfied that it has been established on a balance of probabilities that there are no safety concerns in the children being taken to Hay River for access visits, I am not persuaded, in any event, that it is in their best interests, for the time being, to be driven back and forth between Yellowknife and Hay River to spend time with their father. The distance between Hay River and Yellowknife is almost 500 kilometers. That is a long distance to travel by car for young children, particularly if the return trip has to be done within a relatively

short period of time. It seems to me the time they spend with their father would be of better quality if it did not involve making a return trip of close to 1,000 kilometers within the span of 4 or 5 days.

[24] This is not a situation where access is impossible unless it takes place in Hay River. It can take place, and has taken place, unsupervised, in Yellowknife.

[25] I recognize that exercising access in Yellowknife may entail costs for the father that would not arise if he exercised access in Hay River. But there are also costs involved in driving up to Yellowknife to pick up the children, driving back to Hay River with them to have a visit, driving them back to Yellowknife, and going back to Hay River.

[26] Considering that I am dealing with the issue on an interim basis only, I have concluded that it is in the best interests of the children for the access to continue to take place in Yellowknife for the time being.

[27] There is no indication of there having been any problems during the last access visit that took place in Yellowknife, on July 7 and 8. If the father travels to Yellowknife to exercise access, there is no reason why he should not be able to exercise access for a longer period of time than two days.

[28] The father deposes that he is available for a visit between August 21 and September 4. In her Supplementary Affidavit the mother deposes that she and the children have plans until August 25. This leaves a reasonable period of time for the father to exercise access if he wishes. In my view, if he is able to travel to Yellowknife to exercise access, he should be permitted to do so for more than a few days. The mother deposes that the children have never been away from her for long periods of times but it is apparent from the evidence that, in the past, there have been periods of access of up to 9 days. In my view, the father should be permitted to have a period of access for a period of no less than 6 consecutive days between August 25 and September 4.

[29] I am not able to deal with specified access beyond that, as I do not have evidence of the father's work schedule beyond September 4. In any event, it would be far preferable for the parties to work out access between themselves, with the assistance of their counsel if need be. It is usually preferable to give the parties some flexibility and for the Court not to micro-manage access. But of course, for this to work, the parties have to approach the issue reasonably and with the purpose of fostering contact of the children with both parents, irrespective of the conflicts and differences that exist between the parents. If this does not prove possible, the

matter can be brought back before the Court and more specific parameters will be set down.

2. Other issues

[30] In my respectful view, the three other issues that were raised on July 25 are matters on which the parties should have been able to reach agreement.

[31] It is not unreasonable, while issues of custody and access are outstanding, for there to be conditions preventing either parent from removing children from the jurisdiction without leave of the Court, unless the other parents gives his or her written consent. Those types of Orders are routinely made to ensure that neither party makes unilateral decision affecting the children and their access to the other parent.

[32] Similarly, it is not uncommon to have interim orders include a term that does nothing more than confirm the *de facto* care and control situation that exists at a given time. This does not cause any prejudice to the party who has a pending application to have that situation changed.

[33] Finally, it is not unreasonable for the father to ask that his child support payment schedule follow his pay schedule. Such a request is not out of the ordinary either. The objective of legislation dealing with child support is to minimize, as much as possible, the impact that the parents' separation has on children, from a financial point of view. If these parents still lived together and the father was paid every two weeks, the management of the family's finances, payment of bills, etc., would have to be arranged and planned around that. I acknowledge that not receiving the full amount of child support at the start of the month requires more planning on the part of the recipient parent. But similar constraints would exist if the parents still lived together.

C) CONCLUSION

[34] For these reasons, the Interim Orders made by this Court on May 23, 2013 and June 20, 2013 will be replaced by an Interim Order with the following terms:

1. The children will be in the day to day care and control of the mother.

2. The father shall have reasonable and generous access to the children, subject to the following terms:

a) the father will not consume alcohol or drugs when exercising access;

b) the access will take place in Yellowknife;

c) the father will provide a telephone number and an itinerary of where he will be with the children;

d) between the dates of August 26 and September 4, the father will have access to the children for a period of no less than six consecutive days.

3. Neither parent will allow the children to be exposed to drugs or alcohol.

4. Neither parent will remove the children from the Northwest Territories without leave of the Court, or the written consent of the other parent, except in case of a medical emergency, on the advice of a medical doctor.

5. The father shall pay child support to the mother in the sum of $1,225 every month, commencing June 1, 2013. For September 2013 onwards, the child support payments will be payable as follows:

a) $612.50 payable the 1st day of every month, and

b) $612.50 payable no later than the 15th of every month

6. The matter is adjourned sine die, to be scheduled for a hearing at the request of the parties

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
14 day of August, 2013

Counsel for the Applicant: Jeremy Walsh
Counsel for the Respondent: Candace Seddon

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