

## SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-04-073947-195

DATE: November 14, 2019

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**BY THE HONOURABLE ANNE JACOB, J.S.C.**

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**S. D.**

**Applicant**

v.

**R. M.**

**Respondent**

and

**THE PUBLIC CURATOR OF QUEBEC**

and

**K. Q.**

and

**DIRECTOR OF YOUTH PROTECTION CENTRE**

**Mis en cause**

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### JUDGMENT<sup>1</sup>

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[1] Since 2010, the paternal grandmother has been the tutor of the minor child, X (11 years old).

[2] The maternal grandmother asks for shared custody. She also asks to extend the child's visits (access rights) during weekends and to maintain the rest of the visits according to the current schedule.

**THE FACTS**

[3] X was born six (6) weeks prematurely on [...], 2008<sup>2</sup>.

[4] The mother, Sa. D. and the father, K. Q. had serious parental limitations and were unable to care for X when she was released from the Neonatal Intensive Care Unit (NICU) after three (3) weeks.

[5] The A Youth Center was involved with X since she was in the NICU because the parents were incapable of looking after her.

[6] X was placed in foster care for two (2) or three (3) days.

[7] The paternal grandmother testifies that Sa. asked her to take care of X. This grandmother was a nursing assistant.

[8] The maternal grandmother testifies that she thought it was a judicious choice. She was aware that her daughter was reproaching her of being too controlling. Sa. was under the impression that her mother wanted to take her place with X since she was born.

[9] The paternal grandmother discussed this subject with her husband, the paternal grandfather.

[10] They were both perfectly conscious of the important responsibility, but they were afraid that the child could be placed with another family. They accepted to take care of X. The paternal grandmother stopped working in order to devote all her time to the care of X.

[11] On [...], 2009, a judgment was rendered by the Youth Division of the Court of Quebec<sup>3</sup>.

[12] This judgment indicates that when the child was hospitalized, the mother only visited her on ten (10) occasions and the father on two (2) occasions for short visits each time. The following paragraphs of that judgment state :

[4] [...]

[5] [...]

[6] [...]

[10] [...]

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<sup>2</sup> Exhibit A-1.

<sup>3</sup> Exhibit A-2.

[14] [...]

[15] [...]

[13] On May 31, 2009, the mother, Sa. died from a heart attack during an epilepsy crisis<sup>4</sup>.

[14] The maternal grandmother was overwhelmed with grief for a period of approximately two years.

[15] On [...], 2010, the Youth Division of the Court of Quebec granted the Director of Youth Protection's motion to confer tutorship on the paternal grandmother<sup>5</sup> :

[12] [...]

[13] [...]

[14] [...]

[15] [...]

[16] This motion was not contested by the maternal grandmother and her husband.

[17] The paternal grandparents testify that X then still needed a lot of care. The maternal grandmother told them that they were heroes to accept such a heavy burden.

[18] Since then, the relationship between the two grandmothers has been very harmonious.

[19] The father of the child now lives in Town A. He visits and calls X on an irregular basis.

[20] X was diagnosed early on with Attention Deficit Hyperactivity Disorder (ADHD) and a slight cognitive impairment<sup>6</sup>.

[21] X had speech therapy for 2 ½ years and occupational therapy for 2 years, before starting elementary school.

[22] The maternal grandmother went with her to many of those sessions<sup>7</sup>.

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<sup>4</sup> Exhibit A-3.

<sup>5</sup> Exhibit A-4.

<sup>6</sup> Exhibit A-5.

<sup>7</sup> Exhibit A-6.

[23] The maternal grandmother is also involved in many of X's medical and dental appointments, in school activities, meetings and extracurricular activities.

[24] Gradually, the maternal grandmother asked the tutor to see X more regularly.

[25] In 2017, the maternal grandfather died suddenly.

[26] The paternal grandparents explain that since then the maternal grandmother insisted on keeping the child more often and for longer periods.

[27] The maternal grandmother says that this situation dates back to 2014.

[28] It is not disputed that the paternal grandmother and her husband let the maternal grandmother take up a large place in X's life.

[29] X stays at her tutor's home during the week and every weekend, from Friday to Sunday, at her maternal grandmother's home.

[30] Generally, X is with her maternal grandmother many days each year which comprises every weekend, 4 days at Easter, 16 days at Christmas, 14 days during the summer when X attends day camp, 10-14 days during August vacation, some pedagogical days during the school year and statutory holidays.

[31] The tutor pays sums to the maternal grandmother for X's babysitting and reimburses her claims for expenses<sup>8</sup>.

[32] In 2018, the maternal grandmother asked three (3) times to the paternal grandmother to share custody. This proposal was finally refused by the tutor.

[33] Both of the grandmothers have been greatly involved in X's life. X has also developed a strong emotional bond with her paternal grandfather.

[34] In February 2019, the maternal grandmother instituted the present judicial Application.

[35] Last summer, the maternal grandmother states that the tutor changed the summer camp without X's consent (nearly 11 years old) who was extremely disappointed.

[36] According to the maternal grandmother, the last summers' camp contained more activities.

[37] According to the paternal grandmother, the chosen camp was less expensive and closer to the child's residence.

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<sup>8</sup> Exhibits D-1 and D-2.

[38] The maternal grandmother affirms that this particular decision was not in the best interest of X. She adds that X has special needs. She believes that there will be important decisions to be made in the future that will have an impact on X's life.

[39] The maternal grandmother asks for shared custody to be able to have a legal voice on an equal basis (50 % / 50 %).

#### THE LAW

[40] The relevant sections of the *Youth Protection Act* are the following<sup>9</sup> :

**70.1.** Lorsqu'un enfant se retrouve dans l'une des situations prévues à l'article 207 du Code civil et que le directeur a pris sa situation en charge, ce dernier peut demander au tribunal de se faire nommer tuteur ou de faire nommer toute personne qu'il recommande pour agir comme tuteur s'il considère que la tutelle est la mesure la plus susceptible d'assurer l'intérêt de l'enfant et le respect de ses droits.

À la suite de cette demande, le tribunal peut procéder à la nomination d'un tuteur lorsqu'il estime, dans l'intérêt de l'enfant, qu'il s'agit d'une mesure appropriée pour celui-ci.

Les règles du Code civil s'appliquent à cette tutelle, sous réserve des dispositions de la présente loi.

**70.2.** Le directeur met fin à son intervention auprès d'un enfant dont il a pris la situation en charge lorsque l'enfant a été confié à une personne ou à une famille d'accueil et que cette personne ou une personne de la famille d'accueil a été nommée tuteur de cet enfant conformément au deuxième alinéa de l'article 70.1.

**70.1.** If a child is in one of the situations described in section 207 of the Civil Code and the director has taken charge of the child's situation, the director may apply to the tribunal to be appointed as tutor or to have a person he recommends appointed as tutor if he considers that tutorship is the measure most likely to ensure the interest of the child and the respect of his rights.

Following the application, the tribunal may appoint a tutor if it considers, in the interest of the child, that such a measure is appropriate.

The rules of the Civil Code apply to the tutorship, subject to the provisions of this Act.

**70.2.** If the child is entrusted to a person or a foster family and that person or a member of the foster family is appointed tutor to the child in accordance with the second paragraph of section 70.1, the director shall put an end to his intervention in respect of the child.

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<sup>9</sup> CQLR c P-34.1.

Dans ce cas, le directeur est assujéti aux obligations prévues à l'article 45.2.

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**70.3.** Pour favoriser la tutelle, une aide financière pour l'entretien de l'enfant peut être accordée au tuteur visé à l'article 70.2, selon les conditions et modalités fixées par règlement.

**70.3.** To facilitate tutorship, financial assistance for the child's upkeep may be granted to the tutor referred to in section 70.2, according to the terms and conditions prescribed by regulation.

**70.4.** Lorsque le tuteur d'un enfant décède, a des motifs sérieux de ne plus exercer sa charge, n'est plus en mesure de le faire ou qu'un intéressé, dans l'intérêt de l'enfant, en demande le remplacement, le tribunal doit en être saisi.

**70.4.** If the tutor of the child dies, has serious reasons to give up his duties or is no longer able to perform them, or if an interested person requests that the tutor be replaced in the interest of the child, the matter must be referred to the tribunal.

Le tribunal doit demander au directeur une évaluation de la situation sociale de l'enfant et une recommandation sur la nomination d'un nouveau tuteur, le cas échéant.

The tribunal shall ask the director for an assessment of the social situation of the child and a recommendation concerning the appointment of a new tutor, if necessary.

**70.5.** Lorsqu'un parent désire être rétabli dans sa charge de tuteur, il doit s'adresser au tribunal.

**70.5.** A parent who wishes to be reinstated as tutor shall apply to the tribunal.

Le tribunal doit demander au directeur une évaluation de la situation sociale de l'enfant.

The tribunal shall ask the director for an assessment of the child's social situation.

**70.6.** Le tribunal peut, lorsqu'il nomme un tuteur ou par la suite, prévoir toute mesure relative à cette tutelle s'il l'estime dans l'intérêt de l'enfant et, entre autres, prévoir le maintien de relations personnelles entre l'enfant et ses parents, ses grands-parents ou toute autre personne et en régler les modalités.

**70.6.** When or after the tribunal appoints a tutor, it may prescribe any measure relating to the tutorship that it considers to be in the interest of the child; it may also prescribe, among other things, that personal relations between the child and the child's parents, grandparents or any other person be maintained, and determine how they will be maintained.

[41] The relevant sections of the *Civil Code of Quebec* are the following :

**33.** Les décisions concernant l'enfant doivent être prises dans son

**33.** Every decision concerning a child shall be taken in light of the child's

intérêt et dans le respect de ses droits. interests and the respect of his rights.

Sont pris en considération, outre les besoins moraux, intellectuels, affectifs et physiques de l'enfant, son âge, sa santé, son caractère, son milieu familial et les autres aspects de sa situation.

Consideration is given, in addition to the moral, intellectual, emotional and physical needs of the child, to the child's age, health, personality and family environment, and to the other aspects of his situation.

**177.** La tutelle est établie dans l'intérêt du mineur; elle est destinée à assurer la protection de sa personne, l'administration de son patrimoine et, en général, l'exercice de ses droits civils.

**177.** Tutorship is established in the interest of the minor; it is intended to ensure the protection of his person, the administration of his patrimony and, generally, to secure the exercise of his civil rights.

**178.** La tutelle au mineur est légale, supplétive ou dative.

**178.** Tutorship to minors is legal, suppletive or dative.

La tutelle légale résulte de la loi. La tutelle supplétive ou dative est celle pour laquelle le père ou la mère désigne un tuteur; dans le cas de la tutelle dative, le tuteur peut également être désigné par le tribunal.

Tutorship resulting from the law is legal. Tutorship for which the father or mother designates a tutor is suppletive or dative; in the case of dative tutorship, the tutor may also be designated by the court.

**185.** Sauf division, la tutelle s'étend à la personne et aux biens du mineur.

**185.** Except where divided, tutorship extends to the person and property of the minor.

**186.** Lorsque la tutelle s'étend à la personne du mineur et qu'elle est exercée par une personne autre que les père et mère, le tuteur agit comme titulaire de l'autorité parentale, à moins que le tribunal n'en décide autrement.

**186.** Where tutorship extends to the person of the minor and is exercised by a person other than the father or mother, the tutor acts as the person having parental authority, unless the court decides otherwise.

**187.** On ne peut nommer qu'un tuteur à la personne, mais on peut en nommer plusieurs aux biens.

**187.** In no case may more than one tutor to the person be appointed, but several tutors to property may be appointed.

Dans le cas d'une tutelle supplétive, on peut toutefois nommer deux tuteurs à la personne.

However, in the case of a suppletive tutorship, two tutors to the person may be appointed.

**198.** Le père ou la mère qui s'est vu retirer la tutelle, par suite de la déchéance de l'autorité parentale ou du

**198.** A father or mother deprived of tutorship as a result of having been deprived of parental authority or having

retrait de l'exercice de certains attributs de cette autorité, peut, même après l'ouverture d'une tutelle dative, être rétabli dans sa charge lorsqu'il jouit de nouveau du plein exercice de l'autorité parentale.

**199.8** Le père ou la mère peut, lorsque des faits nouveaux surviennent, être rétabli par le tribunal dans ses charges de tuteur légal et de titulaire de l'autorité parentale à la demande de l'un d'eux, du tuteur ou de l'enfant âgé de 10 ans et plus.

**205.** La tutelle est déferée par le tribunal lorsqu'il y a lieu de nommer un tuteur ou de le remplacer, de nommer un tuteur *ad hoc* ou un tuteur aux biens, ou encore en cas de contestation du choix d'un tuteur nommé par les père et mère.

Elle est déferée sur avis du conseil de tutelle, à moins qu'elle ne soit demandée par le directeur de la protection de la jeunesse.

**207.** Le directeur de la protection de la jeunesse ou la personne qu'il recommande pour l'exercer peut aussi demander l'ouverture d'une tutelle à un enfant mineur orphelin qui n'est pas déjà pourvu d'un tuteur, à un enfant dont ni le père ni la mère n'assument, de fait, le soin, l'entretien ou l'éducation, ou à un enfant qui serait vraisemblablement en danger s'il retournait auprès de ses père et mère.

**611.** Les père et mère ne peuvent sans motifs graves faire obstacle aux relations personnelles de l'enfant avec ses grands-parents.

À défaut d'accord entre les parties, les

had the exercise of certain attributes of parental authority withdrawn may, even after dative tutorship is instituted, be reinstated as tutor once he or she again has full exercise of parental authority.

**199.8** The father or mother may, if new facts arise, be reinstated by the court as legal tutor and as person having parental authority on the application of either of them, the tutor, or the child if he is 10 years of age or over.

**205.** Tutorship is conferred by the court where it is expedient to appoint a tutor or a replacement, to appoint a tutor *ad hoc* or a tutor to property or where the designation of a tutor appointed by the father and mother is contested.

Tutorship is conferred on the advice of the tutorship council, unless it is applied for by the director of youth protection.

**207.** The director of youth protection or the person recommended as tutor by him may also apply for the institution of tutorship to an orphan who is a minor and who has no tutor, or to a child whose father and mother both fail, in fact, to assume his care, maintenance or education, or to a child who in all likelihood would be in danger if he returned to his father and mother.

**611.** In no case may the father or mother, without a grave reason, interfere with personal relations between the child and his grandparents.

Failing agreement between the parties,

modalités de ces relations sont réglées par le tribunal. the terms and conditions of these relations are decided by the court.

## ANALYSIS

### DEMAND FOR SHARED CUSTODY

[42] On [...], 2010, tutorship was conferred by a decision of the Youth Division of the Court of Quebec under section 70 of the **Youth Protection Act**<sup>10</sup>.

[43] The custody of X was entrusted to her tutor, the paternal grandmother.

[44] Under section 186 of the **Civil Code of Quebec** when tutorship extends to the person of the minor *the tutor acts as the person having parental authority unless the Court decides otherwise*.

[45] In this case, the tutor has both sole custody and parental authority.

[46] The parties do not argue that the file should be returned to the Youth Division since tutorship is not disputed by the maternal grandmother.

[47] The maternal grandmother does not request that the tutor be replaced in the interest of the child.

[48] She does not contest the paternal grandmother's ability to exercise her role as a tutor.

[49] The maternal grandmother only asks for shared custody.

[50] In the light of all the aforementioned sections, this particular request does not seem well-founded in law.

[51] Anyhow, the evidence does not demonstrate that this tutorship (custody and parental authority) has been exercised contrary to the best interest of the child.

[52] There is no complaint regarding the care of X, her academic performance or of any financial mismanagement by the tutor.

[53] X is happy and is progressing very well at all levels. There is no reason to change the current situation.

[54] The fact that the tutor has permitted such great involvement of the maternal grandmother over the years does not constitute a partial implicit waiver of custody and

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<sup>10</sup> *Id.*

parental authority but demonstrates her openness to allowing the child to maintain a meaningful personal relationship with her maternal grandmother.

[55] Moreover, the evidence also does not reveal that the maternal grandmother's apprehensions of future decisions related to the child are serious and well-founded.

[56] In fact, the search by the maternal grandmother of an equal voice to the tutor is rather a bad omen.

[57] The paternal grandmother explains that she opposes a shared custody because she fears the multiplication of the judicial conflicts following the maternal grandmother's more demanding attitude of the last months.

[58] The maternal grandmother denies that it could be a fertile ground for the birth of potential conflicts.

[59] She insists that she wants an equal voice (50 % / 50 %) in order to be able to discuss with the tutor on an equal basis as in the past.

[60] The Court considers that such a situation would be contrary to the interests of the child since in case of disagreement this could be a source of potential judicial conflicts.

[61] Before the proceedings, the child was extremely privileged to be loved and supported by her grandparents.

[62] The maternal grandmother was kindly previously consulted on a regular basis. She is convinced that she deserves now to be treated on an equivalent basis.

[63] At trial, she does not show gratitude and flexibility to the tutor and her husband.

[64] There is no need to contribute to creating a situation that may be conducive to the perpetual confrontation of two (2) grandmothers who have had in the past and should continue to maintain in the future a very strong bond and significant relationship with X.

[65] It could be devastating for X to place her at the centre of conflicts that can generate a hostile climate. Her condition requires a stable and calm family environment.

**DEMAND TO EXTEND WEEKENDS AND TO MAINTAIN THE REST OF THE CURRENT SCHEDULE**

[66] Generally, X sees her maternal grandmother on Friday after school until Sunday at 7 p.m.

[67] The maternal grandmother asks to extend this period to Monday morning. She explains that she could do more activities with the child.

[68] In the case of grandparents, it is not appropriate to refer to « access rights » because the legislator has instead chosen the terms « personal relations ».

[69] In this case, the Court considers that is not in the interest of the child to change her current routine.

[70] As for the request to maintain the current schedule, there is no need to intervene to the extent that the tutor never attempted in the past to interfere or limit the personal relations between X and her maternal grandmother.

[71] The paternal grandmother shows gratitude, empathy, understanding and openness to the maternal grandmother.

[72] In these circumstances, it is not necessary to impose on X and her grandparents a rigid schedule as the child's needs may vary over time.

**FOR THESE REASONS, THE COURT:**

[73] **DISMISSES** the amended Application dated March 4, 2019;

[74] **WITHOUT JUDICIAL COSTS.**

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ANNE JACOB, J.S.C.

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Hearing dates: November 6 and 7, 2019  
Oral judgment date: November 8, 2019