

SUPREME COURT OF YUKON

Citation: *J.D.S. v. C.R.R.J.J.S.*, 2012 YKSC 86

Date: 20121019
Docket S.C. No.: 11-D4398
Registry: Whitehorse

BETWEEN:

J.D.S.

Petitioner

AND:

C.R.R.J.J.S.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Shayne Fairman
Kathleen Kinchen

Appearing for the Petitioner
Appearing for the Respondent

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an interim application by the mother to vary the order of Mr. Justice Veale dated November 29, 2011, specifically seeking the following relief:

1. Interim joint custody of the children, J., soon to be six, and K., age four;
2. That the residential schedule of the children alternate on a week on, week off basis between the parties;
3. That the parties communicate about the children primarily through a communication book with texting and/or e-mail being used when necessary;

4. That the parties share equally the children's school holidays;
5. That the plaintiff abstain from alcohol whenever the children are in his care; and
6. Costs payable to the mother forthwith.

[2] A five-day trial in this matter is scheduled to commence April 29, 2013. As the applicant, the mother bears the onus of demonstrating that there has been a material change in circumstances since the order of November 29, 2011. At that time, the mother was in the hospital. She had just cut her own wrist and had to receive a number of stitches, and she had agreed to be hospitalized for several days while she received psychiatric support and consultation.

[3] The psychiatric consultation report of Dr. Laureijs dictated November 30, 2011, indicates that the reason for the assessment was that the mother could not control herself. She described a long history of contact with mental health professionals dating back to the age of nine. The mother told the doctor that she had been on and off anti-depressants since the age of 13. She described long-term challenges with being unable to control herself. She reported anger problems and self-harm behaviours. She also reported problems with self esteem, panic attacks and feeling utterly overwhelmed at times. She described feeling worthless and experiencing self-harm ideation. She admitted to nightly marihuana use.

[4] The doctor noted that the mother's judgment appeared rather limited and that she had a history of making impulsive choices. The doctor's diagnosis included a reference to the mother having "borderline personality features". The mother indicated

to the doctor that she was agreeable to considering dialectical behaviour therapy for her borderline personality features. The report also made reference to a further interview with Dr. Heredia the following Saturday morning.

[5] Since November 29, 2011:

- a) The parties made a further attempt at reconciliation in December 2011;
- b) The mother again participated in the care of the children;
- c) The parties separated for the last time in late February 2012;
- d) Since that separation the mother has had unsupervised access, especially in the last month, with approximately 14 visits. To date there is no evidence of any significant problems with any of those visits;
- e) The mother has attended ten counselling sessions in connection with her mental health issues;
- f) The mother has been consulting with her family doctor every two weeks;
- g) The mother made a self-referral for a screening with Mental Health Services on May 30, 2012; and
- h) In relative terms, the mother's mental health issues seem to have stabilized, and I use that word advisedly, at least for the time being.

[6] The father's counsel implicitly conceded that there has been a material change in circumstances with his submission that the November 29 order should be varied to provide for specified unsupervised access. In all the circumstances, I am satisfied that there has been a material change in circumstances sufficient to reopen the order on an interim basis pending the trial.

[7] The mother's principal concerns relate to her allegations that the father is regularly drinking to excess while caring for the children and, in particular, has put the children in danger by drinking and driving with them. The father acknowledges that he is a social drinker and has, on occasion, consumed alcohol to the point of intoxication. However, he implicitly denies that his consumption of alcohol has interfered with his ability to care for the children. He also submits that there is no evidence that his alcohol usage has:

- a) Led to any related criminal charges;
- b) Impacted his work with the Yukon Government; or
- c) Been confirmed as problematic, despite investigations by the RCMP and Family and Children's Services.

[8] The mother's counsel submits that the father is minimizing his alcohol problem. I tend to agree. The evidence in this regard comes from both the father himself and several third parties:

- a) The father admits that he over-consumed alcohol during an incident on October 1 and 2, 2011. At one point that evening he kicked down the door of the townhouse where the mother was staying with her then partner, C.W. Leaving aside the fact that that in itself was reckless example of aggression and poor judgment, it is made even worse by the fact that before kicking down C.W.'s door the father mistakenly kicked in the door of another residence in the complex occupied by an elderly woman. While he subsequently paid for both doors to be repaired, he is probably very lucky that he was not charged with the criminal offence of breaking and

entering a dwelling house, which, incidentally, carries a maximum punishment of life imprisonment in both cases;

- b) There is also evidence from K.B., who is employed at a pub in Riverdale which the father has attended. She is a non-drinker. As a server of alcohol she is trained to observe how much people are drinking and to detect when they are becoming intoxicated. She deposed that whenever she was around the father she observed him drinking. She also said that she recalled more than one occasion when the father drank to the point of being drunk at her home and then got behind the wheel of a vehicle to drive away with the mother and the two children. K.B. also said that she has witnessed the father driving with a beer in his hand. She further observed the father drinking beer during breaks on a road trip to Dawson City in August of 2011, when the father was driving a vehicle with the mother and the two children. Finally, K.B. witnessed the father drinking beer while with his children at Shipyards Park, which is a public place, during Rendezvous celebrations last February. She concluded that he was intoxicated on that occasion;
- c) N.R. is the wife of W.R., who plays hockey with the father. N.R. deposed that she attends all of her husband's hockey games and that there have been games where she believes the father was inebriated, based on his inability to skate properly and was falling down frequently. She said that the father is normally a good hockey player, so it is quite noticeable when he is having difficulty standing on his skates;

- d) S.C. is on the mother's softball team. In May 2010, he described a fund-raising team garbage clean-up in which he was riding in a van which the father was driving. He said that over approximately one and a half hours they each drank at least six beers.

[9] In large part, the mother's counsel maintained that the father's alcohol abuse was the reason for her habit of sending the father numerous vitriolic texts and e-mails, as well as regularly reporting him to the RCMP and Family and Children's Services, particularly in the months prior to September 2012. However, the uncontested allegation of the father is that since late 2011, he has received between ten and thirteen thousand text messages from the mother, including numerous harassing allegations and threats. That is an astounding number and clearly beyond the pale in terms of justification. If anything, it would seem to be further evidence of the mother's mental health issues.

[10] On the other hand, the father claims that the mother is minimizing the nature of those mental health issues, and that she has not taken adequate or significant steps to address them. Once again, I tend to agree. According to the report of Dr. Laureijs, the mother has acknowledged having significant mental health issues since she was a child. Dr. Laureijs specifically identified that the mother exhibited potential features of borderline personality disorder. The mother herself has acknowledged that she exhibits certain symptoms of that disorder, as well as potentially bipolar disorder and depression. The father's principal concern regarding the safety of the children in the mother's care is her potential for instability as a result of her mental health issues. Accordingly, the father's counsel has repeatedly written to counsel for the mother requesting further particulars about the status of the mother's diagnosis and/or

treatment. This chain of correspondence began as early as March 30, 2012. However, to date the mother has failed to produce evidence of a definitive diagnosis of her mental health nor any treatment plan for any disorder which she may be suffering from.

Consequently, she remains untreated for whatever may be ailing her.

[11] Further, notwithstanding that Dr. Laureijs alerted the mother that she may be suffering from borderline personality disorder while she was hospitalized in late November 2011, and could benefit from dialectical behaviour therapy, the mother has not pursued either the diagnosis or the therapy. Her evidence in this regard is simply unsatisfactory. She refers to cancelled appointments, difficulty with getting new appointments, difficulty with getting referrals, waiting lists and costs. Ultimately, she claims that she had a telephone assessment with Mental Health Services on May 30, 2012, and was advised at the end of a 50-minute assessment that she “did not need to see a psychiatrist,” but that she could not get Mental Health Services to confirm this in writing.

[12] I find that to be extremely odd, at best, and at worst, an example of the mother failing to address what is clearly the key issue for the father in this case. I also find it inconceivable that the mother would have genuinely been unable to arrange a consultation with a psychiatrist to confirm her diagnosis, one way or the other, from late November 2011 to date.

[13] The mother’s credibility in this regard is directly challenged by the text she sent the father on the very day of her telephone assessment with Mental Health Services in which she says, “I did that call with mental health FYI. And am on the wait list for a dr.

And the rest is for me to know and you have no right to know my diagnosis.” That suggests that she has been diagnosed and has intentionally refrained from consulting with the doctor she was wait-listed with. The mother has also failed to give any explanation why she has not yet provided the father with a copy of the discharge summary following her release from hospital in late November 2011. Presumably, that document would contain further information on her mental health status and recommendations regarding follow-up.

[14] I find that the mother’s failure in this regard also reflects adversely on her credibility. It is almost as if the mother is afraid to acknowledge that she may indeed be suffering from a significant personality disorder, and that she would rather not have that confirmed by a professional in writing because that might impact negatively on her prospects in this family proceeding. However, on the contrary, if the mother is diagnosed with a disorder and then is placed into an appropriate treatment program, I should think her prospects in this proceeding would significantly improve.

[15] Having said all that, relations between the parties seem to have improved somewhat over the past month. The mother’s texts to the father are now limited to one or two per day. The pick-ups and drop-offs have generally gone smoothly, and the mother’s habit of regularly belittling the father, his partner and his other family members has significantly subsided. Further, the mother has presented evidence from a number of third parties who are of the opinion that she maintains an appropriate home for the children and is generally a good and caring mother. The mother’s counsel submitted that there is no good reason not to grant a move towards equally shared residential time, or at least increased specified access.

[16] I agree with the latter, but not with the former. The uncertainty regarding the mother's mental health status is largely due, in my view, to the mother's own lack of diligence in obtaining the necessary evidence to satisfy this Court that it would truly be in the best interests of the children to move towards equally shared residential time. Indeed, the mother's own counsel concedes that a move towards 50-50 residency, week on, week off, would be a much bigger change to the status quo than a move towards increased access.

[17] Further, the degree of conflict in this proceeding is significant and the mother's mental health history does indicate a significant degree of instability. Thus, I agree with the father's counsel that, given the lack of medical evidence from the mother, it is simply too risky at this time to proceed towards an equally shared residential schedule. In other words, it would not be in the best interests of the children to go that far on this interim application.

[18] On the other hand, I am persuaded, largely on the basis that things appear to have gone significantly better in the last month, as well as on the basis of the several witnesses supporting the mother, that it would be appropriate to move towards a greater degree of contact between the mother and the children as the parties move towards the trial date. I am further persuaded that this additional contact should include at least one overnight visit every second weekend.

[19] Subject to suggestions from counsel on particular wording, what I have in mind generally is that the order of November 29, 2011 will be varied as follows:

- a) Para. 2 of that order will be vacated;

- b) The mother shall have unsupervised access to the children;
- c) Beginning next week, the mother will have access to the children on two weekday afternoons from 4:45 p.m. to 7:30 p.m., and overnight access on either Saturday or Sunday night from 1:30 p.m. the previous afternoon until a convenient time the following morning. I will leave it to counsel to suggest what that time might be.
- d) The following week the mother will have access to the children on three weekday afternoons from 4:45 p.m. to 7:30 p.m., but her access on the weekend will be limited to one day from 1:30 p.m. until 7:30 p.m., and again that day can be determined by counsel;
- e) During periods of access the mother will not speak negatively to the children about the father, the father's partner, T.N., or the father's extended family;
- f) During periods of access the mother will not discuss with the children any disputes between her and the father;
- g) During periods of access, the mother will not discuss upcoming activities with the children, unless those have been previously agreed to with the father;
- h) During periods of access, the mother will not consume marihuana or alcohol, and in particular will not drive any motor vehicle with the children as passengers while under the influence of either substance; and
- i) While the children are in the father's care he will not drive any motor vehicle with the children as passengers while under the influence of

alcohol, and I intend this to be a zero tolerance condition and not simply driving over the legal limit of .08.

[20] As the success on this application was only partial, and in particular noting the evidentiary problems with the mother's case, the costs of this application shall be in the cause.

GOWER J.