

SUPREME COURT OF YUKON

Citation: *S.A.M. v. S.R.L.*, 2013 YKSC 20

Date: 20121204
Docket: S.C. No. 07-B0023
Registry: Whitehorse

BETWEEN:

S.A.M.

Plaintiff

AND:

S.R.L.

Defendant

Before: Mr. Justice J.T. Ducharme

Appearances:
Malcolm Campbell
Tess Lawrence
André Roothman

Counsel for the Plaintiff
Counsel for the Defendant
Child Lawyer

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] DUCHARME J. (Oral): This is an application by the father, S.L., for interim custody of his six-year-old son, Y.M. As well, Mr. L. seeks to restrict the mother, S.M., to supervised access with Y. “as determined by the Defendant with such access being arranged through email communication.” The mother, S.M., opposes the awarding of custody to the father. She thinks it is in the best interests of the child for her to be granted custody of Y. Ms. M. is also seeking interim custody of the child.

[2] The original application also sought the appointment of a children's lawyer in preparation of a custody and access report. The parties consented to both of these terms and an order to that effect was made on September 7, 2012.

Background

[3] The mother and father have never been in any sort of relationship and the child is the result of a onetime sexual encounter between them. The father claims this was consensual, while the mother claims it was a sexual assault, as she was too intoxicated to consent. While a complaint was made to the RCMP, charges of sexual assault were never laid against the father.

[4] Y. was in Dawson City in November of 2006, where both he and his parents now reside. On August 7, 2007 the mother was granted interim custody of Y. on the basis that the father was to have reasonable access to him. The mother took Y. to Saskatchewan in late 2007 for a period of approximately one-and-a-half years. The father claims this was done without his knowledge or consent. The mother says she told the father what she was doing and that he indicated he did not care. In any event, the father had no contact with the son during the one-and-a-half year period he was out of the Yukon.

[5] Since Y. has returned to Dawson City, his parents have been involved in litigation over his custody. On August 28, 2009 an interim order was made, requiring that:

1. Neither parent remove the child from the Yukon Territory;
2. That the mother not remove the child from Dawson City without written consent of the father or a further court order; and

3. Granting the father reasonable access to the child as can be worked out between the parties;

[6] On November 16, 2009 the parties were granted interim joint custody of their son. Under the terms of this original order, Y. was to reside with his mother from Wednesday at 9:00 a.m. to Sunday at noon each week, and with his father from Sunday at noon to Wednesday morning at 9:00 a.m., unless otherwise agreed by the parties. These access times were modified by a subsequent order dated February 12, 2010.

[7] On July 31, 2012 the mother was awarded interim access of Y. to be exercised on Tuesdays and Thursdays from 3:00 to 5:00 p.m. at the Dawson City Women's Shelter. The father commenced the current application on August 17, 2012. On September 7, 2012, the parties entered into interim interim consent order that continued to provide the mother with interim interim supervised access on Tuesdays and Thursdays.

[8] The father alleges that in early 2010 he began to have concerns about his son's wellbeing while he was with the mother. Since that time, the father has alleged that his son has been poorly cared for and has been abused both verbally and physically by the mother. These allegations have been supported by photographic evidence, as well as by affidavits from other persons who claim to have seen Y. being poorly treated or mistreated in one way or another. The father has also reported these concerns to both the RCMP and to Family and Children's Services. Finally, in February 2012, the mother was charged criminally with assault in relation to Y.

[9] On June 5, 2012, the mother entered into a common law Peace Bond in relation to this assault charge. She has since received a notice to appear with respect to a breach of recognizance under s. 811 of the *Criminal Code*, and is to appear in court on December 11, 2012. I am told that no charge has been laid as of yet but that the allegations relate to a further assault of the child. Y. has told the children's lawyer he does not wish to return to his mother because she abuses him. He reports being pinched and spanked by the mother. The children's lawyer has expressed concern about returning the child to the care of his mother, and supports the continuation of supervised access.

[10] The mother denies that she has provided poor care to Y. or that she has abused him, either verbally or physically. She emphatically denies any suggestion of physical abuse and explains that she signed the Peace Bond to spare Y. the stress of having to testify in court. While she is not aware of the allegations underlying the possible new criminal charge, the mother denies any wrongdoing and indicates that she will fight these charges. The mother claims the father is alienating Y. from her and that the father has repeatedly violated the interim interim order granting her supervised access. The mother has provided the Court with affidavits from several persons attesting to her good character and to her positive relationship with her son. She has also provided affidavits from two women who have supervised visits between her and Y. who indicate they observed no problems between them.

[11] The father admits that he has breached the order with respect to supervised access of Y. at the Women's Shelter. He explains that Y. has reported that the visits were not in fact supervised and in his report, continued to be at the hands of his mother.

Analysis

[12] In considering what should be done, I am, of course, to be guided by the best interests of the child and in particular by the factors listed in s. 30 of the *Children's Law Act*. In my view, there are two principal concerns that must be addressed in any order that I make. The first is the safety of the child. If the mother is abusing the child, that must not be permitted to continue. The father's materials raise a genuine concern about this, as do the submissions of the children's lawyer. The second concern is the inability of the parties to conduct themselves in a cordial adult fashion. I have explained to the parties that if they truly love their son, they will act in a respectful manner towards one another. It is important that the child have a happy loving relationship with both his parents. Any bad behaviour that undermines the child's relationship with either parent is a bad thing for the child. It is also a factor that will work against the claim of either parent that they should be granted custody of the child.

[13] Due to the safety concerns, I am not prepared to award custody of the child to the mother. I note that this case is atypical, as a mother's access is decreasing over time; however, as I explained to the parties, it is essential that the child have access to both of his parents. Therefore, I am going to continue the supervised access for the mother. I explained to the mother that supervision is in the best interest of both her child and herself. In terms of the child's supervision, it can provide the Court with some assurance that the child is not abused or mistreated. In terms of the mother, supervision provides her a way of demonstrating that she can be trusted to have access to her child and demonstrate that, as she insists, she is not abusing him or providing him with subpar care.

[14] As for custody, I see no reason to give sole custody to either parent at this stage of the proceedings. The fact that they do not communicate well does not entitle either of them to sole decision making authority over the child. I will continue joint custody and have explained to the parents that they should communicate with each other through email. This will provide them both with an opportunity to demonstrate that they can, in fact, act in the best interests of the child. I have explained to both of them that if either expects to get custody of the child, they will have to demonstrate a readiness to communicate with the other parent.

[15] The challenge with supervised access in this case is there have been allegations that the child was not being properly supervised during access visits at the Women's Shelter. This allegation has also been contested by other materials before the Court. Family and Children's Services are prepared to supervise visits, but due to limited resources, they can only supervise one hour-and-a-half visit per week. The parties are unable to come with anyone else who could supervise access visits. Ideally, Family and Children's Services could supervise all of the mother's access, but as this does not seem possible, I will order that access be supervised Family and Children's Services, and where that is not possible, access is to be supervised by staff of the Women's Shelter as enumerated below. The mother has also asked that she be permitted to have supervised access visits at her home where the child would be more comfortable. The father was not able to come up with any coherent reason why that should not be permitted. Therefore, assuming that Family and Children's Services and the other supervisors are available to supervise the visits in the mother's home, that is where the visits will take place. The child can be dropped off and picked up by the father or by his

fiancé. I have explained to both parties it is critically important that their behaviour to one another during these access visits be, at the very least, civil.

[16] I am told that the custody and access report may not be ready until February of next year; both are agreed to a return date of February 26, 2013. Hopefully, the parties will have received the report by that day and will be in a position to inform the Court how they wish to proceed.

[17] So the order will go as follows: on the application of the Plaintiff, S.A.M., and the application of the Defendant, S.R.L., coming on for hearing at Whitehorse, Yukon on the 4th day of December, 2012 and on hearing Malcolm Campbell, lawyer for the Plaintiff; Tess Lawrence, lawyer for the Defendant, and on hearing André Roothman, appearing as the child lawyer, and on reviewing the material filed herein, the Court orders that:

1. The Plaintiff and the Defendant shall have interim joint custody of the child of the relationship, namely Y.R.M.M., born November 28, 2006 (the "Child").
2. The Plaintiff shall interim supervised access to the Child at her residence at her residence in Dawson City, Yukon (the "Residence") on the following dates and times:
 - a. Tuesdays from 3:30 p.m. to 6:00 p.m. with such access being supervised by the Dawson City Women's Shelter, namely one of Diane Schroeder, April Bartlett, Katrina Diles, or such person as can be agreed upon by the parties; and

- b. Thursdays from 3:30 p.m. to 5:00 p.m. with such access being supervised by Family and Children's Services (the "Access").
3. The Defendant and/or A.B. shall drop off and pick-up Y. at the Residence to facilitate the Access.
4. The Plaintiff and Defendant shall communicate through email to arrange further access as can be agreed upon by the parties and to address the needs of the Child.
5. The Plaintiff shall have specific supervised access to the Child on Tuesday, December 11, 2012, as follows:
 - a. From 3:30 p.m. to 5:00 p.m. at the Plaintiff's Residence with such access being supervised by the Dawson City Women's Shelter; and
 - b. From 7:00 p.m. to 9:00 p.m. at the Eldorado Hotel for the Plaintiff's Christmas party. The Defendant and/or A.B. shall drop off and pick-up the Child from the Eldorado Hotel on the above noted times.
6. The matter is adjourned to February 26, 2013 at 10:00 a.m. to be spoken to.

[DISCUSSION RE ADJOURNMENT DATE AND TIME]

[18] Okay. Thank you both for your assistance, I appreciate it very much, and I wish the father and mother all the best. I would like to hear that you made some progress between now and when you are next before the Court. Thank you.

DUCHARME J.