

SUPREME COURT OF YUKON

Citation: *L.R.M. v. J.A.K.*, 2013 YKSC 74

Date: 20130624
Docket: S.C. No. 11-D4379
Registry: Whitehorse

BETWEEN:

L.R.M.

Plaintiff

AND:

J.A.K.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:
H. Shayne Fairman
J.A.K

Counsel for the Plaintiff
Appearing on his own behalf

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): This is what I would describe as a high conflict custody dispute between the mother and father over the custody and access of a four-year-old child. It has been ongoing since the fall of 2011. Fortunately I have the benefit of a Custody and Access Report prepared by Nicole Sheldon, (the “Sheldon Report”) a psychologist specializing in child custody issues. The report is dated May 3, 2013.

[2] Complicating the conflict between the mother and father are criminal charges of assault and uttering a threat which went to a jury trial. There was a conviction of the

father and the Court of Appeal then set aside the two convictions. The matter is back before this Court, but being handled by a different judge.

[3] The Sheldon Report is helpful because it assumes that the conviction took place and the Court of Appeal setting aside of the conviction not being rendered at that point. In effect the report is a positive report for the father with respect to the risk of violence issue.

[4] I am going to quote, somewhat extensively, from the report. At page 26, Ms. Sheldon says the following:

With regard to the alleged risk for violence, the following are my findings. In [the father]'s case, the probability of risk is considered to be particularly low. He does not have a history of violent interactions, he has followed through with all the requirements for his conditional sentence, the incidents in question appear to be situationally related to the tensions and deterioration of the marital relationship, he does not have problems with alcohol or drug use, he does not evidence any mental health issues or personality dysfunction, he enjoys positive familial supports with all of his six siblings, there is no known history of him being exposed to violence as a child himself, he acknowledges his frustration with the system, and he has not made any threats or expressed any anger targeting [the mother] to the professionals who have been working with him for the past year. The aggressive incidents have been emotionally triggered by the high conflict in the marital relationship. There is no evidence of a pattern of coercive control over [the mother] throughout the course of the relationship, nor has there been one since. The one physically aggressive incident towards [the mother] was isolated, lasted in her testimony less than a minute, and occurred a year or more prior to the separation. Since he has been convicted of assault [the father] has worked with an individual counsellor on the Respectful Relationships program and is near completion. Prior to this, [the father] worked with a community counselor to help him make sense of his feelings in this high conflict situation. There has been no history of

control on the father's part and he has been identified as highly involved in [the child]'s life prior to the separation. [The father] is in the process of fully appealing his conviction.

[5] There is also, in that report, a recommended parenting program consisting of nine points and I am just going to read the first point at p. 27:

Although the conditions are not presently in place for a 50/50 shared parenting arrangement because the parents are not currently in communication and the conflict is high, it is important to preserve the understanding that both parents are equally important in [the child]'s life and this level of involvement should be reflected. Any parenting plan is not being forwarded because it places the importance or value of one parent ahead of the other. The parenting plan being suggested is simply due to the current circumstances.

[6] The present circumstances are that the mother has interim interim custody of the child and the father has interim interim access every Monday and Wednesday from 12:30 p.m. to 3 p.m. The father also has access on alternating Fridays from 12:30 p.m. to 6:30 p.m. on one Friday, and on the other Friday, from 3:30 p.m. to Saturday at 6:30 p.m.

[7] The issues to be addressed, and some of them have been agreed upon, are as follows:

1. The parents agree that the father shall have three consecutive weekends a month from Friday at 12:30 p.m. to Sunday at 12:30 p.m.;
2. The mother will have vacation time with the child from July 25 to August 2, 2013 in the Yukon or British Columbia;
3. The father will have vacation time with the child from 8:00 a.m. on August 2 to August 11 on the condition that he not leave Yukon without the written consent of the mother;
4. The mother and father will communicate by text;
5. The issue relating to daily access is not agreed upon. The mother wishes the father to continue exercising access Monday and Wednesday from, as

I understand it, 8:00 a.m. to 2:30 p.m. The father, on the other hand, wishes to have access from Monday through Thursday from 10:30 a.m. to 2:30 p.m.

[8] In my view, the father's access has improved considerably with the three of four weekends and I think it would be appropriate to continue the Monday and Wednesday schedule for the benefit of the child, but extending the time from 8:00 a.m. to 2:30 p.m.

[9] THE COURT: Would you rather have it start at 10:30 a.m.?

[10] J.A.K: Let's say 9:00 a.m.

[11] THE COURT: Okay. We will say 9:00 a.m. to 2:30 p.m.

[12] I think it is number six, but the remaining issue is the transfer which has been either at the child's daycare or Extra Foods, with no direct contact between the father and mother arising out of conditions that were established during a criminal process which are no longer outstanding, but also, from this Court's perspective, out of the mother's fear arising out of the father's anger.

[13] I am going to quote what Ms. Sheldon said about that. She said a lot about it, but at p. 27, she said this:

At this point while [the mother] would say that she is open to [the child] having a relationship with the father, it is [the father] who is seen to be the friendlier parent. [The mother] is trying to limit [the father]'s involvement in [the child]'s life based on her imagined fears of abduction and violent harm. There was no evidence found in my evaluation that would suggest that either of these are an imminent risk. [The mother]'s parenting plan would also continue to have [the child] living a divided life with parents never having contact unless through the court. This is not viable over the longer term and is inconsistent with the life that both parents have

said they would like to live and with the kind of cooperation that is needed in [the child]'s life.

[14] The one constant in this family law case has been the father's anger with the mother which has some validity, but very evident in each court proceeding. As a result of that, I can understand the mother's concern, but I must say that Ms. Sheldon is absolutely correct; in the long term that it is in the best interest of the child that that relationship be normalized, at least with respect to the transfers of the child.

[15] I am not going to change the present transfer arrangements, but I am going to place the mother on notice that the parental relationship must be more natural for the child's best interest to prevail. I will address this issue again on July 5 at 10:00 a.m. to which this application is being adjourned so that we can determine the fall school issue with respect to the child.

[16] Any clarification required by anyone?

[17] MR. FAIRMAN: Yes, My Lord. When you say that you placed the mother on notice that the parental relationship must be more natural and this is an issue that will be addressed on July 5th, could you expand on what you mean by that comment? Just so I have some sense of whether we need to provide you with affidavit material on a certain point, or --

[18] THE COURT: The view is clearly expressed by Ms. Sheldon and if you are of the view that there has to be something different than the normal relationship you will have to put forward some evidentiary basis for that because the evidence before me now is that it should be done in a natural way. You are on notice, and if there

is another way of doing it that is a better way for the parties I am prepared to entertain that, but it has to be normalized for the benefit of this child.

[DISCUSSION RE WEEKEND ACCESS]

[19] MR. FAIRMAN: And that is my next point. Given the vacation schedules we have reached with the parents, I am proposing that this weekend be with L.R.M. and then the way the weekends would fall, there would be three weekends with J.A.K. The next weekend with L.R.M. would be the weekend that falls during her vacation week in any event, and then the next three weekends would ensure that the vacation weekend that J.A.K. is asking would fall during his regular time. That will bring us -- so in order to achieve that I am proposing that this weekend be with L.R.M. and then the three weekends subsequent --

[20] THE COURT: Great. That is agreed then that J.A.K.'s three weekends per month will be consecutive. This coming weekend, which is the weekend of June 28 through June 30, will be the mother's weekend.

[21] MR. FAIRMAN: Well, I am going to make an application - I suspect you are going to dismiss it - but I am going to make the application for the record, in any event. We had set July 5th as a date to address the school issue for this fall, which is a fairly discrete issue, is a fairly narrow issue. Your Lordship has now indicated that you are looking for evidence on a much broader perspective. Essentially, L.M.R.'s response to the Custody and Access Report, which we have not been able to offer Your Lordship, was we have not been able to offer our thoughts or comments with respect to the recommendation of the Court in any sense and --

[22] THE COURT: Well, you know --

[23] MR. FAIRMAN: -- given now that you are looking for, we submit, essentially for L.M.R. to put to the Court the entire foundation for her case with respect to the child in terms of contact with the child that is appropriate and in her best interests, with respect to her level of concern or fear with respect to J.A.K., I would submit that I am not in a position to do that on the dates and times which have been previously discussed. Those dates and times were dealt with on the basis that we are dealing with whether she should be in elementary school versus Montessori school. So I would submit, if the Court is looking for that broader response then, frankly, I would need more time to be able to prepare that.

[24] THE COURT: I hear you. Thank you. Mr. K?

[25] J.A.K.: I would just argue that that time has already been given in the Child Custody Assessment and L.M.R. has plenty of time to respond to a parenting plan as part of the assessment.

[26] THE COURT: Yes. Just for both of you, the 5th may be early for that big an issue if it is not going to be resolved by an agreement. It is a bigger issue and the difficulty I have is when do we deal with it?

[DISCUSSION RE METHODS USED IN CHILD CUSTODY ASSESSMENT]

[27] THE COURT: Well, you know, in fairness, there is an issue there. If that is the issue that must go to trial, Ms. Sheldon's report is quite clear, but it may be unfair for me to hold you, Mr. Fairman, to dealing with that issue. What I am going to do

is I am going to limit the July 5 submissions to proposals and then if the matter is not resolved by Friday July the 5th, I am going to set a date for that matter to be heard in court.

[28] J.A.K.: I thought we were going on the assumption that July 5th is when you would make decisions concerning --

[29] THE COURT: Well --

[30] J.A.K.: Well, because I understand that --

[31] THE COURT: -- that is what I said and I am now resiling from that because, clearly, there is not enough time on the issue that has been presented, and if the issue is going to go forward on the matter that Ms. Sheldon has addressed, that is a very big issue. Ms. Sheldon may be required, who knows, but what I am seeking is some sort of middle ground that the parties can come up to by July 5th that starts to get over the issue that you are so concerned about and legitimately concerned about.

[32] J.A.K.: Your Honour, the issue is that I have already been placed on conditions for over two years and that this proceeding is not about L.M.R., it is about the child and it is certainly in the child's best interest that we not do this hostage-taking thing at Extra Foods every day and it has gone on long enough. And, frankly, every time someone outside of this Court has looked at our situation they have decided in my favour. It is entirely this Court which fails to see what is right in front of its eyes, and -- I'm sorry.

[33] THE COURT: Yes. Look, I appreciate your frustration with the issue. Ms. Sheldon has made a very clear recommendation. You and your former spouse, through Mr. Fairman, can determine whether there is a resolution by July 5. If there is not a resolution we will set a date to have that out in court because they take the view that they are going to challenge Ms. Sheldon's report. They cannot do that between now and July 5.

[34] J.A.K.: Your Honour, they have had two years to try and establish that I am violent, and have not been able to do so. Any delay on the decision represents further punishment of me, which is a presumption of my guilt which has been going on for two years now, and is a *Charter* violation which is already being addressed in the other court and which will be addressed in this court as well. It is where I am going, and then I am going across the hall to the Attorney General and then I am going across to the U.S. Consulate in Seattle because I have had enough.

[35] THE COURT: I hear you. In any event, on July 5 if there is a resolution, and we can consider it if there is no resolution, we will set a date for that to be resolved.

[36] MR. FAIRMAN: But we are still going to deal with the issue of the fall school?

[37] THE COURT: Indeed.

[38] MR. FAIRMAN: Fair enough. I will file material accordingly.

[39] THE COURT: There are two issues. I would like for the parents to make some arrangement for the exchanges for this child if the parents can do so. If they cannot do so, on July 5 we will set a date and spend a week in court resolving that, but at this point hopefully July 5 there will be a resolution that we can move forward with.

[40] J.A.K.: Your Honour, it is inappropriate because it punishes me; it punishes one side.

[41] THE COURT: Yes. Well, look --

[42] J.A.K.: The status quo has been punishing me for two years. It is not -- it just isn't fair, basically. But then -- I mean, the entire proceeding began as L.M.R. filing false charges against me for the purpose of separating me from the child by an international border, and everything that has happened since has been with that in mind. This Court fails to recognize that.

[DISCUSSION RE SIGNING OF THE ORDER]

[43] MR. FAIRMAN: No. I do not want to complicate things. I -- fine, I will get J.A.K.'s endorsement if he signs the order. Fine. If it's not signed then you will hear about it on the 5th, so we will leave it at that.

THE COURT: Thank you.

VEALE J.