

SUPREME COURT OF YUKON

Citation: *J.L.T. v. L.E.J.P.*, 2020 YKSC 9

Date: 20200309
S.C. No. 19-B0066
Registry: Whitehorse

BETWEEN

J.L.T.

PLAINTIFF

AND

L.E.J.P.

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:
Lenore Morris
Paul Di Libero

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] VEALE C.J. (Oral): The plaintiff father applies for the following order for N.R.A.T., (“the Child”), born May 18, 2014:

- 1) the parties shall have joint custody of the Child;
- 2) the Child shall reside with each parent approximately 50% of the time on a schedule to be determined;
- 3) the parties shall communicate in a respectful manner and only about the Child;
- 4) a peace officer assist clause.

[2] The defendant mother applies for the following:

- 1) An order that the mother may proceed with the United States of America immigration application for herself and the Child without interference from the father;
- 2) An order that the Child reside primarily with the mother during the 2020/2021 school year;
- 3) An order that the father have reasonable and generous access to the Child, which shall include school holidays and time during the summer months.
- 4) An order that the defendant may travel with the Child between Canada and the United States without the written consent of the plaintiff, and if any letters or other assurances are required by the United States or Canadian immigration or border authorities, an order that the plaintiff shall provide and sign such documents or give such assurances that may be necessary for the defendant to travel freely to the United States with the Child.

[3] The mother and father are in agreement that there be joint custody. The Child began residing with the mother in the United States on August 20, 2019, when the father drove the Child from Whitehorse, Yukon, to Starlight, Indiana.

[4] The Child has been in the mother's care since that date, subject to the father having care of the Child (except for a brief visit in September) from February 22 to March 7, 2020, by court order, when the Child was in Ontario with the mother visiting her family. The Child is presently with the father who resides in Montreal, Quebec.

BACKGROUND

[5] I take the following from counsel for the father's outline, as varied by me, to the point of the present application:

- 1) The plaintiff and the defendant are the parents of the Child. The father is 35 years old and the mother is 37 years old.
- 2) The parties cohabitated from February 2010 until December 2016, in Whitehorse, Yukon.
- 3) The Child was born on May 18, 2014, in Whitehorse, Yukon, and is the only child of each party.
- 4) Both parents have worked in the social services field. The father is now a full time visual artist. The mother is not currently employed out of the home.
- 5) The father is a member of the Kaska Dena First Nation from Lower Post, British Columbia.
- 6) The mother is a non-First Nations woman. The mother is originally from Ontario and her parents still live there.
- 7) From the date of the parties' separation in December 2016, until August 2019, the Child spent approximately equal amounts of time with each parent. The parties established an informal custody arrangement based on regular shared time with the Child. Under this arrangement, the Child spent from Wednesday afternoon until Saturday afternoon with the father and from Saturday afternoon until Wednesday morning with the mother.

- 8) From the date of the parties' separation until August 2019, the parties successfully co-parented the Child, including by coordinating and sharing the costs of daycare, celebrating the Child's birthday and other special occasions together, and accommodating each parent's travel plans with and without the Child.
- 9) On August 11, 2018, the mother informed the father that she was in a serious relationship with a U.S. citizen and resident of Starlight, Indiana, and that the mother wanted to move to the United States with the Child.
- 10) After considering the issue carefully, on August 21, 2018, the father informed the mother that he did not consent to her moving the Child to the United States. His concerns included the short duration of the mother's relationship with her new partner, the risk of parental alienation, and the effects on the Child of being dislocated from his extended family, as well as social and cultural displacement.
- 11) The parties later agreed to participate in a mediation to address the mother's desire to move as well as other parenting issues. The parties attended mediation sessions, together and separately, with Pat Bragg, mediator, between late September 2018 and May 6, 2019.
- 12) By the conclusion of the final mediation session on May 6, 2019, the parties had verbally agreed that the mother would move to Indiana in or around August 2019, that the father would also move from Whitehorse, and that they would create and follow a parenting agreement.

- 13) The mother drafted a Memorandum of Agreement (“the MOA”), which the father understood to be a written record of the verbal agreement reached during the mediation.
- 14) Paragraph 6(b) of the final draft of the MOA states:

When we are living in the same location, [the child] will share his time more or less equally between us. When [the mother] moves from the Yukon, we will continue to have a more or less equal time-sharing arrangement with exact details to be determined once [the father] decides where he will live. We agree to review this plan by June 2020
- 15) The mother and father were unable to complete a Parenting Agreement.
- 16) On August 1, 2019, the mother left Whitehorse and travelled by air to Indiana. She has resided in Starlight, Indiana, since that date.
- 17) On August 4, 2019, the father and the Child left Whitehorse and travelled by car to Starlight Indiana, arriving on August 20, 2019.
- 18) Starlight, Indiana, is 600 kilometres by road from the nearest Canadian border at Windsor, Ontario, and 1,500 kilometres by road from Montreal, Quebec.
- 19) The father arrived in Montreal, Quebec, on September 26, 2019 and has been residing in or near Montreal since that date.
- 20) In October 2019, the mother travelled with the Child to Ontario, including to Ottawa – 2 hours from where the father is residing. The father requested to see the Child but the mother told him they did not have time. The father was given no phone access to the Child during the trip to Ontario.

- 21) After a November 25, 2019 telephone conversation with an American immigration lawyer, on November 28, 2019, the father notified the Mother by email that he did not consent to the Child immigrating to the United States. The father confirmed on December 11, 2019 that he was not consenting to the Child's immigration to the United States.

[6] I find the following facts:

- 1) The father and mother orally agreed to the May 6, 2019 MOA, where paragraph 6(b) stated that when the mother moved from the Yukon, they would continue to share the care of the Child on a more or less equal time sharing arrangement. They agreed to review the plan by June 2020.
- 2) The mother and father have been quite amicable up to the point of the father delivering the Child to the mother in Indiana, in August 2019.
- 3) Unfortunately, they were unable to work out the sharing arrangement with the Child, which precipitated the filing of the Statement of Claim in this Court on February 20, 2020.
- 4) While it is not always helpful to find fault, both parents have to share responsibility in that regard. The mother for failing to arrange time for the father to have the Child when she travelled to Ontario to see her family. The father for failing to accept an offer to have the Child in his care from January 4 to March 7, 2020. However, I do find that it is the father who has not had an opportunity to care for the Child from September 2019 (except for a brief visit) to February 22, 2020, when this court ordered access while the mother was in Ontario visiting Family.

ANALYSIS

[7] I am proceeding on the basis that the father and mother have essentially agreed to the Child being in the care of the mother in Indiana for the school year which I understand to be approximately August 2020 to the end of May 2021. The oral agreement contemplated a review by the father and mother in June 2020, but we are in effect having that review now in this hearing and I order that the review take place in June 2021.

[8] I have asked the parents for their proposals on sharing the care of the Child during this proceeding so that I will have some basis on which to assess an appropriate resolution when the mother and the Child reside in Indiana and the father in Montreal. In my view, the father and mother have been very civil and generous with what is a very complex circumstance to resolve and unfortunately their relationship may have soured somewhat since September 2019. However, I believe they both have the Child's best interests in their differing views and it is in his best interest that he have a stable situation.

[9] I am therefore making the following interim order which the father and mother may consent in writing to change or amend as circumstances require:

- 1) The father and mother shall have joint custody of the Child, which in effect means that they both have equal rights and obligations with respect to the Child;
- 2) While the Child is in the care and control of one parent, the other parent shall have regular telephone or Facetime access to the Child.

- 3) The mother shall have care and control of the Child from March 7, 2020 to March 21, 2020;
- 4) The father shall have care and control of the child from March 21, 2020 to April 30, 2020;
- 5) The mother shall have care and control of the Child in Starlight, Indiana, and may commence their US Immigration application for permanent residency from May 1, 2020;
- 6) The mother shall have care and control of the Child subject to the father's care and control as follows:
 - a) the father shall have care and control of the Child for one month before school starts, either in Canada or the United States, dependent upon the Child's immigration status and ability to leave the United States. The mother shall apply for the ability of the Child to leave the United States for that care and control.
 - b) the father shall have care and control of the child for two weeks in October 2020 in Canada;
 - c) the father shall have care and control of the Child for one-half of the 2020 Christmas holidays in Canada which shall include Christmas day;
 - d) the father shall have care and control of the Child in Canada for two weeks in March 2021;
- 7) The parties shall share transportation costs equally.

- 8) The father shall have reasonable care and control for a period not to exceed one week in August, September, November, January, February, April, and May in Indiana, while the Child is in school;
- 9) The Supreme Court of Yukon shall retain jurisdiction over all matters connected with the Child, until further order of this Court, or further agreement of the parents in writing;
- 10) The parties shall review the care and control of the Child in June 2021, and failing agreement may apply to this Court;
- 11) Each parent may travel in the United States and Canada with the Child and if any letter assurances are required, the other parent shall give such assurances.

[10] I am not aware of any verbal agreement for the care and control of the Child beyond June 2021. I am not prepared to make an order beyond June 2021, but I do say that it is in the best interests of the Child to have stability and predictability at this stage of his life.

[11] The parties may return to case management, mediation with Ms. Bragg, or binding judicial settlement conference. Counsel may speak to costs in case management, if necessary.

VEALE C.J.