Date: 20030624
Docket No.: S.C. 02-D3509
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

D.H.A.

Petitioner

AND:

K.E. M.

Respondent

Debbie Hoffman — For the Petitioner

Lynn MacDiarmid — For the Respondent

MEMORANDUM OF RULING
DELIVERED FROM THE BENCH

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[1] VEALE J. (Oral): This is a difficult case. We have two loving parents and two very exceptional children, F. aged twelve, and Z. aged ten. Unfortunately, the parents are having difficulty communicating for the last few years and as a result those difficulties are now being visited on the children.

[2] I must say that I implore both parents to give a lot of consideration to your conduct from now on because your conduct is observed by your children. They do not miss a thing, and they are aware of when their parents are behaving like children rather than like parents. So I think it is very important for both parents to take a

strong look at their behavior and take steps to correct it.

[3] The parents met in 1988 to roughly 1990, I understand, in Dawson City in the Yukon. They had a very loving relationship. They were married in 1993 at Shuswap British Columbia, and they returned to Whitehorse in 1995. Unfortunately, financial problems and excessive alcohol and marihuana consumption, primarily, I believe, on Mr. A.'s behalf, appear to have affected the relationship. It culminated with an assault charge against Mr. A. on November 28, 2002.

[4] Mr. A. to his credit plead guilty and has entered the Domestic Violence Treatment Option Program which is available in the Yukon Territory. This is a new program that is being tried in the Yukon and in some other jurisdictions in Canada. Rather than have a trial and, perhaps, incarceration consequences, if a person who is charged pleads guilty that person can enter into a treatment process and at the end of the treatment process, if the person is successful, the treatment process becomes the sentence in effect. This treatment process for Mr. A. is still in process.

[5] There is, also, as a result of the assault charge, a no-contact order in place.

[6] There is also a concern about access having been denied to Mr. A. and that has occurred a great deal before the assault charge, but some of it has lingered after the assault charge. It appears that there may have been valid reasons, but it is very difficult for me on affidavit evidence to make that kind of determination. I should say that it is not wise for one parent to deny their children the right to share their lives with the other parent, except in the clearest of circumstances where it would not be in the best interests of the children. Too often it becomes a method of one parent getting back at the other parent for past wrongs real or perceived.

[7] Two issues are presented. The first issue is the custodial or the care and control arrangements for the children. The second issue is the summer holidays of the children.

[8] I am going to make a quote from a case decided as recently as two weeks ago called *S. v. B.*, 2003 YKSC 28, just to indicate the general view of the court with respect to joint custody:

> In order to encourage the father and mother to play an active role in the upbringing of their children, joint custody is a concept we often apply. Joint custody does not necessarily mean an equal sharing of the care and control of the children, but rather it is an important statement that each parent still has an important role to play in the lives of their children.... Joint custody does encourage parents to communicate and cooperate rather than having the result that the parent who simply has an access right is sometimes ignored.

[9] In this particular case, two particular concerns arise when it comes to the consideration of whether there should be an interim joint custody order. The first is that there has been violence between these two spouses. Mr. A. is the one who has been charged and who is in the treatment process, but it may be that both parents have to give some consideration to their physical aggression towards each other. The concern I have is that sometimes violence in relationships results in an unequal power relationship. That can be an extremely dangerous situation when it arises with respect to children.

[10] The second issue of concern is that the no-contact order is still in place in the assault case with the result that these parents, at this time, cannot have the kind of communication that a joint custody order is intended to foster.

[11] I cannot overlook these problems. It is extremely difficult to order interim joint

custody where the parents are unable to communicate by court order. Communicating through counsel is a necessary method for these two parties, but it is not one that can be properly put in place for the purposes of an interim joint custody order.

[12] However, I do not feel that it is appropriate in this case to make a custody either. I am therefore going to adjourn that decision to September 30, 2002.

[13] At that time, Mr. A. will have a report from the Domestic Violence Treatment Option Program and three months will have passed with respect to the care and control of the children. At that time we can revisit the issue of what kind of custodial order is appropriate, whether it be a joint custody or some other form of care and control.

[14] In the mean time, I am going to make this order:

1) Ms. M. will have care and the control of the children from Tuesday at 9:00 a.m. to Saturday at 5:30 p.m.

And I interject, if counsel have any difficulties with the times that I put on, you can raise it at the end.

2) Mr. A. shall have care and control of the children from Saturday at 5:30 p.m. until Tuesday at 9:00 a.m.
3) Mr. A. shall pick up and drop off the children in Ms. M.'s driveway, and he shall not enter her premises when picking up or dropping off the children.
4) Neither Ms. M. nor Mr. A. shall consume alcohol or drugs during their care and control time with the children.
5) The parent who has the care and control of the children has the

obligation to advise the other parent of any other significant events that took place while they were exercising their care and control. Obviously in emergency situations communications should be made immediately.

6) Each parent will have the obligation to discuss any significant decisions which have to made concerning the children including significant decisions concerning the health (except in emergency decisions), education, religious instruction, and general welfare of the children. This will necessarily have to be with the assistance of counsel at the present time.

7) I am also ordering that each parent has the obligation to discuss these items through counsel and attempt to reach agreement if any major decisions arise between now and September 30, 2003.

8) If the parties cannot reach agreement on any major decision despite their best efforts, either party has the right to come back to this court to seek a court order.

9) Each parent will have the right to obtain information concerning the children directly from third parties including teachers, counsellors, medical professionals and third-party caregivers.

10) For the summer care and control of the children, Mr. A. will have care and control from June 28, 2003, to July 15, 2003. Mr. A. will be taking the children, I understand, to the Vancouver area and on July 15, 2003, at a time to be arranged by counsel Ms. M. will have the care and control of the children because she is going to take the children to see relatives and also a visit to Ontario.

11) Ms. M.'s care and control of the children will be from July 15, 2003, to August 15, 2003. When Mr. A. will have care and control of the children until school commences when the fours days on and three days on will

start up again at the appropriate starting date.

12) Neither parent is to permanently remove the children from the Yukon Territory without a court order.

[15] That is all that I have counsel. Is there anything that needs to be clarified, or that I have missed out?

[16] MS. HOFFMAN: There was one point arising, My Lord. And I apologize for not having addressed it in submissions and have not stated to my friend that I would be addressing it now. However, when you brought up with the Tuesday, 9:00 a.m. until Saturday at 5:30 p.m., or sorry, the Saturday at 5:30 until Tuesday at 9:00 a.m., that reminded me of the fact that at the present time, Mr. A. has been having time with the children from noon until one o'clock on Fridays, during the school period. That is of course very difficult with the children living out on Burma Road for him to exercise that time with them on Friday.

[17] So what I would suggest is that perhaps that he could pick up the children at an earlier time during the summer when they are not in school, on Saturday, in order to compensate for that amount of time. And that, perhaps, a statement could made that when the children return to school in September, the previous arrangement that had been in place, 12 noon until 1:00 p.m., on Friday's at lunch time could come back into place.

[18] THE COURT: Ms. MacDiarmid.

[19] MS. MACDIARMID: From what I recall, and I just briefly spoke with Ms. M., is that the boys that chose to go on Saturday night because they spend

time with their friends in the neighbourhood on Saturday during the day. I think, originally, they wanted it to be seven and we sort of pushed it back to 5:30 p.m. Ms. M. says that she does not feel that pushing it back more, at this time -- really they get the Saturday at that residence, and they get the Sunday at his.

[20] THE COURT: There is no difficulty I take it, well, I guess I question the necessity of making this particular order given that summer is going to on a different circumstance. So why do we not just leave it that the Friday, 12 noon until 1:00 p.m., will return to the normal schedule once school has started.

[21] MS. HOFFMAN: Thank you, My Lord.

[22] THE COURT: Thank you, very much, counsel for your helpful submissions.

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VEALE J.