

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Goodwin v. Goodwin*, 2004 YKSC 84

Date: 20041203
Docket No.: S.C. No. 04-D3671
Registry: Whitehorse

Between:

SARAH COLLEEN GOODWIN

Petitioner

And

LEE FORREST GOODWIN

Respondent

Before: Mr. Justice L.F. Gower

Appearances:
Emily R. Hill
James Van Wart

For the Petitioner
For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The mother/petitioner has applied for interim custody of the child, C., born June 22, 2004. She also seeks specified access for the respondent/father as well as increased interim child support and a contribution by the father toward special or extraordinary expenses of the child. Finally, the mother also asks for specific permission to travel out of the Yukon with C. for the upcoming Christmas holidays.

[2] The father has applied for interim joint custody of C. and asks for a number of specific terms governing how the parties are to share the parenting of the child. In

particular, he seeks a term that one party be granted the final decision-making authority for the child, but that the other party should have the right to ask the Court to review any such decision. In addition, the father seeks increased specified visitation and continuation of his existing child support payments. He agrees to contribute towards the child's special or extra-ordinary expenses. He opposes the mother's request to travel with the child over the Christmas holidays, unless he is granted an equivalent amount of visitation time to make up for the resulting loss of time with C.

ISSUES

[3] Of course the overall issue here is what is in the child's best interests. Specifically, I must determine:

1. Whether joint custody is appropriate?
2. Even if joint custody is not appropriate, how should the parties share information about the child?
3. What is the most appropriate visitation schedule for the father?
4. What amount of child support should the father pay?
5. Should the mother be permitted to travel with the child over the Christmas holidays and, if so, on what terms?

BACKGROUND

[4] The parties have had a relatively short but tumultuous relationship. They met in approximately November 2002 and began living together in 2003. The mother soon became dissatisfied with a number of things about the relationship, notably the consistent marijuana use by the father and his failure to maintain regular employment. Conflicts escalated in the spring and summer of 2003. One particular fight over the

father's relationship with a former friend, Ms. M. O'Donnell, led to a separation for a few months. The parties reunited in the summer of 2003 and the mother became pregnant. Sadly, the mother miscarried the child in the first trimester.

[5] The couple became engaged in the fall of 2003, but continued to experience conflict, periodically erupting into violent episodes. The father was jailed for two months for driving while suspended in early 2004. After he was released the couple reunited, but broke up again in April 2004, at which point the mother ended the engagement.

[6] However, they came together yet again just before the birth of C. in late June 2004, at which time they had another serious violent altercation. Remarkably however, they recoupled within days and were once more engaged. They were married by a Justice of the Peace at the hospital the day after C. was born on June 22, 2004.

[7] In early July there were two further physical fights, the second of which resulted in the mother charging the father with assault. Also about that time she filed her Petition for custody of the child and other related relief.

[8] The mother was granted interim interim custody of the child in July and the father was allowed supervised specified access. In August, the father was ordered to pay child support of \$130 per month based on an imputed annual income of \$15,300. The father currently sees the child every second day for three hours and for six hours when his access occurs on a weekend. To date, all access has been supervised.

[9] On October 28, 2004, the father plead guilty to the charge of assault upon the mother and received a suspended sentence plus probation for a period of one year. It is

a term of the probation order that the father have no contact directly or indirectly with the mother except with the written permission of his probation officer or in accordance with any order that this Court may make for the purposes of allowing access to the child.

[10] A Custody and Access Report (CAR) was completed by Geoffrey Powter, clinical psychologist, on October 29, 2004.

ANALYSIS

Issue #1 Whether joint custody is appropriate?

[11] When the father was interviewed by Mr. Powter for the preparation of the CAR, he was intending to seek custody of C. However, after having reviewed the CAR, he changed his mind and is now seeking joint custody. The father's counsel submitted that joint custody is more likely to be in the child's best interests than the father simply being granted access. He argued that both parents were identified in the CAR as having certain liabilities in their personalities and that a joint custody order would act as a "check and balance" against these respective liabilities. In particular, it would allow the father a greater level of knowledge about the child's affairs, even if joint decision-making is not possible and the mother is granted the primary decision-making power, as contemplated by the father's application.

[12] The father also says he wants to work towards a relationship of mutual respect with the mother for the benefit of the child. His counsel suggested that this Court could order some form of gradually increasing contact between the parties in order to facilitate the joint decision-making required for joint custody and that the probation order allows

for this. Further, if the father were to violate those terms, then the father could be prosecuted for the criminal offence of breach of probation.

[13] While the father's counsel ably represented his client and said everything that could be said in support of his cross-application, I am left unpersuaded that joint custody would be in the child's best interests.

[14] I recognize that this is an interim application. The parties have made conflicting allegations both in their affidavit material and in their representations to Mr. Powter in the preparation of the CAR. Those allegations have not been tested by cross-examination. Therefore, it is difficult for this Court to make clear findings of fact in many instances. Theoretically, those findings of fact could be made at the trial of this action, but counsel advised me that a trial is unlikely, given the financial circumstances of the parties. Therefore, the practical reality is that the orders made at this stage are likely to have the effect of final orders, subject to any applications to vary by either party.

[15] One of the consequences of this being an interim application is that I must rely upon the best evidence available. In large part, I am referring here to the CAR, which is the result of Mr. Powter's careful and objective assessment of the situation. He spent a good deal of time meeting with the parties, interviewing a number of collateral witnesses and reviewing related documents. The report is clearly detailed, containing some 223 paragraphs over 28 pages.

[16] It is Mr. Powter's considered opinion that this family is not a good prospect for joint custody because of the "very strong history of conflict" and little positive history in the relationship (CAR at para. 206). Rather, he feels that the mother is "clearly the

parent of choice” and the “best-fit” parent for the child at this time (CAR at paras. 203 and 205).

[17] I agree with the father’s counsel that both parties have certain personality deficits. The mother described herself as being naïve, innocent and gullible. Mr. Powter felt that she seemed especially vulnerable to being swayed by others around her, particularly by the father (CAR at para. 48). Mr. Powter’s psychological testing confirmed that the mother is high-strung and emotionally naïve with a tendency towards anxiety, depression, and histrionics (or intense emotionality) (CAR at paras. 68, 70, 71 and 73).

[18] However, the mother was noted to have taken significant steps to seek out support programs for advice on parenting and has demonstrated “commitment and growth” in that regard. She was described as having a very strong social network in place (CAR at para. 80). Mr. Powter also said that the mother was willing to look at the potential impact of her problems upon the child and openly acknowledged her need for help to resolve those problems through continued counselling and contact with parenting resources (CAR at para. 209). Despite having some reservations about how her personality deficits might manifest themselves in her parenting, Mr. Powter concluded that, if the mother can minimize her exposure to stress, “especially the stress with [the father] and can keep resources available to her, there is no definitive risk to the child” (CAR at para. 197). Further, he described the mother as a “fluid, talented and committed parent”, whose performance on the tests measuring parenting ranked her quite high relative to her peers (CAR at paras. 91 and 96). She was noted to have a good understanding of the child’s developmental level and her own role in the child’s life at present and in the future (CAR at para. 200). A “Healthy Families” worker involved with

the mother said that she would give her “the highest rating” in terms of her “commitment, talents and bonding” with the child (CAR at para. 165).

[19] The father was also described as having demonstrated good intuitive parenting skills, as well as good skills in tasks such as feeding, bathing, changing and maintaining hygiene in the home. His performance with the child was observed by Mr. Powter as being “very high quality” and that he seemed warm, engaged and very interested in his bond with his son (CAR at para. 154).

[20] On the other hand, Mr. Powter found that there was “considerable evidence” that the father has “antisocial personality traits” (CAR at para. 100). He was described by Mr. Powter as being “self-absorbed” and subject to “self-glorification”, as well as someone who portrays himself as a victim, lacks acceptance of responsibility and has a tendency to blame others (CAR at paras. 101 and 102). Further, Mr. Powter felt that the father showed a disregard for rules and structures. A number of collateral witnesses described him as being aggressive, controlling and manipulative (CAR at paras. 103 and 104).

[21] It is interesting to note that the father was in a previous relationship in 2000 which resulted in violence, criminal charges and a break-down in the marriage. As a result of a conviction for assaulting this partner, the father was ordered to complete spousal assault programming with the Family Violence Prevention Unit in Whitehorse, but he failed to do so (CAR at para. 105). Indeed, Mr. Powter said the father “was abusive and refused to take any responsibility for the charge that had landed him in trouble” (CAR at para. 125).

[22] I also found it very interesting that the mother told Mr. Powter she felt the father was more interested in “winning the custody dispute, or making him look good in other people’s eyes”, than genuinely wanting a role in the child’s life. She felt that the father was far too selfish to truly give up his own needs for the sake of the child. The mother said she believed that, even if he received custody, his interest in the child would be short-lived and he would very quickly pass the child off onto caregivers (CAR at para. 86). While I recognize that this is simply the opinion of the mother, there is some support for her belief in the results of the father’s psychological assessment, in particular the MCMI, which put the father in the category of “nomadic antisocials”. Such individuals are described in the literature as seeing their environment “as if it were a tournament with one person pitted against the other” (CAR at para. 109).

[23] Finally, it is also surprising that Mr. Powter was able to reach any conclusions about the father’s personality, when the validity scales on the psychological tests suggested that the father had made a concerted effort to present himself in an unrealistically positive light (CAR at para. 111).

[24] I repeat that, at this interim stage in the proceedings, I feel compelled to accept at face value the recommendations and opinions in the CAR respecting custody. Certainly, the father has not presented any arguments or evidence to contradict or invalidate those opinions, other than to suggest that certain statements (which I will discuss later) regarding the young age of the child were “boiler plate”.

[25] On the basis of the evidence in the CAR, part of which I have discussed here, I am unable to imagine how the parties could possibly succeed, at present, in a joint

custody relationship. Neither trusts the other. Both continue to doubt each other's actions and tend to look for evidence of wrong-doing (CAR at para. 38). The mother does not want direct contact with the father and feels that her own will and interests would be lost in disputes with him about decision-making. She also feels that the father's value system disqualifies him as an appropriate parent. The father on the other hand has told Mr. Powter that he feels the mother is not emotionally stable enough to be entrusted with the child's welfare (CAR at paras. 42 and 43). Thus, putting the parties into a joint custody relationship would be the equivalent of pouring gasoline on a fire. That in turn would lead to increased stress for the mother, which almost certainly would not be in the child's best interests. Accordingly, I order that the mother shall have interim custody of the child.

Issue #2

Even if joint custody is not appropriate, how should the parties share information about the child?

[26] At the hearing of these applications, the mother said she was agreeable in principle to the concept of information sharing. However, I emphasize that the mother does not wish direct contact with the father. Rather, the mother is willing to communicate with the father about matters relating to the child through a combination of means. Firstly, by using a "communication book" which travels with the child back and forth between the parents and in which information is provided about the child's needs and the parents desires and concerns. Secondly, the mother is agreeable to communicating through "back door" telephone voice-mail. Specifically, the mother can leave messages on the father's voice-mail system without having to directly dial the father's telephone number and risk the father answering the phone. Similarly, the father can leave

messages on the mother's answering machine. As the mother has call-display on her telephone, she will be alerted to when the father is placing a call and will not answer the telephone. Further, both parties are aware that such telephone communication can be recorded and, if necessary, transcribed. Hopefully this will act as a deterrent to either party leaving inappropriate or abusive messages.

[27] I have reviewed the father's Chambers Outline in which he sets out the type of information he is seeking about the child. Principally, these seem to focus on issues of health, education, religious instruction and the general welfare of the child. However, given that the child is just over five months old at present, I would expect that most of the communication would have to do with such things as the child's health, hygiene, clothing and activities. As I understand the mother, this is precisely the type of information which she intends to exchange through the communication book and the telephone messaging system. Therefore, it seems unnecessary at this time to specify within an order what types of information need be exchanged. If the father is truly interested in rebuilding a relationship with the mother based upon mutual respect, then I assume he is prepared to also act reasonably in the information exchange. The alternative of specifying the information the father is entitled to, could easily lead to increased conflict and reason for argument.

Issue #3

What is the most appropriate visitation schedule for the father?

[28] As a preliminary point, the mother is no longer seeking supervised access. Her position in that regard is also supported by Mr. Powter (CAR at para. 220).

[29] On the other hand, the mother does not wish to change the current schedule of access, which is every second day for three hours in the early evening on weekdays and for six hours in the afternoon on weekends. Mr. Powter also supports the current access schedule, as being a good example of a plan which facilitates frequent but relatively brief visitation until the child is closer to age three.

[30] The primary change in the access schedule requested by the father is to include overnight access on weekends. He seemed to agree that the overnight access should start on a “test-night” basis, as recommended by Mr. Powter, perhaps initially at the rate of one evening per month to start.

[31] As I understand Mr. Powter, he is opposed to “multi-day visits”, which I take to mean overnight access, until the child is about three years old. Presently, he says the main focus should be on providing the child with a stable primary home with the mother. The father’s counsel characterized this opinion as a very general “boiler plate” conclusion, which tends to revive the notion of the tender years doctrine effectively placing an unfair onus on the father. On the other hand, Mr. Powter clearly recognized the need for the access arrangements to evolve in the future, so as to provide greater time between the father and the son (CAR at para. 223).

[32] Frankly, I remain concerned and somewhat sceptical about the father’s professed desire to change his ways and behaviour. That concern relates directly to the father’s request for increased access. At the time of the preparation of the CAR, Mr. Powter noted that the father “showed little acceptance of having any problems” and that it seemed “unlikely that his behaviour will change” (CAR at para. 211). And specifically,

Mr. Powter said it was “a fair diagnosis” that the father has an “antisocial personality disorder” and that such individuals:

... especially when it involves a history of violence, will likely, at some point, express their antisocial tendencies either directly or indirectly as parents. (Indirect expression would involve the parent passing on antisocial *views* to the child; direct expression would see the parent acting out their antisocial impulses and anger on the child).
(CAR at para. 188)

In my cautious view, it is already a significant and progressive step for the child to move from supervised to unsupervised access. That will likely increase the father’s flexibility and the range of activities he can enjoy with his son. However, given Mr. Powter’s concerns, which again I feel compelled to accept at face value at this time, I am not persuaded that the father should be allowed overnight access. Further, given that the child is continuing to breastfeed and is expected to do so for some time to come, I am ordering a continuation of the existing access schedule. That is, the access shall occur between 4:45 p.m. and 7:45 p.m. when falling on a weekday and between noon and 6:00 p.m. when falling on a weekend.

Issue #4

What amount of child support should the father pay?

[33] The father filed a financial statement indicating that his current gross annual income is \$33,566.40. By applying the Child Support Guidelines, that would result in monthly payments of \$293.

[34] On August 11, 2004, I ordered the father to pay child support of \$130 per month, based on an imputed annual income of \$15,300. At that time the father was unemployed, but I determined that he was capable of employment. The father initially fell

into arrears, but obtained a job as a general finance officer with the Kwanlin Dun First Nation in Whitehorse on October 12, 2004. He says he received his first cheque from that employment on or about November 12th and thereafter paid in full all child support due to December 31, 2004. Notwithstanding his new employment, the father asks that he be allowed to continue paying at the rate of \$130 per month. He argues that his financial situation has been up and down over the past several months and he is still trying to get on his feet. On the other hand, the mother argues that the father incurs significant monthly expenses in connection with his two aquaria and his two cats. In her affidavit #5 the mother deposed at paragraph 22 that she learned the father has paid approximately \$150 for veterinary expenses for the cats, at a time when he was not paying regular child support. Indeed, the father's financial statement discloses that he spends approximately \$100 per month on fish and cat food.

[35] Frankly, I am sympathetic to the mother's position here. Accordingly, I order the father to pay child support pursuant to the Guidelines at the rate of \$293 per month. I expect the father will make appropriate adjustments in his domestic budget to allow for the proper financial support of his child.

[36] The father has also indicated a willingness to contribute towards the mother's transportation costs in dropping off and picking up the child from the father's residence. The father's driver's licence is presently suspended and so the mother is solely responsible for shuttling the child back and forth in her vehicle. She sought a contribution of \$20 to \$30 per month as a special or extra-ordinary expense under s. 7 of the Child Support Guidelines. While s. 7 does not specifically contemplate these kinds of transportation expenses, I am satisfied that I have the authority under s. 33(2)(b) and (c)

of the *Children's Act*, R.S.Y. 2002 c. 31, to order that the father contribute to the mother's expenses associated with facilitating the father's access. Accordingly, I order that the father pay to the mother an additional \$20 per month.

Issue #5
***Should the mother be permitted to travel
with the child over the Christmas holidays
and, if so, on what terms?***

[37] The mother originally filed her application for this relief on September 28, 2004. She wants to travel to Alberta and Saskatchewan to visit her family with the child from December 18th to January 3rd. She says she is willing to accommodate the father's Christmas plans by arranging longer access before or after the trip. She says she will be spending time with her mother, her maternal grandparents, four maternal aunts and many cousins who will be travelling from all over western Canada to spend Christmas together. None of that side of the family have met the child and are reportedly excited to do so. The family has contributed money to the mother and child for this trip.

[38] I am somewhat surprised by the father's relatively rigid position on this point. Initially he was completely opposed to the application, because he had a scheduled access day on Christmas Day. He has since changed that position, but remains opposed unless he receives equal time in compensation for each of his missed days of access. Given that he purports to want to re-establish a relationship of mutual respect with the mother in their dealings over the child, I would have expected a willingness to compromise in this special situation.

[39] Nevertheless, in an attempt to be as fair as possible to the father, while recognizing that the mother's plans for this Christmas are a reasonable departure from the routine thus established, I order that the father shall have the option of exercising access on a daily basis, rather than every second day, during the same hours indicated above, from December 13th through 17th inclusive and from January 4th through 8th inclusive. I further grant permission to the mother to remove the child from the Yukon from December 18, 2004, through to and including January 3, 2005.

POST SCRIPT

[40] Given that the mother was largely successful with her application, I award her costs in any event of the cause.

[41] I acknowledge the father's attendance at a "For the Sake of the Children" workshop sponsored by Yukon Family Services Association on November 17, 2004. I commend him for that, notwithstanding he did so only shortly before the hearing of these applications.

[42] I also note that under his current probation order the respondent is required to attend for an assessment by the Family Violence Prevention Unit and to complete the batterers program or any other program directed by that unit. He is further ordered to take such substance abuse assessment, counselling and treatment as may be directed by his probation officer.

[43] Given the views of Mr. Powter about the father suffering from an antisocial personality disorder, I would strongly recommend that the father attend and complete all

the programming available to him under the auspices of the probation order. In the longer term that will clearly not only be in his best interests, but also in the best interests of the child.

[44] Similarly, although I do not find it necessary to make it part of an order, I strongly suggest the mother continue with her current counselling and support programs. Those which I have noted are:

- a) seeing her counsellor at Yukon Family Services once a week;
- b) meeting with a Healthy Families worker once a week;
- c) meeting with her family physician on a regular basis; and
- d) her proposed weekly program for the child at the Child Development Centre.

GOWER J.