IN THE SUPREME COURT OF YUKON

Citation: S. v. N., 2008 YKSC 22

Date: March 7, 2008
Docket: S.C. 05-B0033
Registry: Whitehorse

Between:

C.S.

Plaintiff

-and-

S.N.

Defendant

Reasons for Judgment
The Honourable Justice M. T. Moreau

I. Introduction

[1] This is an application for custody of the child L., born July 6, 2003, born of the common-law relationship between the plaintiff and the defendant. The plaintiff, C.S., is seeking sole custody of the child and the maintenance of the defendant's current access schedule until September 2008. At that time, L. will start attending kindergarten. She requests that the access schedule be varied starting in early September 2008 to one weekend out of every two and one evening in the middle of the week. The defendant is seeking an order either for sole custody, or for 50% shared custody based on one week out of every two.

II. Background facts

[2] The parties separated on August 4, 2005. On August 9, 2005, the plaintiff commenced an action for interim and permanent custody pursuant to the provisions of the *Children's Act,* RSY, 2002, c. 31. Following the plaintiff's application, the Honourable Mr. Justice Gower, on August 12, 2005, issued an "interim-interim" order granting custody of L. to the plaintiff and establishing an interim access schedule for the defendant with his child. This schedule provided for access by the defendant on Tuesdays, Thursdays and Sundays with no overnight stays, permitted communication by telephone between the defendant and L. at any reasonable time, and prohibited the parties from taking L. outside the Yukon Territory without the consent of the other parent or an order of the court.

[3] On October 21, 2005, the Honourable Mr. Justice Veale ordered that an evaluation report be prepared regarding custody and access. He amended the previous order and stipulated a set time for the defendant's telephone calls. On April 27, 2006, Gower J. amended the location for the transfer of the child from one parent to the other, at the request of the plaintiff, to particular restaurants in Whitehorse and prohibited any communication during these transfers as well as any telephone communications between the parties, except to facilitate regular calls between the defendant and L. He prohibited the defendant from presenting himself at the plaintiff’s workplace except for professional reasons.

[4] On August 10, 2006, Geoffrey Powter, a psychologist, submitted to the court his evaluation report regarding custody and access.

[5] On August 29, 2006, at the request of the plaintiff, Gower J. amended the defendant's access schedule to Sundays, Mondays and Tuesdays, (without overnights), to allow L. to attend daycare the other weekdays.

[6] At the pre-trial conference on August 27, 2007, I set the dates for the trial of the custody and access matters and directed that Mr. Powter update his report. I also ordered that the defendant's scheduled visits be varied to allow L. to stay with the defendant from Sunday to Tuesday night. The order also permitted the plaintiff to visit her family and the defendant's family in Quebec with L. The schedule of telephone calls was varied to allow each parent to call L. at the other parent's home between 6 p.m. and 7 p.m. On November 7, 2007, at the request of the plaintiff, I varied the defendant's scheduled visits to 5:30 p.m. Sunday until 5:45 p.m. Tuesday.

[7] Both parties appeared at the trial without counsel.

III The evidence

[8] Some relevant facts are referred to in the reasons for judgment regarding the distribution of assets accumulated during the relationship.

C.S.

[9] The plaintiff is 33 years-old. She testified that she had primary responsibility for the care of L. during her maternity leave. The defendant was building their house during that time. In June 2004, the defendant returned to her job as a full-time journalist and the defendant took primary responsibility for L.'s care during weekdays. However, the plaintiff maintained that she had continued to perform the bulk of the housework. She was obliged to take two weeks' leave in May 2005 due to exhaustion. Based on her doctor's advice, she reduced her work schedule to four days per week.

[10] The plaintiff described the relationship as abusive, the defendant constantly criticizing her both in public and in private, and his contrary nature alienated her friends. He was sexually demanding. Their quarrels were frequent and loud.

[11] According to the plaintiff, the defendant did not believe that it was necessary to impose discipline on their child nor to follow a bedtime schedule.

[12] On August 4, 2005, the plaintiff left the defendant, taking L. with her. She left a message on the defendant's answering machine with her cell phone number so that he could make arrangements to see L. but she did not reveal where she was staying, indicating that she was afraid of the defendant and could not predict his reaction to the separation. She noted that the defendant had threatened to return to Quebec with L. or even to take him to Mauritius, his birthplace. She obtained an interim-interim order on August 12, 2005 granting her custody of L.

[13] The plaintiff registered L. at a daycare centre starting in June 2005. Adopting regular routines for L.'s care, notably a set bedtime, had a positive effect on his behaviour. The notes from the daycare centre tendered in evidence indicate that in June 2005 (prior to the separation), L. would cry when his mother would leave him, would eat very little, would not readily accept having to take a nap and did not play easily with the other children at the daycare centre. The notes dated September 2005 reveal an improvement in all these areas.

[14] At the same time, according to the affidavits submitted in evidence by both parties, the transfers of the child were taking longer and longer and were becoming very stressful. According to the plaintiff, the defendant took advantage of the transfers to abuse her verbally and to make disrespectful gestures, all in L.'s presence. She would

raise her voice in response. She finally asked an employee of the daycare, S.J., to be present for the exchanges, and the situation calmed down for several months until S.J.'s departure from the Yukon in February 2006. In a statutory declaration dated February 15, 2006 tendered in evidence, S.J. noted that any exchange of the child from one parent to the other "quickly becomes confrontational". In April 2006, the plaintiff applied for a peace bond. The peace bond was replaced by an order dated April 27, 2006 limiting communication between the parties. According to the plaintiff, the April 27 order greatly reduced the tension between the parties during the transfers.

[15] However, the conflict between the parties continued on other fronts. The plaintiff testified that the defendant had difficulty complying with the access schedule. She called the police in October 2005 and December 2005 because of L.'s tardy return, although she did state that on one of these occasions, the defendant had left her a message that L. was sick and further, that he always brought L. back to her. She testified that the defendant had refused to support her attempts to toilet-train L. and that the child would be wearing diapers after returning from visits with his father. The defendant would not return medications that she would send with L.

[16] However, the defendant established during cross-examination of the plaintiff that he had only been informed that L. had been vaccinated the very day of his visit and that he does not receive information about L.'s health.

[17] The plaintiff refused to agree to a modification to the access schedule to allow overnight stays. In August 2007, I ordered overnight visits. Five months later, the plaintiff testified at the trial that this new regime has had a stabilising and calming effect on the child.

[18] Both parents acknowledge that the order limiting their communication did not represent an ideal situation for the child. The plaintiff stated that she would be prepared to consider a relaxation of the order if she had assurances regarding the defendant's behaviour during the transfers of the child.

[19] The plaintiff testified that she is doing as much as she can to ensure that L. communicates regularly with his father by telephone but that the child does not particularly like speaking on the phone. She sends school pictures to the defendant and to his family in Quebec, helps L. draw birthday cards and Christmas cards for his father, ensures e-mail communications between L. and the defendant's family in Quebec, and arranges for visits between L. and the defendant's family when she travels to Quebec with the child.

[20] The plaintiff stated that since the 2005 order prohibiting the parties from taking L. outside the Yukon without prior written consent or order, it has been impossible to obtain the defendant's consent for trips with L. to Quebec or elsewhere. She obtained a court order allowing her to travel to Alaska and British Columbia with her father and L. in April 2006, and again, allowing her to travel to Quebec with the child in July, 2006. The defendant refused to consent to a southern trip that she wanted to make with L. in March 2007. She was obliged to obtain an order in May 2007 to have L.'s passport signed. She was obliged to obtain an order in August 2007 allowing her to travel to Quebec with L. in September 2007. According to the plaintiff, she responds immediately to requests from the defendant to change the schedule of visits yet in January 2008, the defendant gave her barely two days notice of a several-week-long

trip that he took to Norway. She nevertheless agreed to take care of L. during the entire time of the trip.

[21] However, the plaintiff confirmed that since their separation two-and-a-half years ago, the defendant has never breached the order prohibiting him from taking L. outside the Yukon.

[22] According to a letter dated February 7, 2008 from L.'s pre-kindergarten teacher, L. is advanced for his age in learning new concepts. He demonstrates good behaviour during directed and small group activities and he participates in games.

[23] The plaintiff testified that she had recently seen L. sitting alone in the defendant's truck parked in front of the grocery store. However, the defendant established under cross-examination of the plaintiff incidents of lack of attention on the plaintiff's part that occurred prior to their separation.

M.N.

[24] M.N. is a long-time friend of the plaintiff. She testified that she visited the plaintiff near the end of June 2005, shortly before the parties' separation. She testified that the defendant slept late in the morning while the plaintiff prepared breakfast for L. before leaving for work. She stated that the defendant constantly criticized the plaintiff and, in her presence, threatened to make the plaintiff's life "hell" if she left him. In her opinion, the defendant imposed neither schedule nor discipline on L. After the separation, the plaintiff lived with her and they bought a house together in May 2006. In August 2007, M.N. was working at the daycare that L. attended. She noted that he was sleeping better during naptime and that he seemed calmer following the separation. According to her, he was benefiting from the routine of sleep and meals imposed by the plaintiff.

She observed that the plaintiff encouraged L. to speak with his father on the telephone. She was present during the transfers of the child. The defendant would insult the plaintiff in the presence of the child and would needlessly prolong the transfers whereas the plaintiff did not denigrate the defendant in front of L. She indicated that the order limiting communication between the parties has greatly reduced the climate of tension between the parties.

[25] She testified that she observed the defendant leave L. alone in his truck on two occasions in front of the community centre last year.

[26] M.N. expressed the opinion that the defendant has neither the maturity nor the necessary organizational skills to assume parental responsibilities during the weekdays that L. is attending daycare.

S.N.

[27] S.N. is 38 years old. He referred to two incidents prior to the separation where the plaintiff had prevented his departure from the house during their arguments and had punched him and pulled his hair. He described the plaintiff as demanding, confrontational and querulous when her plans did not unfold as she would have wished. He maintained that he did his share of the housework. He denied having been demanding in their sex life.

[28] S.N. testified that he did not understand why the plaintiff took L. from him when she left him in August 2005 since he had had primary responsibility for L.'s care for fourteen months following the plaintiff's return to work. He stated that the transfers of the child after their separation were confrontational but following the order requiring

them to effect the transfers at a Whitehorse restaurant, they have been much more peaceable.

[29] The defendant listed a series of dates in 2005 and 2006 when L. did not telephone him. However, he did remember an occasion near the end of January 2006 when it was clear to him that L. was irritated and did not want to come to the telephone, but the plaintiff forced him to speak with him. He asked the plaintiff to stop forcing him. This incident reported by the defendant indicates that L., at four years of age, does not always feel like making calls at times that suit one or the other of his parents. The defendant testified that the plaintiff has attempted to keep other individuals away from him and that a colleague of the plaintiff told lies regarding his violent nature. He deplored the limited amount of information that he receives regarding L.'s medical care and progress.

[30] The defendant mentioned one occasion when he questioned L. about what he had had for breakfast at his mother's. I am of the view that this type of questioning is not appropriate since it obliges the child to report to one of his parents about the care he is receiving from the other. The defendant had also alerted the plaintiff's automobile insurance company that he had seen Ms. N. driving the plaintiff's truck. I find that his intention in doing so was to cause disruption to the plaintiff. The defendant stated that he sees himself as the victim in the relationship and in the litigation. He noted that pursuant to the plaintiff's instructions, the daycare and the pre-kindergarten program do not even have access to his telephone number to communicate with him in case of an emergency. J.C., a teacher at the school, stated in an affidavit tendered in evidence that he had no way to reach the defendant in an emergency. The plaintiff did not deny

that she had issued this directive but noted that the defendant did not have a telephone for several months.

[31] The defendant testified that he has tried for over two years to convince the plaintiff to allow L. to stay with him overnight. He noted that L. has been calmer and more secure since late summer 2007 when the court modified the schedule to include overnights. In addition, under the new schedule and with the reduction in the number of transfers between residences, L. has been happier to see his mother again. The defendant maintains that he is able to meet L.'s needs on weekdays, that he has never abused him in any way, and that he has sacrificed his pursuit of regular employment to be able to maximize his time with L. before he starts attending school. He maintains that the occasions when he left L. alone in the truck were of very short duration and that he always keeps an eye on him. As to his discipline of the child, he maintains that L. listens to him and that he has a set bedtime.

[32] The defendant testified that he did not consent to the trips that the plaintiff wished to take with L. because she refused to grant him additional access. He stated that he has also expressed the desire to take L. on a trip but that the defendant has never allowed him to do so. He would like to take L. to Mauritius for a holiday to meet his great-grandmother and other members of his birth family. He maintained that he had no intention of removing L. from the Yukon Territory.

[33] The defendant described his telephone communications with L. as a constant source of conflict. He is opposed to the decision to phone him being entrusted to L. alone in view of his age and proposes that each parent take responsibility for ensuring regular and reasonable telephone communications between L. and the other parent.

[34] He acknowledged that he gave the plaintiff very little notice of his recent trip to Norway for a film festival but stated that he could not have given any more advance notice because the financial arrangements remained uncertain until the last minute.

[35] The defendant is currently working with adolescents. He works 15 to 20 hours per week from Wednesday to Saturday (the days when the plaintiff has the care of L.). He is a member of a board of directors of a local festival and hopes to be able to gain paid employment with that organization. He also wants to continue to produce films. Although he does hold a Class One driver's permit, he does not want to take employment as a truck driver because this would take him away from L. He states that he wishes to live a simple life and to dedicate himself, as much as possible, to caring for L.

Geoffrey Powter

[36] I acknowledged Mr. Powter's expertise as a clinical psychologist able to provide opinion evidence on the issues of custody and access. Mr. Powter holds a Masters degree in clinical psychology and has been in practice for over 25 years. He has prepared over 125 evaluation reports concerning custody and access for the Supreme Court of the Yukon Territory.

August 10, 2006 Evaluation

[37] In 2006, the plaintiff presented the following complaints against the defendant:

1. The defendant limits L.'s social life and is opposed to L. attending daycare.

2. The defendant turns L. against her and blames her for the reduction in contact between himself and L. The defendant maintains that the plaintiff criticizes him openly in front of the child.
3. L. is less disciplined when he returns from visits to the defendant's. The defendant maintains that he imposes rules and creates a structured environment in his home. In his opinion, the plaintiff is too rigid and demanding of L.
4. The defendant has no direction in his life; he is a very poor role model. The defendant maintains that he does have plans and ambitions.
5. The defendant is not attentive to L.'s nutritional needs. The defendant maintains that he prepares good meals. He adds that the plaintiff does not inform him about L.'s health.
6. The defendant leaves his child alone in his vehicle and takes him to inappropriate places. The defendant denies these allegations but states that since he lives in the country, he does take advantage of the transfers of L. in town to run errands.
7. The defendant refuses to cooperate to perpetuate the conflict. The defendant maintains that the plaintiff continues to resist his contacts with L.
8. The defendant limits her trips with L. to Quebec. She also maintains that the defendant will take L. to Mauritius if she allows him to travel with L. The defendant insists that there is no basis for these fears.

[38] In addition to the complaints noted above, the defendant, in 2006, shared the following concerns with Mr. Powter:

1. The plaintiff blocks his access to information from the daycare and from L.'s physician about the child. The plaintiff maintains that he does not ask for any information and considers himself to be a victim.
2. The plaintiff is destroying his reputation in the community by spreading lies about him. The plaintiff maintains that the defendant himself is responsible for his reputation.

[39] At the time of Mr. Powter's first evaluation, the defendant was caring for L. on Sundays, Tuesdays and Thursdays from 8:30 a.m. to 5:45 p.m. The plaintiff complained about the fact that the defendant was often late for exchanges; the defendant complained about his limited contact with L.

[40] Mr. Powter summarized the results of the psychological tests undergone by the plaintiff. They reveal a preponderance of discipline-related traits. Pushed to the extreme, these traits may characterize an individual as perfectionist, demanding, distant and inflexible. These traits may provide a possible explanation for some of the conflicts between the parties but they do not affect the abilities of the plaintiff as a parent.

[41] According to Mr. Powter, the plaintiff’s house is a good environment for raising L. She has the benefit of support from a large number of friends, colleagues and social organizations. He noted that there is a strong affective bond between L. and his mother and that their interactions are fluid, judicious and appropriate. Contrary to the defendant's allegations, Mr. Powter did not observe any indication that she prioritizes her job over L.

[42] Mr. Powter noted that the defendant did not provide his responses to the psychological tests. He could therefore not explore the plaintiff's allegation that, during their relationship, the defendant would experience profound and unpredictable mood changes.

[43] He noted that Mr. N's house has electricity but no running water and there are no neighbours within sight. However, despite the presence of construction materials around the house, the area is neither dangerous nor inappropriate for a child of L.'s age.

[44] According to Mr. Powter, the defendant has an open mind and social skills but he does not accept his separation from L. His affect is stable, constant and appropriate. His descriptions of his plans, his parenting style, the state of his finances and his community support are rather inconclusive. Mr. Powter noted that his attitude of "an eye for an eye, a tooth for a tooth" towards the plaintiff risks compromising his consideration of the interests of his child. His parenting style is more permissive and laissez-faire than that of other parents. However, he has a very strong bond with L., their interactions are fluid and the defendant responds well and reasonably to the child's needs.

[45] According to Mr. Powter's observations, L. is a normal happy and healthy child. He appreciates both parents' homes and responds well to their directions. He is developing well despite his parents' conflict. Neither of the parents represents a risk to the child's well-being. However, Mr. Powter emphasized that L. needs constant and reliable parental care. The plaintiff's more structured approach, along with her understanding of the role of a parent, would better serve L.'s interests, although the defendant should play an important affective role in the child's future.

[46] Mr. Powter noted in his 2006 evaluation that shared custody of L. is not the preferred solution in these circumstances, since both parents have adopted an intransigent attitude. He recommended that legal custody be granted to the plaintiff while ensuring that the defendant is able to exercise his privileges and responsibilities in order to preserve a stable environment for the child with a minimum of conflict. In his opinion, the plaintiff demonstrates a clear appreciation of the duties and responsibilities of a parent and an ability and willingness to plan the future with L. The bond between the defendant and L. is strong but his plans and ambitions are less concrete. Mr. Powter recommended that his visits progress to regular overnight stays. He also recommended the appointment of mediator to check periodically on the defendant's access arrangements.

[47] Finally, Mr. Powter noted that there is very little hope that the conflict will dissipate over time because of the significant level of mistrust manifested by the parents and their inability to communicate.

January 12, 2008 Evaluation (Updated)

[48] Mr. Powter noted that during the 2007 interviews, the defendant informed him of his dissatisfaction with the 2006 evaluation. He maintained that his life is more structured and planned than Mr. Powter had indicated in the 2006 evaluation and that the latter had underestimated the role played by the plaintiff in their current conflict. He also expressed his disagreement with the first report's recommendations regarding custody and access.

[49] The plaintiff expressed her disagreement with the recommendation in the 2006 evaluation that the defendant be granted greater access to the child and, in particular,

that he should have the right to overnight stays during weekdays. She feared that this recommendation would promote more conflict and that there would be a risk that L. would not be as well prepared for school as he could be. According to her, the 2006 evaluation underestimated the risks associated with the defendant's behaviour.

[50] Mr. Powter noted in his 2008 update that the parties had made no real progress towards resolution of the conflict. In fact, the level of mistrust and anger had increased and, from all appearances, a co-parenting relationship does not exist. L. continues to live two distinct lives, each of the parents imposing his or her own regime of care. However, he characterized as positive the introduction of overnights with the defendant since the fall of 2007. The report refers to plaintiff's observation that L. seems more content and calm. However, she does not wish an increase in access.

[51] Both parties have found new partners. However, according to Mr. Powter, their grievances have not really changed since his last report. He writes at page 10:

> Both parties insist that they are willing to sort things out while the other blocks every attempt at good will, both harbour lists of grievances about the situation, and both feel the answer lies in the other party’s hands.

[52] Mr. Powter confirmed his previous observations that the plaintiff is better able to provide L. with structure, guidance and discipline. She was able to articulate a scholastic plan based on the child’s needs. She maintains an open and warm relationship with him.

[53] Mr. Powter observed that the defendant is locked into his anger and his frustrations over the 2006 evaluation and the litigation, and he presents himself as a victim. However, he did note a certain amount of progress. The defendant has more

regular employment and he is benefiting from the support of friends. The affective link between father and son is very strong. However, he is still the more “laissez-faire” parent as far as daily routines are concerned and these seem to be less established. For example, the defendant seems less concerned about meals.

[54] According to the updated evaluation, L. functions perfectly normally and seems content despite the conflict between his parents. Mr. Powter notes at page 22:

> In 2007, both parties continued to insist that they have not been personally adding to the conflicts. Instead, each continued to lay out almost all of the blame for the situation at the feet of the other, and this lack of willingness to change, or lack of awareness of personal responsibility, has fuelled continuing bitterness and self-righteousness on both sides. To some degree, both parties also said that the courts have been adding to the stalemate by unjustly validating, or even considering, the concerns of the other party.
>
> Thankfully, in the middle of the dispute the child seems to be functioning remarkably well. In almost every sense L. seems to be a happy, adapted and normal child. In fact, save for some mild concerns from the school about his peer socialization, L. seems to be [the] member of the family coping best with the conflicts, and with the fact of two separate lives.

[55] Mr. Powter indicated that the level of conflict between the parents makes any plan for shared custody illusory, noting at page 23:

> … by Mr. N. and Ms. S.’s own admission, neither of them are currently ready to sit down, accept responsibility for their own failings and move forward. Instead, both seem too committed to their negative perceptions of the other to relinquish

> control, or to have faith in a better future relationship. The result, in my opinion, is that contact will continue to result in conflict, with the unfortunate result that one parent likely has to be chosen over the other as sole custodian.

[56] According to Mr. Powter, a custody and access plan established by the court must have as its objective minimizing L.'s risk of being exposed to the conflicts between his parents. He reiterated his 2006 recommendation that the plaintiff is the better choice for L.'s legal custody, particularly since he will soon be starting school.

[57] However, Mr. Powter indicated in his 2008 update that the court should also maximize contact between the defendant and L. He recommended a test period of a more generous schedule of visits, to include school days. Mr. Powter indicated that he would support the schedule requested by the defendant, that is, 50-50 shared custody, if the test should prove to be positive. However, if the defendant demonstrates that he is not able to meet the responsibilities entrusted to him by the school or if he meddles with the plans and structures adopted by the plaintiff, Mr. Powter would not recommend any increase in the number of visits. He also recommends that the defendant have access to medical and school information concerning L. and that the parents exchange a communications notebook to facilitate the sharing between the parents of information about the child.

[58] In his 2008 update, Mr. Powter recommends that L. be free to communicate with both parents by telephone when he wishes and that the parents avoid adopting a rigid schedule for such communications. In his opinion, rigid schedules better serve the parents' needs rather than those of children and tend to create unnecessary tensions.

[59] Finally, Mr. Powter concluded that there is a very low risk of L. being kidnapped by either parent.

Mr. Powter's testimony

[60] Mr. Powter noted the importance of psychological tests, since they are often the only objective data available to the evaluator. He noted the absence of data to assist him in his psychological evaluation of the defendant.

[61] He also emphasized the profound impact of parental conflict on a child's development, an impact that is even greater than that of the absence of a parent or direct abuse of the child.

[62] Mr. Powter was of the view that the defendant's frustrations, even more pronounced at the time of the second evaluation, hinder his ability to make compromises, and that he will only accept 50-50 shared custody. Mr. Powter also expressed his concern that the defendant's significant level of anger could lead him to give priority to avenging himself for past troubles rather than to L.'s interests.

[63] He noted that the defendant may fail to support the plans and structures that the plaintiff is attempting to establish in relation to the important phases in L.'s development, offering as an example his lack of support during toilet-training.

[64] Mr. Powter described the plaintiff as the "psychological parent", in the sense that she properly understands her role. In his opinion, the impact on L's development of the two parental styles, one more structured, the other more laissez-faire, is a very complex question. While there is room for both styles according to literature on the subject, the structured style in the context of separated parents is preferable for the child, especially when reaching school-age. According to Mr. Powter, it is often preferable that the

parent with the more structured style have the care of the child during schooldays and that the parent with the more relaxed style have weekends. He expressed some concerns regarding the defendant's ability to adopt a structured style when L. attends school. While his 2008 report recommended a test period prior to adopting a 50-50 shared custody model, he is concerned that L. might become "a guinea pig".

[65] In his cross-examination of Mr. Powter, the defendant asked him how he could have imposed a structure in view of the limited time he spent with L. in the last two years. Mr. Powter replied that he had seen a considerable number of parents in limited access situations succeed in establishing more structure with their children than the defendant has demonstrated. He emphasized that the existence of a strong bond between father and child is not necessarily evidence that one is an ideal parent.

[66] Mr. Powter noted that shared custody could provoke more conflict between the parents. While it is true that L. does not appear to been affected to date by this conflict, his perceptions will become sharper as he ages and as he learns to better express himself. The conflict therefore risks becoming more transparent.

[67] As far as the defendant’s request to attend L.'s medical appointments is concerned, Mr. Powter indicated that very few separated parents attend these appointments together and he would hesitate to place L. in the middle of a probable conflict. He would prefer to trust the plaintiff to communicate the results of these appointments to the defendant by e-mail in a timely manner.

[68] Finally, Mr. Powter noted the fact that both parties insist on recounting incidents demonstrating the other party's shortfalls as parents, which evidences the depth of their conflict.

IV. Summary of the positions of the parties

[69] In view of the conflictual relationship between the plaintiff and the defendant, the plaintiff maintains that it is neither realistic nor in L.'s best interests that the court impose a shared custody regime, one in which both parents make decisions regarding L. She proposes that she maintain legal custody of L. and his primary residence. She requests that the current schedule continue until L. enters kindergarten and that the schedule be changed in early September 2008 to one weekend out of two, from Friday to Sunday night, in addition to one visit without overnight each Wednesday night. She requests a return to the current schedule of Sunday night to Tuesday night during the summer. She wishes to have one month's vacation with L., spread throughout the year, contingent on two weeks' prior notice. In addition, she wishes to travel freely with L. outside the Yukon and Canada. She also wishes to have the ability to travel with L. to Quebec on very short notice in case of emergency, in view of her mother's precarious state of health. She asks that L. be in her care on Christmas Day, Easter and Mother's Day. She proposes that the defendant have access to L. on New Year's Day, the July 1 holiday as well a Father's Day. She requests the continuation of the April 27, 2006 order limiting communication between the parties but states that it should be amended to allow communication by e-mail and by notebook concerning questions relating to the child. She requests that the access schedule not be reviewed before August 2009. Finally, in order to discourage repeated formal applications, she requests the imposition of a judicial resolution mechanism according to which the losing party would pay costs.

[70] As far as telephone communications are concerned, the plaintiff noted that the defendant often calls late and it often happens that L. does not feel like speaking to him.

She therefore proposes that L. be free to communicate by telephone with his parents when he wishes.

[71] In respect of the payment by the defendant of child support, the plaintiff states that she is prepared to leave that decision to the court. She emphasized that, in fact, she has assumed full financial responsibility for L. since his birth and that she does not wish the defendant to refuse employment simply to avoid his financial obligations towards L. She wants him to get on with his life and to obtain stable, paid employment. However, she requests that she continue receiving L.'s child tax credit of $150 per month since she is putting it aside for his future.

[72] The defendant seeks shared guardianship of L. or, alternatively, legal custody. He is requesting shared custody at each parent's residence on a schedule of one week out of two with each parent; each parent having the right to an overnight with L. during the week the child is staying at the other parent's. The defendant is requesting the same holiday and travel privileges as those being sought by the plaintiff. He requests that Christmas Day and New Year's Day be shared between the parents unless there is an agreement to the contrary. He requests that the court order that both parents to encourage L. to communicate regularly by telephone with the other parent. He requests that each of the parents be responsible for the costs incurred in their respective residences and that any exchange of funds between the parents should be on a voluntary basis. He also requests that L. attend his pre-kindergarten program no more than three days per week until such time as he attends kindergarten full-time in September 2008. He also requests the sharing of medical and school information

regarding the child and the right to be consulted prior to making decisions concerning his health. Finally, he wishes to be present at L.'s medical appointments.

V. Legislative Background

[73] Part 2 of the *Children's Act*, R.S.Y. 2002, c. 31, governs the matters of custody, access and guardianship of L. Among the purposes of Part 2 set forth in s. 29, the following are noted in para. (a):

> … ensure that applications to the courts dealing with
>
> (i) custody,
>
> (ii) incidents of custody, or
>
> (iii) access
>
> to children will be determined in accordance with the best interests of the child…

[74] Section 30 explains the considerations that the court must take into account in determining the best interests of a child:

> *Best interests of child*
>
> **30**(1) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including
>
> (a) the bonding, love, affection and emotional ties between the child and
>
> (i) each person entitled to or claiming custody of or access to the child,

(ii) other members of the child's family who reside with the child, and

(iii) persons, including grandparents involved in the care and upbringing of the child;

(b) the views and preferences of the child, if those views and preferences can be reasonably determined;

(c) the length of time, having regard to the child's sense of time, that the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessities of life and any special needs of the child;

(e) any plans proposed for the care and upbringing of the child;

(f) the permanence and stability of the family unit with which it is proposed that the child will live; and

(g) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child.

(2) The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the

conduct is relevant to the ability of the person to have the care or custody of a child.

(3) There is no presumption of law or fact that the best interests of a child are, solely because of the age or the sex of the child, best served by placing the child in the care or custody of a female person rather than a male person or of a male person rather than a female person.

(4) In any proceedings in respect of custody of a child between the mother and the father of that child, there shall be a rebuttable presumption that the court ought to award the care of the child to one parent or the other and that all other parental rights associated with custody of that child ought to be shared by the mother and the father jointly. *S.Y. 1998, c.4, s.2; R.S., c.22, s.30.*

[75] I also note Sections 31 and 32 of the Act concerning custody and access, in particular, the following provisions:

31(1) Except as otherwise provided in this Part, the father and the mother of a child are equally entitled to custody of the child.

…

(5) The entitlement to access to a child includes the rights to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

….

(8) Any entitlement to custody or incidents of custody or to access under this section is subject to alteration by an order of the court or by an agreement between the parents or other persons entitled to the custody or access. *R.S., c.22, s.31.*

VI. Fact Findings

[76] I find as follows:

1. The relationship between the parties has deteriorated since L.'s birth, and has been punctuated by confrontations and quarrels. It is not the role of the court to determine who was right and who was wrong, but rather, to determine what care arrangement will serve L.'s best interests. I note that the plaintiff abruptly removed L. from the family home and that this action had a pronounced and far too prolonged effect on the establishment of a reasonable access regime. In light of the plaintiff's mistrust and her refusal to agree to reasonable and generous access arrangements, the defendant adopted in turn a mistrustful and somewhat parsimonious attitude towards the plaintiff's attempts, after the separation, to take charge of L.'s life.
2. L. is currently facing a vicious circle of hostility, mistrust and contempt. The conflictual relationship between his parents has made any amicable resolution impossible in relation to such issues as the right of the defendant to overnights with L., L. traveling with his mother outside of the Yukon, and the signature by both parents of a passport application for the child.

3. The level of the defendant's mistrust is particularly manifest in his refusal to supply responses to the psychological tests. The results of these tests would have helped Mr. Powter and the court evaluate his character, his stability and his abilities as a parent. Because of this refusal on his part to cooperate with this aspect of the evaluation, the court is lacking an important perspective on these issues. The court has more information on the character and the abilities of the plaintiff. I am of the view that L. must not be used as a "guinea pig" in an experiment of shared custody in the absence of this important data regarding the defendant.
4. Each party has described incidents before and after the separation to cast doubt on the abilities of the other as a parent. Having considered Mr. Powter's evaluation and testimony, I am of the view that the child is well cared for by each of the parents and that he is not the victim of abuse or negligence in either of the parental homes.
5. Both parents maintain very strong affective bonds with L. In view of his age, L.’s opinions and preferences cannot be reasonably determined, but I accept Mr. Powter's findings that L. is at ease, secure and stable in the care of each of his parents.
6. The recent introduction a schedule of frequent overnights with the defendant has had a stabilizing and reassuring effect on the child. Given the defendant’s greater presence in L.’s daily life, a reduction of this regular and frequent contact as of September 2008, as proposed by the plaintiff, would

have a destabilizing effect on L. and would therefore not be in his best interests.

7. The plaintiff made reasonable decisions after the separation to encourage L.'s intellectual and social development. The plaintiff functions well as a parent, imposing a certain structure and routines that are beneficial for L. and these will be helpful to him when he starts school. But there is also a place in L.'s development for the defendant's more relaxed parenting style. To ensure L.'s balanced development, I am of the view that disputes surrounding the important decisions relating to his development are to be avoided. Several examples of such conflicts rear up from the past, such as attempts to toilet-train L., the pros and cons of daycare, the frequency of his participation in the pre-school program, and his travel outside the Yukon.
8. In view of the conflict between these parents, I am of the view that an order for shared custody would lead to a future return to court to settle a variety of issues.
9. To summarize, I recognize that: (i) the plaintiff has made reasonable decisions regarding L.'s socialization, health and intellectual development, and has shown the necessary skills to guide him and raise him; and (ii) it is necessary to avoid L. witnessing conflicts between his parents which, in all probability, are going to continue. Consequently, I am of the view that L.'s best interest will be better served by granting the plaintiff legal custody of L. as well as the power to make final decisions concerning his education, health, and his physical, emotional and spiritual development. I note Justice Alison

Harvison Young's comments in *High Conflict and Joint Custody: An Idea whose Time has Been? A Cook's Tour of Current Law,* cited in *Graham vs. Bruto,* [2007] W.D.L.F. 3334 (Superior Court of Justice), at para. 65:

> The single most damaging factor for children in the face of divorce is exposure to conflict. The more repeated or continuing the conflict, the greater the risk to the child. In such a case, a joint custody situation that puts the children in the middle of conflict every few days makes little sense. Second, the parents' inability to cooperate in such cases may result in frequent visits to court over the mechanics of the joint custody, as the more the court order presupposes, the greater the opportunity for conflict.

I conclude, therefore, that, in the circumstances, the presumption that a court should award the care of a child to one or other of the parents and that the parental rights associated with custody should be jointly shared has been rebutted. However, even though the plaintiff will be making the final decisions, she must consult with the defendant regarding major decisions affecting the child's development.

10. I share the opinion expressed by Mr. Powter that the defendant must play a significant parental in the child's future. For that reason, the daycare or the school must have his coordinates in case of an emergency. He shall be entitled to take L. to and pick up from school and daycare and to attend special occasions and meetings at school. He shall also be entitled to direct access to information from the school, the doctor or the dentist. However, in

view of the concerns mentioned above regarding conflicts, the plaintiff shall have the sole responsibility, except in case of an emergency, to take L .to his appointments with his doctor, dentist or, if necessary, the orthodontist.

11. The transfers of the child from one parent to the other have been much more peaceable for almost a year. Both parents have found new partners. For these reasons, I am of the opinion that the time is propitious for exchanges without the no-contact order. The transfers are taking place in a Whitehorse restaurant without difficulties; there is no reason to alter this arrangement and they will continue on this basis in the future.

12. There has been no attempt by either parent to remove the child from the Yukon Territory since the separation. I share Mr. Powter's opinion that neither of the parents currently has the intention of removing L. from the Yukon. The plaintiff has stable employment and has bought a house near Whitehorse. The defendant has been living in the Whitehorse area for several years and has cultivated friendships. I conclude that he wishes to stay in the Yukon. In view of his experiences with limited access to the child, I am confident that he appreciates the risk associated with an attempt to remove the child, particularly as concerns his future relationships with L.

13. Given the level of conflict between the parties, any custody arrangement must specify the role of each of the parents and time-sharing. It is possible one of the parents may have to be absent, from time to time, while he or she has the care of the child. In general, I am of the view that an order requiring that the other parent be invited to take the child during these periods risks increasing

the conflict. However, if one parent is absent for an overnight or more, the interests of the child will be better served if the child spends that time with the other parent, rather than with other individuals.

14. I note that Mr. Powter has expressed concerns that L. not be treated as a "guinea pig". However, L. will be starting kindergarten in September 2008. The evidence establishes the benefits of frequent visits, with overnights, with the defendant. The time that the child will have available to spend with the defendant will be reduced once he starts kindergarten. Therefore, I am of the view that the defendant's access schedule should be increased so that the defendant has the opportunity to care for L. during the week as well as during weekends. The access arrangement must promote, as much as possible, the preservation of the strong affective bond between L. and his father. I am of the opinion that an arrangement of one weekend out of every two, with one overnight per-week, risks harming this bond and destabilizing the child.

15. In view of the amount of the child tax credit and the testimony of the plaintiff that she puts it aside for L., I am of the view that she should continue to invest it for him.

16. In the circumstances, I do not believe there is a need to order the payment of child support by either parent. In particular, I note that: (i) the plaintiff has been paying the bulk of the expenses associated with L.'s education, his clothing and his school-related activities since the separation and will in all likelihood continue to do so; (ii) there is a wide gap between the resources of the two parents; (iii) as a result of the reasons for judgment on the division of

property, the defendant's housing costs will increase; and (iv) the time that the defendant will spend with L. will increase as a result this judgment and his expenses will increase proportionately.

VII. Conclusion – Order

[77] For all of the reasons stated above, the Court orders that the plaintiff have legal custody of L. The court appoints the defendant as a guardian of L., with the plaintiff, his guardianship rights being subject to the following orders:

1. The current schedule of visits shall continue (including the 2008 summer period) until L. starts kindergarten in September 2008. When L. starts kindergarten in early September 2008, the defendant shall have access each week from 11:00 am Sunday until Wednesday morning (return to school). The exchange of L. on Sundays will take place at Zola's Café, or any other public location that the parties agree upon. If the defendant decides to register L. in the pre-kindergarten program Mondays and Tuesdays before September 2008, the access schedule shall be changed to Sunday morning at 11:00 am until Wednesday morning (return to school).
2. The access schedule provided for above shall continue during the summer period. Each parent shall have the right to one month per year of vacation time with L. (including the Christmas school holidays) but their respective holiday periods shall not exceed two consecutive weeks. Each parent shall provide the other, before April 30, advance notice of the desired summer vacation period. For all other holiday periods, the parents shall provide each other with two weeks' advance notice, except in case of an emergency

because of the health of members of their families living in Quebec. The parents shall take at least 14 days of their annual vacation time during the summer and will, as much possible, take their additional vacation time during school holidays. The parent who accompanies L. on holiday shall supply the other parent with an address and telephone number where the other parent can reach L. at all times.

3. In 2008, the defendant shall have the first half of the Christmas school holidays with L. and the plaintiff shall have the second half. In 2009, the plaintiff shall have the first half of the Christmas school holidays and the defendant the second half, and so on. The plaintiff will have the 2008 Easter weekend and the defendant will have the 2009 Easter weekend, and so on. Starting in 2008, the plaintiff will have Mother's Day with L. and the defendant will have Father's Day.
4. Neither parent shall change L.'s residence to a location more than 50 km from Whitehorse, without obtaining the prior consent in writing of the other parent, or a court order, on at least 60 days notice.
5. Each parent shall have the right to accompany L. outside the Yukon Territory and Canada during their respective holiday periods or during periods that they are caring for L. on the following conditions: (i) that parent shall provide to the other parent an address and telephone number where the other parent can reach L. at any time; (ii) the defendant shall give to the plaintiff before any vacation with L. outside of the Yukon an undertaking signed by him to return the child to Whitehorse at the end of the vacation; (iii) the plaintiff shall

provide L.'s passport to the defendant for the purpose of travel outside Canada and he shall return it to the plaintiff immediately upon L. returning to the Yukon.

6. The parents shall not have the right to register L. in school-related activities that take place during the other parent's access period, without first obtaining the prior written consent of the other parent.
7. The April 27, 2006 order limiting communication between the parents is vacated, however, the parents will, as much as possible, use e-mail and a notebook for communications concerning L. They shall record in the notebook any information concerning L.'s homework, school-related activities, and his health and well-being. Neither of the parents shall use these means of communication to insult or attack the other parent. The plaintiff may consult the defendant, by these means of communication, on decisions concerning choice of school, and non-urgent medical, dental and orthodontic care, but she will make the final decision on these matters. L. will not be used as a messenger for communications between the parents. Neither parent shall criticize or insult the other parent in L.'s presence.
8. The defendant shall have direct access to all information concerning L. from the daycare, school, physicians, dentists and orthodontists and shall have the right to be present at special school events. The defendant shall also have the right to attend independent meetings with L.'s teachers. The plaintiff shall be responsible for arranging and being present with L. at his medical and dental appointments.

9. L. shall have the right to communicate by telephone with both his parents as frequently as he wishes and each parent shall have the right to contact L. by telephone once per day on the days when L. is in the care of the other parent. Each parent shall supply the other with a cellular telephone number to facilitate these communications.
10. Should one of the parents be absent for a period of at least one overnight, he or she shall ask the other parent, before asking any other person, to take care of L.
11. The plaintiff shall be responsible for L.'s school costs and shall invest the child tax credit for L.'s education or well-being. Each of the parents shall assume the other costs associated with L.'s care during the period that they are each caring for the child. There shall be no order for the payment of monthly child support by either parent for L.
12. Each parent shall have the right in August 2009 to request a review of the defendant's access schedule. Should a dispute arise concerning the issues related to custody or access or the provisions of this order, the parents shall first use mediation to settle the dispute before making an application to the court. The costs of the mediation shall be shared equally by the parents.

[78] The plaintiff has obtained legal custody of the child, while the defendant has been able to increase the access schedule, to have his right to take holidays with L. recognized and to receive medical and school information about him. In view of the mixed success, I'm of the view that the parties should assume their own costs for the trial. However, I direct that the plaintiff recover costs for some of the interim

applications in which she was successful, namely the August 12, 2005 application (which led to the provisional custody order) and that of April 27, 2006 (which led to the no-contact order). I set the costs for the two applications, pursuant to paragraph 13.1) a) of Rule 57 at $ 2000 (including disbursements). These costs shall be paid by the defendant from the proceeds of sale of the Lands.

Heard: February 11, 12, 13 and 14, 2008

Issued: March 7, 2008

M.T. Moreau

D.J.S.C.Y.T.

For the plaintiff:

C.S. appeared on her own behalf

For the defendant:

S.N. appeared on his own behalf