

SUPREME COURT OF YUKON

Citation: *C.M.K. v. B.J.M.*, 2009 YKSC 79

Date: 20091215
S.C. No. 01-B0008
Registry: Whitehorse

Between:

C.M.K.

Plaintiff

And

B.J.M.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Stephanie Schorr
B.J.M.
Kathleen M. Kinchen

Counsel for the plaintiff
Appearing on his own behalf
Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the mother for custody of a nine-year-old child, a prohibition of access order against the father and an order for child support. The father, who is self-represented, seeks supervised access and directions on obtaining unsupervised access. The application is complicated by the fact that the director of the Family and Children's Services has informed the mother that if certain child protection concerns regarding the father are not addressed, the department may take more intrusive action if access to the father has commenced.

[2] The mother and father had a brief two-year relationship from 1998 to 2000 during which the child was born. There is no dispute that the mother has been the sole caregiver for the greatest part of the child's life and, thus, the custody application of the mother is not contested. The father has also consistently paid child support and the only issue relates to the amount of child support. The main issue in dispute is the application for prohibition of the father's access.

BACKGROUND

[3] The mother commenced her court action in May 2001 and was granted interim custody of the child, child support and access to the father monitored by the mother. The mother and father were both teenagers when the child was born and the monitored access meant that the mother knew at all times where the child was. There were three access visits of a two-hour duration per week and the father was prohibited from driving any motor vehicle with the child. The mother attended the Teen Parent Centre while she completed her high school education. The mother had a number of concerns about the father's ability to care for the child while she was breast-feeding. During this time, the father's application to take the child to visit his family out of the Yukon was dismissed.

[4] In December 2002, a custody and access report was recommended by the Court but it was never undertaken by the government. The mother expressed concerns about the father cancelling access visits, yelling and being irrational. The mother also reported a spanking incident to the Director of Family and Children's Services. The spanking incident was confirmed but did not amount to abuse according to the director.

[5] In April 2003, the court ordered overnight access to the father, as well as access each Wednesday afternoon and such other reasonable access as could be agreed

between the parties. The condition prohibiting the father from driving a motor vehicle with the child was removed. There was some improvement in the father's care of the child. The mother moved out of the Yukon between 2005 and 2006 with the child to pursue her education. She returned to the Yukon in the summer of 2005 and permanently returned in the summer of 2006.

[6] In the fall of 2007, the child was in grade 2 and each parent had care and control of the child for 50 percent of each week. The child had difficulty adjusting to school and a diagnosis of attention deficit disorder was considered. No formal diagnosis was presented to the court but the mother indicated that the child had difficulty interacting with his peers and she had to respond to behavioural problems at school a couple of times each week.

[7] The child's behaviour took a very serious turn in the fall of 2007. It was reported that the child attempted suicide with his schoolbag while riding on the school bus. He was taken to the hospital and assessed for several days. The mother responded by supporting the child in the hospital and arranging for a member of her family to be with the child during the night. She stated that the father thought the child was exhibiting attention seeking behaviour. The father indicated that he was aware that the child had attempted suicide. However, it was his view that the hospital stay should not be treated as an occasion requiring special attention. The child's doctor recommended a consistent care arrangement of one week with each parent and the parents cooperated in implementing that arrangement.

Child Protection Intervention

[8] Following his suicide attempt, the mother testified that the child continued to have moody behaviour, swearing and angry outbursts. She attributed this to the relationship between the father and his new spouse. She tried to talk to the father about the child's behaviour but the father simply stated that the child would have to get used to it. During the 2007 Christmas holidays, the mother went to the father's house where she found the father drunk and giving alcohol to the child. It also appeared that the child had been caught in a physical altercation between the father and his new spouse.

[9] In January 2008, the child was seeing a counsellor at a local agency as well as a counsellor at a mental health service. The child was also seeing the school counsellor on a regular basis because of conflicts with his peers.

[10] On February 20, 2008, the Department of Family and Children's Services intervened and had a meeting with the mother to develop a case plan. In a letter to the father and his spouse dated March 27, 2008, the social worker advised the father of the following child protection concerns:

- a) Family violence in the father's home that the child has witnessed directly or indirectly;
- b) Emotional abuse of the child due to his exposure to emotional outbursts and aggressive behaviours of the father and his spouse; and
- c) Minimizing the suicide threats/attempts in the current mental health of the child.

[11] The letter concluded with the following:

Please be advised that until such time that these identified risks in your home are addressed and mitigated by both of

you, Family and Children Services will not be supporting access between [the child] and yourselves. In addition, [the mother] will be advised that as the custodial parent she must act to protect [the child]. If Family and Children Services were to receive information that access had commenced and these risks have not been adequately addressed we may be compelled to take more intrusive actions to protect [the child].

I wish to convey to you that I would like to work on the identified concerns with you so that in the future if access does resume it will be a positive and healthy experience for [the child].

It is my plan to close your file if I do not hear from you by April 11, 2008.

[12] The father has not had access since April 2008. The mother has cooperated with Family and Children's Services and considers the letter to be a direction not to permit access to the father. The mother reports that the child has been doing well since the denial of access. She reports that he is making friends in school and keeping up academically. She has refused any access requests of the father and states that the child does not want to visit the father. She states the child is afraid of the father. The maternal and paternal grandparents have access to the child.

[13] The social worker testified and relied upon 65 exhibits comprising of the departmental records about the intervention. The intervention actually occurred in January 2008 and an investigation was conducted which culminated in the letter dated March 27, 2008. Pursuant to a letter dated January 8, 2008, the mother was advised not to permit unsupervised access until the investigation was completed.

[14] The investigation confirmed the attempted suicide of the child and that the father's new spouse had significant mental health issues. The investigation also confirmed the father's attempts to protect the child to some extent from his new

spouse's mental instability. It also confirmed the diagnosis of ADHD and that the child was placed on medication in March 2007. The medication was ultimately reduced and taken only on school days in 2008. The father has not had access since the reduction of the medication for ADHD.

[15] The investigation also concluded that the mother is patient and understanding of the child's behaviour problems and controls him using verbal discipline. However, the father and his new spouse have unrealistic expectations of the child which results in conflict and anger directed towards the child. One example of discipline by the father was requiring the child to stand erect while holding his arms out for an extended period of time.

[16] The investigating social worker prepared a case plan agreement and contacted the father to pick up the proposed agreement and meet with her. Her letter of March 27, 2008, indicated the file would be closed April 11, 2008. She advised the court that the father did not meet with her and he did not pick up the proposed agreement. In cross-examination by the father, the social worker acknowledged that he had contacted her in August 2009 to discuss the issues that he needed to address. The social worker advised the father that the file was closed. The social worker testified that the department's mandate was child protection and without a child protection concern, the onus was on the father to address the identified concerns. In cross-examination by the child advocate, she acknowledged that if the mother granted access to the father, the child could be apprehended. She stated that in the event that the mother granted access, the department would only intervene if there was a triggering event. The social worker seemed to understand that the letter of March 27, 2008, left the mother with the

understanding that if she granted access she could lose custody of the child and that the father could not have access until approved by the Department.

[17] The father testified briefly and admitted generally the child protection concerns identified by the investigation of the social worker. However, he stated that he did not agree with them fully and, thus, did not participate in the preparation of a case plan agreement. For example, he indicated that his new spouse suffers from chronic anxiety and depression. She has been participating in counselling for a year with mental health services and is getting better. He did not provide any report to confirm this. Basically, he felt "railroaded" with matters being taken out of context. He said he could provide a report that would show matters were improving. As to the suggestion that he was downplaying the significance of a suicide attempt by the child, he said that he did not want the incident to be given "special attention".

[18] In cross-examination, he acknowledged that the suicide attempt was a cry for help. He did not appear to have any knowledge of the mental health issues for the child. With respect to the incident where he gave alcohol to the child, he admitted having done so but said it was in the context of giving his child a taste of alcohol. He acknowledged that it was a momentary lapse of judgment. He denied that the child had been involved in any family violence between the father and his new spouse but he admitted that he would take the child to his mother if he had concerns about his new spouse. He agreed that he also played a role in the family violence with his new spouse, but said that he has not taken any steps to address his conduct. He also indicated that there would be "serious consequences" if the child was lying about an incident at school. He described the "serious consequences" as confining the child to his room from the end of school

until supper time. When asked about his understanding of the special needs of the child, he stated that he himself had grown up with ADHD but he did not indicate any awareness of how to deal with the child's special needs.

[19] On cross examination by the child advocate, he was asked why the child doesn't wish to see him. He stated that he had been contemplating that question but did not fully comprehend why sometimes he was happy to see him and on other occasions he was upset. He accepted that it was possible that the child both loved and feared him. He stated that in the last two years he had reassessed how he disciplined the child and how he should have responded to his cry for help. He stated again that his new spouse's mental health had improved.

[20] The father indicated that he had no dispute with the mother's custody of the child and that he consented to her obtaining a passport for the child without his consent as well as traveling out of the Yukon without his consent. He does not object to paying child support and stated that it should be based upon an annual income of \$38,000. He acknowledged that he received \$1,733.33 every two weeks which would amount to an annual income of approximately \$41,600.

ANALYSIS

Access

[21] The *Children's Act*, R.S.Y. 2002, c. 31, sets out the factors to be considered in an application for access to a child under s. 30. In addition to the statutory matters that must be considered, there are a number of general principles that the Court applies to access applications or, as in this case, an application to deny access. Those principles were set out in *R.D. v. U.S.D*, 2001 YKSC 543, para. 13 as follows:

I summarize, in a non-exhaustive way, the general principles of family law as it applies to access as follows:

1. a child should have as much contact with each parent as is consistent with the best interests of the child;
2. the access of a child to a parent is the right of the child;
3. the best interests of the child requires consideration of the condition, means, needs and other circumstances of the child;
4. access may be denied to a parent if it is not in the best interests of the child;
5. the past conduct of a parent may be taken into consideration if it is relevant to the ability of that person to act as a parent of a child;
6. the onus is on the parent seeking access, to establish on a balance of probabilities that access is in the best interests of the child.

[22] That case also made it clear that when physical or psychological abuse exists between the parents, or between a parent and child, access is not routinely granted and may be denied if it is not considered to be in the best interests of the child. In my view, the case before me is clearly a case where access should be prohibited as it is clearly not in the best interests of the child. I should interject here that the child advocate, an experienced lawyer and social worker, opposed the granting of access to the father on the grounds that the child did not want any access and feared the father. That alone, could result in an order for carefully supervised access to ensure that the relationship of the father and child would be preserved. However, in this case the father has been abusive to the child and has no understanding of the impact of his abuse on the child. While the father clearly wishes to have a relationship with the child and to his credit

continues to voluntarily provide child support, he requires a great deal of counselling on the issue of domestic violence and its impact on his family. He also requires counselling with respect to proper parenting of young children and education on the challenges that this particular child has and how the father can respect and support the child. The father requested that I give direction to him on what he must do to begin to re-establish his relationship with his child. The father is capable of pursuing his personal counselling with both the Many Rivers counselling service and the Family Violence Prevention Unit, with the latter being a program in the Department of Justice. There is a further complication for the father in that his spouse has mental health issues that clearly impact upon the father's child when the child is under the father's care and control. In this circumstance, it is necessary that the father's spouse be considered in any application to grant the father supervised or unsupervised access. Thus, the first step would be for the court to consider granting supervised access to the father if he is able to satisfy the court that that is appropriate. The next step would be for the father to seek the assistance of a Family Support Worker and the new spouse's counsellor to assist the father in an application for unsupervised access. I am setting out these conditions for the benefit of the father and the child in light of the fact that Family and Children's Services Branch may still consider the file to be closed.

Family and Children's Services Branch

[23] Sections 108 and 109 of the *Children's Act* set out the responsibilities of the director of Family and Children's Services Branch as follows:

It is the policy of the Minister and the director to supply services as far as is reasonably practicable to promote family units and to diminish the need to take children into care or to keep them in care.

For the implementation of the policy described in section 108, the director shall take reasonable steps to ensure the safeguarding of children, to promote family conditions that lead to good parenting, and to provide care and custody or supervision for children in need of protection.

[24] The intervention of the director to ensure the safety and well-being of this child was entirely appropriate. Given that the mother is quite capable of ensuring the safety and well-being of the child so long as the father did not have access, it was also quite appropriate for the director to proceed to a care plan agreement rather than proceeding to court to establish that the child was in need of protection. It is also, in my view, quite appropriate for the director to indicate to the parents of the child that a protection proceeding was possible if the father was granted access to the child without addressing the obvious child protection concerns. This method of proceeding, while not being a court order, has the same effect as a court order in the eyes of the mother who is being directed not to grant access to the child and the father who is being denied access. To that extent, the director must be satisfied that the procedure is appropriate and fair on the circumstances, always considering what is in the best interests of the child. Either the mother or the father has the remedy of proceeding to court should they consider the director's intervention inappropriate. There is no doubt that the director must sometimes make decisions in the best interests of children which may be controversial. Parents and children may have these decisions reviewed by a court.

[25] What I find disturbing about the director's action in this case is that having made the intervention that effectively terminated the father's access to the child, the director inexplicably closed the file, apparently, because the father did not participate in preparing the case plan agreement in a timely manner. In my view, considering the

statutory policy set up in the *Children's Act*, the director must continue to take reasonable steps to promote family units and promote family conditions that lead to good parenting. Alternatively, where access should be prohibited, the director could actively support the mother in bringing an application to prohibit access to the father. Having said that, the preferable procedure would be to work with the father and assist him to be a good parent. To conclude, it would be the preference of this Court that when the director intervenes short of a court order, the director should assist the parent who is being denied access to obtain the services that promote family units and lead to good parenting.

The Use of the Director's Records

[26] Section 169(2)(c) of the *Children's Act* provides that hearsay evidence may be used in a proceeding under the *Children's Act*. Further, the disclosure of the director's records was ordered pursuant to s. 176(2). In this case, the director's records which themselves are hearsay, were accepted to supplement the direct evidence presented by the social worker. There are several advantages to proceeding in this fashion.

[27] The father was provided with a copy of the records thereby enabling him to know the precise nature of the case against him and providing him the opportunity of disputing the results of the director's investigation.

[28] The use of the director's records in court saves a substantial amount of time for both the court and the social worker in presenting the director's evidence.

[29] The requirement that the director prepare meticulous records is a safeguard for both the parents and the best interests of the child involved.

SUMMARY

[30] I order that the mother shall have custody of the child and the access of the father to the child be prohibited, subject to the father having the right to bring a further application supported by evidence as indicated above. The mother shall have the right to obtain a passport for the child without the consent of the father and to travel with the child out of the Yukon without the consent of the father. The father shall pay child support to the mother commencing January 1, 2010, in the amount of \$380 per month based upon an income of \$41,600. The arrears of child support in the amount of \$1,000 shall be paid by the father in the amount of \$87 per month until paid. The mother and father shall share orthodontic expenses on a 50 – 50 basis with the mother making the initial payment and submitting the copy of the paid invoice to the father. He shall reimburse his 50 percent share to the mother forthwith. Counsel may speak to costs, if necessary.

VEALE J.