SUPREME COURT OF YUKON

Citation: *A.L.H.* v. *D.B.B.,* 2010 YKSC 54

Date: 20100903
Docket S.C. No.: 10-B0016
Registry: Whitehorse

BETWEEN:

A.L.H.

Plaintiff

AND:

D.B.B.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Stephanie Schorr	Counsel for the Plaintiff
Norah Mooney	Counsel for the Defendant
Jennifer Cunningham	Counsel for the children

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): The mother and father have both applied to have their two children in their primary care. The father, in what I will describe as the home community, and the mother in Whitehorse. The parents agree that there should be an order of joint custody and they each apply for a child support order from the access parent, on the understanding that there would be a deduction of $200 from the monthly amount to reflect the high cost of transportation to exercise access.

BACKGROUND:

[2] The parents have had a common-law relationship from 1997 to June of 2008. They had one previous separation in 2004, with the final separation date being June 2008. Both parents are employed.

[3] After the separation in June of 2008, when the mother left the home community to go to Whitehorse, it was worked out, one way or the other, that the two children, A., aged 11, and J., age 9, would attend school in Whitehorse and reside with the mother in Whitehorse. Both children had adjustment difficulties with the move to Whitehorse. A. had the most difficulty in adjusting. There is no doubt that these two children have a close relationship. As a result of the difficulties, it was agreed in the following year, from September 2009 to June 2010, that the children would live in the home community with their father and attend school there. Once again, J. had some difficulty in adjusting and it was ultimately agreed that she would return to Whitehorse for the January to June 2010 academic session. A. remained in the home community, and although there is some debate about this among the parents, she did reasonably well academically but continued to have some persistent socialization issues. Nevertheless, she remained in the home community for the entire academic year, 2009-2010.

[4] When the court action was commenced in the spring of 2010, the parents agreed that the father would have A. and J. in July and the mother would have A. and J. in August. And I want, at this stage of the proceeding, to compliment both parents on their parenting efforts with their children. They each clearly have different styles, the mother may be more disciplined and the father may be easier going, but they are both

essentially good parents and, quite frankly, either parent could succeed in caring for both children in their respective communities. The difficulty, of course, is that they cannot agree on the primary residence and this results from a history of poor communication.

[5] I just want to make a comment to you about the communication that you should have. When you have poor communication, either lack of communication or communication that is not respectful and civil, that has very serious consequences for the children because that is all the children see. They rely on their parents to teach them and if all they see is bad communication and disrespect, then they model that when they grow older. The result is that if they take it to heart, they will have difficulties in their relationships, they will have difficulties in parenting their children. So there is a very strong obligation on each of you to make your best efforts to communicate in a civil and respectful way.

[6] A children's lawyer was appointed a few months ago and interviewed the children on August 10, 2010, I believe. At that time, both children expressed an interest in returning to the home community. It is of some significance that the school in the home community starts, I believe, a week before the school in Whitehorse starts. The children were not returned to the home community on the basis of that expression of interest of the children because the agreement had been reached that the children would remain with the mother in Whitehorse until the end of August.

[7] The mother enrolled the children in the Whitehorse school, presumably because she wanted to ensure that they would have a place in the school if she were successful

in the court application. Unfortunately, it has been a source of some dispute between the parents, with the suggestion that the mother has been unduly influencing the children. When the children's lawyer went back to the children prior to this hearing to get an update, the update she received was that the children, having spent a few days in school in Whitehorse, were of the view that they would prefer to stay in Whitehorse.

[8] I want to make it clear that in court, the general practice is that we do not hear from children, either as witnesses or even with the judge in private chambers. I have done that on occasion on cases where counsel have asked and where the child wants to participate and so on, but it is the exceptional case. The rule, generally, is children do not participate, children do not make decisions about their custody, but there are occasions where, when we appoint a children's lawyer, we give the children voice, but very clearly we do not give them choice.

[9] The reason for that is amply demonstrated by what has occurred in this case, because the children have vacillated in terms of where they want to go. I know where the children want to go. They want to go with both parents, wherever both parents live. That is what they would like but that is not going to happen. But I want to indicate that I do not give any weight to the express wishes of the children in this matter. It is so difficult to determine what the real views of children are and those views can be vastly different than what is in their best interests, and we are here to determine what is in their best interests.

[10] I have considered the factors for the best interests of the children under s. 30 of the *Children's Law Act*, R.S.Y. 2002 c. 31. As I indicated before, I concluded the

children could remain in the primary care of either parent, but a decision has to be made and I have concluded that the primary residence of the children should be with the mother in Whitehorse. I have made this decision for two reasons. One, J. clearly had difficulty in the return to the home community and would more likely be placed in Whitehorse and have that as a more acceptable educational solution for her. A. could return to the home community but the children, as I indicated, have a close relationship and I think it will be to the mutual benefit of the children to be in the same residence. That is why I have concluded that the primary residence should be in Whitehorse.

[11] Now, counsel, my inclination is this: Mr. B. is a good father and wants to have generous access to the children. The question is how we achieve it. I will just throw a view out, in case there are issues with it. The view would be that he would have access to the children on any weekend, any weekend where he can give one week's notice in writing that he wants access that weekend. He has to respect the children's extra-curricular activities on that weekend, but he can choose the weekend because he is the person who will not have the close connection with the children. So that was one thought I had.

[12] I would reduce, of course, his child support obligation by $200. So he would be paying $680 a month, commencing September 1st. He would get two weeks at Christmas with alternating Christmas days, starting this year with Christmas in the home community; one week during the spring break and one month in the summer, and he would give notice by April 30, what month it would be in the summer.

[13] Mother and father should communicate by email. Both the father and the mother have an obligation to indicate to the other parent when they will be leaving the jurisdiction with the children. They have to give addresses and telephone contact numbers and they have to give that notification to the other party 30 days in advance, aside from exceptional circumstances.

[14] The parties are to communicate with respect to the substantial issues relating to the education and upbringing of the children. If there is disagreement on that, they can come back to Court either by application or by way of what we call judicial arbitration in Chambers with the judge, where you do not need lawyers and you do not have to present affidavits. Any views on that from either counsel? It is not a decision, it is open for discussion.

[15] MS. MOONEY: Just on that last point, you mean, Your Honour? Any views on the last point or on any other?

[16] THE COURT: Anything.

[17] MS. MOONEY: Well, what strikes me is that because my client would have to consider extra-curricular activities and respecting those when he comes into town, that he should also be consulted about those extra-curricular activities, because if there were so many that he drove all the way here and didn't really get to see much of the girls, then I think that would frustrate the point of the access.

[18] THE COURT: That is a fair point. I am going to say that that should be included in the consultation process that they have, what the extra-curricular

activities will be, and I am not making an order that he contributes to those. Okay. There will be no s. 7 order.

[19] MS. SCHORR: I just have a question, a clarification about any weekend. So is that any weekend in the home community? Like, they would --

[20] THE COURT: It could be if he wants. My assumption was that the weekends would normally be in Whitehorse because he has to get the children to the home community. In other words, it is easier for him to come to Whitehorse than it is for the children to go to the home community, but it could be either way.

[21] MS. SCHORR: And I guess this final point on how to arrange this access is how will the parties communicate? I had the one week notice --

[22] THE COURT: Email.

[23] MS. SCHORR: By email. So one week notice by email and any weekend as they agree, either in the home community or Whitehorse.

[24] THE COURT: Well, it is not as they agree, I am giving the father the right to access any weekend as long as he --

[25] MS. SCHORR: No, I mean as to location.

[26] THE COURT: Yes, he can do it, have the access wherever he wishes, and that does not exclude having another party bring them to the home community. But you know, that has got to be iron-clad. I do not know that there are that many people around that will take the children to the home community.

[27] MS. SCHORR: And sorry, I think we -- I just raised it earlier, so with the summer, when they each have one month, then presumably there would be no child obligation -- child support obligation?

[28] THE COURT: No, that is correct. Thank you for that. The only exception to the child support would be in the one month in the summer when the father has the children under his care and control.

[29] The other thing I did want to include was that the father may provide cell phones to the children and the mother shall keep them charged so that the father can call the children on those cell phones. Has that been difficult? I know that there has been a difficulty with the charging and so on, but I do not think it is an area that is going to be abused in any way.

[30] MS. SCHORR: It's been a difficulty, but.

[31] THE COURT: It has been a difficulty in terms of the communication but it is not like he is going to be calling them at school and calling them at home at night and all that sort of thing. He will call them in a reasonable way.

[32] MS. SCHORR: Currently, only A. has a cell phone but I'm not sure.

[33] MS. MOONEY: Your Honour, at this point it's difficult for my client. I mean, how he will afford to pay all of these things he really doesn't know. He can't even afford his own cell phone right now with the child support obligations.

[34] THE COURT: Well, I am putting it in so that he has the right, should he wish to exercise that right, in terms of providing the cell phones.

[35] MS. SCHORR: I mean, from our perspective, communication can occur by email but Ms. H. has never been opposed to him calling her on her landline either.

[36] THE COURT: No, I understand that but I am not going to require that as a method of communication. That is the preferred method of communication and if they can do it, fine, but email is the one that I think they should use. I am in total agreement. I think email communication has the advantage of not having any miscommunication, but often there is miscommunication because you are not talking to the other person and hearing their response and so on. So obviously, telephone communication is preferred. Counsel, I think you have the essence, then, of the balance of the judgment in order to do up the order, agreed?

[37] MS. MOONEY: I believe so.

[38] THE COURT: Okay. Then we are concluded. Thank you, counsel.

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VEALE J.