SUPREME COURT OF YUKON

Citation: *S.N.* v.*C.C.,* 2010 YKSC 60 Date: 20101001
Docket S.C. No.: 09-B0067
Registry: Whitehorse

BETWEEN:

S.N.

Plaintiff

AND:

C.C.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
S.N. Appearing on his own behalf via teleconference
André Roothman Counsel for the Defendant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by Mr. N., seeking interim custody of the three children, J., who is seven, J., who is five, and A., who is almost two.

[2] Mr. N. was granted interim interim custody of the children pursuant to an order that I made on December 17, 2009, because of certain allegations that were made against Ms. C. regarding her drug and alcohol use and abuse, and the potential for the children to be in danger as a result. The interim interim order stated that the children would reside with Mr. N. from Sunday evenings at 6:00 p.m. until Friday evenings at 5:00 p.m., and then with Ms. C. on the weekends. That, effectively, has been the status

since the interim interim order, although I gather from the submissions of both parties that there have been times when the children have been residing with Ms. C. on a longer term basis. Significantly, over the past month approximately, while Mr. N. has been heavily involved with hunting activities, Canadian Ranger activities, and so on, which have taken him outside of the home community of Dawson City, the children have been with Ms. C.

[3] I want to state at the outset that this is Mr. N.'s application. The status quo prior to the application, which was filed December 15, 2009, as stated in Mr. N.'s statement of claim, is that Ms. C. had primary residence of the children and Mr. N. had virtually daily access. So what we are really talking about is varying that status quo to something different. There is no obligation on Ms. C. to demonstrate any kind of a material change in circumstances since the interim interim order was made, since that is the very nature of that type of an order.

[4] In his initial affidavit, as I said, Mr. N. made various allegations about the specifics of Ms. C.'s substance abuse in the months of June and July, September, October, and into November of 2009. Ms. C. responded to that affidavit and specifically denied a number of the particulars alleged by Mr. N. She did, however, acknowledge having a previous substance abuse problem, and a relapse in 2009, which she says was caused by the relationship that she had with Mr. N., in which she felt that she was being physically and emotionally abused and controlled. To the extent that the allegations made by Mr. N. are denied by Ms. C., I can put no weight in them, because there has been no testing of the evidence. However, Ms. C. has gone on to depose in her three affidavits that she has taken significant steps to remain clean and sober since

her relapse in 2009, and that she is taking counselling and looking to the First Nation in Dawson City for support.

[5] Now, Mr. N. seems to base his argument today on a continuing belief that Ms. C., and I quote, “may be” continuing to abuse substances and that there is a resulting risk associated with her caretaking of the children. However, Mr. N. has had the responsive affidavit material from Ms. C. for a number of months now and has filed not a single affidavit to contradict what Ms. C. has said about turning the corner and attempting to remain clean and sober. In fact, there were some emails attached to one of Ms. C.’s affidavits which indicate that Mr. N. himself was acknowledging that Ms. C. was taking those steps in a more positive direction, as recently as March of 2010. None of that has been denied or contradicted and no further independent corroboration has been provided by Mr. N. to support his proposition that Ms. C. continues, today, to be abusing various substances.

[6] In addition to that, I am told, as I indicated a moment ago, that Mr. N. has, at times, allowed Ms. C. to have the care of the children for lengthy periods of time, more than just weekends, and specifically over this past month when he has been busy with other activities.

[7] In my view, for those reasons, there is no substance at all to Mr. N.’s proposition today that Ms. C. should not have primary residence of the children because of his perception that she is continuing to use and abuse substances.

[8] The two points of relatively objective evidence that are presented by Ms. C. come from the affidavit of Ms. D.N. and the school report card of the eldest child, J., who just

completed Grade 1 in the last full school term. Now, Mr. N. criticized the evidence of Ms. D.N., saying that he has never met with her, has not spent much time with her, and that everything she said in the affidavit is hearsay. I disagree. Most of what Ms. D.N. has said in the affidavit is based on her observations, her conversations with Ms. C., and her prior relationship and knowledge about Ms. C. as an individual. She has known her since Ms. C. was a teenager. She is a long-term resident of the community and is Ms. C.'s sister-in-law. I agree with Mr. Roothman that there is nothing to suggest that Ms. D.N. has any bias against Mr. N. or any bias in favour of Ms. C. She is a neutral witness who is only a family member by marriage. She has given evidence that supports that of Ms. C., i.e., that the parties had an abusive relationship, with Mr. N. being the abuser. On one occasion there is reference to Mr. N. hitting Ms. C. and being physically abusive and so on, and that this caused Ms. C. some significant stress, which ultimately led to her drinking and abusing various substances. That is all fair game for Ms. D.N. to give evidence about, based on her own observations and her knowledge of Ms. C. as an individual and her previous relationship with her.

[9] Ms. D.N. has also said that she has seen marked changes in the children's behaviour since they have been with Mr. N., that Mr. N. has refused to allow the children to attend family or First Nation gatherings in the community of Dawson City. One of the most telling aspects was that the youngest child, who is almost two, apparently does not even recognize Ms. D.N. because she sees the children so infrequently. Again, that is something that is fair game for her to give evidence about. It is not hearsay, and it is very, very telling as to the extent to which Mr. N. has been preventing the children from interacting with the larger extended family and others in the

community. That is a significant piece of evidence which goes to the best interests of the children.

[10] The other significant piece of evidence is the school report card for J., and in this regard, there are a number of indications that J.'s performance in school and various areas deteriorated from what is referred to as, "meeting expectations" in Term 1, when she would have initially been in the primary residence of Ms. C., to Term 3, when she had been in Mr. N.'s residence for some time, since the late fall of 2009. In many areas, including social and emotional development, social responsibility, reading and writing, particularly, there are numerous indications where she has regressed from "meeting expectations" to either "only sometimes meeting expectations," and worse, to "requiring support in meeting expectations". In addition to those grades, if you will, in these various areas, there are statements by the teachers involved, that by Term 3, and I quote from one of the teachers:

> "Term 3 has been a difficult time for her. She lacks motivation and quickly becomes discouraged. She has had some problems with peers this term, and frequently complains of being tired."

That is under the area of Health and Career Education, and Social and Emotional Development and Responsibility. In reading the comment that is made after Term 3 in which both reading and writing effort indicate that she only "sometimes meets expectations," the comment is made that, and I quote:

> "Her progress was steady until late March. Although she has strong literacy skills, she has been reluctant this term to participate in reading and writing activities. She becomes discouraged and resists much of the help that is offered to her. J. needs encouragement to build her confidence and

> interest in reading. She needs to read often over the summer....”

[11] Now, Mr. N.’s response to this objective evidence is to focus on the attendance record of J. for the three terms. I suppose I must have misunderstood what he was getting at there, because to me there is nothing of significance which turns on the evidence regarding J.’s attendance. In Term 1, she had, it looks like, four lates and nine and a half absences. In Term 2, one late and 11 and a half absences. In Term 3, six lates and eight absences. So it is not as if she was attending school with any greater regularity after moving into and living primarily with Mr. N. Whatever argument he was attempting to make in that regard has eluded me.

[12] In all of the circumstances, I am persuaded that it is in the best interests of the children for them to live primarily with Ms. C., and that Mr. N. will continue to have access to the children. But because of the issue of community, First Nation and family activities, which the children have apparently been deprived of for some time now while residing primarily with Mr. N., it is my decision that Mr. N. will only have access to the children every second weekend from after school on Friday until Sunday at 6:00 p.m. On the weeks where Mr. N. does not have weekend access, he will be entitled to overnight access with the children from after school on Wednesday evenings. He will ensure that the children are sent off to school the following morning, and in the case of the youngest child, A., that she will be returned to Ms. N. no later than 8:00 a.m. on the Thursday morning.

[13] There will be a further term that Mr. N. may have such further and other reasonable and generous access as can be agreed to between the parties. So that will

give a level of flexibility to go above and beyond what I have ordered, but what I have ordered will be the minimum.

[14] There will be a fourth term, that while the children are residing with Ms. C., she will not consume or be under the influence of drugs or alcohol, she will not have drugs or alcohol in her home, nor will she allow anyone under the influence or in the possession of drugs or alcohol to be in her home while the children are present.

[15] Now, Mr. Roothman, I need your advice on this. If I say nothing about joint custody, my intention is that the *de facto* joint custody, which existed prior to Mr. N. filing his application, will continue. But should that be a term of the order?

[16] MR. ROOTHMAN: Perhaps, for some sake of clarity.

[17] THE COURT: I think it should be, and I will make that a final term of the order. I will dispense with Mr. N.'s signature approving the form of the order, but will direct that the order come up to me before it is issued.

[18] MR. ROOTHMAN: So, pardon, Your Honour. So term 5 would be that there would be joint custody?

[19] THE COURT: Yes. Did you wish to speak to costs?

[20] MR. ROOTHMAN: Yes, it's Mr. N.'s application. He failed to deal with his burden of proof and he had the onus of getting the arrangement changed. The status quo is back to what it was and I would, under those circumstances, seek that costs go to my client for this application.

[21] THE COURT: Mr. N., do you have anything to say on the issue of costs?

[22] THE PLAINTIFF: Brief me on the costs, Your Honour?

[23] THE COURT: Okay. Under the Rules of Court, when a party brings an application, if they are substantially unsuccessful, as you have been, then court costs are awarded to the other side. Those court costs are calculated by reference to a tariff in the Rules of Court, where Mr. Roothman can claim for certain steps that he has taken in preparing for this application. They are based on a certain number of units and there is a dollar value assigned to each unit. It is roughly intended to compensate Ms. C. in the vicinity of 50 percent, plus or minus, of the actual legal fees that she has expended in retaining Mr. Roothman. So you could be looking at exposure of about $500, plus or minus, plus disbursements.

[24] THE PLAINTIFF: As the situation is right now, Your Honour, that I applied, but the seasonal work for what I was doing is no longer there, and I've applied for unemployment benefits, and plus I'm working on my business also. But right as it stands right now, waiting to see if I've been accepted for unemployment benefits, Your Honour.

[25] THE COURT: Okay. Thank you. Mr. Roothman, your client will have her costs for the application.

[26] MR. ROOTHMAN: Thank you, Your Honour.

[27] THE COURT: I think we are done. Is there anything else?

[28] MR. ROOTHMAN: May I just clarify the one term, while I am interrupting this much, it was -- the fourth clause dealing with the no alcohol and there's three parts of it, my client will not be allowed to consume drugs or alcohol, and --

[29] THE COURT: Not to possess any in her residence.

[30] MR. ROOTHMAN: Not to possess any, and then the last one was to allow anybody in the house while --

[31] THE COURT: Either under the influence of drugs or alcohol or in possession of.

[32] MR. ROOTHMAN: Okay.

[33] THE COURT: So in other words, her home is a 'no go zone' for drugs or alcohol.

[34] MR. ROOTHMAN: Sorry, I was just not sure of the "or in possession". That's fine; I have no further questions, Your Honour.

[35] THE COURT: Okay. Thank you. Yes, Mr. N?

[36] THE PLAINTIFF: Yeah, I just want to, just for my own knowledge, is that -- so what if there is, you know, just for my own sake and for the children, what if there is drugs or alcohol or somebody around there?

[37] THE COURT: I suggest, Mr. N. --

[38] THE PLAINTIFF: [Indiscernible] that I have probable cause, that I could

phone the RCMP?

[39] THE COURT: I suggest you get legal advice on that.

[40] THE PLAINTIFF: Okay.

[41] THE COURT: All right.

[42] MR. ROOTHMAN: Your Honour, pardon, just one issue which slipped my mind. The -- since there is this arrangement now for the alternate weekends, this order, it's Friday today, so it takes effect immediately, I assume?

[43] THE COURT: Yes.

[44] MR. ROOTHMAN: What would be the arrangement for this weekend?

[45] THE COURT: The children are with your client now?

[46] MR. ROOTHMAN: No, they were with Mr. N.

[47] THE COURT: Okay. Well, why don't we say that it will commence -- this will be his weekend.

[48] MR. ROOTHMAN: Okay.

[49] THE COURT: So it will commence this coming Sunday at 6:00 p.m.

[50] MR. ROOTHMAN: Very well. Thank you, Your Honour.

[51] THE COURT: Thank you.

[52] THE PLAINTIFF: Sunday, October 3rd?

[53] THE COURT: Yes, I do not have a calendar, but yes, that is correct.

[54] THE PLAINTIFF: Is -- will Ms. C. be back on Sunday?

[55] THE COURT: Yes. She is indicating yes by nodding her head. By the way, Mr. N., Mr. Roothman will draft up the terms of this order and he will ensure that a filed copy is provided to you in due course.

[56] THE PLAINTIFF: Okay.

[57] THE COURT: Any other questions from your end, sir?

[58] THE PLAINTIFF: Not really. But I don't know how -- if this is a stupid question or not, but what if I appeal?

[59] THE COURT: I suggest you get legal advice on that.

[60] THE PLAINTIFF: Yes, Your Honour.

[61] THE COURT: If you cannot afford a lawyer, you can get in touch with the lawyer that operates the Law Line here in Whitehorse, his name is Robert Pritchard. You can get some free information about the possibility of an appeal.

[62] THE PLAINTIFF: Thank you, Your Honour.

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GOWER J.