

SUPREME COURT OF YUKON

Citation: *N.A.M.S. v. R.B.*, 2012 YKSC 101

Date: 20121106
Docket: S.C. No. 06-B0071
Registry: Whitehorse

BETWEEN:

N.A.M.S.

AND:

R.B.

Before: Mr. Justice R.S. Veale

Appearances:

Karen Wenckebach
Norah Mooney

Counsel for the Plaintiff
Counsel for the Respondent

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): This is an application by the father to vary an order of April 11, 2007, which granted the mother interim custody of the child, now six years old, with reasonable supervised access to the father. I note that the order also provided that the father was at liberty to vary the access and child support without demonstrating a material change in circumstance. The mother and father have agreed that they shall have interim joint custody of the child; however, the father applies for alternating weekly care and control of the child, and the mother applies to be the primary residence of the child with access to the father every weekend, from Friday night to Sunday night.

BACKGROUND

[2] The child was born on July 4, 2006, when the mother and father had a casual relationship. The father acknowledges that he was drinking a lot and as a result the father did not have any relationship with the child for the first two years, but he always paid child support as ordered by the Court.

[3] The mother, to her credit, did not give up on the father and continued to be open to the father having a relationship with their son. Fortunately, the mother had a lot of support from friends and family and was able to raise the child on her own during the first two years. All of this changed when the father met his son for the first time at age two and began to get involved in his life again. The father also entered into a common-law relationship in 2009, and his spouse has been supportive of his relationship with his son.

[4] Despite the court order for supervised access, the mother and father have shared care and control of the child, from December 2010 through to June 2012, on an alternating weekly basis. This arrangement, unfortunately, came to an end when the mother became concerned about the child's apparent reluctance to go to the father's house, and the child's difficult behaviour on his return from the father's care.

[5] The mother and father do not communicate well. The mother terminated the alternate sharing of residential arrangement and the result is this court application. The change in the weekly sharing arrangement of the mother and father is demonstrated most clearly by the student enrolment form filed for each school year for the child. When the child was entering kindergarten in 2011, the form filed by the mother stated [as read

in]: "I have sole custody but we have an arrangement upon sharing custody." This was followed by the father's residential information and the maternal grandmother was also listed as a contact. In 2012, the form stated: "Father may not pick up," and there was no information about the father's residence. The father's information section was left in blank.

THE CHILD

[6] The child is a very engaging young boy, who is a delight to his teachers who interact with him. His mother wisely referred him to the Child Development Centre in 2007 [sic], to work on his language skills, as well as emotional and attention difficulties that he was experiencing. A report was prepared by the Child Development Centre dated June 3, 2011, on the transition of the child from daycare to kindergarten. It provides an excellent baseline for the child's development. It says this:

The boy currently attends a daycare centre for five days a week. He alternates between living with his mother one week and his father the next week. His living situation will be changing significantly for him in the fall. His mother is expecting and is engaged. Her fiancé is moving in with her and the boy and his little sister. He will also be moving his two sons that currently live in Mexico up to Whitehorse. Both boys are school age. The boy has a good relationship with the mother's fiancé, and the mother says he is excited about the upcoming baby. Although all the changes are positive for the family, it may still be a difficult period of adjustment for the boy, given the arrival of new family members, starting kindergarten, and the transitions to and from mom and dad's.

Further on in the report dated June 3, 2011, I quote as follows:

Through discussions with the child's mother and father it is apparent that the child struggles with verbally expressing or identifying his emotions and displays them instead. The father reported that the child struggles to explain or understand how or

why he is feeling upset. This is an area of needed development for the child. The child also displays more self-care and independence in his father's care, but seems to change his behaviour for his mother. This may be due to an attempt for attention from his sibling or just different personalities interacting. Although the child appears to be emotional at times, he has shown that he responds positively to re-direction when his emotions become charged or he is crying.

[7] His kindergarten teacher from January to June 2012 knows the child as "a caring playful young boy with lots of energy and enthusiasm for learning and playing." She indicates that the father and his common-law wife are very engaged with the child's education, and I have no doubt that the mother is so engaged as well, and has taken the lead role for a considerable period of time, since the child's birth.

[8] The kindergarten teacher makes this comment.

The only concern raised by the child was near the end of the school year when he was resistant for his week at his dad's house. He told us that he didn't like Dad's because there were rules and an early bedtime.

The same kindergarten teacher wrote the following in the child's report card for the period March 24, 2012 to June 15, 2012:

It has been a pleasure to be part of the child's learning this year. The child's outstanding enthusiasm, sense of empathy and kindness and positive attitude have been much appreciated in our classroom. I have enjoyed observing the child's academic success and growing confidence this year. Thank you for your continued support from home.

MY ANALYSIS

[9] I do not in any way want to minimize the mother's concern about the child's reluctance to visit the father; nor do I want to suggest that there was necessarily

something wrong in the father's care of the child. However, I have these comments to make. Firstly, the week on/week off regime has worked for a significant period of time, from December 2010 to June 2012. Secondly, the mother and father appear to have different approaches to rules and perhaps discipline, which a child will have difficulty adjusting to. Thirdly, the mother's household has been subject to considerable change in the past year, which may affect the child.

[10] I conclude that the mother and father have made tremendous efforts in giving this child the stability and support that he requires, and I want to make it abundantly clear that my ruling in this case is not to find fault with either parent, as parenting a young boy is a big challenge, particularly where there are two households with different parenting styles. I do say that the mother has made the right decision in sharing the joint role of both parents in their child's life, and I want that cooperation to continue, despite the concerns that may have appeared.

[11] I am therefore ordering that the alternating weekly sharing care and control be reinstated, but with the transfer to be on Friday of each week, to give the child an opportunity to adjust to each parent's household before starting school on each Monday. I am also ordering that the child remain at his present school and that he be permitted to attend martial arts classes proposed by the mother. I am also recommending that a custody and access report be prepared should the mother have any concerns about the sharing arrangement.

[12] With respect to child support, the table amount should be calculated for each parent and set off accordingly. Extraordinary expenses should be agreed upon in

advance and shared in proportion to the parents' income upon receipt for the expense being provided.

[13] The holiday sharing has been agreed upon as set out in paragraph 4 at page 2 of the Plaintiff's Outline. Each parent shall give 30 days notice of intended travel outside the Yukon and provide the other parent with an itinerary and email and telephone numbers.

[14] The parents shall use a communication book to deliver to each other on transfers between residences, to indicate to the other parent any issues or concerns that arise during their care and control of the child. All major decisions about the child's health and education, and extracurricular activities, shall be discussed in the first instance by the mother and father. If they are unable to agree, the issue must be brought, first, to judicial settlement conference, and, if not resolved there, an application may be made to the court.

[15] Because the order of April 11, 2007 has been substantially varied, that order should be vacated and replaced by the terms of this order.

[16] Counsel, any questions? Ms. Wenckebach.

[17] MS. WENCKEBACH: I think there's agreement that there be a term of the order that financial information be exchanged every year.

[18] THE COURT: Please add that. Do you want the usual clause that it be exchanged by June 1 of each year accordingly?

[19] MS. WENCKEBACH: Yes, I think that's appropriate.

[20] THE COURT: And you might want to specify whether you are talking about income tax statements or whether you are talking about --

[21] MS. MOONEY: Normally I would put the income tax return and the notice of assessment. Usually people have --

[22] THE COURT: The notice of assessment should be out by June 1st, yes.

[23] MS. WENCKEBACH: I agree.

[24] THE COURT: I cannot recall whether anyone requested it to be enforced by Maintenance Enforcement. Has that been an issue?

[25] MS. WENCKEBACH: No, that's fine.

[26] THE COURT: Good. I can indicate, too, that I am prepared to do the judicial settlement conferences as they arise; I think that is appropriate, if I am available, in a timely manner. I do not know if the lawyers have explained judicial settlement conferences, but basically you come upstairs into a boardroom. It is a much friendlier atmosphere, and you can share your concerns, and we can usually resolve them; not every time, though, but sometimes it is helpful to bring the lawyers, if you still have a relationship with the lawyers, but it is not necessary; you can come on your own. You just have to call the person they call the trial coordinator and she will give you a time. Anything else?

[27] MS. MOONEY: Your Honour, then I would take it that that would begin on Friday of this week?

[28] THE COURT: I think that is appropriate, unless there is an issue outstanding.

[29] MS. WENCKEBACH: Yes, I think so.

[30] THE COURT: Friday after school.

VEALE J.