

SUPREME COURT OF YUKON

Citation: *M.-L. v. L.*, 2014 YKSC 17

Date: 20140207
S.C. No. 08-D4076
Registry: Whitehorse

BETWEEN:

A.-M.C.M.-L.

Petitioner

AND:

J.B.L.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:
Kathleen Kinchen
Shayne Fairman

Counsel for the Petitioner
Counsel for the Respondent

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): This is an application by the mother for child support, arrears of child support, s. 7 expenses, and extraordinary expenses. She also seeks a small but significant reduction in the father's time with the two children. The father opposes and seeks a ruling under s. 9 of the Child Support Guidelines which applies where the father has not less than 40 per cent of the time with the children over the course of the year.

[2] The father opposes all the retroactive claims but offers to go forward on an interim basis to share s. 7 and extraordinary expenses on a 50-50 basis. I understand

that offer has been accepted. The father opposes any reduction in his residential time or his involvement in major decision-making for the children

[3] It is not necessary to set out the income of the mother and the father in these reasons except to say that the mother earns approximately twice as much as the father.

THE FACTS

[4] The children are 10 and 12 years old and very lucky to have such devoted parents. One child is severely challenged, both cognitively and physically, as I understand it, but he is supported by two very involved parents as well as a team of professionals at school. Caring for children is one the hardest jobs that any parent can have and these parents have an exceptionally hard job but have managed to do it over the years, which is no small accomplishment, since they separated in 2008 and had many issues to resolve.

[5] In my view, this contested application was triggered by the father's discovery that the mother has twice his income at a time when he is having financial difficulties. He had been voluntarily paying \$1,025 per month to the mother and arbitrarily reduced it to \$500 a month for May, June, and July of 2013, and then no payment except for \$1,000 to this date.

SHARED CUSTODY

[6] Section 9 of the Child Support Guidelines states as follows:

Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs, and other circumstances of each spouse and of any child for whom support is sought.

The key wording is that a parent who exercises access or custody “for not less than 40 per cent of the time over the course of a year” has the factors set out taken into consideration, rather than simply paying a table amount automatically. Surprisingly, both parents, in their calculation of hours spent with the children, have the father’s time with the children at slightly below 40 percent.

[7] I prefer the analysis in *Berry v. Hart*, 2003 BCCA 659, and adopted in *Mehling v. Mehling*, 2008 MBCA 66.

[8] In *Berry v. Hart*, Saunders J.A. stated this at para. 10:

In my view the issue is a matter of judgment not amenable to simply a time accounting exercise. I consider that in determining whether the threshold level for application of s. 9 is met the question is whether the paying parent spends such a sizeable percentage of time with a child or children that, on any reasonable view of the evidence and considering the advantage that may accrue to a child in spending the occasional additional day, part day or hour with a parent, one can say reasonably that the 40 percent or more level is achieved. It follows, in my view, that a court may assess child-parent time as meeting the s. 9 criteria without a tight accounting. That assessment should be made by considering the broader context of the parenting arrangement. ...

[9] In *Mehling v. Mehling*, *supra*, Hamilton J.A. stated at para. 42:

So, should the 40 per cent threshold analysis be a strictly mathematical calculation? I think not. Is there a mathematical component to the analysis? Of course, because the pattern of parenting must be analyzed and this will, by necessity, involve a

consideration of the time the children are with their respective parents. In *Cabot*, this court specifically rejected a "minute-by-minute" calculation method. While I would not categorically rule out an assessment on the basis of hours, it seems to me that an assessment of the time that a parent is with, or responsible for the children and their needs, on the basis of days or weeks, or portions thereof, will be a more realistic approach to the analysis than an hourly accounting. That being said, the approach to be used for the assessment of time is within the judge's discretion to determine.

[10] While a flexible approach is desirable in my view, it cannot trump the agreement of parents that the father's time is slightly less than 40 percent. Particularly where the other factors in this case would not, in all likelihood, affect the mathematical calculation. Thus, I order the father to pay the mother \$1,080 per month commencing March 1, 2013, and each month thereafter. The arrears since the father stopped paying are \$8,520, which brings the child support up to date to February 2014. I order the father to pay those arrears and I will take submissions at the end with respect to timing of that.

RRSP WITHDRAWALS

[11] The question is whether RRSP withdrawals should be included in income. The case law is mixed in this regard but as a general principle I do not think that RRSP withdrawals should be included. In circumstances like this, where the withdrawal is needed to meet daily or other expenses, the children often benefit, albeit indirectly. But it is usually an exceptional situation to withdraw the capital set aside for retirement, and the tax paid is a heavy penalty. That said, there will always be circumstances where it may be reasonable to include it in the income, to calculate child support, and that discretion should always be available. In this case the RRSP withdrawals should not be

calculated as income for support purposes, particularly given the father's other contributions to the children.

THE ARREARS

[12] The mother claims arrears of child support beyond the arrears order that I have just made, and arrears of s. 7 and extraordinary expenses based upon receiving the husband's income tax returns rather than the paystubs previously provided. The amounts claimed are not great but could amount to several thousand dollars. In my view, calculating the arrears where there has been voluntary child support payments over at least a four-year period is not appropriate in this case where the paystubs have been provided and voluntary increases in monthly payments from \$969 to \$1,025 per month have been made. In a situation where the father has financial issues, an order to pay arrears is not warranted when neither parent provided the other with notices of assessment. However, I do order the parents to provide income information in the form of notices of assessment before May 15 of each year, with the recalculation to commence on June 1 of each year.

THE RESIDENCY AND SHARING OF THE CHILDREN

[13] The status quo for several years has been that the father has the children every alternate weekend, from Friday after school until Monday morning. The father also picks up the children after school and the mother then picks them up at the father's residence at 6:00 p.m. The parents agree that the father will drop the children off on these occasions at the mother's residence at 6:15 p.m. The mother also seeks to reduce the father's time with the children on alternate weekends by having the father return the

children Sunday night at 6:15 p.m. The mother says that it would be preferable to allow the children to settle down Sunday night before school starts. The father opposes this strenuously as he has had this access for several years.

[14] This case has had the benefit of two child custody assessment reports, one filed November 15, 2010, and the updated report filed December 21, 2012, both reports being prepared by Nicole Sheldon, registered psychologist and mediator. She described the current situation in the December 21, 2012 report at page 2 as follows:

In the November 15, 2010 report, recommendations to support the children in this family were made. In a letter dated March 8, 2012 from Mr. Fairman to Bev Fohse of Family and Children's Services requesting the update, Mr. Fairman noted that although parents had been able to address a number of issues, the issue of residential arrangements for the children remained. It is noteworthy that parents had come to an agreement for a shared parenting schedule that was more generous than the one I had recommended in 2010.

Following the 2010 assessment, parents decided that the [children] would live primarily with [the mother] and spend every other weekend from Friday overnight to Monday morning with [the father]. In addition, the [children] are picked up Monday to Thursday after school by their father, and their mother picks them up from their father's home at 6:00 pm on those evenings.

THE PARENTS' CURRENT POSITIONS REGARDING CUSTODY AND ACCESS

[15] The father would like the children to be with him half of the time on a week on/week off basis. At a minimum, he is requesting more time with the children. The mother indicated that this re-evaluation was driven by the father. The mother is content with the current schedule and feels that it is supportive of the children. This paragraph is from the Summary and Recommendations, page 19:

Although [the father] sees the [children] 11 out of 14 days ([the mother] sees them 12 out of 14 days), he is still asking for more time. [The father] doesn't seem to have a good sense that he has "prime time" with the [children], seeing them for three hours, 8 out of 10 school nights. The [children] go home to sleep at their mother's and in the two hours left before bedtime, she is driving them home, practicing music, doing homework, and completing bedtime routines. In the mornings, [the mother] is getting the children up and ready for school, insuring lunches are packed, and that all the materials required for the day are in their backpacks. Mom's time is around structure and insuring predictability in the [children's] lives; dad's time is around fun and relaxation. [The father's] one primary responsibility in his three hours after school is to make sure the [children] have a nutritious meal. [The father] could not comment on what makes sleeping over so critical, especially given that it would alter the current structure significantly and in actuality, result in less time that the [children] have with each of their parents. Having the kind of week on/week off schedule proposed by [the father] would also significantly undermine the sense of security and predictability that the current arrangements offer.

[16] I am going to include in the Reasons for Judgment the nine recommendations that Ms. Sheldon has set out in her report filed October 21, 2012:

1. [The mother] should retain primary residential care of both children. While both parents should be consulted in major issues affecting the children, in the event of a dispute, [the mother] should be allowed final say.
2. [The mother] should retain responsibility for all appointments, scheduling, and organizing of the children's calendars. She should be the primary point of contact for all professionals. This means that professionals know who to vet information through and insures that there is a complete log of interactions and interventions. What this means is that [the mother] is responsible to insure that [the father] has access to all information. [The father] should also be listed as a contact and be available for all appointments and involvements related to the [children], as he currently is. This recommendation in no way whatsoever infers that [the father] is less important; instead, it insures that with one point of contact, no information is missed or lost.

3. This family absolutely needs access to an educator/mediator or parenting coordinator/counselor who can help them work through disagreements. This was recommended in the last assessment and parents indicated that they have not used this support. Continuing to use the assessment process to resolve disputes is inappropriate for this family.
4. [The father] should continue to have the [children] after school every day as is currently happening; that is, Tuesday to Thursday, Monday on mom's weekend, and Friday on his weekend. This time is roughly 3:00 pm when [the father] needs to pick up the children up from school. To facilitate increased time at mom's end for doing homework and bedtime routines, [the father] should be doing the driving. The time for drop-off should be 6:15 pm. By shifting the time to 6:15 pm, [the father] doesn't lose any time with the [children] as the 6:00 to 6:15 would be for travel. This alleviates the uncomfortable situation of mom having to wait at dad's door for the [children] to be ready. It also allows dad the opportunity to create and set a routine expectation for the [children] and helps alleviate any internal conflict the [children] may have about wanting to stay and feeling "pulled" to leave because their ride has arrived.
5. [M.] should remain sleeping over at his dad's every other weekend from Friday night to Monday morning. He does best with his own space and routine. There is no real independent space for [M.] at his dad's house and he goes from a room of his own at his mom's to a shared room at his dad's. There may come a time when [M.] begins reacting negatively to this shared space. Should that happen, parents would do well to focus on [M.]'s needs and make appropriate alterations with the support of outside professionals, and not make it competition about overnights.
6. [G.] could manage an extra overnight on Thursdays of the weekend that he would generally be at his father's anyways. The problem with increasing overnights and no bus service in this family is that it will always require a parent to do the driving. With [G.] staying overnight at his dad's on the Thursday, this will mean that dad will need to drop [G.] off at his mom's on Friday morning so that she can get both [children] to school and [the father] is still available to pick both [children] up after school. To increase overnights any more than this on school nights may start to have an impact on [G.]'s sleep and would generally increase the stress on this family system.
7. If the recommendation in #6 doesn't make sense or becomes too onerous, another option might be for the children to be overnight

with dad whenever there is a professional development day at school the following day.

8. Yet another option might be three out of four Friday nights with dad. Although this would decrease mom's full weekend leisure time with the children, it might be an option for parents to explore. This is not to suggest that every single month there would be three weekends out of four that the [children] would spend the Friday night at their dad's, what it is saying is that this is a way to increase overnights without putting too much stress on the [children].
9. Absolutely no adult matters related to custody, access, or legal involvement should be discussed with the children. Both of these children are coping with anxiety, though both in different ways. Continuing to discuss these kinds of matters with the children would suggest that the parent who is doing so does not have a good grounding in what is best for the children and as a result, that parent's access to the children should be limited.

[17] Now, counsel have not addressed all of these recommendations, so I will only address the specific issues raised and those that I feel should be addressed. My order is the following:

1. The parents shall have interim joint custody of the children with the mother making the day-to-day decisions for appointments, scheduling, and organizing, the children's calendars, and being the primary point of contact for all professionals.
2. The mother and father should be listed as contacts and be available for all appointments and meetings for the children. The father cannot be excluded from these.
3. Major or significant decisions about the children's health and education, excepting emergency decisions, must be fully discussed in advance by the parents, with the mother having the final decision, subject to the father's right to bring the matter to court. I say this because there must be a resolution or final say in the event of a dispute. I should also say that the recommendation of a mediator/coordinator or, more precisely, a parenting coordinator/counselor is a good one. My understanding is that in the Yukon, at the present time, we do not have a such trained professional person but I am aware of the fact that someone is available to perform that role. We are fortunate in having the provision that permits the court to recommend the appointment of a

child advocate and I am certainly prepared to do so if parents wish that to be the case.

4. Holiday time should be shared equally.

[18] I wish to comment on the father's indication that this will go to trial on the issue of residential time. That is unquestionably his right and I can only say that my experience is that after all the expense and disruption that a trial causes, and I want to tell the parents that it is significant, it only results in the judge making a decision rather than the parents, and the recommendations of Ms. Sheldon will certainly carry some weight in that decision regardless of who the judge will be.

[19] Are costs in issue?

[20] MS. KINCHEN: We've requested costs.

[21] THE COURT: Mr. Fairman, do you want to submit on that?

[22] MR. FAIRMAN: Yes. I'm just going to ask for clarification as well.

[23] THE COURT: Sure.

[24] MR. FAIRMAN: My Lord, I believe Your Lordship's direction with respect to the application by [the mother] for base child support arrears greater than you've already ordered, and for special and extraordinary expenses in arrears, to have been dismissed. Is that correct?

[25] THE COURT: Correct.

[26] MR. FAIRMAN: Right. And that the s. 7 expenses going forward are to be shared equally by the parents?

[27] THE COURT: Correct. That was accepted, as I understand, when you made the offer during the course of the hearing.

[28] MR. FAIRMAN: Yes. Two things. We're not going to be asking to set a trial date.

[29] THE COURT: I am sorry?

[30] MR. FAIRMAN: We're not going to be asking that a trial date be set today. I think that Your Lordship's remarks need to be given some thought by both parties and I would certainly appreciate the opportunity, having heard your decision, to speak further with my client with regard to the remarks you've made and with respect to the outcome of this application.

[SUBMISSIONS RE COSTS]

[31] THE COURT: Fair enough. Any submission with respect to scale?

[32] MS. KINCHEN: The ordinary scale.

[33] THE COURT: Scale B?

[34] MS. KINCHEN: Yes.

[35] THE COURT: Well, thank you for your submissions. Given my finding that the application was triggered by the arbitrary decision to stop paying child

support, I feel that costs should be awarded to Ms. M.-L. on Scale B. I appreciate that the outcome is divided to a certain extent but not so on the major issue of the going forward child support costs. Any further issues, counsel?

[36] THE COURT: You know what I mean, counsel. Is there an issue there?

[37] MR. FAIRMAN: It might be easier, given that we have fixed the arrears, and I do not think there is disagreement about the amount, that it might easier to simply indicate that support is payable at \$1,080 per month commencing March 1, 2014.

[38] THE COURT: If you are content with that, that is the order. Time to pay?

[39] MR. FAIRMAN: And that the arrears are fixed at \$8,520.

[40] THE COURT: Correct. Time to pay then, that is an issue.

[SUBMISSIONS RE TIME TO PAY]

[41] THE COURT: The arrears at \$500 a month until paid.

VEALE J.