

SUPREME COURT OF YUKON

Citation: *EWM v LDG*, 2015 YKSC 32

Date: 20150710
S.C. No.06-B0080
Registry: Whitehorse

Between:

E.W.M.

Plaintiff

And

L.D.G.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Amy Steele
Norah Mooney
Debbie Hoffman

Counsel for the Plaintiff
Counsel for the Defendant
Children's Lawyer

REASONS FOR JUDGMENT

[1] This is an application by the defendant mother for joint custody of the three children, [M.], age 11, [Z.], age nine-and-a-half, and [E.], age seven-and-a-half, and for financial disclosure. The plaintiff father has had interim custody and primary residence of the children since May 2010. That resulted from an incident where the mother was involved with drugs and alcohol and Family and Children's Services were notified. The mother then left the Yukon for a period of time, but returned in 2014. She now appears to have her substance abuse under control, has upgraded her education, and has obtained

steady employment. On April 10, 2015, I ordered specified unsupervised access for the mother, and on June 2, 2015, I increased that access to alternating weeks.¹

[2] This is a high conflict matter in which the parties have filed numerous conflicting affidavits over the years. The mother now alleges that the father is attempting to alienate her from the children. The children's lawyer shares that concern.

[3] The children's lawyer provided me with an article entitled "*Alienated Children and Parental Separation: Legal Responses in Canada's Family Courts*" authored by N. Bala, B. Fidler, D. Goldberg, and C. Houston, (2007), 33 Queen's LJ 79. The article defines an alienated child as one who expresses unreasonable negative feelings and beliefs towards a parent that are significantly disproportionate to the child's actual experience with that parent. In other words, the child may unreasonably reject the parent despite the absence of alienating conduct by that parent. This can occur when the other parent's conduct indirectly undermines a positive relationship between the child and the rejected parent, for example a father repeatedly telling the child that their mother is a liar. Indirect alienating conduct also occurs when the custodial parent expresses sadness that the child is going on an access visit. As a result of these concerns, Canadian courts have often said that a custodial parent has a positive obligation to encourage the child's relationship with the other parent.

[4] Sometimes, a child can become aligned with one parent as a response to the loyalty conflict that can arise in a high conflict separation. The authors suggest that it may be emotionally less stressful to take the side of one parent, without completely rejecting the other. This is the specific concern expressed by the children's lawyer in this case.

¹ The father has filed a Notice of Appeal regarding the order of June 2, 2015.

She is also worried that the children are far too involved in the issues arising from this litigation, and that this could cause them serious long term harm.

[5] The article lists several behaviours commonly exhibited by an alienating parent, including the following:

- allows the child to make decisions about contact with the other parent;
- no encouragement of calls to other parent in between visits;
- tells child fun things that were missed during visit with other parent;
- refusal to speak directly to other parent;
- exaggerates negative attributes of other parent;
- over-involves the child in adult matters and litigation; and
- requires the child to be a messenger.

[6] The authors also suggest that bitter protracted litigation may transform an alignment with one parent into outright rejection of the other, which can have long-lasting negative effects on a child. On the other hand, they point to a growing body of research which suggests that maintaining regular contact with both parents generally results in better long-term outcomes for children, even in high conflict separations. With respect to joint custody, the authors state:

Although the courts have generally held that joint custody should not be ordered unless there is some history of cooperation between the parents, in some cases of alienation judges are prepared to make an order of joint custody as a way to “send a message” to the custodial parent and child that further resistance to the child’s relationship with the other parent may reverse custody. This approach minimizes the instability in the child’s life and signals to the alienating parent and third parties that they should respect the roles of both parents....

[7] Before making my June 2nd order allowing the mother week on/ week off access, I carefully reviewed the letter from the children's lawyer dated May 29, 2015, which includes the following statements:

The children want their parents to know that they are not taking sides, rather, they are expressing their wishes about how they would like to spend time with their parents.

I am asking the lawyers to caution their clients about discussing court matters or living arrangements, or the children's views and preferences directly with the children. The children want to immediately commence a one-week/one-week timeshare arrangement.

..

I must say that these children were an absolute delight to meet with. They are fun, clever, articulate children who were very clear with me about their wishes. There was no reluctance by any of the children to express their views about their living arrangements and time with each parent.

[8] At the hearing before me on July 7, 2015, the children's lawyer confirmed that she has instructions from the children that the week on/week off residential schedule continue, and that the parents should now move to a joint custody arrangement.

[9] Notwithstanding these clear instructions from a very experienced children's lawyer, the father continues to feel that joint custody is not in their best interests. In his affidavit filed July 6, 2015, he deposed:

I am opposed to the Defendant's application for joint custody as I feel it is not in the Children's best interest. I have had sole custody of my kids for six and a half years [in fact it has only been five years since the order of May 25, 2010]. I feel they are not ready for the Defendant to have shared custody. It is clear to me that they would like to go back to the old schedule where they get to visit their mother and have an occasional sleepover. They love her, but I feel they do not want to live

with her half of the time. They have made that clear to me, and I feel they are afraid to tell their mom the same thing.

[10] The father's counsel made similar submissions during the hearing on July 7th, to the effect that the children are telling the father one thing and the children's lawyer something completely different.

[11] For the reasons which follow, I prefer to accept the relatively objective submissions of the children's lawyer that the children genuinely want to continue the week on/week off schedule and to begin a joint custody arrangement. In my view, the father's position is tainted by his animosity towards the mother and his apparent determination to do everything possible to frustrate her relatively recent attempt to play an equal parenting role in the lives of the children.

[12] For example, the father has repeatedly expressed his concern over the mother's suspected alcohol and drug abuse, as well as her association with suspected drug dealers. However, it is important to note that the mother has filed a letter from her family physician dated November 19, 2014, which indicates that the physician has treated her for the past 16 months and that she has no reason to believe the mother is abusing alcohol or using any illicit substances. Nor could she see any indication from her clinic or hospital chart that her previous caregivers were concerned about drug or alcohol abuse. Further, the mother provided a letter dated April 20, 2015 from an addictions mental health counsellor with Alcohol and Drug Services, who interviewed the mother on four occasions and had her complete a questionnaire regarding possible outpatient counselling. The counsellor concluded that the mother "does not appear to have difficulty with functioning... does not have a level of addiction that would warrant serious concern...[and] sounded sober and clear-minded".

[13] In addition, the mother graduated this past spring from the Culinary Arts Program at the Yukon College and was placed on the Dean's List. She now has regular employment with a local hotel doing food preparation. I take this as additional evidence that she is currently well functioning and no longer subject to substance abuse.

[14] Notwithstanding this evidence, in his most recent affidavit filed July 6, 2015, the father continues to make allegations of the mother's abuse of alcohol and association with drug dealers.

[15] Further, during the hearing on June 2, 2015, I indicated to the parties that this matter was turning into an "affidavit war", which I hoped they were capable of stopping for the sake of the children. However, it is clear from the father's most recent affidavit of July 6, 2015, that the war simply continues, at least from his point of view. The mother, on the other hand, has demonstrated what I take to be a genuine effort to get along with the father since June 2nd. As the father concedes, during the mother's week, on June 5th, she allowed [M.] to have a sleepover at her father's house. Further, during the mother's week of June 15th, the mother allowed the children additional time with the father so that they could celebrate the last day of school. On June 16th, the mother also allowed [M.] another sleepover at her father's house. On June 17th, the mother allowed [Z.] a sleepover at the father's house. On June 20th, the mother allowed the father to take [Z.] to Johnson's Crossing. The mother was even prepared to allow the children to go with the father in order to neutralize the unpleasant scene at the grocery store on June 18th (which I describe below), until the father told them to go with her because she had bought food for their dinner (not because it was her week with the children).

[16] There were also a number of passages in the father's affidavit of July 6, 2015 which support the conclusion that, intentionally or not, the father is conducting himself in a way which risks aligning the children with him against the mother. I will cite a few representative examples.

[17] The father deposed that after the children went to reside with the mother on June 2nd, pursuant to my order of that day:

...My Children did cry, and I feel they were upset. I have had sole custody of the kids for six years. I know it wasn't easy for them nor was it easy for me. I have been in their lives constantly and will continue to do so.

[18] The father further deposed that when he met the children on June 5th:

... I could tell that they missed me dearly. [M.] asked me if he could have a sleepover that night at my house with some of his friends. The Defendant allowed that to happen [this was during her week]. I believe [M.] feels more comfortable in my home because he spent most of his life living there.... The following day...the Defendant picked them up. It appeared to me [M.] did not want to go and was a little sad to do so.

This is one of several examples of the father effectively allowing the children to choose which parent they will spend time with, notwithstanding the order for equal time.

[19] The father further deposed that when he got the children back from their mother's house on June 8th:

... That first night back, [M.] talked to me a bit. He told me that he was concerned about going back to the Defendant's house the following week and he told me that he did not like it at her house and that he wanted to be home....

This is simply inappropriate. The father should not be involving the children in the litigation.

[20] The father further deposed to an incident on June 16th, which was during the week the mother was to have the children:

On June 16 I started getting texts from [M.]. He told me he was going to make plans to hang out with his friend. I then texted the Defendant and asked her to get [M.] to call me. During this call [M.] asked if he could come to the [father's] house and chill with his friend. I said OK as long as his mother agreed....[M.] later told me that he was scared to tell his mom and that he didn't want to be there again. The Defendant did allow [M.] to come over to my house.... He told me that he didn't feel comfortable telling the Defendant how he feels because he is afraid of what she may do...

[21] The mother presented a copy of her exchange of texts with the father over this incident. In my view, she understandably complained about the father making plans with [M.] without going through her first. The father denied this and texted back "Get your story straight". This is another example of the father failing to respect the mother's time with the children, unnecessarily involving them in the litigation and continuing to be oppositional with the mother.

[22] The father further deposed about an incident with [Z.] on June 17th, again, during the mother's week with the children:

On June 17 I got a couple of texts from [Z.] that day and she wanted to see me. I called [Z.] to see what was up. As soon as I got on the phone with her I could hear in her voice that she wasn't very happy at all. She sounded upset and I felt that she needed to see me. I told her that I could pick her up and take her for a cruise. I texted the Defendant and she was OK with the meeting. Upon getting to the bank [the pickup spot] I could tell something was wrong with [Z.] and she came with me. As soon as we left the bank [Z.] started to cry and was upset. She told me that she likes visits with her mom and would like that to continue. However, she told me that she no longer wanted to be at her mom's half of the time and she just wanted to schedule to go back to normal. It took me a while to calm her down, and I texted the Defendant and told her that [Z.] did not want to come back and that she should call [Z.].

The Defendant did call [Z.] and she allowed [Z.] to spend the night with me. [Z.] told me she was happy to spend an extra day with me. She picked out a movie to watch and we had a great night. It is important to me that the Children are happy and don't have to deal with so much stress. I feel that the Defendant is not willing to accept how the Children feel about the custody arrangement....

[23] According to the mother, she was walking with [Z.] on June 17, and [Z.] was happy until she received the telephone call from the father, after which she started crying and said she wanted to go for a cruise with her dad.

[24] This is yet another example of the father failing to respect the mother's time with the children and allowing them to effectively choose which parent they will spend time with, despite the order. It also indicates how the father feels that he knows best what the children really want, despite their clear instructions to the children's lawyer.

[25] The father deposed that on the morning of June 18th, [Z.] did not want to go back to the mother's house, so he took her to Family and Children's Services, to look into their "options". The father's response here simply seems bizarre. He was also allowing nine-and-a half-year-old [Z.] to effectively dictate where she was going to spend her time and unnecessarily involving her in the litigation. He was also creating a situation where [Z.] might pick up the message that she would not be safe if the father simply returned her to her mother's home.

[26] Eventually, the father agreed to return [Z.] to the mother at a local grocery store. This is the incident I referred to above at para. 14. The other two children were also present. The father's version of what took place conflicts with the mother's. The mother deposed as follows:

...The Plaintiff was on a bench at the entrance to the store with the children. In a loud voice the Plaintiff said to me, "look

what you are doing to my family". The children were crying. People were looking at us. I said it is convenient that every time he shows up or calls the children start crying. The Plaintiff became very angry and said, "oh is this convenient for you?" I said I was not going to play his game. [Z.] was crying on the Plaintiff's shoulder. He pulled her back and looked in her face and said, "Do you like your Mom's game", "do you like this game [Z.]. [Z.] was very upset and crying....

[27] The father's version is as follows:

... I was in the store with [Z.] when the Defendant found us. It appeared to me that the boys were happy to see me and [Z.]. They walked with me and I went to the entrance of the store with the kids. The Defendant continued to shop and met us at the entrance. While the Defendant was shopping [Z.] got emotional again. She told me that she did not want to go with her mom and she just hugged me and sat on my knee on a bench. The boys told me that they wanted to come and stay with me as well. When the Defendant got to the entrance I could tell she wasn't very happy. Then she blurted out that "this is a game" and that I was trying to make a scene. I wasn't very happy with what she said, especially in front of the Children and said, "you think this is a game? Look at what you're doing to these kids."... I absolutely deny stating anything to [Z.] about a game.

[28] It is always difficult on an interim application such as this to sort out conflicts in affidavit evidence without cross-examination or a trial. That said, what I take from this evidence is that the father was again unnecessarily involving the children directly in the litigation and interfering with the mother's time with the children. This was the mother's week, yet there had already been two different sleepovers at his house contrary to the order: [M.] on June 16th and [Z.] on June 17th. In my view, despite the conflict in the evidence, there is a basis for drawing the inference that the father intentionally wanted to make a public scene of how sad the children were, that it was the mother's fault and that he wanted the children to know this. He admits telling the mother in the children's presence "Look at what you're doing to these kids."

[29] In addition, the mother has deposed that the children have told her that the father tells them that he cries all the time when they are not with him and he does not eat or sleep without them. The father denies this, but admits that he tells them he misses them all the time and that they tell him the same. In the mother's opinion, the father has done his best to sabotage the order made on June 2nd and believes that his behaviour is damaging the children. I prefer the mother's view here. As I noted earlier, indirect alienating conduct occurs when the custodial parent expresses sadness that the child is going on access visits, and this theme is repeated throughout the father's most recent affidavit.

[30] In the result, I am ordering a variation of the order of May 25, 2010 to grant the mother and the father interim joint custody of the children. I further vary the order of June 2, 2015 to state that, for the summer school vacation months, the alternating weekly schedule which began on June 8, 2015 will continue, but the exchange of the children will occur on Mondays between 4 and 5 PM in front of the Royal Bank in downtown Whitehorse. When school resumes, the exchange of the children will occur after school on Mondays.

[31] The children will no longer have an unrestricted right to call, text or email the parent with whom they are not currently residing (the "non-residential parent"). Rather, the children will have the option of telephoning, only, the non-residential parent on Wednesday and Saturday afternoons between 4 and 5 PM. The non-residential parent may also telephone the children on those days and between those times, but shall not text, email or telephone the children at any other time.

[32] The children will also have the option of having supper with the non-residential parent on Thursday evenings, but they are to be returned to the residential parent at least one hour before their bedtime.

[33] Neither parent shall use the children to relay messages to the other parent. Rather, the parents shall make their best efforts to communicate with each other in a civil, businesslike and respectful tone.

[34] The non-residential parent shall not make arrangements to spend time with the children, or any of them, without consulting the residential parent.

[35] The children shall not have the right to decide which parent they are going to spend time with or when.

[36] Both parents will make their best efforts to engage the children in regular counselling. The parents shall consult with one another in good faith in the selection of an appropriate counsellor or counsellors. However, if they are unable to agree, then the mother shall have the right to make the selection. If the father is unhappy with that outcome, he may request a case management conference to further discuss the issue. I am assuming here that because the father is on social assistance, he may be able to arrange this counselling without any cost to either parent. If I am wrong about that assumption, the parties can request a further case management to discuss the issue.

[37] Each parent will similarly make their best efforts to engage in personal counselling to deal with issues arising from the separation. As with the children's counselling, if this is unaffordable for either, then the matter can be addressed in case management.

[38] Both parents shall make their best efforts to avoid discussing issues arising in this litigation with the children. If a child should initiate a conversation with a parent about

such an issue, that parent shall tell the child that the judge has ordered them not to discuss the matter, but that the child is free to talk to their lawyer or their counsellor about the issue.

[39] The father is to retake both levels of the Parenting after Separation workshops offered for free by the Yukon Department of Justice at the first available opportunity. I acknowledge that the father has taken these courses before, but it appears that this was several years ago and that he is probably in need of a refresher. I note that the mother completed these programs relatively recently in March 2014, so I am not requiring her to retake them.

[40] The parents shall consult with one another in good faith on the issue of whether [Z.] attends school in Teslin for the 2015-16 school year. However, if they are unable to agree, then the father shall have the right to make this decision. If the mother continues to be unhappy with the result, she can request a case management conference to discuss the issue. Should [Z.] attend school in Teslin, the mother will be entitled to have [Z.] in her care in Whitehorse every second weekend. I will leave it to counsel to work out further details and, if that is not possible, then either parent may request a case management conference to discuss the issue.

[41] There will be a review of this matter on September 1, 2015 at 2 PM, or on such other date as may be agreed upon between the parents and the children's lawyer.

[42] The father shall provide financial disclosure to the mother as sought in paragraph five of the mother's Notice of Application filed June 1, 2015, within 30 days of the date of this order.

[43] I will remain seized of this matter. Either parent, or the children's lawyer, may request a case management conference to discuss issues which cannot otherwise be resolved.

[44] At the urging of counsel, I have attempted here to be as specific as possible about the various issues that were raised at the hearing. However, I will leave the exact wording of this order to them.

GOWER J.