

IN THE SUPREME COURT OF YUKON

Citation: *E.J.M. v. D.D.I.*, 2008 YKSC 21

Date: 20080307
S.C. No. 98-B0009
Registry: Whitehorse

Between:

E.J.M.

Plaintiff

And

D.D.I.

Defendant

Publication of the name of the child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act*.

Before: Mr. Justice R.S. Veale

Appearances:

Susan Carr
Shayne Fairman
Norah Mooney

Counsel for plaintiff
Counsel for the defendant
Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] This case involves a 12-year old child. Both parents care for the child very much and wish to be involved in her life. The child has spent 11 years of her life primarily residing with the mother. Recent events have resulted in the child living with the father and some strain in the child's relationship with the mother. The mother remains

committed to the child's best interests but is encountering some difficulties in re-establishing her former close relationship with the child.

[2] All the evidence has been in affidavit form. The order set out at the end of this judgment was made on December 19, 2007. These are my reasons.

BACKGROUND

[3] The mother raised the child in a Yukon community as a single parent since a consent custody order was made in 1998 when the child was three years old.

[4] In order to improve opportunities for herself and the child, the mother moved to Whitehorse in 2006. The child attended school for one year in Whitehorse and according to the mother, was adjusting as well as could be hoped. The Child Advocate advises that the child does not wish to return to Whitehorse but prefers to remain with the father for reasons addressed below. The mother had her own adjustment problems with family illness and acknowledges, somewhat belatedly in this proceeding, that her drinking became inappropriate. Both the mother and the father have had their problems with drinking. The father stopped drinking approximately five years ago and the mother as recently as July 23, 2007.

The Incident

[5] In June 2007, the mother and child visited the community where the mother lived before moving to Whitehorse. In the evening of June 17, 2007, the mother left the child, 11 years old at the time, caring for a six-year old child. The child in this proceeding was unhappy with this responsibility and went out looking for her mother and found her at a relative's home. The child was physically assaulted in the early morning hours by the

mother's niece. A social worker intervened and the child was placed with the father in his nearby community. The mother initially consented to this arrangement but expected the child to be returned to her on August 15, 2007, so she could return to school in Whitehorse. The social worker, in a letter to the father and a separate letter to the mother, indicated that there were concerns if the child was returned to the mother's custody and stated that an assessment of the child's safety would be required.

[6] The mother's niece was charged with assault and the incident has been very traumatic for the child. The incident appears to have driven a wedge between the mother and the child. Fortunately, the criminal charge has resulted in a peace bond so a trial will not be necessary.

The Court Process

[7] In late May 2007, the mother had applied for an increase in child support and the father offered an increase. However, the June incident occurred and the daughter began living with the father. The father commenced an interim custody application on August 6, 2007, indicating that the child expressed an interest in remaining with him and not returning to the mother's custody in Whitehorse.

[8] On August 9, 2007, I recommended the appointment of a Child Advocate and ordered that the child remain in the care and control of the father until August 31, 2007. I also ordered that the child could be enrolled in the father's community school without prejudice to the competing custody claims.

[9] The mother filed an affidavit outlining her primary care of the child for 11 years and their close bond. She stated that her home in Whitehorse was alcohol and substance

free. She acknowledged that there was a strain in her relationship with the child who was becoming rebellious, but described it as a normal development on becoming a teenager. She gave her version of the assault incident but took no responsibility for the events that evening. She also stated that the child wished to reside with her and return to school in Whitehorse.

[10] The Child Advocate was appointed and reported that the child wished to remain with her father.

[11] The father alleged that the mother's home was not alcohol free and that the drinking affected the child's school attendance and relationship with the mother. The father believed the child had not been happy in Whitehorse and had expressed an interest to live with him even before the assault incident in June.

[12] At the hearing on August 31, 2007, the mother's counsel applied to be removed from the record. The Child Advocate confirmed that the child expressed the wish to remain with the father. As the mother did not have counsel, I adjourned the matter to September 11, 2007, with the child remaining under the care and control of the father.

[13] A new counsel for the mother appeared on September 11, 2007, requesting an adjournment to October 11, 2007. That counsel withdrew shortly afterwards and the mother filed a notice of intention to act in person. I ordered that care and control of the child remain with the father until October 2, 2007.

[14] On October 2, 2007, the mother appeared on her own behalf still wishing to retain counsel. At this point, I ordered interim interim custody to the father and rescinded the

father's child support obligation effective October 1, 2007, until further order. The father's costs application was adjourned to the next hearing date on October 29, 2007.

[15] The mother retained counsel prior to October 29, 2007, and all counsel consented to have the application heard on December 19, 2007.

[16] In the meantime, the mother filed an extensive affidavit with evidence of strong community support for her role as a parent. She expressed concerns about her difficulty in having access to her child. She acknowledged the difficulty she and the father have communicating and expressed concerns about the child's internet access and the father's ability to care for the child.

[17] She also acknowledged, for the first time, that the previous year had been a difficult one for her in the move to Whitehorse, and that she had consumed alcohol inappropriately. To her credit, she has sought support and counselling. She candidly admitted that she felt sick about her niece's assault on her child and wanted to support her child. She acknowledged the Child Advocate's statement that her child wishes to remain with the father for now. The mother has no wish to alienate the child. She simply wants what is in her child's best interests and correctly states that a 12-year old may not always know what is in her best interests. It is fair to say that the mother may be more strict in her parenting and the father less so. It is obviously a significant point of disagreement between the father and mother, as well as with the child.

[18] The child has now resided with the father since June 18, 2007. She appears to be doing better at school and the school principal reports that she is thriving both academically and socially. The criminal assault charges have been dealt with by a peace bond so that anxiety for the child should be reduced.

[19] The father indicates that he has been arranging access to the maternal grandparents and the mother's extended family. He also stated that the child has grown increasingly distant from her mother because of the mother's attitude. The mother, on the other hand, feels that the father does not encourage access. The father has arranged for monthly counselling for the child from a psychologist who visits the community. The father is concerned that the mother might not support the counselling but he encourages the mother and child to pursue counselling to patch up their relationship.

ISSUES

[20] The mother concedes that the child should remain with the father for this school year. However, she applies for interim joint custody which the father opposes because of their lack of communication. She also seeks a review date at the end of the school year which the father opposes. The father seeks costs.

DECISION

[21] It has been a practice in this court to make joint custody orders despite communication breakdown between the parents to encourage the parents to rebuild their relationship for the benefit of their child. There are, admittedly, some relationships that are so toxic that joint custody makes absolutely no sense as it leads to continued conflict which is harmful for the child. I do not find this parental relationship to be so irreparable that they cannot communicate about their child. Both parents are devoted to the child and sincerely wish for the child's best interests, albeit from their point of view. I am also taking into consideration the mother's primary role in raising the child for 11 years prior to the assault incident. This child is at a crucial developmental stage and needs the care and contact of both parents.

[22] I conclude that an interim joint custody order is appropriate. At the same time, I know that the mother appreciates how delicate the situation is when a teenager begins to rebel. Thus, I order that the primary residence be with the father and that he advise and discuss with the mother all significant matters respecting the child and, where possible, reach agreement. In the event no agreement can be reached, the father may make the decision and the mother may apply to the court to review it.

[23] With respect to costs, there is no doubt that the father has been put to considerable expense because of delays in having this matter heard. It is also apparent that the father had a significant improvement in income in recent years which the mother was poised to address in child support. I am also satisfied that the mother was not intentionally delaying the proceeding. Each party shall pay their own costs.

[24] The order that I made at the hearing is the following:

1. the application of the mother for interim child support is adjourned generally;
2. the mother and father shall have interim joint custody of the child;
3. the primary day to day care of the child shall be with the father;
4. the father shall have an obligation to advise the mother of any significant matters that may arise pertaining to the child;
5. the mother has the right to obtain copies of all educational and medical information with respect to the child, with the exception of information or documentation in the possession of the child psychologist pertaining to the child;

6. the mother and father shall discuss significant decisions respecting the health (except for emergencies), education, religious and general welfare of the child, and where possible, reach agreement;
7. where no agreement can be reached between the mother and the father, the father shall have the right to make the decision, and the mother may apply to the court to review any decisions;
8. the mother shall have reasonable access to the child which shall include a minimum of one weekly phone call at a time convenient for the mother and the child, and a minimum of one monthly meeting in person to be facilitated by the father in discussion with the mother and in consultation with the child on the understanding that this is a court-ordered access;
9. overnight access between the child and the mother is to be encouraged but is not mandatory;
10. neither the mother nor the father shall make derogatory comments about the other parent in the presence of the child;
11. access between the mother and the child is conditional on the mother not consuming alcohol immediately prior to, or during, the access;
12. a recommendation is made that the Child Advocate continue to be involved with the child;
13. the father shall take both levels of the *For the Sake of the Children* workshop and course as soon as possible;

14. the father shall make every effort to facilitate access between the child and the mother and the mother's extended family over the upcoming Christmas holidays;
15. either the mother or the father can make further application to the court with respect to issues pertaining to the child without the necessity of demonstrating a material change in circumstance;
16. each party shall bear their own costs with respect to these applications.

VEALE J.