

SUPREME COURT OF YUKON

Citation: *KDFK v WALBS*,
2024 YKSC 3

Date: 20240125
S.C. No. 22-B0060
Registry: Whitehorse

BETWEEN:

K.D.F.K.

PLAINTIFF

AND

W.A.L.B.S.

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff

Norah Mooney

Counsel for the Defendant

Paul Di Libero

REASONS FOR DECISION

Introduction

[1] This is a decision on one aspect of the two applications that were heard on Wednesday, December 13, 2023. That aspect is the request for an order by the defendant father to remove the requirement for supervised access visits with the child of the relationship, E.J.S., born [redacted] ("E.") and with O.K., born [redacted], ("O.") the daughter of the plaintiff mother from another relationship.

[2] I note that this request is not specifically made in the father's notice of application. However, I will consider this as part of the request for a residential schedule, which has been made by both parties in their application.

Procedural Background

[3] This case has been the subject of many court appearances, without the merits of the applications being addressed. The original application was brought by the plaintiff on May 16, 2023, for sole custody and primary residence for E., and other corollary relief. The court appearances occurred on May 11, 2023 (family law case conference), June 6, 2023, July 18, 2023, August 15, 2023 (family law chambers), and November 16, 2023. The second application was brought by the father on November 14, 2023, for joint custody of E. and O., a shared residential schedule, and other relief related to travel and communication, prompting the lawyer for the mother to request an adjournment on November 16, 2023. The delays were generally attributable to time needed by the father to obtain legal counsel and the change of legal counsel of the mother. During the court appearances, interim interim orders were made pending the hearing of the application. Several of those interim interim orders included supervised access visits by the father with E. and O.

History of Access Visits

[4] On June 6, 2023, the Court ordered one supervised access visit by the father until the next scheduled court appearance on July 18, 2023. On July 18, two supervised visits were ordered before the next scheduled court appearance on August 15. On August 15, the mother advised the Court that she had provided more than 10 supervised access visits and she consented to their continuation. The Court ordered that the order of July 18, 2023 would remain in place until the application could be

heard. On November 16, 2023, counsel for the father's request for more interim interim unsupervised visits was adjourned to the hearing of the applications.

[5] The parties with the help of counsel have now been able to establish a regular schedule of access visits: Wednesdays 5:30-8:30 pm, unsupervised visits; Saturdays 1:30-8:30 pm, public place or supervised visits; Sundays – 1 hour in the morning at church.

[6] The father says he has been forced to cancel visits with the children many times because of his inability to find a supervisor for the Saturday visit.

[7] The other child in the care of the mother is O. The father seeks unsupervised access visits with her as well even though she is not his biological child. He says he stood in the place of the parent during his relationship with the mother and continues to do so since it has ended. The status and extent of the relationship between him and O. are other matters to be determined in the consideration of these applications and I will not be deciding that issue now. Both parties through their counsel agreed the children should stay together during access visits so this order about supervised access visits shall apply to both E. and O.

[8] The mother deposed in her affidavit of October 6, 2023, that she would likely agree to unsupervised access visits if the father maintains sobriety for a period of at least one year, and has a home. She noted she has been generous and accommodating with schedules since the separation, including providing many more visits than what the Court ordered on an interim interim basis.

Circumstances of the father

[9] At the time the first interim interim order for a supervised access visit was made on June 6, 2023, the situation was different than it is now. The relationship between the parties began in late 2019. They began living together in January 2020. The relationship ended in February 2023. After February, they attempted to share equal residential time with E. and the mother prepared a schedule for April and May 2023. However, the mother had the children for approximately twice as much time as the father.

[10] At the end of April 2023, the father did not communicate with the mother on the days he was scheduled to take E. on two occasions. The day after the second occasion, the mother received a phone call from the father from the Northwest Territories. He was intoxicated. He missed his two scheduled weeks with E. in April/May, and his 10 scheduled days with her later in May.

[11] On May 11, 2023, at the first family law case conference, he appeared by telephone from the Northwest Territories. He did not return to Whitehorse until early June 2023. He appeared in family law chambers on June 6, 2023, and the mother stated on the record that day that she thought he was intoxicated. She also described him as rowdy and obnoxious at a baseball game where both parents attended, on June 5, 2023. He was drinking from a bottle of Gatorade from which he refused to let E. drink. The mother believed he was intoxicated. On July 8, 2023, a friend reported to her that she had seen the father heavily intoxicated at Schwatka Lake.

[12] In July 2023, the father did not have his own accommodation and was living with his brother in Whitehorse. By August 2023, he was living in his trailer parked at the High

Country RV Park. In December 2023, at the date of the hearing of this application, the father was living in a three-bedroom home in the [redacted] subdivision in Whitehorse.

[13] The father has restarted his [redacted] business, which he works at in his house. He has a workshop planned in Inuvik in the near future.

[14] The father provided affidavit evidence that he has been sober since July 9, 2023. He recognizes that his alcohol use has been a source of problems in his life. He has had significant periods of sobriety in his life, including most recently the 5 years (2014-2019) he was in another relationship in [redacted], and co-parented two children.

[15] Currently, he attends weekly counselling with a registered social worker, counsellor and trauma therapist. By November 14, 2023, he had completed 18 counselling sessions since February 2023, with 15 of them completed since July 27, 2023.

[16] The father has also sought out supports at the Skookum Jim Friendship Centre and the CYFN Family Preservation Unit. Workers from both places comment on his intentions and stated commitment to want to do the best for his children.

Parties' Positions

[17] At the hearing, the mother expressed her main concern about the father's access visits with the children is his failure to maintain sobriety. She agrees that the father is a good parent when he is sober. The real issue is his alcohol use, and her inability to trust him because of his previous minimization, deception and lack of insight around alcohol use. She would like another six-to-seven months to pass with him remaining consistently sober and stable before agreeing to unsupervised access visits.

[18] A secondary concern is his financial stability and consequent ability to provide the necessities of life to the children while they are with him even for short visits.

[19] The father says his sober state removes the concerns of the mother. He says the mother is unfairly relying on a short period of instability after the separation when he travelled to [a community in the Northwest Territories] as well as an exaggerated account of his drinking habits. In order to address the mother's lack of trust in his ability to remain sober, the father agrees to be bound by a condition of non-consumption of alcohol and non-prescription drugs while the children are in his care. He also agrees to provide results of random alcohol and drug tests done by the Commissionaire's office to the mother and a further court review if required after test results are obtained.

Law

[20] Supervised access is intended to be a temporary remedy for the purpose of resolving difficulties surrounding access. It should not be used as a long-term remedy (*M(BP) v M(BLE)* (1992), 97 DLR (4th) 437 (Ont. CA)). It is to be used when one parent fears that the parent seeking access may not be able to care for the child properly due to past misconduct (*Folahan v Folahan*, 2013 ONSC 2966) or inexperience. A court may also order it "where the benefit a child would derive from contact with a parent must be balanced against the risk of harm to the child that such contact may entail" (*VK v AK*, 2018 ONSC 7290 at para 44). It requires evidence of unusual and exceptional circumstances (from *CG v MG*, 2009 ONCJ 254 at para. 9, referred to in *VK v AK* at para. 43).

[21] The onus is on the parent requesting supervised access, in this case the mother, to show that the restrictions are in the child's best interests. It is not necessary in this

case to show a material change in circumstances in order to change the supervision order, because those previous orders were made on an interim interim basis.

Decision

[22] I am persuaded by the consistent progress the father has made over the last five or so months that supervised access visits are no longer necessary. He is acknowledging the harm created by his alcohol use, is addressing the problem and is working to improve his life circumstances.

[23] The supervised access order was made and continued at a time when the father was still drinking regularly to the point of intoxication. He did not have a stable living arrangement in Whitehorse. He was still discussing the possibility of returning to the Northwest Territories to live. He was not financially stable.

[24] Since mid-late July 2023, the father has taken some significant steps to regain control of his life: he has committed to live in Whitehorse, stopped drinking alcohol, attends weekly counselling, accessed available family law supports, obtained a secure home in a safe neighbourhood, and recommenced his [redacted] business.

[25] The earlier affidavit evidence from the mother made it clear the father was minimizing or refusing to acknowledge his issues with alcohol use. However, his sobriety over the last approximately five months, his ongoing weekly counselling and positive views of the counsellor, his stable living situation, his re-engagement with his carving business, and his willingness to abide by conditions and submit to random testing are all positive developments. I am alive to the fact that the views of the counsellor can only be based on what was reported to her by her client and her observations of him. Based on her twenty years of experience as a social worker,

counsellor and trauma therapist, I attach weight to her observations and conclusion in para. 21 of her affidavit of November 13, 2023: he has addressed his triggers for drinking and due to his years of successful sobriety in the past, she believes he has the skills and tools to maintain his sobriety in the circumstances.

[26] Given this commendable progress made by the father, I will remove the condition of supervision of his access visits with the children. The requirement for supervision is impeding his ability to maintain relationships with the children, because of the number of times he must cancel due to his inability to find a supervisor. The mother has agreed since November 2023 to allow unsupervised access visits for three hours on Wednesday evenings and did not express concern at the hearing about these visits. I agree with the mother that the father's position that he cannot attend CYFN organized public events because of the stigma attached to him of requiring supervision, is unreasonable. Many parents who do not require supervised access attend these events with their children. However, I appreciate the father would like to visit with his children in his [redacted] home, rather than at a public place. I will order certain safeguards to protect the children.

Order

[27] The father shall have unsupervised access visits with E. and O. on Wednesdays 5:30-8:30 pm; Saturdays 1:30-8:30 pm; and Sundays – 1 hour in the morning at church.

[28] The father shall not consume or be under the influence of alcohol or non-prescription drugs during access visits with the children.

[29] The father and the children shall not be in the presence of anyone who is consuming or under the influence of alcohol or non-prescription drugs during access visits.

[30] If the mother believes the father is under the influence of alcohol or non-prescription drugs at any time during an access visit with the children, she may cancel the visit and bring the children to her residence.

[31] The father shall submit to random testing by the Commissionaire's Office for the presence of alcohol or non-prescription drugs in his system on the request of the mother and this matter may be returned to Court if necessary upon receipt of test results.

Conclusion

[32] My decision on the remainder of the issues raised in these applications shall be released under separate cover.

DUNCAN C.J.