SUPREME COURT OF YUKON

Citation: *L.C.A.H. v. J.E.G.R.*, 2020 YKSC 31

Date: 20200813
S.C. No. 18-D5110
Registry: Whitehorse

BETWEEN

L.C.A.H.

PLAINTIFF

AND

J.E.G.R.

DEFENDANT

Before Mr. Justice D. Aston

Appearances:

Norah E. Mooney	Counsel for the Plaintiff
Gregory Johannson	Counsel for the Defendant
Kathleen M. Kinchen	Children's Lawyer

REASONS FOR JUDGMENT

[1] The parties separated in January 2018 after 11 or 12 years together. They have two children who are the subject of the present dispute, W.R. who just turned 11 and O.R. age 9.

[2] In March 2018 Mr. R. was sentenced to three years imprisonment in Alberta. He was released on day parole May 21, 2019 and granted full parole last August. His parole, together with the conditions attached to it, expires next spring. In the interim he is living in Duncan, British Columbia and is restrained from having contact with the plaintiff.

[3] The defendant has not seen the children for two and a half years. He has only had sporadic and problematic telephone contact. He brings this application to re-establish parenting time with his children. He recognizes that there must be a gradual reintegration into their lives. He has withdrawn his claim for joint custody.

[4] The plaintiff's application is to terminate any relationship between the children and their father, except perhaps to allow him to send them correspondence and gifts. She says the children do not want anything to do with their father. Counsel for the children corroborates that they do not wish to even have telephone contact with him at this time.

[5] The affidavit material on these applications is very lengthy and contradictory. I have reviewed the material more than once and I have listened to the recorded phone calls between the father and the children. I do not intend to analyze or resolve all the untested conflicting evidence. Suffice it to say I have concerns about the accuracy, objectivity and reliability of the evidence from each side. The order I propose to make is essentially based on, or notwithstanding, facts that are not in dispute.

[6] The essence of the father's position is that the mother has exaggerated and fabricated evidence as part of an effort to alienate the children from him. The mother's response is that only the father is to blame for the resistance the children have to contact with him, detailing both his abusive past behaviour and the negative comments and reactions of the children.

[7] Independent counsel for the children has presented an affidavit from Dr. Christopher Peck, a licensed psychologist in Utah. It confirms the instructions the children have given to her, that they do not wish to have contact with their father. Dr.

Peck was initially consulted “to help them [the children] work through anxiety brought about by phone visits with the defendant, their father”. He describes the children as “uncomfortable” and “fraught with anxiety”. He says they are afraid of their father and distrust him. He confirms their desire not to have contact with him.

[8] I accept Dr. Peck’s evidence as corroborating the express wishes and preferences of the children. However, I am reluctant to attach great weight to it. It does not address the best interests of the children except by innuendo. The father was not a participant in the process. Dr. Peck’s evidence does not address the circumstances of the interviews, that is to say any safeguards to ensure the children were not simply parroting the mother’s perspective. There was no psychological testing. The affidavit stops short of concluding that the children would come to any actual harm, or even potential harm, if they were required to have contact with their father. Finally, Dr. Peck’s evidence was only served on the father’s lawyer the day of the hearing and there has been no opportunity to test it.

[9] I do accept, however, that the children are consistently and unequivocally expressing a wish not to be forced to have contact with father.

[10] Any analysis of a child’s best interest must take into account the wishes and preferences of a child. On the other hand, children as young as this are hardly in a position to know what is in their own long term best interests. The negative reactions the children have expressed fall short of establishing that there is a threat to their emotional or psychological health if they are simply required to have video or telephone contact with the defendant.

[11] On the other hand, anything more than telephone or video contact, at least for now, runs a real risk of putting these children at the center of high conflict. In my view it is premature to advance to personal parenting time for the father without first ascertaining if he is capable of repairing his relationship with them through video and telephone contact. A modest beginning will also test whether the mother is willing and able to foster a positive relationship or alternatively determined to undermine it.

[12] Section 16(8) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), states that in making a custody or access order, or terms and conditions incidental to such an order, "the court shall take into consideration only the best interests of the child". There is no statutory recognition of any "parental rights". However, it has long been recognized in the jurisprudence that a child's ability to maintain some relationship with an estranged parent is usually in the long term best interests of the child.

[13] This is reinforced by ss. 16(9) and (10). The court is directed not to take into consideration the past conduct of a parent unless that conduct is relevant to the person's ability to act as a parent and the court is to give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child.

[14] It is obvious in this case that the children are thriving in the care of the mother and her partner. It is also obvious from the animosity between the parents and the hiatus in the father's relationship with the children that joint custody is not appropriate. The mother's application for sole custody is granted. However, her application to completely sever the father's relationship with the children is dismissed.

[15] The father is to have access to the children by Skype or other form of video call, or alternatively (but not preferentially) by telephone call, not less than 3 times each month. The mother shall advise of the dates and times at least one week in advance and shall be responsible for initiating the call and ensuring the availability and participation of the children. The calls are not to be monitored or supervised by the mother or anyone else but may be recorded by her or by the father. The father is restrained from questioning the children about the mother or her partner.

[16] The father is also at liberty to send correspondence, cards or packages to the children at any time, without interference by the mother.

[17] Consistent with s. 16(5) of the *Act* the mother shall keep the father informed about any significant matter affecting the health, education or general wellbeing of the children. The father also shall have the right to make inquiries and be given information and documentation directly from third parties: including any school, teacher, principal, school board, hospital, physician, dentist, counsellor or other health care provider. However, provision of information or documents to the father from such third parties is subject to the general policy, protocol or reasonable discretion of such third party that reasonably justifies withholding such information or document in whole or in part.

[18] The mother does not require the consent or permission of the father to relocate or travel within or outside Canada. She may renew any passport for either child without the consent of the father.

[19] Either party may bring a fresh application after January 1, 2021 respecting the father’s access, contact or parenting time, or to impose terms or conditions regarding the mother’s ongoing entitlement to custody.

[20] The father is restrained from harassing the mother and specifically restrained from attending within 150 metres of her, her residence or her place of employment.

[21] The order now granted will include the standard RCMP enforcement clause.

[22] The father has not complied with the order for financial disclosure made last March and there is little information about his actual or potential income. It is not clear whether his disability income is taxable or not. Apart from his bald and uncorroborated assertion of casual part time income of $200-$400 monthly, nothing is known of his present employment or his plans. In his submission on these applications the father's counsel did not dispute a finding that Mr R.'s income is at least $23,000 annually and that the appropriate table amount of child support is $373 monthly. I have little doubt that figure is too low. However, because he has not paid any voluntary child support whatsoever it is appropriate to put some order in place now, without waiting for better evidence. Moreover, there is no principled reason not to make an order retroactive to at least the month following the commencement of his full parole. Mr. R. is ordered to pay child support of $373 monthly, retroactive to September 1, 2019. This order is to be without prejudice to an increase, or an earlier start date, and also without prejudice to any claim for child support under s. 7 of the applicable Child Support Guidelines.

[23] This order is also without prejudice to any steps the mother may take to enforce compliance with the prior order for financial disclosure and the costs then ordered in her favour.

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ASTON J.