

SUPREME COURT OF YUKON

Citation: *M.J.W. v. J.G.W.*, 2020 YKSC 45

Date: 20201203
S.C. No.: 16-D4893
Registry: Whitehorse

BETWEEN:

M.J.W.

PLAINTIFF

AND

J.G.W.

DEFENDANT

Before Chief Justice S.M. Duncan

Appearances:
Megan Whittle
André Roothman
Lenore Morris

Counsel for the Plaintiff
Counsel for the Defendant
Lawyer for the Children

REASONS FOR JUDGMENT

[1] DUNCAN C.J. (Oral): This is an application by the plaintiff mother for custody of three of her children and primary residence of her four children, as well as for various conditions about access by the father. The mother also applies for child support according to the *Guidelines*, as well as an order for a contribution to post-secondary expenses for N.W. under s. 7 of the *Guidelines*.

[2] This is a matter that has come to court many times; I believe from my brief review of the orders in the file, at least 10 to 12 times since 2017. This is my first involvement in the file and so I will give a brief outline of the issues and the background, provide my analysis, and then set out my order.

ISSUES

[3] There are four children in this matter and they have been represented by the Children's Lawyer since 2017. The children are: N.W., date of birth: December 8, 2002; C.W., date of birth: March 24, 2005; Q.W., date of birth: August 23, 2008; and S.W., date of birth: January 1, 2011.

[4] The Children's Lawyer has advised that the three older children are capable of providing instructions. S.W., who is nine, is capable of expressing her views in a candid and clear way but is not yet mature enough to provide instructions. The three younger children have said that they do not want to have contact with their father at the moment.

[5] The primary issue here is the father's substance use. The secondary issue is the ongoing negativity expressed by the father to the mother.

[6] There is no question that the children love their father very much and enjoy spending time with him when he is sober. There is also no issue about his ability to parent well when he is sober, and the mother acknowledges this.

BACKGROUND

[7] The evidence about the father's recent substance use is very serious and extremely concerning. I will summarize the salient points here.

[8] Between May and September 2020, there were seven incidents known to some or all of the children, and later the mother, of the father inhaling air duster. Literature included in the affidavit material from the RCMP and CAMH describes this behaviour as highly addictive and dangerous. Three or four of these incidents occurred while the father was in the role of caregiver for S.W., Q.W., and N.W. After these occasions, the father promised the child or children that he would stop or that it was a one-time

incident; and in N.W.'s case, this was promised even in the presence of a third party counsellor. The children trusted what he said, more than once, and, as a result, did not disclose the incidents to anyone until late August, after another inhaling incident occurred.

[9] Instead of stopping, the father continued to get high on air duster in increasingly risky ways. For example, on one occasion in September 2020, he was found driving while intoxicated from inhaling air duster; and on another, he was found by passers-by passed out in the forest near his home after inhaling. EMS was called on that occasion. His son N.W. learned of this through Facebook and talked to his uncle and asked his uncle to look for his father. Both these latter two incidents occurred while the father's brothers and father were staying at his home.

[10] These are not the only substance abuse issues that the father has had. From 2016 to 2018, there were a number of incidents of alcohol intoxication occurring while he was in a caregiver role for his children. Access with the children was suspended several times, restored on a supervised basis, and eventually fully restored after he completed intensive treatment successfully in 2018, and complied with court-ordered counselling and attendance at Alcoholics Anonymous meetings.

[11] During those years, however, the younger children expressed concerns about feeling unsafe at their father's place. Indeed, C.W. refused for a time to see her father and her mother was given custody and primary residence of her. She has since resumed seeing her father on occasion but not to the same extent as the other children. The father promised multiple times during that period that he would stop drinking, but he did not until he entered and completed treatment in 2018.

[12] It appears that the alcohol addiction is no longer an issue but it has been replaced by the inhalant addiction. The dangerous outcomes and highly addictive nature of inhalants have been borne out by the actions of the father between May and September of 2020, as described by the children.

[13] The father did attend treatment in Calgary after his brothers and father urged him to do so. He left Whitehorse on or about September 19, 2020. It was a seven-week program and the father arrived back in Whitehorse on October 23, 2020. The evidence of his participation in the program was a letter dated October 29, 2020 from a counsellor at the program, who spoke highly of the father's participation, leadership, motivation, and positive response to treatment. The counsellor also spoke of the importance of the father's children to his recovery and said that he has the potential to live a complete life in recovery.

[14] There was no explanation, though, of the father's failure to complete the full seven weeks until his counsel's submissions at the hearing. Mr. Roothman explained that because of the father's previous attendance at programming for his alcohol addiction and the fact that he had made significant progress in the Calgary program, it was unnecessary for him to attend the full seven weeks.

[15] The father also stated that he is attending counselling with Mental Wellness and Substance Use Services but provided no information about the type of counselling, how often he attends, or information about relapse prevention. His counsel did say that he would be willing to provide updates on his counselling to the mother.

[16] The father's counsel acknowledged that the father has an addiction issue that is likely going to be a lifelong struggle and that he may well have to be connected with

some kind of programming for the rest of his life. I take him to be saying that, in other words, any future decisions about access to his children will have to be made in the context of his lifelong struggle. The father's counsel, while recognizing that all decisions must be made in the best interests of the children, also raises the spectre or concern that the children are being subtly influenced by the mother against the father and father's family.

[17] The Children's Lawyer described the children as remarkable and very impressive, and acknowledged that credit is due to both parents. She observed the high degree of maturity exhibited by all of the children. She noted that the children wrote letters to their father and that they had the courage to review their content with him in person.

[18] I just want to quote from N.W.'s letter because I think it sums up the issues in this case very well in his final paragraph. This was a letter that was written recently. I do not have the date, but it was recent. I note generally that N.W. comes across as mature and articulate from the material I have reviewed.

[19] He writes in his letter:

. . . This is my last attempt to make you understand the wrong in your ways, and make you want to change them. It isn't my responsibility anymore, and I hope you don't put it on any other of your children ever again. We all love you more than you can know. We forgive you, and we hope you forgive yourself and can find it in yourself to do what we have deemed necessary to move on and start living a normal and happier life. The ball is in your court.

[20] The other children's letters contained similar pleas for their father to take responsibility for his mistakes and to make efforts to get along better with their mother

so they could all move forward as an extended family. They feel that his hostility towards their mother is negatively affecting their relationship with him.

[21] The Children's Lawyer indicated that at her last meeting on November 24th with the girls, the three of them asked to speak with her at the same time instead of separately as they have in the past, because they had something difficult to say. That was that they did not want to live with, communicate with, or see their dad at this time. Because of the huffing incidents, they do not feel safe and nor do they trust him.

[22] I note that N.W. does still have contact with his father at the moment, in person and by text or phone, and there is no reason why this cannot continue, given N.W.'s age and his wishes.

[23] The Children's Lawyer added that all the children know they are important to their father and loved by him. As I said at the outset, it is clear that they love him very much, are loyal to him, and enjoy spending time with him when he is sober and they feel safe. The letters also make this clear.

ANALYSIS

[24] So given this background, it is clear that the father has a serious addiction issue and he has not yet accepted full responsibility for it. More importantly, he has not demonstrated sufficient insight into the effect of his addiction-related behaviour on his children. It would have been absolutely terrifying for the children to see their father passed out on the floor with an inhalant beside him. It must have been heartbreaking to them to be promised by him that it would not happen again, only to have it happen again, only worse. The degree of emotional and psychological harm inflicted on the

children is unimaginable. It is a testament to the stability and maturity of the mother and other supports in the children's lives that they are as resilient as they are.

[25] I fully recognize that addiction is a disease and that this may be the context of any future relationship between the father and the children. The concern here is not just limited to the disease itself but it is the failure of the father to accept responsibility for its seriousness and its impact. Right now, there is a disconnect between the father's behaviour and his expectations of a continuing relationship with the children and the necessary ingredients for that healthy relationship to be restored- that is, a safe and stable environment, trust, honesty, acceptance of responsibility, maturity, cooperation with the mother. Those ingredients are not there at the moment.

[26] Connected to the father's failure to accept full responsibility for his behaviour related to substance use is his ongoing failure to accept responsibility for his behaviour in relation to the mother. The affidavit material shows the mother's attempt to be cooperative, not angry, and reasonable. By contrast, the father is blaming, insulting, and combative. For example, the mother has intervened appropriately in the past to protect her children from unsafe situations when the father has been intoxicated, and he responded by threatening contempt motions because of a technical breach (and, in my view, entirely justified) of the access arrangements. The children also object to him referring to their mother as a snake and to her rescue of them when they felt unsafe with him as kidnapping.

[27] I agree that the father's evident hostility towards the mother is an impediment to a positive co-parenting relationship and also affects the children detrimentally.

[28] I agree that the three younger children's wishes not to see or communicate with their father at this time should be respected. The father needs to demonstrate his full awareness of his addiction and its impact on his children. One letter from a counsellor at a program where he did very well but did not complete it is not enough.

[29] I also note that that counsellor's letter talks about the importance of restoring the relationship with the children to the father's recovery. This does not take into account at all the best interests of the children. It is in the best interests of the children for their father to show he has recovered; that he understands the impact of his behaviour on them; and that he has plans in place in case of relapse. There needs to be evidence of this before unsupervised access can be restored.

[30] Turning to the identification of an appropriate supervisor when this is implemented, I agree that at this time the father's immediate family members, (that is, mother, father, and brothers) are not appropriate supervisors. Assuming any COVID-19 restrictions that may exist are not an impediment, the family's failure to acknowledge the father's substance use issues to the children and/or their minimizing of these issues, as well as their inability to prevent the father from drinking or inhaling while they were staying with him are reasons for their unsuitability. Further, the children have indicated their objection to them as supervisors because they do not fully trust that they will be kept safe.

[31] This is not at all an attempt to prevent the children from seeing or communicating with the father's family. Ongoing contacts and visits with them are important for the children. These comments are restricted to them acting as supervisors for any access visits between the children and their father that may occur in the future.

[32] I want to address, before turning to support, Mr. Roothman's argument that the mother has subtly influenced or is subtly influencing the children against their father and his family. I do not believe this is well-founded. While there may have been conflict in the past that was attributable to both parties, the affidavit evidence before me now shows attempts by the mother to be reasonable, accommodating and understanding, but ongoing hostility from the father and to some extent by his mother.

[33] As the Children's Lawyer has said and as I have observed from the children's letters and from N.W.'s affidavit, they are mature, intelligent individuals who love and care for their father very much, are loyal to him, and are extremely bonded with him. I believe their wishes are being expressed independently without influence from their mother.

[34] Finally, turning to support issues, as Mr. Roothman stated, the Court cannot deviate from the *Child Support Guidelines* table amounts unless undue hardship can be shown. In the absence of undue hardship, which was not argued in this case and is a tough threshold to meet (that is, severe financial consequences or excessively hard living conditions) the Court has no discretion to lower the applicable table amount of child support under the *Guidelines*. This lack of judicial discretion is to ensure certainty and consistency that comes from the application of a prescribed formula. It is also intended that child support be a priority over other financial commitments.

[35] So, the other request with respect to financial contributions is a request for an order for partial contribution by the father to post-secondary education expenses of N.W. pursuant to s. 7 of the *Guidelines*. As counsel notes, s. 7 analysis is fact-specific

and the Court must consider necessity, in relation to the children's best interests and reasonableness, in relation to the means of the parents.

[36] Mr. Roothman urges the Court to require N.W. to contribute some of his earnings at least to post-secondary expenses after the Yukon grant is deducted and RESP amounts are deducted. He also asks to adjourn this aspect until the Court receives more information and his client receives more information about the income earned by N.W.

[37] Section 7(2) of the *Guidelines* does not require the Court to relieve the parents from contributing to expenses where students can contribute on their own. Normally, this means a student loan. In this case, it is income earned from work. But a Court can decline to order that the child contribute to expenses, or it may only treat part of that income as a contribution to be made.

[38] The suggestion is that N.W. pay 25 percent of his expenses after the Yukon grant and after any scholarship, and that each parent pay 25 percent, and that the RESP pay the remaining 25 percent.

[39] Given counsel's submission about the dire state of the father's financial circumstances and given that these expenses will not be incurred until September 2021, I will adjourn this aspect of the request of the application to when we return to court for a review, as has been requested by the mother and Children's Lawyer. If it is still an issue when we return, it would be useful to have the budget for N.W., to know the amount of the Yukon grant, and any scholarship amount so that the father knows what amount he may be responsible for.

ORDER

[40] So now turning to the order, I am just going to work off of the notice of application that was provided by Ms. Whittle.

[41] First, the plaintiff shall have interim custody of N.W., Q.W., and S.W.

[42] The plaintiff shall have primary residence of the four children of the marriage, N.W., C.W., Q.W., and S.W.

[43] The defendant shall have access to N.W. and C.W. as determined by N.W. and C.W.

[44] Q.W. and S.W. may communicate by telephone, email, or text with the defendant if they wish.

[45] In-person access with S.W. and Q.W. and the defendant shall not be permitted until each of the children states they are comfortable with resuming it and a period of four months has elapsed during which the defendant has maintained his sobriety. Evidence of this must be satisfactory to the plaintiff.

[46] Next, when in-person access resumes with the defendant and Q.W. and S.W., it shall be supervised by a third party to whom the plaintiff consents, in Whitehorse.

[47] Q.W. and S.W. shall be permitted to contact the plaintiff or a third party at any time for any reason while in the defendant's care.

[48] If Q.W. or S.W. inform the plaintiff that they do not wish to visit the defendant, the plaintiff shall notify the defendant and Q.W. and/or S.W. will not be required to visit the defendant.

[49] If Q.W. or S.W., while in the defendant's care, inform the defendant that they wish to leave his care, the defendant will return both of them to the plaintiff, the plaintiff's residence, or to an immediate family member of the plaintiff.

[50] The defendant shall not consume alcohol, non-prescription drugs, including cannabis or inhalants, 12 hours prior to and during his access visits with any of the children.

[51] No alcohol, non-prescription drugs, including cannabis or air duster, shall be kept at the defendant's residence while any of the children are in the defendant's care.

[52] If Q.W. or S.W. inform the plaintiff that they feel unsafe while in the defendant's care, the plaintiff may request that the defendant return Q.W. or S.W. to the plaintiff, the plaintiff's residence, or to an immediate family member of the plaintiff, and the defendant must:

- (a) immediately comply with the plaintiff's request; or
- (b) allow the plaintiff or an immediate family member of the plaintiff to access his residence to retrieve any of the children.

[53] The Royal Canadian Mounted Police may take such reasonable steps as they deem necessary to enforce the previous clause — it will not be clause 13 because the order of numbering has changed — of this order, including, without limiting the generality of the foregoing, upon it appearing to a police officer having jurisdiction in the Yukon, that the defendant is in breach of that paragraph, then the police officer shall be authorized to arrest the defendant, restrain him, and bring him at the earliest possible time before a justice to show cause why he should not be cited for civil contempt.

[54] The defendant shall pay child support for four children commencing — this is something we did not discuss — commencing September 1, 2020.

[55] Is that because the children have been living with the mother since September 1st?

[56] MS. MORRIS: That's correct, Your Honour.

[57] THE COURT: Okay. So commencing September 1, 2020, based on his 2019 gross income of \$90,835 and continue to do so as long as the children remain primarily in the care of the plaintiff.

[58] A review of this matter will be scheduled in six months from today's date.

[59] Anything else?

[60] MS. WHITTLE: Will you be making an award of costs?

[61] THE COURT: Costs. Normally, in family applications, we — I have not thought about that. What are your submissions on costs?

[62] MS. WHITTLE: Your Honour, my submissions are that we were successful in our application —

[63] THE COURT: Right.

[64] MS. WHITTLE: — and that, generally speaking, regardless whether it's family or a civil matter, costs follow the event and, as such, I would be seeking that we obtain costs for this application. In my view, these applications shouldn't be necessary that we have to continue to come back to court and, as such, I think my client should be awarded costs in this application.

[65] THE COURT: How much are you suggesting?

[66] MS. WHITTLE: I'd be seeking \$1,500.

[67] THE COURT: Mr. Roothman.

[68] MR. ROOTHMAN: Your Honour, I would — costs is always in the discretion of the Court and I would offer or submit that, in this case, it may be appropriate for each party to pay their own costs, given my client's very dire financial situation and the impact of this order on him.

[69] THE COURT: It is a difficult one but I do appreciate the mother's counsel's submissions that this should not have been necessary and that she was successful on this application.

[70] I will order costs but not in the amount of \$1,500. I will order costs in the amount of \$500.

[DISCUSSIONS]

[71] MS. WHITTLE: And I'll be drafting the order.

[72] THE COURT: Yes.

[73] Thank you.

DUNCAN C.J.