

SUPREME COURT OF YUKON

Citation: *B.C. v. R.A.*, 2021 YKSC 18

Date: 20210309
S.C. No.: 19-B0067
Registry: Whitehorse

BETWEEN:

B.C.

PLAINTIFF

AND

R.A.

DEFENDANT

Before Chief Justice S.M. Duncan

Appearances:
Allyssa Tone
Amy Steele

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

[1] DUNCAN C.J. (Oral): This is primarily a dispute over access by the father to the two children of the relationship, T., date of birth: June 13, 2015; and Y., date of birth: September 24, 2016. Other matters to be decided are custody and support payments.

[2] I will first review the background briefly, summarize the position of each party, and then set out my analysis of the issues and my conclusion.

Background

[3] The plaintiff, B.C., met the defendant, R.A., in 2014. R.A. is a member of the Gwichya Gwich'in Band and B.C. is originally from Ontario. They lived together on and

off in [community], Northwest Territories, R.A.'s hometown, from March 2015, just before the birth of T., to June 2016, when B.C. moved to Whitehorse. R.A. moved to Whitehorse in September 2016, a week before the birth of Y. During 2017, they continued to live together on and off in Whitehorse and then in [community in Northwest Territories], and ultimately separated in June 2018. B.C. and the children stayed with her family in Ontario until they returned to Whitehorse in November 2018, where they have lived since then. B.C. has been the primary caregiver for the children, although R.A. did have regular contact and some caregiving responsibilities while they were living together.

[4] R.A. has worked at many different jobs during the course of the children's lives. They have included as a fire chief, a boat captain, a highway ice road worker, and, most recently, he worked for the [former employer] on a ship. He is currently employed full-time as a supervisor at [place of employment]. He relocated to Whitehorse in or about November 2020. R.A. has had issues with alcohol in the past and, according to B.C., also with marijuana. He did attend a five-week treatment program in 2017 and since then he does not appear to have had further issues in this respect.

[5] This application was originally commenced by B.C. in January 2020 before R.A.'s relocation to Whitehorse and permanent employment with [current employer]. Access by R.A. to the children was granted by court order in November 2020, as agreed by the parties, provided that the defendant requested access 24 hours in advance.

[6] In December 2020, R.A. refused to bring the children back to B.C., who has primary residence of the children by court order. This resulted in an emergency application brought by B.C. Access visits by R.A. to the children were restored after that

application but to every second weekend beginning Friday after school to school on Monday morning. This began on January 8, 2021.

[7] R.A. lives in a one-bedroom legal suite in Takhini. He has one bed in which he and Y. sleep, while T. sleeps on a foam mattress on the floor. B.C. lives in a two-bedroom cabin in [rural area], heated and powered by propane and a wood stove, without running water. She was renting a house on the property but because of a problem with the septic field they were forced to move into the cabin on December 31, 2020. The photographs submitted in evidence of the cabin shows a well-built, well-kept, relatively spacious cabin with hardwood floors and full appliances. Many people in the Yukon live in cabins heated by wood stove or propane and needing to haul water. Although it does require more work for daily living, it is not considered to be an unusual hardship.

[8] Y. has had behavioural issues from a young age. Very little detail about the nature of these problems was provided to the Court, but I have gathered that they are along the lines of being defiant and having difficulty in getting along with others, and possibly anger management. At one point, B.C. believed she would have to home school him because of his difficulties. Y. is receiving regular counselling at the Child Development Centre, initiated by B.C. Y. is now attending daycare and has been doing much better. Over the last few months, he and his brother, T., have been able to play well together.

Positions of the Parties

[9] B.C. wants to restrict access by R.A. to every second weekend during the days only. Since R.A. has had regular access, including overnights, she has noticed a deterioration and regression in the behaviour and well-being of the boys, which she attributes to the time they spend with R.A. She testifies in her affidavit that they both come back from visits with R.A. exhausted, are oppositional and defiant, and fight with each other constantly. She says these are negative changes from their behaviour before R.A. returned to live in Whitehorse. She does not think that R.A. is ensuring that the boys are adhering to their sleep and diet routines that she has established. She says the sleeping arrangements, that is the lack of their own beds and co-sleeping with R.A., have caused Y. in particular to regress and not want to sleep independently, something that she has worked very hard to achieve with him.

[10] She also is concerned that R.A. has been minimizing or denying Y.'s behavioural issues. She testifies in her affidavit that R.A. has had little interest in engaging with the Child Development Centre, school and daycare about the children's progress, although she does acknowledge that this has changed in the last two to three weeks.

[11] B.C. recognizes that the children enjoy their time with their father and she is open to the possibility of increasing access in the future but until their behaviour improves and some stability returns, she is not willing to agree to more access than during the days every second weekend.

[12] R.A. acknowledges he has not been as involved a parent as he could have been in the past. He attributes this mainly to his various jobs which have taken him away for extended periods of time. He emphasizes that he has now made a sincere commitment

to be a good parent by relocating to Whitehorse, living here, and obtaining steady, regular employment. He testifies in his affidavit that he does many activities with his sons; both indoors, such as Lego and puzzles, and outdoors, such as skidooning, sliding, and walking in the forest. He also shares his traditional cultural knowledge with them. He testifies that he has started and will continue connecting directly with the school, daycare, and Child Development Centre.

[13] R.A. seeks joint custody. He wants to work towards access 50 percent of the time but recognizes that it is too soon for that much access. For now, he requests access one week a month and every second weekend. He also wants to take both children for a month to a fish camp in the Northwest Territories this summer.

[14] I should also add that B.C. seeks sole custody.

Analysis

Legal Principles

[15] As you know, I must be guided by one main principle, and that is the best interests of T. and Y. The question is how to determine what is in their best interests.

[16] "Best interests" under the *Children's Law Act*, RSY 2002, c 31, includes:

30(1) ...

(a) the bonding, love, affection and emotional ties between the child and

(i) each person ... claiming custody of or access ...

(c) the length of time ... the child has lived in a stable home environment;

(d) the ability and willingness of each [parent] ... to provide the child with guidance, education, the necessities of life and any special needs of the child; and

...

(f) the permanence and stability of the family unit [where] it is proposed ... the child will live;

...

[17] Best interests must be examined from the perspective of the child's needs with an assessment of the ability and willingness of each parent to meet those needs.

[18] The courts also consider, particularly in the case of young children, the importance of the role of the primary caregiver in meeting the needs of the children. The status quo is also a relevant factor in ensuring a child's stable home environment.

[19] There is a rebuttable presumption that all parental rights associated with the custody of the child ought to be shared by both the mother and the father jointly, but this is always subject to a consideration of the best interests of the child.

Application to the Facts

Access

[20] As counsel for R.A. noted, it is difficult for the Court to know with certainty whether the apparent recent changes in the children's behaviour are solely attributable to their time spent with R.A.

[21] I note that the regular every second weekend access has not been occurring for very long, only about two months since early January. The children are young and transition to any new routine is challenging.

[22] I also observe that they have experienced other recent changes: first, moving from the house to the cabin; second, the introduction of a new relationship in the mother's life; third, although it was not in evidence, I take judicial notice of the adjustment and changes we have all had to make to varying degrees because of the

COVID-19 pandemic; and finally, I observe that both children started school and daycare respectively this year, which was a transition for them.

[23] I acknowledge though that B.C. said that the problems in their relationship with each other and in their behaviour have increased recently when the visits with R.A. began to be more regular.

[24] R.A. says he is maintaining the sleep and diet schedule set by B.C. with the children. He says Y. does not display extraordinary behaviour problems when he is with him and he has no explanation for the children's exhaustion, failure to get along, and defiance that B.C. has observed and experienced.

[25] I agree with B.C. that the current sleeping arrangements provided by R.A. are inadequate. The boys are used to sharing a room but sleep in their own beds when they are with B.C.

[26] I agree with B.C. that it is important for Y. to maintain the sense of security and maturity he has achieved by sleeping independently. Co-sleeping with R.A. appears to be causing him to regress, at least in part, and is unhealthy. T. should not be forced to sleep on a foam mattress on the floor and also should not be co-sleeping with R.A.

[27] So, no overnight access will be permitted by R.A. until he can obtain beds for each of the boys and they have their own room separate from him. This is what they are used to and it is important for their development. I recognize how difficult it is to find housing now in Whitehorse so I am not saying that R.A. has to move to a two-bedroom apartment. I am saying that he should set up a place for him to sleep separate from the boys' bedroom. Until that can happen to the satisfaction of B.C., through photos, there should be no overnight visits. Every second weekend access by R.A. on one or both

days, as agreed, can continue in the meantime. Once satisfactory sleeping arrangements have been made, access can increase again.

[28] R.A. has clearly shown his intention to make a commitment to parenting and to be more present in the boys' lives. I realize there has been a history of broken promises with him and inconsistencies in his visits with the children, and I appreciate fully B.C.'s reticence and concerns. The difficulty has been R.A.'s absences, his failure up until now to assume a caregiving role, and also his unwillingness to engage with other caregivers and communicate honestly about challenges faced by the children, in particular by Y. All of this appears to be changing, according to his stated intention and as demonstrated over the last few months and weeks. However, in my view, more time is needed in order for trust to be restored and some stability and consistency to be created. We are not there yet. Good intentions need to be supported by actions.

[29] I encourage R.A. to continue to engage fully with school and daycare and the Child Development Centre; and to discuss what he has learned with B.C. so that the two of them can have a full, cooperative, and successful co-parenting relationship. The consistency of information and the approach to parenting and addressing problems together will be in the best interests of the children.

[30] It may also be helpful for both parents to speak to the Child Development Centre about techniques, strategies and approaches to improve the transitions of the children from one parent to the other.

[31] Given the difficulties in transitions to date, the need for gradual changes to routine, in my view, is evident. Over the next two months, from now until mid-May, access to the children by R.A. will be every second weekend during the day only.

Assuming by mid-May the proper sleeping arrangements are in place, overnight visits on weekends may start on Friday and Saturday nights every second weekend.

[32] The children will be six and four this summer. This, in my view, is very young to be away from their mother for a period of one month, especially in a different jurisdiction — and now I am addressing R.A.'s request to take them to a fish camp for a month this summer. We also do not know yet what the quarantine restrictions will be and whether even travelling between territories will be possible, and this may complicate things.

[33] I do think it would be appropriate for R.A. to have the children for two full weeks; one full week each of the summer months, but not consecutive, as long as they stay in the Yukon.

[34] So over the summer, every second weekend access may continue, including overnights or otherwise agreed, and R.A. can have access to the children for two full weeks in the summer, but not consecutively.

[35] MS. TONE: Your Honour, which do you consider the summer months?

[36] THE COURT: Yes, because I guess school starts in August here; right? I leave it up to you.

[37] MS. TONE: So two months —

[38] THE COURT: Two months, yeah.

[39] MS. TONE: — and we can put into the order which —

[40] THE COURT: Yes. I am leaving this as flexible as possible because I think there is the ability for these two parties to work things out, especially with the assistance of counsel, so I am not going to be too prescriptive unless you request it otherwise.

[41] Let me just finish my reasons and then I will summarize my order in the end and you can ask any clarifications at that point.

[42] MS. TONE: Thank you.

Custody

[43] THE COURT: As I noted during the hearing, the excerpts from the text and email communications between the parties is encouragingly respectful in tone. Although communication definitely needs improvement, especially in the substance of what is discussed about the children, the current communication style certainly suggests that a satisfactory co-parenting relationship is possible.

[44] Because of R.A.'s recent demonstration of commitment, I will order joint custody, meaning that decisions about the children shall be shared. However, in recognition of B.C.'s primary role as caregiver and particularly in recognition of the difficulties in behaviour with Y., I will also order that if there is disagreement about issues relating to the children, B.C. shall have final decision-making responsibility.

[45] Primary residence will continue to be with B.C.

Support

[46] B.C. is requesting arrears of support payments starting in January 2019 and also requesting support to be paid on an ongoing basis.

[47] R.A. is not opposed to paying support but the issue is the amount. R.A. has supplied financial information. He earned \$97,000 in 2020, in a combination of his work as [former employer] as well as work at [current place of employment]. He is currently earning \$61,000 annually. R.A. says he has other children from other relationships to

support. However, there is no evidence of the amounts he has paid or continues to pay in support of these children.

[48] Although he has claimed undue hardship under the *Federal Child Support Guidelines*, this was not aggressively pursued during counsel's submissions. The test of undue hardship is set out in the *Federal Child Support Guidelines*, s. 10(2). It includes the consideration of a requirement of the individual to pay support for other children. However, because I do not have evidence here of how much he pays, for how long, and for how much longer, the test of undue hardship is not met in this case.

[49] There was some evidence of discussion of support in 2019 between the parties but the request was not clear until it was formalized by the notice of application in January 2020. So, I will order arrears of support to be paid beginning January 2020, according to the *Child Support Guidelines*, based on R.A.'s total income in 2020. Going forward, beginning January 2021, R.A. will be required to pay support according to the *Child Support Guidelines*, based on his current income of \$61,000.

[50] To summarize then:

[51] There will be an order for joint custody with primary residence with B.C. In the event of disagreement, final decision-making responsibility will rest with B.C.

[52] Access by R.A. to the children will occur on one or both of the weekend days from the date of this order until the 17th of May.

[53] Assuming proper sleeping arrangements are in place at R.A.'s residence to the satisfaction of B.C., overnight weekend visits can commence after May 17th and continue indefinitely. "Overnight" can mean Friday and Saturday nights, or as otherwise agreed.

[54] R.A. shall have access for two full weeks, not consecutive, or as otherwise agreed, during the summer.

[55] If stability exists and the transitions are going well, it is my view that access by R.A. to the children should be increased after the summer, but I do not want to make a specific order now because there are too many variables. The best interests of the children are unable to be assessed at this time because we are in a transition period, but I will order that discussion about increased access by R.A. shall occur. If the parties are unable to agree about increased access after the summer, then I encourage you to either talk about it in mediation or, as a last resort, return to court.

[56] R.A. shall pay arrears of support calculated from January 2020, based on his income for 2020. The payments that he has already made shall be deducted from any payments owing. He shall also pay support going forward, based on his current income of \$61,000, beginning January 2021. Section 7 expenses shall be shared proportionate to income.

[57] I know, Ms. Steele, you asked for the RCMP clause to be removed but I think for now we will keep it in. Hopefully, it will never have to be used but until some stability can be returned, I will keep it in.

[DISCUSSIONS]

[58] THE COURT: Just leave it at that and then each of you know what you can do if you cannot agree. I want it to be noted that the Court is expecting that if things go well, access will increase.

[59] MS. STEELE: Your Honour, I was wondering if we could actually maybe suggest a time for an access review. I think that might be useful.

[60] THE COURT: We can set a time if the parties are otherwise unable to agree.

[61] MS. TONE: So let's say this discussion will occur at the end of the summer in that case.

[62] THE COURT: So we will say review in September if the parties are otherwise unable to agree.

[DISCUSSIONS]

DUNCAN C.J.