SUPREME COURT OF YUKON

Citation: *A.C.R. v. D.R.M.*, 2021 YKSC 22

Date: 20210408
S.C. No. 20-B0020
Registry: Whitehorse

BETWEEN:

A.C.R.

PLAINTIFF

AND

D.R.M.

DEFENDANT

Before Chief Justice S.M. Duncan

Appearances:
Shayne Fairman — Counsel for the plaintiff
Shaunagh Stikeman — Counsel for the defendant

REASONS FOR DECISION

Introduction

[1] This is a high conflict case arising from the separation in April 2020 of the parents after the plaintiff mother obtained an Emergency Intervention Order ("EIO") against the defendant father. The parents were in a relationship for over 15 years and have two children, O, age 7, and A, age 4.

[2] This is an application by the father for joint custody, equal parenting time, a parallel parenting regime, specified mode of communication between the parents, specified child support amounts, arrangements for s. 7 expenses (Yukon *Child Support Guidelines*) and extra-curricular expenses and imputation of income of the mother, and

costs. The mother opposes all aspects of the application except for the proportional division of s. 7 expenses, to which she consents.

[3] It is significant to note, however, that the mother's opposition is based primarily on the prematurity of this application. The prematurity concern arises from the lack of resolution of the defendant's criminal charges of assaulting her at the time this application was argued, as well as concerns about the effect of the domestic violence on the children and on the parents' ability to co-parent the children.

[4] If an interim order for custody is made at this time, the mother seeks interim custody, primary care, and a continuation of the current residential arrangement subject to written agreement otherwise by the parties.

[5] I will summarize the facts, provide some preliminary observations and evidentiary findings, set out the positions of the parties, the applicable law, my analysis and conclusion.

Facts

[6] The parties' relationship began in September 2003 when they were both at university in Ontario. The father returned to Yukon in 2004. The mother moved to Whitehorse in 2005. In October 2006, they bought their current family home in Whitehorse. They began co-habiting in 2008 after the father moved to Whitehorse from Haines Junction.

[7] The mother is a teacher. The father was a teacher and now works for the Department of Education.

[8] The mother took maternity leave for 22 months after O as born, and 24 months after A was born. The father took combined parental leave and holidays for a period of approximately 5 months after each child was born.

[9] The mother states she was subjected to many incidents of verbal abuse from the father over the years. It began to worsen approximately two years before separation. In June 2018, the father began physically assaulting the mother, eventually leading to her obtaining the EIO in April 2020. She describes 19 separate acts of physical violence on her by the father, some of which occurred in the presence of one or both children, or when they were nearby in the family home. The frequency and intensity of the incidents increased closer to the time of separation and continued even while the father was engaged in counselling. The mother felt belittled and disrespected.

[10] The father states that he was subjected to constant, relentless, and unfounded criticism from the mother during the relationship, making him feel controlled, unvalued, oppressed and underappreciated. He suffered from situational depression during the relationship, but since separation, has recovered. The father says that both parties contributed to the conflict between them and believes the children were shielded from most of that conflict. He attests that the mother seems incapable of acknowledging her role in their conflict and remains in denial of the ways in which she inflicted mental and emotional harm on him. He states the mother struggles with accepting that she must share parenting with him and this is one of the reasons for her refusal to grant more access time and agree to joint custody. The father states another reason for this refusal is the mother does not want a reduction in child support payments.

[11] On September 1, 2019, the father began renting his own apartment. The father attests that in his mind this represented the beginning of the separation. The mother says her understanding was they agreed the apartment rental was for the father to have a retreat for the purpose of de-escalating the conflict and avoiding physical altercations. She understood they were still working on their relationship.

[12] The last physical assault on the mother by the father occurred on April 6, 2020. O, their son, saw the father hit the mother. The mother obtained an EIO on April 9, 2020, valid for 60 days. Near the end of the EIO term, on May 20, 2020, based on statements to the police by the mother, the father was charged with four counts of assault, one count of assault causing bodily harm, and one count of assault with a weapon. From the date of issuance of the EIO, and continuing to the date of hearing, there has been a no contact order in place between the parents.

[13] The mother facilitated access between the father and the children within a few hours of the first request by counsel for the father at the end of April 2020. This access increased over the following months. Since August 28, 2020, the father has the children in his care every Tuesday from 3:00 p.m. to Wednesday at 3:00 p.m. and every Friday at 3:00 p.m. to Saturday at 6:00 p.m.

[14] There is a dispute between the parties about the amount of quality time and attention each of them provides the children. There is no dispute that both are involved parents who each spend a significant amount of time with the children. The father has an active lifestyle and likes to take the children hiking, camping, rock-climbing, bike riding, geo-caching and skiing. He has also taken the children to their extra-curricular activities, including swimming, hockey, gymnastics, soccer, and skiing. He does indoor activities with them, such as puzzles, crafts and reading books. The mother organizes extra-curricular activities for the children, takes them to medical and dental appointments, hikes, bikes, and swims with them, buys them clothing, encourages their participation in activities such as hockey and gymnastics, and organizes birthday celebrations. Both parents care deeply about the children and have good relationships with them.

[15] Since the separation, both parents attest that the children seem to be settled, now that there is a regular routine of shared residential time, albeit unequal. Both children are doing well in school, according to reports from teachers. Both are continuing to participate in extra-curricular activities.

Issue

[16] The main issue in this case is how the mother's allegations of physical violence against her by the father, and the status of his criminal charges of assault of her affect his application for joint custody and equal parenting time. What is in the best interests of the children in these circumstances?

[17] A secondary issue is the dispute over whether the mother's annual income should be imputed at a higher amount and its effect on support payments.

Preliminary Observations about Affidavit Evidence

[18] As noted below, the primary legal consideration in this case is the best interests of the children. In this application, each party filed two affidavits on the main issues and one affidavit for the earlier adjournment application. The father's affidavits on the main issues were 209 paragraphs and 309 paragraphs; the mother's affidavits on the main issues were 255 paragraphs and 97 paragraphs. Many paragraphs in these affidavits detail incidents of the conflict between the two parents, including pointed personal attacks and insults. They illustrate years of complex misunderstandings caused in part by personality differences, failure to communicate well, assumptions, and coping mechanisms that became destructive. Each parent identifies as the victim in the relationship. Each casts blame on the other and spends much time in each affidavit trying to justify their own behaviours by providing their differing accounts of the same incidents, some of them from many years ago.

[19] Much of this affidavit evidence is irrelevant to the issues for determination – parenting time, custody arrangement, and child support. While I recognize that some background to the relationship is necessary, especially where there are allegations of domestic violence, the amount of detail provided here was not helpful in determining what is best for the children. It served to show that the parents remain enmeshed in the throes of their intense conflict with each other.

[20] I must focus on the evidence provided about the children, and how the parents are best able to meet their needs.

Evidence of Johanne Filion

[21] The father relied heavily on an affidavit and three letters from a registered marriage and family therapist, Ms. Johanne Filion. She provided conjoint therapy to both the mother and father from October 18 to November 27, 2018; and from February 16 to March 13, 2019. During that same time, she provided individual counselling to the father, and from November 1, 2019 to the date of her affidavit, December 4, 2020, she has continued to provide individual counselling to the father.

[22] Ms. Filion fully supports the father in his quest to establish an equal shared custody arrangement, saying in her 51-paragraph affidavit that he poses no threat to the children and is an actively involved parent and excellent father. She writes that the father was experiencing high levels of distress due to the constant criticism he received in his relationship with the mother, and the constant conflict in the relationship. She states he was clear in accepting responsibility for his behaviour without hesitation and was seeking assistance to improve his ability to cope with stress and better manage his frustration and behaviour and was hoping to work toward improving his relationship.

[23] She further writes that "[b]y comparison, [the mother] had difficulty accepting responsibility for the ways in which she contributed to the conflict in her relationship with [the father]" and "[the mother] was unable to accept that her criticism of [the father] was detrimental to his well being and to the health of their relationship." She writes that she said "to [the father] that the descriptions of [the mother's] behaviour could be characterized as bullying towards [the father]."

[24] Nowhere in her affidavit evidence or letters does Ms. Filion refer to any physical violence by the father. In referencing the EIO, she writes only about the father's concern for the children's well-being and the impact on them of the "abrupt separation", and how the reduction in stress he has experienced since the separation has reduced the likelihood of negative exchanges between the parents. In her affidavit she writes "he has stated his desire to put this conflict and hard feelings between him and [the mother] behind them as he knows this to be in the best interest of the children. … [H]e respects her important role as the mother to their children."

[25] The mother objected to the admissibility of all of the affidavit evidence and letters from Ms. Filion, on the basis of an absence of consent from her to discuss Ms. Filion's interactions or involvement with the mother during marriage counselling – either joint or individual sessions. Her counsel noted it is impossible to tell from Ms. Filion's letters and affidavits whether the information she shared was gained from the conjoint sessions or the individual sessions with the father. The mother denied she had waived the need for consent by her references to the joint counselling sessions in her own affidavit to provide her version of events, saying that once the information from Ms. Filion was put into evidence by the father, it was too risky for her not to respond.

[26] Counsel for the father argued that Ms. Filion's views and information are relevant to the issues in this application and that consent was not required to disclose this information as the father was seeing her individually.

[27] There are significant concerns with this evidence. The general approach at common law is that communications with a marriage counsellor are privileged, based on the Wigmore test:

i. communications must originate in a confidence that they will not be disclosed;

ii. the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

iii. the relation must be one which the opinion of the community ought to be sedulously fostered; and

iv. the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation.

[28] The balancing test set out by the fourth criterion is the source of much litigation about marital counselling records. In *Duits v. Duits* (2006), 27 R.F.L. (6th) 407 (Ont. Sup. Ct.), a case where a marriage counsellor was not permitted to testify at trial because of the inherent unreliability of his evidence and consequent lack of weight the Court could give it, the Court noted that "the public interest in maintaining the confidentiality of marriage counselling would have taken precedence over the immediate relevance of any evidence proffered in the litigation in question." (para. 47). Specifically the Court wrote:

> 48 … In our court system in Ontario, there has been major systemic change to [as written] over the past ten to fifteen years to encourage mediation, collaborative family law mediation, case conferences, settlement conferences, pre-trial management conferences, pre-trial conferences and mid trial settlement conferences. These processes are aimed at allowing the parties to work out their differences themselves. The costs, stress, emotional damage and waste of time of much litigation can thereby be avoided. … There may be the exceptional case where the common law recognition of the paramountcy of confidentiality must be abrogated but such cases must be exceptional and I suggest relatively rare. Otherwise, the social and court processes which have been created to facilitate discussion, settlements, and offers to settle will be compromised. Lawyers will be obliged to tell parties that they must not be forthright in all they say in such processes. Some lawyers may encourage their clients to participate for litigation reasons, rather than settlement purposes. Counsellors may be reluctant to keep detailed notes for fear those notes will be scrutinized by courts and other parties at a later date.

[29] I agree with this view. Like the Court in *Duits*, I do not find it necessary to analyse fully whether this information from Ms. Filion is protected by common law privilege, or, if so, whether that privilege was waived by the mother, as I have decided that Ms. Filion's evidence will be given no weight for other reasons set out below. I am also of the view that permitting a therapist's evidence from confidential marital counselling sessions to be used in court has significant negative public policy implications. It should not be encouraged as a practice. Information from therapists but for exceptional situations should be limited to the frequency and type of counselling or therapy being received and general statements about progress. Otherwise, the integrity and trust established in counselling sessions may be detrimentally affected, and the ability of the individuals seeking counselling to be forthright and honest in their sessions may be compromised due to fear of disclosure of personal revelations to their detriment in litigation.

[30] I will not draw any conclusions about the professional propriety of this disclosure, as there are other forums better placed to address this issue.

[31] I will not rely on the evidence of Ms. Filion because it is not helpful in sorting out the issues in this case. Ms. Filion is an advocate for the father. As noted above, in her affidavit and letters she does not reference any of the acts of alleged physical violence by the father against the mother. She refers to the father's attempts to improve himself and the absence of any threat by him to the children. She is silent about the advice she provided in the joint counselling sessions about the unacceptability of violence and the recommendation that if violence occurs the mother should contact the police immediately and a safety plan should be established. It is not clear from her affidavit if the information on which she relies for her conclusions are from the father, the mother, or both. She reports that the father wants to move forward and leave the conflict behind. Yet less than one month later, while the father is still seeing her for counselling, the father wrote a 309-paragraph affidavit full of bitter recriminations, insults and personal attacks on the character and actions of the mother, reaching back 15 years in some cases for examples. She also repeats information provided to her by the father, without hearing from the mother on the same incident where the mother denies that same information in her affidavits.

[32] I note that Ms. Filion was not retained by anyone to provide an opinion on the safety or best interests of the children. Her comments about the children and about the father's parenting abilities come from the father and are hearsay. Ms. Filion has never met the children, nor observed the parents with the children.

[33] Ms. Filion's one-sided advocacy on behalf of the father, her dismissal of the mother's concern, her criticism of the mother, and her lack of involvement with the

children, who are the main focus of this application, diminishes any weight I place on her evidence.

[34] I do not accept counsel for the father's argument that the mother's request that Ms. Filion's evidence be struck is motivated primarily by its detrimental impact on her. While it may be true that her evidence reflects poorly on the mother, there are larger, significant, public policy and evidentiary issues at stake here that affect the Court's determination of reliability and weight.

Evidence of Kirsten Timpany

[35] The evidence of Kirsten Timpany, psychologist at Creative Works Psychological Services Inc. ("Creative Works"), about the status and condition of O will not be admitted. Although this is information about how O is doing and is therefore of assistance to the Court, there was an agreement Ms. Timpany provided to the mother acknowledged and signed by her, that her assessment was not to be used in custody and access court proceedings. Presumably the same agreement was provided to the father, although his copy is not in evidence. The father has ignored and disrespected the agreement by submitting Ms. Timpany's assessment and using it to advance an argument for equal parenting time. Again, there are important public policy reasons for not involving Creative Works or Ms. Timpany in the custody and access dispute. As Creative Works sets out in their contract "…in order for me to be most helpful to your family, it is imperative that I not get involved in any conflict between you and the other parent. … In order for your child to view me as a support and not as a detective or assessor, it is important that I not [be] involved in any custody proceedings".

[36] There may have been a way of introducing evidence of how O was doing, by inquiring of Ms. Timpany to provide a letter, for example, with content she was

comfortable in disclosing in order to provide information to the Court, and not to advance an argument one way or the other for the purpose of custody and access. This approach was not attempted, however.

Positions of the Parties

Custody and Access

[37] The father states he has always been and is a loving, calm, capable parent, who is a good influence on his children. He provides many examples in his affidavits where he has had to assume significant responsibilities for the children, while by contrast he describes the mother sloughing off her responsibilities. For example, he says he left work every day to pick the children up from school and bring them home; he cared for them while the mother was horseback riding two or three times a week, including five hours every Saturday, or was travelling to horse competitions; whenever the family was in public, he would be required to care for and entertain the children, because he said the mother acted as though she were “off duty” in those circumstances. He says he is able to care competently for their basic needs and extra-curricular activities.

[38] The father says there was never any concern expressed by the mother about his ability to care for the children during their relationship. He states her current objection to equal parenting time is rooted in her desire for control, her inability to acknowledge that he is an equally good and capable parent, her emotional dependence on her time spent with the children, and her desire to maximize support payments from him. He says there has been nothing of significance to justify her denial of parenting time to him since April 9, 2020.

[39] The father states that a parallel parenting regime is appropriate even with the communication ban and issues between the parents, relying on case law where this has been ordered in situations in which the parents are unable to communicate.

[40] The father suggests that the mother's reporting to the RCMP leading to the assault charges was in retaliation for his counsel's request to increase parenting time. He also calls the EIO "unfounded".

[41] The mother says the father's minimizing or denial of the physical violence against her, as well as his adversarial approach demonstrated through this application material, make his requests premature and inappropriate at this time. She is concerned about the effect of the exposure to violence on the children. She is concerned about how the criminal charges will be addressed and wants them resolved before discussing custody and increased access. She would like to know whether the father is undergoing treatment for anger management. She is also concerned about the disrespect he has shown her, not just during their relationship, but on an ongoing basis and shown by the affidavit evidence on this application. She does not believe that any kind of co-parenting regime can exist when they are forbidden to communicate with each other, or, if their communication, once permitted, cannot be mutually respectful. She denies that the charges of assault were motivated by a desire to retaliate against him for requesting additional parenting time.

[42] The mother agrees that a set routine is important for the children and notes that there has been a certain routine in place since August 2020, through the two-day and two-night weekly access by the father, to which they have adapted well.

Support

[43] There is a disagreement about the amounts of annual income earned by each party. The father seeks to impute a higher income to the mother as he says she is intentionally underemployed by working .8 instead of full time. The mother says there was an agreement between them she would work .8 for two years. In any event, she is incapable of working full-time given the stresses and upheaval of the relationship breakdown.

Law

Best interests of the child

[44] The factors for a court to consider in determining the best interests of the child in an application for custody of or access to a child are set out in s. 30 of the *Children's Law Act*, RSY 2002, c. 31, in the case of parents who are unmarried. The statute directs the court to consider all the needs and circumstances of the child including:

> 30(1) …
>
> (a) the bonding, love, affection and emotional ties between the child
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> …
>
> (b) the views and preferences of the child, if those views and preferences can be reasonably determined;
>
> (c) the length of time, having regard to the child's sense of time, that the child has lived in a stable home environment;
>
> (d) the ability and willingness of each person applying for custody of the child to provide the child with

> guidance, education, the necessaties [as written] of life and any special needs of the child;
>
> …
>
> (2) The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the conduct is relevant to the ability of the person to have the care or custody of a child.
>
> (3) There is no presumption of law or fact that the best interests of a child are, solely because of the age or the sex of the child, best served by placing the child in the care or custody of a female person rather than a male person or of a male person rather than a female person.

[45] As described by a family court judge in *Roberts v. Roberts* (2000), 98 A.C.W.S. (3d) 614 (N.S. Fam. Ct.):

> [5] … These interests include basic physical needs such as food, clothing and shelter, emotional, psychological and educational development, stable and positive role modelling, all of which are expected to lead to a mature, responsible adult living in the community. …

Domestic Violence

[46] There have been recent amendments to the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), not applicable in these circumstances, about the treatment of domestic violence in family law situations. Half of the provinces have amended their statutes to include similar provisions about the definition of family violence. To date, the Yukon government has not amended the *Children's Law Act* to mirror the *Divorce Act* amendments.

[47] It is generally accepted that domestic violence includes physical abuse by one family member to another family member that is more than an isolated or rare incident such as a push or a shove. The Court in *N.D.L. v. M.S.L.,* 2010 NSSC 68, discussed the effects of domestic violence on children as follows:

> [35] Children are harmed emotionally and psychologically when living in a home where there is domestic violence whether they directly witness the violence or not. Exposure to domestic violence is not in the best interests of children and those who are the perpetrators of domestic violence, who remain untreated and who remain in denial are not good role models for their children. The fact that there is no evidence the perpetrator has actually harmed the child is an insufficient reason to conclude the perpetrator presents no risk to his or her child. One risk is that the perpetrator will continue to use violence in intimate relationships to which the child will be exposed in the future. Another is that the child may model aggressive and controlling behaviour in his or her relationship with others. There are many other risks and these are summarized on the Department of Justice website. Assessing and containing those risks will be the job of the court in determining what contact with the perpetrator is in the best interest of the child.

[48] In a family law matter, the standard of proof for allegations of violence is on a balance of probabilities *(N.D.L. v. M.S.L.,* para. 36).

Parallel Parenting

[49] Courts have begun to adopt the concept of parallel parenting, which initially emerged in the social work world. There are different models of parallel parenting, depending on the ability of the parents to communicate and make decisions in the children's best interests. The models vary with respect to the amount of decision-making made by the parents together or independently, and in what areas (*Jackson v. Jackson*, 2017 ONSC 1566, paras. 68-70). Factors to be considered by the court include the involvement of each parent with the children and the strength of their ties; any history of domestic violence; the ability of each parent to place the needs of the children above their own needs; the nature and intensity of the conflict and whether the parallel parenting model will increase or decrease the conflict; and whether either or both have engaged in alienating conflict (*Jackson*, para. 72).

Support

[50] I will address the relevant law on support below in my conclusion on this issue.

Analysis

Credibility

[51] I was urged to make credibility findings in this application. It is difficult on affidavit evidence only, without cross-examination, to test the assertions. Much of the material is "he said/she said". Some of the differences in describing the same incidents may be a result of differing perceptions because of the layers of misunderstanding, stress, or the passage of time. On the other hand, they could be a result of exaggeration, deliberate or unintentional, carelessness with detail, or revisionist history, consciously or unconsciously motivated to promote a certain perspective (see *N.D.L. v. M.S.L.*).

[52] There are a few instances where it is possible to determine from objective evidence the credibility of certain statements. The father's evidence suffers from exaggeration at least and incorrect information at worst in the following examples:

i. He claimed that the mother's Toyota repair bills in 2019 were several thousand dollars. The mother contacted Toyota who confirmed there were two services for $378.89 and $428.25.

ii. He stated that his rental of an apartment was the beginning of their separation. The mother's notes taken during the conversation and attached as an exhibit indicate that the father was getting an apartment because of physical aggression toward the mother and the timeframe would be up to two months.

iii. He claimed that they spent very little time with his family when they travelled to Victoria in October 2019 when the mother competed in a half

> marathon. The mother sets out the details of five occasions that weekend when they had dinner or visited with the father's sister and her family or his parents.

[53] On a more general level, the father's affidavits contain internal contradictions. On the one hand, he says he is eager to get beyond the conflict between him and the mother for the children's sake. Yet on the other hand, in his third affidavit, he goes into great detail about past incidents of conflict with the mother and attacks her personality and character ruthlessly. This is not an example of him taking the high road as he claims he has. They are examples of statements that serve to escalate the conflict.

[54] He argues that he did not detail the concerns about the mother's behaviour until he needed to respond to the allegations of violence raised by the mother. Yet with the first affidavit, he included four affidavits from friends who knew both parents. All but one of these affidavits included criticisms of the mother's personality and character, calling her distant, disrespectful to the father, not engaged, and difficult. This kind of hurtful evidence from friends is not helpful in allowing the parties to move on from the place of conflict and it is of limited value. The proffering of 'good character evidence' is consistent with characteristics of those who engage in domestic violence. As noted by Dr. Linda Neilson in her e-book updated March 2020, (Dr. Linda C Neilson, "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases" 2nd ed (2020), 2017 CanLIIDocs 2) they "often have excellent public reputations". It is common that their public behaviour is at odds with their behaviour in private. This makes public character evidence of limited value. The difference between the father's behaviour in public and private was highlighted with examples set out several times in the mother's affidavits.

[55] The father attests throughout his affidavits that he thoroughly enjoyed child care responsibilities, especially when the mother was not present. Yet he expressed deep resentment at being required to care for the children during the trip to Alaska while the mother was competing in a horse show.

[56] The most glaring contradiction is the father's repeated statements that he has continuously accepted responsibility for his role in the conflict between him and the mother, while she has not. Yet he is either silent about the allegations of physical violence against her, or he minimizes or denies them.

[57] These contradictions at a more general level negatively affect my assessment of the father's credibility.

[58] Given my findings on the marital counsellor's disclosures, and the limited weight I place on the affidavits from the friends, the father provides no objective evidence to support his affidavit evidence about the incidents of conflict between him and the mother. While I am unable to discern with certainty whose affidavit evidence is truthful because of the "he said/she said" nature of the content, the mother's affidavit evidence does not contain the same kinds of internal contradictions or objectively discernable exaggerations as does the father's. I accord more weight to the mother's evidence as a result.

What is Not in Dispute

[59] There are several factors in this case I find are not in dispute. They are:

i. both the mother and father are involved and caring parents;

ii. both parents shared more or less equally in raising the children, after the maternity leaves of the mother were completed;

iii. both parents are well-educated, gainfully employed professionals, financially stable, healthy, and active; and

iv. both parents come from good families and had stable upbringings.

Evidence of Domestic Violence

[60] In a family law matter, proof of domestic violence is on a balance of probabilities. I am satisfied on a balance of probabilities that the father did commit acts of violence on the mother in this case for the following reasons:

i. Her affidavits contain sufficient details of the incidents to be credible.

ii. She includes as exhibits to her affidavits emails from the father where he apologizes for his behaviour to her, castigates himself, and promises to do better. In at least one of those emails he refers specifically to him placing his hands on her and how she should be able to trust him not to hurt her.

iii. The father rented an apartment in 2019 for the purpose of a retreat for him when the conflict escalated, to avoid physical violence. He does not deny he stayed at the apartment evenings and overnights when the conflict escalated.

iv. The father does not deny the incidents of domestic violence; he is either silent about them, or he justifies or minimizes them. The point of his third affidavit is to set out in detail the problems he has with the mother's character, personality and role in their relationship, especially her disrespect of him and need to control him. Through this, he describes himself as a victim and rationalizes his frustrations with her.

v. It appears the father has pled guilty to criminal assault against the mother in the Territorial Court of Yukon, in order to allow him to participate in

> Domestic Violence Treatment Option ("DVTO") court. The DVTO court is a therapeutic alternative to the treatment of offenders in traditional criminal court. It encourages offenders to accept responsibility for the violent behaviour early in the justice system process, and to understand and "unlearn" this behaviour. This information about the father's participation in DVTO court was not in affidavit evidence, but was provided by counsel for the father in submissions, and acknowledged by counsel for the mother. The father's affidavit evidence referred to his assault trial scheduled in criminal court for May 2021, indicating he pled not guilty. The not guilty plea also meant that the father did not provide any affidavit evidence in response to the mother's allegations about the incidents of violence, except to say they contain untruths, exaggerations and fabrications, for fear it would prejudice his rights at trial. The fact that he has now apparently pled guilty to the assaults lends credence to the mother's allegations and raises questions about the veracity of these statements in his affidavits.

[61] The father's approach to the violence in the relationship is troubling. While the father's frustrations in his relationship with the mother may be understandable, given how the relationship appears to have developed over time, it is how he handled these emotions that causes concern. Instead of walking away, going to his apartment once he had it, or dealing with his feelings of anger and frustration in another way, he took them out on the mother. More troubling is that his behaviour escalated while he was undergoing individual counselling with Ms. Filion.

[62] He attests more than once that he was shocked by the EIO and called it unfounded. However, the incidents described by the mother were enough for a Justice of the Peace to issue an EIO for 60 days, 15 days longer than the 45 days the mother had requested.

[63] He attests that the charges of assault the mother brought were a strategy to ensure she maintained control of the children, relying on the timing of the charges the day after his lawyer sent a demand letter for more time with the children. The mother denies this and attests she reported the assaults to the police days before her lawyer received the father's lawyer's letter.

[64] The father states that since the separation in April 2020 there have been no altercations with the mother. But there has been a no contact order in place continuously since then.

[65] He attests he is no longer situationally depressed since the separation, and no longer suffers from emotional dysregulation. This is good news, but it has not been fully tested because there has been no interaction between him and the mother.

[66] There is also no evidence of any treatment he has received for anger or frustration management, especially in the context of intimate partner violence.

[67] The concern about the father's denial and minimization of the violence in this case is increased by his delay in dealing with the assault charges. The father's counsel advised the reason he did not choose DVTO court earlier was because of an inexperienced Crown lawyer who did not provide it as an option. This seems unusual, because DVTO court is always available as an option to someone charged with domestic assault, as long as they are prepared to accept responsibility for the offence, and they are found eligible. Whatever the reason, the delay in resolving the criminal

charges has not assisted in the resolution of the issues surrounding the children, or in rebuilding any trust between the parents. It also does not provide the Court at this stage with any information about the treatment programs the father may be undergoing.

[68] It is possible that this case is one of the exceptional situations where the violent incidents are as the father says – that is, situationally induced, with no underlying emotional dysregulation on his part that may re-appear in future. However, at this stage there is insufficient information to be confident of this. The absence of acknowledgement by the father of the incidents and instead a blaming of the victim mother for his behaviour is in keeping with the findings in the literature as described by Dr. Linda Nielson that non-acceptance of responsibility and projection of blame are characteristic of domestic violators. This includes a tendency to minimize and deny their own violence to themselves, their therapists, lawyers and judges. They also often claim that violence was the product of the intimate partner's bad behaviour and that the targeted partner is mentally unstable. The concern this presents is that the behaviours associated with domestic violence can be replicated in parenting practices. There is a risk that the children will become victims of the same behaviour especially in the absence of evidence of treatment to ensure reduction of future risk.

Potential Effect of Domestic Violence on Children

[69] The father's domestic violence against the mother is relevant to the determination of access to and custody of the children. The father again minimizes this connection, saying that he does not believe the children were exposed to the conflict, that the conflict with the mother while they were living together never caused her to be concerned about his ability to care for the children on his own, and now that they are separated there is no further risk of violence.

[70] In this case, there is evidence that the children were exposed to the violence. For example, the incident occurring on April 6, 2020, where the father swung a bag of garbage at the mother and she blocked it from hitting her head with her arm, was witnessed by O. He spoke about it afterwards, saying he could not stop seeing in his head his father hitting his mother. A was in the mother's arms when there was a heated argument at least one night while the father was trying to leave the house. O was in the car in Victoria when the father assaulted the mother. The children were in the house during many of the incidents described by the mother, and were likely exposed to the verbal arguments at least, if not the physical altercations.

[71] An article by Nova Scotia lawyer Cynthia Chewter entitled "Best Practices for Representing Clients in Family Violence Cases" (January 7, 2015)[1], addresses common judicial misperceptions about family violence. One of those myths is that spousal abuse is irrelevant to parenting. The author writes at p. 14:

> …
>
> Men who abuse their spouses are much more likely to abuse their children. …
>
> Exposure to family violence is the second most common form of maltreatment of Canadian children, accounting for twenty-eight percent of all substantiated cases investigated by child protection workers in 2003. … Children often believe the violence is their fault.
>
> Children who witness family violence are at ten to seventeen times greater risk for such emotional and behavioural problems as bullying, anxiety, aggression, depression, insecurity, destroying property, and post-traumatic stress disorder. …
>
> A child's well-being is inextricably tied to the well-being of his or her primary caregiver. Intentional acts that undermine the

[1] https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/bpfv-mpvf/viol2a.html

> mental and physical health of the primary caregiver should be (but often aren't) treated as intentional acts that are contrary to the best interests of the child. …
>
> Even if there is no direct exposure to family violence, the power and control issues that give rise to it can easily overflow into parenting, resulting in a tendency on the part of the abusive spouse to "dominate, control and coerce the children, rather than to nurture and empower them".
>
> …

[72] The connection between intimate partner violence and effects on children of the relationship cannot be ignored. This must be a factor in the consideration of any custody and access arrangement.

Views and Preferences of Children

[73] The views and preferences of O, age 6 at the time of the application and now age 7, were referenced. Both parents referred to conversations they have had with O about the access arrangements. Counsel for the father urged the Court to consider O's spontaneous exclamations that it would be more fair for the children to have equal time with each parent. The mother responded in her affidavit that O has never expressed discontent with the existing arrangements to her and that a good routine has been established.

[74] In my view, no weight can be placed on a six or seven year old's expressions of views and preferences in this case, especially in the context of such a high conflict separation. It is entirely possible that O is saying whatever he thinks the parent he is with does or does not want to hear. In any event, it is inappropriate and unhealthy for the parents to be drawing the children into their conflict and there is a suggestion from their affidavit evidence, particularly in the father's case, that this may be occurring. I do not place any weight on the views and preferences of O at this stage.

Parallel Parenting Inappropriate at this Time

[75] This case can be distinguished from the cases provided by counsel for the father where the courts ordered a parallel parenting regime. For example, in *Ursic v. Ursic* (2006), 32 R.F.L. (6th) 23 (O.N.C.A.), the parents had difficulty communicating and achieving consensus on their child's upbringing. They were awarded joint custody of the child shortly after separation and attempted unsuccessfully for several years to share the decision-making.

[76] In this case, it is a different situation as currently there is no communication at all between the parents and criminal assault charges are not yet resolved. There have been no failed attempts to communicate in the best interests of the children because communication is not yet possible. It is too early to tell whether a parallel parenting regime would be appropriate or even workable.

[77] In *Jackson v. Jackson,* cited above, there was clearly high conflict between the parties, with findings of emotional abuse, and incidents of yelling, cursing and throwing things, some leading to police involvement. However, there were no criminal charges laid. More importantly, significant time had passed from the breakdown of the relationship and the reasons for judgment. The parties were divorced in 2012, the litigation was heard between 2014 and 2016, and the decision was released in 2017. This passage of time and the absence of criminal charges are significant differences from the case at bar. More time to assess what kind of parenting arrangement will work best is needed in this case.

Conclusion on Access, Custody and Parallel Parenting issues

Access/Equal Parenting Time

[78] To conclude first on the issue of access, I am prepared to adjust the access arrangements at this stage. It is appropriate to allow the father a further increase in access to the children every second week for the whole weekend, until Sunday night, or as otherwise agreed. The exchange on Fridays will continue, and every second weekend the father will continue to have care of the children until Sunday evening at 6 p.m.

[79] This decision is based on the following facts and assessment. The twice-a-week access visits have been going well so far and the mother has not expressed concerns. Despite the affidavit evidence denying or minimizing the domestic violence, the father has now pled guilty to the assault charges and is participating in DVTO court, meaning he will be undergoing treatment programs. I am of the view there is hope in the future once the parents' emotions have decreased in intensity and treatment is completed that they will have some ability to co-parent and this should be worked towards. Increased access to the father is a step along this path.

[80] While counsel for the father argued that there is a presumption in favour of equal parenting time as this is considered to be in the best interests of the children, this presumption does not necessarily apply where there is domestic violence. The effect of spousal violence on the children in this case is a concern, and more information is needed before an order for equal parenting time can be considered. The equal parenting time application is denied at this time.

Parallel Parenting and Joint Custody

[81] On the issues of parallel parenting and joint custody, I agree with counsel for the mother that this application is premature. The conflict between the parents in this case is long-standing and complex. Both parents must bear responsibility for how their behaviour may have created and enhanced the conflict. Both must work to create an environment where they can communicate respectfully with one another, for the sake of their children.

[82] Personal attacks, recriminations, blaming, and insults reflect the intense conflict that exists between the parents. Perhaps at some level this approach is therapeutic or cathartic, but it is unhelpful for the process of the parents moving into a co-parenting arrangement. Their antagonistic approach may be a necessary stage in the separation process and hopefully will change over time, supporting a conclusion that this application is premature. At this time, however, there is an insufficient basis to consider joint custody or parallel parenting because of the inability of the parents to communicate, the intense nature of their conflict, and the lack of information about the father's criminal charges and treatment programs.

[83] These issues will be adjourned without a return date, to be argued if the parties are unable to agree. The application shall not be brought back until, at the very least, the father's criminal charges have been resolved and he is undergoing treatment, and the no contact order has been removed. Evidence about the mother's understanding of her role in the conflict would also be helpful.

[84] The passage of time, the resolution of the father's criminal charges, and information about treatment may allow these parties to establish a form of communication allowing them to come to an agreement, rather than using the court

process. It is clear that both parents love and care for their children very much. It is hoped they will be able to get beyond their own conflict and relate to one another in a way that puts the interests of the children first.

Calculation of Income for Child Support

[85] There is some discrepancy about each parent's annual income in 2020. To resolve this, the parties shall exchange their Revenue Canada Notices of Assessment for 2020 and their last pay stub for 2020, to confirm their respective annual incomes for 2020.

[86] Section 7 expenses shall be calculated proportionate to the annual incomes of each party.

[87] The father seeks to impute an annual income to the mother of $116,762. She works .8 of a week and as a result has a reduced income. The father says she is intentionally underemployed because she is earning less than she is capable of earning, having regard to all of the circumstances, including her age, education, experience, skills and health, past earning history and the amount she could earn if she worked to capacity (*J.A.F. v. P.U.*, 2019 YKSC 68, at paras. 29-30). The father says her choice not to work on Fridays is intentional underemployment, and not for the purpose of caring for the children or for her health or educational needs. He denies there was an agreement between the two of them that she would work a reduced work week for two years.

[88] The mother attests they agreed she would work .8 for two years. This is the second year. She further states that the combination of the relationship breakdown, the domestic violence, and the litigation process have negatively affected her, rendering her unable to work full time.

[89] The Yukon *Child Support Guidelines* recognize that reduced work may be required by the needs of any child or the health needs of the parent.

[90] As noted at the outset, this is a high conflict matter. Whether or not there was an agreement between the parties about a reduced work week for the mother this school year, I find that she has valid reasons as a result of the factors she has noted for reducing her work week to .8. I decline to impute the $116,762 annual income to the mother.

Costs of Adjournment Application

[91] Finally, I will award costs of $750 to the mother for the adjournment application that she brought in November 2020, after receiving a lengthy affidavit from the father without sufficient time to respond. Although the date of the application, December 4, 2020, had been agreed upon by counsel in communication with the Trial Coordinator, no dates for exchange of affidavits were set. This was an unfortunate deviation from the usual practice to agree on dates for exchange of affidavit material, to avoid this kind of situation. The father's affidavit was dated November 17, 2020, but was not served until November 25, 2020. The affidavit was 209 paragraphs. For a case of such high conflict, where counsel have been communicating regularly, there should have been communication about appropriate timing for exchange of evidence between counsel. This was counsel for the father's application and there was no willingness to compromise, even when it was clear a lengthy affidavit filed nine days before the hearing was unable to be responded to properly by counsel for the mother. The adjournment application took one hour of court time, resulting in the granting of an adjournment.

Costs of this Application

[92] Costs of this application may be spoken to if not able to be agreed upon.

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DUNCAN C.J.