SUPREME COURT OF YUKON

Citation: *S.E.P. v D.P.P.*, 2022 YKSC 6

Date: 20220207
S.C. No. 21-D5357
Registry: Whitehorse

BETWEEN:

S.E.P.

PLAINTIFF

AND

D.P.P.

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff — Amy Chandler

Counsel for the Defendant — Jeremy Lewsaw (via video-conference)

REASONS FOR DECISION

INTRODUCTION

[1] In this divorce proceeding the plaintiff, S.P., and the defendant, D.P., have two children of the marriage: C.K.P., who is 11 years old, and C.J.P., who is 7 years old. S.P. has filed an application under the *Divorce Act,* R.S.C., 1985, c. 3 (the "*Act*"), for primary residence of the children of the relationship. She is also seeking that the parties consult about decision-making with regard to the children, but that she have final decision-making responsibility if the parties cannot reach agreement. She furthermore seeks that the defendant not be under the influence of alcohol while the children are in his care.

[2] Child support and other care-related orders were also sought, but the parties agreed to deal with those matters at a later date.

[3] From counsel's submissions, I take it that D.P. is opposed to almost all the relief sought by S.P. During oral submissions D.P.'s counsel did say that D.P. would agree to abstain from consuming drugs or alcohol while the children are in his care.

[4] During the preparation for the application, and during the course of submissions, a question arose as to whether the parties should be cross-examined on their affidavits. I will therefore address when cross-examination would be useful in family law applications, as well.

ISSUES

A. What role does a party's declaration of their willingness to go to trial play in the court's decision?

B. Under what circumstances is cross-examination warranted in family law applications?

C. What test is to be applied in determining the application?

D. Should the residential schedule and the decision-making responsibilities be changed?

ANALYSIS

A. What role does a party's declaration of their willingness to go to trial play in the court's decision?

[5] D.P.'s counsel argued that S.P. should declare at the outset of oral submissions whether she was willing to consider the Court's decision on her application as final, subject only to her right to appeal.

[6] In support of his argument, counsel stated that parties could “take a punt in chambers”. Victory at an interim hearing can take on its own force, creating a new *status quo* that the trial judge may be hesitant to change. Parties will therefore have nothing to lose by bringing applications if they do not commit to going to trial.

[7] I do not believe this is an issue of concern in the Yukon. In this jurisdiction, when custody and parenting time are litigated, they are generally resolved on interim applications. Trials in which parenting time or custody are issues are uncommon. On review of Quicklaw, I found that, between 2005-21, there were nine trials in which parenting time was an issue. Most proceeded in the early 2000s: only two trials have proceeded since 2015.

[8] Thus, counsel’s concern that a party may “take a punt in chambers” is not a live concern in the Yukon.

[9] In addition, while trials are sometimes necessary, and are always the right of the parties, they are often not advisable, particularly in a family law situation. The parties in custodial disputes are first and foremost parents. After an order is made the parties will continue to be in a relationship and will have to communicate and cooperate in order to parent effectively.

[10] The court process, which is adversarial, and in which there are winners and losers, does not assist the parties in achieving a relationship that is conducive to communication and cooperation. Rather, it serves to increase distrust and discord.

[11] Minimising, where possible, the antagonism between parties also helps to meet the best interests of child, which is the central consideration in applications concerning parenting time and decision making authority.

B. Under what circumstances is cross-examination warranted in family law applications?

[12] D.P.'s counsel sought an order, during a family law case conference, that he be permitted to cross-examine S.P. on her affidavit. Counsel stated that he sought to cross-examine S.P., in part, in order to assess the strength of the case and to help determine how to proceed with the matter. I denied counsel's request in large part because the purpose of cross-examination is to test the credibility of the witness, and to assist the court in assessing the evidence before it. Its purpose is not to assist the parties in determining the strength of a case.

[13] In submissions on the application, D.P.'s counsel returned to the question of cross-examination on affidavits. He argued that, except in the absolute clearest of cases, where important factual elements are in dispute, either oral evidence should be called, or cross-examination on affidavits should be conducted before a significant change to a parenting regime is considered. The cases D.P.'s counsel cited are from Alberta. He stated that, although not binding, the cases are persuasive.

[14] In my opinion, the Alberta approach to cross-examination in applications is distinguishable. Alberta's *Rules of Court*, AR 139/2021, September, 2021 ("*Alberta Rules*"), state:

> 12.23(1) A person who makes a statement, reply statement or affidavit in support of a claim or response in a proceeding under the *Family Law Act* may be questioned by a party adverse in interest.
>
> (2) A person may be questioned under oath as a witness for the purpose of obtaining a transcript of the person's evidence required for use at the hearing of a proceeding under the *Family Law Act*.

[15] The court has concluded that under Alberta Rule 12.23, a party is entitled to cross-examine on affidavits (*Sellin v Illes*, 2004 ABQB 874 at para. 17).

[16] The *Rules of Court* of the Supreme Court of Yukon, (the *Yukon Rules*) are different from the *Alberta Rules.* Yukon Rule 50(9)(a) states that the court *may* order the cross-examination of a party or deponent in an application. Parties are therefore not entitled to cross-examine on an application, but rather, it is left to the discretion of the court.

[17] The court has not analysed when it would be appropriate pursuant to Yukon Rule 50(9)(a) to allow cross-examination in a family law application, other than to note that the ability to cross-examine on affidavits does exist (*Baxter v Benoit*, 2004 YKSC 60 at para. 45).

[18] In practice, cross-examination on family law applications does not currently occur. I found eight cases in Quicklaw in which cross-examination took place in family law matters since 2000. All of these cases occurred before 2010.

[19] In this jurisdiction, therefore, the court makes interim decisions on the basis of affidavit evidence without cross-examination, even where there is conflicting testimony on material issues.

[20] However, the court has, at times, noted that it is difficult to determine credibility on the basis of conflicting affidavit evidence and expressed concerns about making decisions in the absence of testing of the evidence.

[21] Given that, and given that there has been no analysis about whether cross-examination on family law applications may occur, and if so, under what circumstances, I will assess that issue here.

[22] In other jurisdictions the courts take different approaches to cross-examination in family law applications.

[23] In Prince Edward Island, which has rules similar to those of Alberta, parties are entitled to cross-examine on affidavits in applications (*CV v LMAD*, 2009 PESC 26 at paras. 10-12).

[24] In Saskatchewan, as here, the rules give the court the discretion to allow cross-examination on applications. However, in practice, cross-examination is not permitted in family matters. Instead, the court directs the matter to a pre-trial conference and trial (*Heck v Meszaros*, 2020 SKQB 230 at para. 87).

[25] In *Heck,* the court explained why cross-examination in family law matters is not permitted, stating, at para. 89:

> ... Our court has developed rules specific to family law proceedings with a view to ensuring the parties are able to advance their case through the procedural steps with a minimum of both delay and complication. The focus has been on limiting the warfare which can erupt in such emotionally charged proceedings. Thus, the affidavits available by way of reply on an interim application are limited with leave of the court required to file anything further. …

[26] In Newfoundland and British Columbia, which also have the same rule on cross-examination in applications as the Yukon, the court does permit cross-examination, depending on the facts of the case (*O v C*, 2004 NLSCTD 7 ("*O*") at para. 27; *Gallagher v Gallagher*, 2000 BCSC 418 at para. 5).

[27] In *O*, the court stated that cross-examination may be permitted where:

a. there are major differences on relevant facts in the affidavits filed;

b. cross-examination is necessary to challenge facts, not reasoning, deposed to by a party and where those facts are central and critical to proper determination of the issue in question; and/or

c. it is necessary to elicit additional relevant information that will amplify or qualify affidavit material.

[28] In Ontario, the rules are different than those in the Yukon. Where there is a final order or agreement, an application brought with conflicting evidence, and cross-examination is not conducted, the court should not make a decision on the application, but should refer the matter to trial (*Lines v Lines* (2006),153 ACWS (3d) 391 (Ont Sup Ct)).

[29] Some judges have applied this principle to circumstances where there is no final order or agreement (*Harness v Savoy*, 2021 ONSC 1174 at para. 33), while others have been more circumspect about applying it where there is no final order or agreement in place (*OM v SK*, 2020 ONSC 3816 at para. 27). It appears that where the court declines to make a decision, the matter is referred to trial.

[30] In New Brunswick, it is an error to decide an application on affidavit evidence in which material facts are contested without a full hearing (*NER v JDM*, 2011 NBCA 57 at para. 20).

[31] In Manitoba, full hearings with either oral evidence or cross-examination on affidavits may be held in family law applications (*Inscho v Inscho*, 2010 MBQB 90).

[32] In Nova Scotia and the Northwest Territories, it is not clear what the constraints on examination and cross-examination are, but it is permitted (*DL v LC*, 2018 NSFC 24; *KMT v JMPP*, 2018 NWTSC 16). The court in the Northwest Territories has said,

however, that family law applications "frequently" proceed on the basis of affidavit evidence alone (*Rocher v Rocher*, 2008 NWTSC 62 at para. 5).

[33] As Saskatchewan and Newfoundland and Labrador have similar rules to the Yukon, and there is case law considering the issue, I will analyse whether the legal principles arising in those jurisdictions can inform the practice here.

[34] It seems to me that the case law from Saskatchewan should not be applied here. While the rule at issue is the same, the procedural landscape in Saskatchewan is different than the Yukon. In Saskatchewan, the focus is to move the matter to trial; here, however, the focus is on resolving matters at the application stage.

[35] In my opinion, as in Newfoundland and Labrador, cross-examination in family law applications may be beneficial where there are material facts in dispute. Otherwise, the court may be required to make decisions that have important consequences to the parties on unsatisfactory evidence.

[36] At the same time, I believe that the cases in which cross-examination will be required are rare. I earlier noted that the adversarial process can have a detrimental impact on the best interests of the child and on the parties, given that the parties are required to maintain a relationship after the conclusion of proceedings. The court should be cautious to employ tools, such as cross-examination, which may entrench the parties in adversarial positions.

[37] I also agree with the court in Saskatchewan that the issues in family law disputes are emotionally charged, and that skirmishes can easily spark into all-out war. The court must be careful not to provide parties with ammunition. As such, cross-examination should play a limited role and be permitted sparingly.

[38] I believe that cross-examination should only be permitted in circumstances where the safety or security of the child or party is in question, for instance in cases of family violence or where substance abuse has an impact on the safety of the child.

[39] While issues of safety and security are a pre-condition for cross-examination, it is not the only factor the court will consider. *O* provides good guidance for determining the question of cross-examination. Accordingly, the court may take into account whether:

a. there are major differences on relevant facts in the affidavits filed;

b. cross-examination is necessary to challenge facts, not reasoning, deposed to by a party and where those facts are central and critical to proper determination of the issue in question; and/or

c. it is necessary to elicit additional relevant information that will amplify or qualify affidavit material.

[40] Finally, the court may also consider the history of the family law proceedings and whether cross-examination may serve to perpetuate negative dynamics in the parties' relationship.

[41] As Yukon Rule 50(9)(a) provides that the court may order cross-examination, leave must be sought before cross-examination can take place. Counsel proposing to cross-examine a witness would be required to explain to the court the areas upon which they wish to cross-examine the witness and the reasons why cross-examination is necessary.

[42] Ultimately, however, the determination of whether to permit cross-examination turns on the facts of the case.

[43] Given that the case law from Alberta is not applicable, I also find that the test advanced by D.P.'s counsel that a change be made only when the situation is urgent and the new regime is clearly in the best interests of the child, is not applicable here. Nothing turns on the fact that cross-examination did not take place.

C. What test is to be applied in determining the application?

[44] S.P. submitted that the Court is to consider the best interests of the child in making its determination.

[45] As well as arguing that the application should only be granted where the matter is urgent and in the clearest of cases, D.P. also stated that, where, as here, there is a separation agreement in place, the moving party must show a material change in circumstances before the court can enter into a consideration of the application on the merits (*MWU v JAJS,* 2012 YKSC 87 at para. 21).

[46] With all due respect to the judge in *MWU*, I disagree that a material change of circumstances is required where a separation agreement is in place.

[47] In *MWU*, the applications judge cited three cases in coming to his conclusion. The decision which was critical to his determination that the moving party must demonstrate a material change in circumstances was *HHL v JTS*, 2006 BCSC 1928. However, in *HHL*, the court did not cite any authority to support its position that a separation agreement should be given similar weight to a provision settled by judgment. The other two cases cited do not stand for the proposition that, where there is a separation agreement, the moving party must demonstrate a material change in circumstances. In *Stonier v Stonier,* 2004 BCCA 307 the court stated, at para. 21:

> It is well-settled law that an agreement between the parents concerning the custody of their children cannot oust the jurisdiction of the court to determine the issue of custody.

> The court must base its decision on the best interests of the child or children. However, that does not mean that an agreement between parties concerning custody is not a factor to be taken into account when determining issues of custody and access. …

[48] The other case cited by the applications judge, *Holland v Holland,* [1986] BCJ No 2789 (BCSC), concerned a variation application of a court order.

[49] *CRH v BAH*, 2005 BCCA 277, which the applications judge did not have the benefit of reviewing, directly addresses whether the moving party must show a material change in circumstances when bringing an application after a separation agreement has been signed. There, the Court of Appeal adopted its previous reasoning in *AL v DK*, 2000 BCCA 455, wherein it stated at para. 13:

> … Where no prior order for permanent custody has been made, a court's order for custody must be based on a full and balanced consideration of all factors touching on the best interests of the child. An agreement concerning custody between contending parties is an important factor to take into consideration, but it is only one factor.

[50] The moving party is not required to demonstrate a material change of circumstances (para. 39).

[51] In this case, then, S.P. is not required to demonstrate that there has been a material change of circumstances. The determination of the application is based on the best interests of the children. The separation agreement is, however, one factor that I must consider in my analysis.

D. Should the residential schedule and the decision-making responsibilities be changed?

[52] The best interests of the children is the sole consideration in determining questions about the care and responsibility for children of the marriage (s. 16(1) of the

Act). Section 16(3) of the *Act* sets out factors that can help determine the best interests of the children.

[53] Here, S.P. identified that family violence is a factor, while D.P. raised the issue of the children's views and preferences. I believe that the history of the care of the children; the ability and willingness of each parent to care for and meet the needs of the children; and the ability and willingness of each parent to communicate and cooperate with each other on matters affecting the children, are at play. I will address each factor in turn.

Family Violence

[54] S.P. stated that there is some low-level family violence in this matter, as demonstrated by D.P.'s reactions to S.P. when she intervened while he was intoxicated or subjecting the children to unsafe conditions.

[55] In her affidavits, S.P. says that when she attempted to discuss issues with D.P. she often received "hostile responses such as name calling, outright refusal to follow the measures, or no response at all." In describing a situation in which she believed D.P. was intoxicated, she stated that D.P. was "confrontational and yelled at me in front of [C.J.P.]." S.P. also describes other situations in a similar manner.

[56] There is insufficient evidence that this constitutes even low-level psychological abuse. This is evidence that D.P. may have behaved inappropriately, but falls short of establishing psychological abuse.

Views of the Children

[57] For his part, D.P.'s counsel says that the views of the children are important, but S.P. did not seek to have the views of the children heard. It is incumbent on S.P. to explain why at least C.K.P.'s views, who is eleven years old, cannot be heard.

[58] The answer to this submission is that the burden to advance the views of the children is on both the parties. D.P. cannot complain when he could easily have sought the appointment of a child lawyer himself.

History of the Care of the Children

[59] The children live with the parties in a shared residential schedule and live half the time with each parent. The parties dispute when this schedule was established, however, it is clear that this schedule has been in place since at least 2019. For children, two years is a long time. For C.J.P., who is seven, he may not remember anything else.

[60] I also take into consideration that the parties made this decision voluntarily, through a separation agreement. It is an important factor that the parties considered that this was in the best interests of the children.

Caring and Meeting the Needs of the Children

[61] S.P. states that a pattern has been established in which D.P. consumes alcohol, requiring S.P. to intervene. When S.P. does intervene, D.P. gets angry at her and is confrontational in front of the children. While at one point D.P. cooperated with S.P. in responding to his drinking, D.P. has stopped doing so and refuses to admit he has a problem.

[62] Moreover, D.P. has not been cooperative in dealing with the children's health, and in particular, with C.J.P.'s health problems. C.J.P. was diagnosed with epilepsy. C.J.P.'s doctor gave the parties specific safety precautions for C.J.P., but D.P. has disregarded them. He has, for instance allowed C.J.P. to be on a chairlift without adult supervision. When S.P. has attempted to raise issues around C.J.P.'s health, D.P. has either gotten angry or been silent.

[63] D.P. denies that there is a pattern or that he has put the children at risk through his intoxication. He also disputes that there was any particular safety planning around C.J.P.'s condition and stated in his first affidavit that the doctors determined C.J.P. did not have epilepsy.

[64] As the evidence is largely in dispute, my assessment here turns on the issue of credibility and sufficiency of evidence.

[65] In her affidavits, S.P. provides specific evidence about several different instances where it appeared D.P. was not in a condition to care for the children and references four other instances between 2017 and 2021.

[66] In 2017, D.P. phoned S.P. while intoxicated. As he had care of the children at the time, and as C.J.P. was with D.P., S.P. attended D.P.'s home and took responsibility of C.J.P. D.P. got angry and yelled at S.P. in front of C.J.P. A few days later he apologized, and said he would not drink while the children were with him again.

[67] In 2019, D.P. called S.P. and appeared intoxicated. S.P. went to D.P.'s home to ensure the children were safe and noted that D.P.'s partner was there and sober. As D.P. began yelling at S.P., S.P. left the home.

[68] The following day, S.P. went to C.J.P.'s daycare and as he was not there, went to D.P.'s home. D.P. was sleeping and difficult to rouse. When he awoke, he said that his nephew was taking care of C.J.P.

[69] In December 2020, D.P.'s adult daughter from a previous relationship, contacted S.P. She had been speaking with her father and came to the conclusion he was intoxicated. D.P. told his daughter he was to take the children into his care from school that day, so D.P.'s daughter telephoned S.P. and told her about this. S.P. took the children into her care again. At that point, she refused to return the children to D.P. and attempted to negotiate with him to ensure that the children would be safe with him. D.P. refused to discuss the issue. Eventually the children returned to the regular residential schedule.

[70] D.P.'s daughter also filed an affidavit in which she confirms that she spoke to D.P. in December, 2020, believed he was intoxicated, and then spoke to S.P. about her concerns.

[71] In 2021, there were two occasions in May and June where D.P. contacted S.P. to take the children, saying there was an emergency. In the May incident, D.P. appeared intoxicated. S.P. later learned that there had not been any emergency.

[72] In June, D.P. contacted S.P. again and asked her to take the children into her care, saying that because of a family emergency he had to travel to British Columbia. S.P. later learned that he did not travel to British Columbia.

[73] There are problems with the sufficiency of S.P.'s evidence, and with D.P.'s credibility.

[74] S.P. referenced, but did not describe, four incidents in which she says that D.P. was intoxicated. Evidence about these incidents should have been provided. Without more detail, D.P. could not respond. Additionally, even if I could conclude that D.P. was indeed intoxicated, I would need context in order to determine whether and how the incidents affected the children.

[75] The problems with D.P.'s evidence relate to credibility. A great deal of D.P.'s evidence is dedicated to providing argument on S.P.'s evidence (for example Affidavit #1, paras. 11 and 17).

[76] His tone is also argumentative (for example Affidavit #1, paras. 9 and para. 20(c)) and he is, at times, sarcastic. At para. 21 of his Affidavit #2, for instance, he states: "The extent to which this weekend appears to have reached high drama, murder-mystery like proportions to both [D.P.'s daughter] and S.P. is truly remarkable." Rather than providing clear responses, then, D.P.'s approach is defensive and hostile.

[77] There are also some inconsistencies in some of his evidence. In response to S.P.'s evidence about the incident in 2019 when she went to D.P.'s house, D.P. says in the first affidavit that he has no memory of it. In her second affidavit, S.P. provides no more information about the incident. Despite this, in his second affidavit, D.P. does recall it and responds in detail. No explanation is given as to why he was able to recall the incident when he did not before.

[78] Turning to the specific allegations, D.P. does not deny that the incident in 2017 occurred. S.P.'s uncontroverted evidence, therefore, is that D.P. was intoxicated and that C.J.P. was with D.P. It is also uncontroverted that D.P. was confrontational and yelled at S.P. with C.J.P. present. Finally, it is uncontroverted that D.P. later apologized

and assured S.P. that he would refrain from drinking alcohol while the children were in his care.

[79] D.P. does specifically deny being intoxicated in other examples raised by S.P.

[80] In the two instances described in 2019, I need not decide if D.P. was intoxicated. S.P. acknowledges that there were other adults or young adults there with D.P. As such, even if D.P. was intoxicated, the children were not at risk.

[81] With regard to the incident in December 2020, I find that D.P. was intoxicated on the day that he was to have the children in his care. In this case, it is not a simple matter of dueling affidavits. D.P.'s daughter provided an affidavit about this incident. She explained that she spoke on the phone with D.P. and concluded he was intoxicated. D.P. told her that he was to have the children in his care soon, which concerned her. She therefore phoned S.P. and told her about the situation. There is, therefore, evidence to corroborate S.P.'s own evidence.

[82] In responding to this evidence, D.P. is evasive in his first affidavit and defensive in his second affidavit.

[83] The evidence about this incident emerged gradually. S.P. provided evidence about this incident in her first affidavit. D.P. filed his first affidavit and responded to S.P. on this incident. After that, D.P.'s daughter filed her evidence. D.P. filed a second affidavit where he responded to his daughter's evidence.

[84] D.P.'s evidence on this incident in his first affidavit is five paragraphs long. However, he does not deny that he was intoxicated. He also says that he believes that his daughter contacted S.P. after "apparently" speaking with him and thinking he was intoxicated. D.P. does not state whether he spoke to his daughter.

[85] It is only in his second affidavit, after his daughter provided her evidence, that he admits he spoke with his daughter and attests that he was not intoxicated. D.P.'s answer did not squarely answer the concerns raised, nor did he address the contextual facts he knew, until he was pressed to once his daughter filed her own affidavit.

[86] Moreover, D.P. minimizes and misstates his daughter's evidence and is argumentative and sarcastic. He states, at para. 20 of his second affidavit:

> I specifically deny that I was intoxicated when I spoke to [S.P.] [as written – the reference appears to be about his daughter's affidavit] on the phone during the call which she described in paras. #16-20 of her Affidavit. [relating to the incident in December, 2020]. I noted that in para. #29 of her Affidavit [D.P.'s daughter] appears to assert that because I had what she calls "slowed speech", she figured that I sounded intoxicated to her on every phone call I had with her over the course of an entire weekend.

[87] D.P.'s daughter did provide the evidence at para. 29 of her affidavit that D.P. refers to, but that evidence was about another incident. With regard to the phone call in December 2020, his daughter gave detail about why she believed he was intoxicated, stating at paras. 17 and 18:

> … My dad was showing signs which I recognize, from his patterns of behaviour when drinking, as being intoxicated such as slowed speech, being increasingly confrontational, his tone of voice and fixating on the things he 'needs to do for his kids' like giving money.
>
> My concerns started because he seemed to be less coherent than the other times that I have spoken to him and I was worried that his alcohol use had worsened.

[88] Given that there is evidence not only from S.P., but also D.P.'s daughter, and given the problems in D.P.'s evidence, I conclude that D.P. was intoxicated in

December 2020 and S.P. was correct in ensuring that the children did not go into his care.

[89] The evidence from S.P. about the incident in May 2021, in which D.P. asked S.P. to take the children into her care is insufficient for me to conclude that D.P. was intoxicated.

[90] The evidence from June 2021, in which D.P. asked S.P. to take the children into her care is different, however. S.P. does not state in her affidavit that she believed D.P. was intoxicated. However, D.P.'s daughter attests that when she spoke to her father, he appeared intoxicated. It is on this occasion that she states that she spoke to her father on several occasions during the weekend and that she believed he was intoxicated "due to his slowed speech and because he was not acting like himself."

[91] In his affidavits, D.P. did not specifically address whether he was intoxicated during that weekend.

[92] The central question of the incident in June 2021 was whether D.P. could not, or did not want to, care for the children due to intoxication. His answer, which belittles his daughter's evidence, is at best evasive. It was incumbent on D.P. to clearly state whether he was intoxicated. He did not.

[93] Based on his daughter's clear affidavit evidence, as well as D.P.'s lack of clarity, I conclude that D.P. was intoxicated during the incident.

[94] The other major issue that S.P. raises is about D.P.'s ability or interest in responding to the children's health care. In particular, S.P. raises concerns about D.P.'s refusal to follow safety precautions that the doctor recommended they follow when C.J.P. was diagnosed with epilepsy.

[95] The evidence about the safety precautions centres around whether D.P. allowed C.J.P. to ride chairlifts without an adult. I find that the evidence is unclear about what the doctor's exact recommendations were, and whether D.P. followed them.

[96] What is concerning, however, is D.P.'s lack of awareness of C.J.P.'s health problems. In her first affidavit, S.P. stated that C.J.P. was diagnosed with epilepsy. In response, D.P. stated in Affidavit #1 at para. 3: "[C.J.P.] had two seizures a number of years ago, and he hasn't had once since. [C.J.P.] has been tested many times since then and what we have been specifically told is that he does <u>not</u> have epilepsy …" (emphasis in original).

[97] In her subsequent affidavit, S.P. attached as an exhibit doctor's notes in which the doctor states about C.J.P. that: "a diagnosis of epilepsy is quite likely at this stage." C.J.P. was prescribed medication and S.P. was taught how to administer medication should C.J.P. have suffered a prolonged seizure.

[98] In his second affidavit, D.P. seized on the fact that the doctor said that C.J.P. likely had epilepsy in an attempt to prove S.P. wrong.

[99] While S.P. was not entirely correct, it does appear that the doctor treated C.J.P. as though he had epilepsy, even if he could not completely confirm it. The difference between whether C.J.P. likely or definitely had epilepsy is a question of semantics.

[100] It is also troubling that D.P. believed that they had been told that C.J.P. did not have epilepsy, and that, when confronted with the fact that he was incorrect, did not admit it, but attacked S.P.

[101] C.J.P. is no longer on medication and he is healthy. There is no suggestion, moreover, that D.P. did not follow medication requirements, although what he

understood about the need for medication, given that he believed C.J.P. did not have epilepsy, is unclear. Nevertheless, D.P.'s lack of knowledge and attitude does leave me with concerns about how D.P. will respond if either children have health problems in the future.

Communication and Cooperation

[102] S.P. identified communication and cooperation as a problem. D.P.'s counsel did as well, suggesting that S.P. should speak to D.P. about her concerns, for instance, if she believed that D.P. was intoxicated while the children were in her care.

[103] Based on the evidence before me, I conclude that S.P. has made efforts to address issues with D.P. She describes in her affidavits her attempts to speak to D.P. about problems, particularly about her concerns with his consumption of alcohol. The texts and emails attached to her affidavits are courteous and directed at resolving problems.

[104] I also conclude that D.P. does not communicate with S.P. in a productive manner. Thus, for instance, he does not deny her statement that he was confrontational and yelled at her in front of C.J.P. in 2017.

[105] Similarly, he does not deny that he yelled at her in front of the children in the spring of 2019, though he spends some time discussing the incident. It appears that D.P. seeks to justify his reaction on the basis that S.P. arrived at his home unannounced when she knew he was having a barbeque. If so, I find that S.P.'s actions do not justify yelling at her in front of the children.

[106] D.P. could also have prevented confusion if he had communicated with S.P. when he asked her to take the children in May 2021. D.P. says that S.P. could have

talked to him about what occurred. Given how D.P. reacts to S.P., S.P. could very well have been worried about D.P.'s response. Moreover, the children were in S.P.'s care at the request of D.P. D.P. also has the responsibility of reaching out to let S.P. know that the situation had changed.

[107] S.P. and D.P.'s daughter also attested that D.P. did not want S.P. to know about an allegation of sexual assault made by his other daughter against his stepson. D.P. denies that he asked his daughter not to tell S.P. I do not think it necessary to draw any conclusions about what did or did not occur. D.P. says that he told S.P., which S.P. does not deny, and the children were not at risk at any time.

[108] The evidence that I can accept, therefore, is that there were two instances in which D.P. was intoxicated while the children were in his care: in 2017, and again in December 2020.

[109] With regard to the incident of June 2021, I cannot conclude that D.P. was intoxicated while the children were in his care. I can, however, conclude that it played a role in D.P.'s request to have S.P. take the children into her care.

[110] The 2017 incident is dated, but the incidents from 2020 and 2021 are fairly recent.

[111] Furthermore, D.P. displays a lack of awareness of his child's health problems. He also does not communicate well with S.P.

[112] On the other hand, the children have been living half the time with D.P. since at least 2019, and the parties did believe that a shared residential schedule was most appropriate for the children.

[113] I note that S.P. has not identified any further problems after she commenced her application, which she filed on August 31, 2021. The parties have been under an interim interim order since September 21, 2021, which included terms that the parties not be intoxicated while the children are in their care and that S.P. could cancel D.P.'s parenting time if she had reason to believe that the children were not safe.

[114] The concerns that S.P. has raised are significant. In the end, however, I believe that it is possible to attenuate the risks involved while keeping the residential schedule the same. D.P. agrees to continue the abstinence term. I have concluded that it is in the best interests of the children to order an abstinence term, but will modify it from the interim interim order.

[115] Keeping the term that S.P. may cancel D.P.'s parenting time if she has reason to believe the children are not safe is not ideal, as D.P. has responded inappropriately when S.P. has cancelled parenting time in the past. However, I believe it is necessary for the children's interests. On the basis of the affidavit evidence, I am also satisfied that S.P. will act only where there are genuine concerns about the children's safety.

[116] Given D.P.'s lack of understanding of C.J.P.'s health problems, I will also make orders about decision-making. S.P. has sought final say on decision-making on all matters. I believe that at this point, this is not necessary. However, I will make an order that S.P. has final decision-making authority on health issues for the children.

[117] The communication issues may hopefully be resolved by requiring the parties to communicate by text or email and to limit them to discussions about the children.

CONCLUSION

[118] My order is therefore as follows:

1. On an interim basis, the parties shall share parenting time of [C.K.P.] born [redacted], and [C.J.P.] born [redacted], (the “Children”) on an equal basis.
2. On an interim basis, the Defendant shall not consume alcohol or non-prescription drugs immediately before or while the Children are in his care, nor shall the Children be in the presence of anyone under the influence of alcohol or non-prescription drugs while in the Defendant’s care.
3. On an interim basis, if the Plaintiff believes on reasonable grounds that the Children, or one of the Children, is not safe or is being exposed to drugs, alcohol, violent behaviours or unsafe people and situations while in the Defendant’s care, the Plaintiff may cancel the Defendant’s parenting time.
4. On an interim basis, if the Defendant is unable to care for the Children during his scheduled parenting time, the Plaintiff shall be notified and the Plaintiff shall be at liberty to take the Children into her care.
5. On an interim basis, the Plaintiff and Defendant shall share decision-making responsibility for the Children as follows:
   (a) the Plaintiff shall consult with the Defendant about health care decisions for the Children, but if the parties are unable to come to agreement, the final decision-making responsibility shall rest with the Plaintiff; and
   (b) the Plaintiff and Defendant shall share all other decision-making responsibilities.

6. The Plaintiff and Defendant shall refrain from saying disparaging comments about one another in front of the Children.

7. On an interim basis, the Plaintiff and Defendant shall communicate only by text or email, for the sole purpose of discussing matters pertaining to the Children, and all such communications shall be conducted in a respectful manner.

[119] I have not made orders with regard to travel and passports, as this was not discussed during the hearing. Matters related to child support and special and extraordinary expenses were also adjourned. If the parties cannot resolve these issues, they can be brought back for a further hearing.

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WENCKEBACH J.