SUPREME COURT OF YUKON

Citation: *C.T.B. v B.A.A.B.*, 2022 YKSC 15

Date: 20220309
S.C. No. 21-D5359
Registry: Whitehorse

BETWEEN

C.T.B.

Plaintiff

AND

B.A.A.B

Defendant

Before Justice K. Wenckebach

Counsel for the Plaintiff — Lenore Morris

Counsel for the Defendant — Andre Duchene (by videoconference)

This decision was delivered in the form or Oral Reasons on March 9, 2022. The Reasons have since been edited for transcription without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The defendant, B.A.A.B., has filed an application in this divorce proceeding. He and the plaintiff, C.T.B., have one child of the marriage, M.B. In his application, the defendant sought a number of orders. However, in the hearing, the defendant's counsel sought interim parenting time for the defendant and stated that the other matters could be adjourned generally.

[2] Specifically, he seeks that the child spend Monday to Fridays with the defendant and be returned to the plaintiff for weekends for a period of at least one month, after

which the parties would return to court to discuss appropriate interim access. This would constitute remedial parenting time. The plaintiff opposes the application. The defendant's counsel submits that the plaintiff has sought the intervention of the state to deprive the defendant of his home and his time with the child.

[3] The parties separated in July 2021. At that time, the plaintiff applied for an emergency intervention order. The defendant says that the plaintiff did this although she had no real fear of the defendant and certainly no reasonable fear of the defendant. Her main concern was to remove the defendant from his home.

[4] The defendant consented to the order, though he now says that he consented based on bad advice from his then counsel. The defendant's counsel says that since then the plaintiff has worked to deprive the defendant of contact with the child.

[5] For her part, the plaintiff's counsel says that the plaintiff was reasonably concerned about the defendant's actions and that is why she obtained the emergency intervention order. She has sought to provide the defendant with parenting time and it is because of the defendant's actions that his contact with the child was curtailed. She admits that she and the defendant were in an unhealthy relationship and that they brought the worst out in each other. She is, however, concerned about his mental health and his ability to care for the child for long periods of time. She therefore seeks that the defendant have parenting time with the child only for short periods.

[6] The defendant filed video and audio tape of his interactions with the plaintiff, her mother, and with the child. Before I enter into a consideration of the merits of the application, I will determine to what extent I should use these materials.

[7] The defendant made his video recordings with the plaintiff's knowledge. In some instances, the plaintiff can be seen videotaping the defendant as well. The audio recordings, however, do not appear to be made with her knowledge or consent.

[8] In *F.S. v. T.W.S.*, 2019 YKSC 25, Justice Duncan, as she was then, provided a summary of the legal principles with regard to the use of recordings obtained surreptitiously. At paras. 6 to 8, she stated:

> [6] As noted by the Alberta Court in *E.T. v. G.T.*, Canadian courts are divided about the admission of surreptitiously obtained evidence in family law cases. Further, over the last 15 years, judicial views have changed. Such evidence was more often admitted in the past, and more frequently excluded in recent years. The Ontario Court in *Scarlett v. Farrell* concluded that even the cases with different outcomes can be reconciled on the basis of the following analysis. The Court wrote at para. 31:
>
> > … All the cases recognize the general repugnance which the law holds toward these kinds of recordings. However, at the end of the day, the court must consider what the recordings themselves disclose. And if the contents of those recordings are of sufficient probative value, and if … the probative value outweighs the policy considerations against such recordings, then the court will admit them into evidence. It will do so having regard to the court's need to make decisions about the best interests of the children based upon sufficiently probative evidence that may be available to the court.
>
> [7] The policy considerations against admitting surreptitious recordings into evidence were described in earlier cases as well. In *Seddon v. Seddon*, the Court called surreptitious recordings of household conversations in the home among family members, an "odious practice". In stating that surreptitious recordings of telephone calls by litigants in family law matters should be strongly discouraged, the Court in *Hameed v. Hameed* noted there was already enough conflict and mistrust in family law cases

> without the parties worrying about whether the other is secretly taping them.
>
> [8] Whether or not to admit such evidence requires a weighing of the policy considerations against the probative value of the evidence. The party seeking its admission should establish a compelling reason for doing so. [citations omitted]

[9] In this case, I find that the probative value of the recordings is low. During the hearing, the defendant's counsel submitted that the recordings demonstrate that the plaintiff is not afraid of the defendant. The plaintiff does not act fearful, and the defendant is calm and controlled throughout. The recordings support his submission that the plaintiff concocted the story of the defendant's abuse to deprive him of his home and access to the child.

[10] However, people react in a variety of ways in threatening situations. That the plaintiff or her mother engaged with the defendant and did not back down says nothing to me about whether they were afraid of him. That the defendant was calm when he was recording himself says nothing to me about how he is when he knows that the cameras and audio recorders are turned off. Recordings are often not as clear in depicting what occurred as we would wish them to be. They can be even less helpful when, as here, the defendant's counsel is asking me to make conclusions about the emotions and motivations of people in the recordings.

[11] I therefore conclude that the probative value of the recordings is low. I decline to admit the audio recordings submitted by the defendant.

[12] The video recordings are on a somewhat different footing. While the plaintiff did not want the defendant to record her, she also recorded him. I will therefore admit them as evidence, although I may not place much weight on them.

[13] I now turn to the question of the defendant's parenting time with the child.

[14] What I must determine is what amount of parenting time is in the child's best interests. The factors I am taking into account are:

(i) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(ii) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

(iii) any plans for the child's care;

(iv) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child; and

(v) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security, and well-being of the child.

[15] First, I will look at the child's needs.

[16] The child is a two-and-a-half-year-old child. He has always resided with his mother in the same home. The defendant's proposal to have the child during the week and to have him return to the plaintiff's care on the weekends for one month does not take into account how destabilizing this could be for the child.

[17] Second, I will consider the willingness of the parties to support the development and maintenance of the child's relationship with each other and the ability to meet the child's needs together as one factor.

[18] The defendant's counsel submits that the evidence demonstrates that the plaintiff willfully prevented the defendant from living in his home and being with his child. He

points to the video recordings to show how the parties acted and notes that the plaintiff contacted the RCMP on several occasions when it was not warranted.

[19] Having reviewed the materials, I note, firstly, that both parties called the RCMP on each other. I also cannot conclude that there were no genuine concerns that prompted the plaintiff's phone calls to the RCMP. What I can conclude from the evidence is that the parties were in an extremely unhealthy relationship. Shortly before they finally separated, the RCMP were called three times: once by the defendant and twice by the plaintiff. The RCMP attended. It appears that the parties fought with each other, that the RCMP were concerned about the potential for escalation, but that no criminal charges were warranted. Maybe this caused the plaintiff to overreact. Maybe her fear was objectively reasonable. Regardless, I can see no evidence that the plaintiff did not genuinely fear the defendant.

[20] This is not to say, however, that the plaintiff has consistently acted to foster the defendant's relationship with the child. Indeed, I find that neither party has been acting in the child's best interests. While there have been times when the plaintiff has provided parenting time to the defendant, she has also denied it or threatened to deny it for very flimsy reasons, including, for instance, because the defendant would not bring a grey hoodie for the child to wear.

[21] For his part, the defendant has frequently put his needs before those of the child, such as when he demanded that he be able to spend time with the child when the child was sick, and then demanding that the child be taken to the hospital to prove that he was sick.

[22] It seems to me that, when they had contact, the parties' time was spent in petty arguments. Each person dug into their own position, unwilling to seek a compromise or a resolution.

[23] For instance, on one occasion when the child returned home to the plaintiff, he became quite ill. The plaintiff, understandably, asked the defendant what the child had eaten and who he had seen. However, the unfortunate undertone of the message was that the defendant had contributed to the illness. The defendant, in return, did not provide the information but, rather, require proof that the child was not able to see him.

[24] This pattern of digging in rather than trying to find a solution to problems has impacted the defendant's time with the child. After the emergency intervention orders expired, the parties spoke of establishing a new scheme for the defendant to see the child but neither would email the other to discuss the issues. One issue led to another and, not surprisingly, in the end, the defendant stopped having parenting time with the child.

[25] Eventually, the parties' lawyers communicated, but this was not enough to clear the impasse. The plaintiff's counsel proposed an order which the defendant's counsel objected to. Nothing was put in place, no other discussions occurred, and, as a result, the defendant did not see the child for months. It was the responsibility of both parties to take all reasonable steps to ensure that the child spent time with his father. They did not and, as a result, the child's interests were ignored.

[26] I also note that, in texts, the plaintiff has stated that the defendant draws the child into their disputes. There is some evidence of this. In a text communication, the

defendant used the child's statement about which parent he wanted to be with to change a planned ride to a restaurant.

[27] The child is still oblivious to what the defendant is saying. However, it does not take long for children to understand the feelings, if not always the language, of their parents. The child should not be drawn into this dispute.

[28] I am not convinced by the plaintiff's counsel that the defendant's health conditions prevent him from caring for the child for longer periods of time. The evidence presented is that he had some difficulties but has taken treatment. I do not have sufficient evidence to conclude that the defendant's health problems made it difficult for him to parent before and cannot conclude that it has an impact on him now.

[29] The plans for the child's care is also a factor here. What is most telling is that the parties spent very little time in their affidavit discussing the child's care. As the child has been in the care of the plaintiff, I can conclude that his needs are being met. However, I have no evidence from the defendant about his plans for the child's care. The affidavit evidence was that the defendant was soon to be without housing and it was at the hearing that the defendant's counsel said that the defendant did have housing where he could take the child to.

[30] I do not have any evidence, however, about how the defendant would be able to accommodate the child for overnight visits, such as whether the child will have a bed to sleep in a separate space. When the defendant had parenting time before he requested that the plaintiff provide for all of the child's needs, including food and diapers: it became one of the sources of conflict between the parties. It is therefore important to

know that the defendant will be able and willing to provide for the child's necessities while he has him in his care if he is to spend more extended periods of time with him.

[31] Finally, the defendant has been charged with criminal harassment and mischief. The parties are on a no contact order. A third party must therefore be involved in pickups and dropouts. Counsel to the parties did not request to have anything in place after the criminal charges are resolved. I will leave that consideration to a later date.

[32] I have concluded that it is in the child's best interests to gradually increase the amount of time he spends with the defendant. At this point, I do not have enough evidence to conclude that the child should have overnight visits with the defendant. There will be a review provision to bring this back to court, at which point the amount of time the defendant spends with the child can be revisited.

[33] The defendant has parenting time three times a week with the child for four hours at a time. Given that the parties require an intermediary for pickups and dropouts, I will not increase the number of times the defendant has parenting time with the child.

[34] I will order that the time the defendant spends with the child be increased immediately to five hours during his weekday visiting time and will remain at four hours during the weekend visit. This should be put in place for another two weeks, followed by another increase in the amount of time spent.

[35] I was reluctant to put an amount of time because I do want to respect the child's schedule. I note that napping is of vital importance for a child of his age, so I do not want to interfere with that.

[DISCUSSIONS RE: VISITING TIME]

[36] It will be six hours. Three weeks later, we will put it to between 8 a.m. to 4 p.m. for those two days of the week. Weekends will remain at four hours. Then we will do a review three months from this order. I think the focus at that point will be overnights.

[DISCUSSIONS RE: FACILITATORS AND OVERNIGHT ACCESS]

[37] At this point, I just do not have any information about the defendant's ability to have the child overnight. I know he has a place to stay. Like I said, does he have a bed; is he going to have the stuff ready for the child? It is the basic, sort of, just day-to-day stuff that I need to know that he has that.

[DISCUSSIONS RE: OVERNIGHT ACCESS]

[38] It is a bit of logistical issue. It is also a bit of the defendant's willingness to take that on, because he has also expressed the difficulty he has in terms of economics. I do want some evidence about that. I think it might be useful to have a little bit of a groundwork laid that his amount of time with the child is working, in terms of that issue.

[DISCUSSIONS RE: OVERNIGHT ACCESS & HANDOVER]

[39] It seems to me that, given that the house was a hotspot, that it would be best to do exchanges offsite as well. Obviously, I am not the person involved but, Mr. Duchene, that is something to consider, again, for everybody's interests.

[DISCUSSIONS RE: RECORDING OF INTERACTIONS]

[40] I will make an order that there be minimal communication during interactions and that the parties speak to each other in a respectful fashion.

[41] Ordinarily, I would make an order that they not record each other. It is so counterproductive, in terms of the relationship and there is going to be a relationship at

the end of this somehow and it has to — it is not going to help, but I also understand your concerns and so I am not going to make an order that they not do it.

[42] I am going to suggest very strongly to the defendant that he not record.

[43] MR. DUCHENE: Again, I am not envisioning, like, a camera in anyone's face. I am imagining, you know, a phone in the pocket and it would be unobtrusive and no one will hear about it. I am also fine with an order that does not allow use of the recording in the family proceedings. This is simply to protect against any future criminal or quasi-criminal proceedings.

[44] THE COURT: I appreciate that. It is because of that that I am not making the order. It is really not about whether it forms part of the evidence; it is my concern about the — your clients have a long, long road, in terms of repairing their relationship and this is not going to help.

[45] Again, if the defendant does make that choice, what I am going to order is that the plaintiff be made aware of that.

[46] And, Ms. Morris, in terms of the overnight visits, you can always bring evidence forward about that and that will be taken into consideration.

[DISCUSSIONS RE: WAIVING OF SIGNATURE]

[47] I will waive the requirement that Mr. Duchene sign the order, but he will need to approve of it beforehand.

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WENCKEBACH J.