

SUPREME COURT OF YUKON

Citation: *RGJP v CEL*,
2022 YKSC 64

Date: 20221021
S.C. No. 21-D5390
Registry: Whitehorse

BETWEEN:

R.G.J.P.

PLAINTIFF

AND

C.E.L.

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff

Paul Di Libero

Counsel for the Defendant

Kathleen M. Kinchen

Counsel for the Children

Shaunagh Stikeman

This decision was delivered in the form of Oral Reasons on October 21, 2022. The Reasons has since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): This application concerns three children (I.N.P., born December 9, 2012; C.C.P.; born August 7, 2014; and K.R.P, born May 29, 2016). Their parents, the plaintiff (R.G.J.P.) and the defendant (C.E.L.), are married but separated on January 26, 2021. Since then, they have attempted to reach agreement about the care and residential schedule for their children. To their credit, they have agreed to some

aspects of the children's care. The major outstanding issue is about the children's residential schedule.

[2] R.G.J.P. seeks to have a residential schedule in which the children will live with him half the time and with C.E.L. the other half of the time. C.E.L. seeks to have the children live with her and that the children have one overnight a week with R.G.J.P. and/or have one play date for a few hours per week.

[3] A Child lawyer was appointed for I.N.P. and received instructions from her. She also recommends that R.G.J.P. spend one overnight per week with the children and/or have a play date for a few hours per week with them.

[4] The sole issue in this case is what parenting schedule is in the best interests of the children.

[5] The sole consideration in determining parenting time is the best interests of the children. Section 16(3) of the *Divorce Act*, RSC, 1985, c 3 ("*Divorce Act*") enumerates a number of factors that may be considered in assessing the best interests of the child.

[6] In the case at bar, three themes emerged from counsels' submissions that correspond to those factors:

- the history of the children's care and the parties' abilities to meet the needs of the children;
- allegations of family violence; and
- the children's views and preferences.

[7] With regards to the history of the children's care and abilities to meet the needs of the children, the affidavits and some of the submissions discussed the history of the care of the children. There was some disagreement about who did the household

chores and provided childcare. I accept that both R.G.J.P. and C.E.L. were very involved in their children's lives until separation, and R.G.J.P. has been involved as much as possible since then.

[8] It is also uncontroverted that both parties love their children very much. R.G.J.P. displayed a great deal of knowledge about some aspects of his children's lives and who they are.

[9] Clouding the determination about the parties' abilities to meet the needs of their children, however, are the allegations of family violence against R.G.J.P, and so I turn to those considerations.

[10] C.E.L. alleges that R.G.J.P. has been violent to the children. R.G.J.P. denies that he has been violent in any way.

[11] I find that R.G.J.P. has been violent towards I.N.P., C.C.P., and K.R.P.

[12] The *Divorce Act* defines family violence broadly. It includes any conduct that is violent or threatening or that causes a family member to fear for their own safety. One of the enumerated forms of abuse is psychological abuse.

[13] Family violence is a critical consideration when determining the best interests of the children. C.E.L. attests that R.G.J.P. has been violent to the children. As one example, she describes an incident in which she came home and found the children in distress. They told her that C.C.P. accidentally broke a gift given to him. R.G.J.P. slapped him numerous times and called the children "spoiled little fucking brats". The three children repeated this phrase numerous times. R.G.J.P. also pushed I.N.P. by her face and yelled to her to lay down as she was defending her brothers.

[14] C.E.L.'s mother, B.C., also provided an affidavit. The parties lived in a cabin on B.C.'s property and, as both parties attest, they had frequent contact with B.C. She also attests that R.G.J.P. shouted at and slapped the children.

[15] R.G.J.P. denies that he was violent in any way. R.G.J.P.'s counsel submits that R.G.J.P. has raised his voice and been firm with the children, but only within reasonable limits.

[16] Others who have witnessed his parenting also attest that R.G.J.P. is a good and attentive father. A friend of his with whom he spends a considerable amount of time in the presence of his children attests that he is calm and is stern with the children when they need correction, but not aggressive.

[17] R.M., who was C.E.L.'s brother's fiancée, also spent a great deal of time with the family until 2018. She also attests that R.G.J.P. was never angry or out of control with his emotions.

[18] It is extremely difficult to determine credibility on affidavits alone. The parties see things from their own perspective and may not be reliable. The affidavits of third parties are also difficult to parse through. Those filed on behalf of C.E.L. cannot be reconciled with those filed on behalf of R.G.J.P. The third parties are also not disinterested. They are friends and relations of the parties. Moreover, family violence most often occurs in private. It is possible that what the third parties witnessed is not what occurred behind closed doors.

[19] In this case, I am assisted by I.N.P.'s information, as presented by the Child lawyer. I.N.P. told the Child lawyer that R.G.J.P. has difficulty controlling his anger around her mother and the children. She is anxious when he is with them and he will

quickly become dysregulated and angry with them. She additionally reported that R.G.J.P. can become angry if the children do not want to speak with him.

[20] R.G.J.P. expressed concerns about the Child lawyer's information. He states that the way the letter is phrased makes it difficult to know what I.N.P. actually told the Child lawyer. He also says that the Child lawyer did not report that she assessed whether C.E.L. had influenced I.N.P. and notes that the vast majority of meetings took place when I.N.P. was in C.E.L.'s care.

[21] I do not share these concerns. As the Child lawyer stated during the hearing, I.N.P. decides what the Child lawyer does and does not include in her reporting letter. A child speaking with a Child lawyer is in a vulnerable position. They may fear retribution from one of their parents or they may worry that they will hurt their parents' feelings. It is therefore not unusual to have letters that are short on details. In this instance, as well, I.N.P. did provide some information about interactions with her father.

[22] With regard to whether C.E.L. influenced I.N.P., R.G.J.P. relates a comment made to him by I.N.P. which suggests that C.E.L. has spoken to I.N.P. negatively about R.G.J.P. This is contested by C.E.L. I cannot determine whether or to what extent C.E.L. does speak to the children about R.G.J.P. It is useful to remember that speaking negatively about the other parent to the child is never appropriate. Ultimately, however, whether C.E.L. has spoken negatively to the children about R.G.J.P., I am not convinced that C.E.L. has influenced I.N.P. to feel the way she does about R.G.J.P. During the hearing, the Child lawyer said that she did not detect any parental influence.

[23] Moreover, I.N.P. has noted not only concerns about R.G.J.P. but also that there have been improvements in the way he relates to the children since the Child lawyer

provided her first letter. This provides an indication to me that I.N.P. is evaluating her relationship with R.G.J.P. on her own and coming to her own conclusions.

[24] C.E.L.'s counsel stated during the hearing that concerns about the Child's lawyer's letter could have been canvassed before the hearing. I agree that it can be useful to discuss and possibly clarify these issues with the Child lawyer in advance of a hearing.

[25] I.N.P. has not stated that R.G.J.P. shouts at her or has slapped her or the other children. Given the frailties of affidavit evidence, I do not find that the incidents occurred as C.E.L. and as B.C. described them. However, I.N.P.'s descriptions and her anxiety around her father, in combination with C.E.L.'s and B.C.'s overall testimony, does lead me to conclude that R.G.J.P. has been, at the very least, psychologically abusive to the children.

[26] I now turn to I.N.P.'s views and preferences.

[27] The Child lawyer was appointed to act on behalf of I.N.P. only. The parents agreed that C.C.P. and K.R.P., who are eight and six, respectively, were too young to speak with the Child lawyer. I.N.P. wants to live with C.E.L. and to visit with R.G.J.P. overnight once a week and to have a play date for a few hours per week.

[28] I give I.N.P.'s views considerable weight. The child's views can assist the Court and the parties greatly in determining their best interests. At the same time, the child's views are not determinative. Factors that may assist the Court in determining the weight to give the views of the child include:

- the child's age and maturity level;
- whether the child is clear and unambivalent in expressing their wishes;

- how informed their wishes are;
- the length of time they have expressed their preference;
- practicalities involved;
- parental influence;
- the overall context of the situation;
- whether both parents are capable of providing adequate care; and
- the circumstances of the preferences from the child's point of view.

[29] In the case at bar, the practicalities of I.N.P.'s wishes are not at issue.

[30] Parental influence, the overall context, and the parents' abilities to provide adequate care have been addressed above.

[31] I will address the other factors in turn.

[32] With regards to the child's age and maturity level, I.N.P. is 11 and will turn 12 in early December. Her parents agree that she is mature, but R.G.J.P.'s lawyer submitted that, as I.N.P. is young, that must be taken into account as well.

[33] The Child lawyer described her as articulate in describing her feelings and in recognizing the impact her parents' actions have on her.

[34] I.N.P. is young. However, in this case, that does not detract from the weight I give her views. R.G.J.P.'s actions have had a negative impact on I.N.P.'s well-being. She experiences anxiety at least sometimes when she is with him. I.N.P.'s suggestions provide a way for her to continue to spend time with R.G.J.P. but in a way that is safe for her. It does appear that I.N.P. has insight that belies her age.

[35] The second issue is whether the child is clear and unambivalent in their wishes and the length of time they have expressed those wishes.

[36] The Child lawyer met with I.N.P. numerous times and spoke with I.N.P.'s counsellor. She states that I.N.P.'s views about the parenting schedule have been consistent for a lengthy period of time. I.N.P. is firm in her wishes.

[37] With regards to how informed I.N.P.'s wishes are, I.N.P.'s wishes are based on her experiences with her father. They are not, as counsel to R.G.J.P. suggests, an overreaction to his reasonable actions nor are they influenced by C.E.L.

[38] In terms of the circumstances of the preferences from the child's point of view, it is clear that I.N.P. loves her father very much. I also accept that she enjoys spending time with him. However, she experiences anxiety with him and is worried about making him angry.

[39] R.G.J.P.'s lawyer said that R.G.J.P. acknowledged that his manner has had an impact on I.N.P. and has modified his behaviour accordingly.

[40] I.N.P. has seen a difference in R.G.J.P.'s behaviour but I see no evidence that R.G.J.P. has changed how he interacts with I.N.P. because he recognizes that he has had a negative impact on I.N.P. The circumstances from I.N.P.'s point of view are important and should not be minimized.

[41] Considering the factors together, it is my opinion that I.N.P.'s wishes should play a significant role in my decision.

[42] In conclusion, given that there has been at least psychological abuse and given I.N.P.'s firm wishes, I conclude that it is in I.N.P.'s best interests that C.E.L. have primary parenting with I.N.P., C.C.P., and K.R.P. It is also in K.R.P. and C.C.P.'s best interests.

[43] My order is as follows:

- the plaintiff and defendant shall have joint decision-making authority for the children of the marriage;
- C.E.L. shall have primary parenting time with the children of the marriage;
- R.G.J.P. shall have parenting time with the children one overnight per week and may have an additional play date once a week;
- the children shall spend Christmas Eve and Christmas morning, December 24, 2022, at 3 p.m. to December 25, 2022, at 1 p.m., with the plaintiff, and for each subsequent even numbered year after 2022 unless otherwise agreed upon by the parties;
- the children shall spend Christmas Eve and Christmas morning, December 24, 2023, at 3 p.m. to December 26, 2023, at 10 a.m. with the defendant, and for each subsequent odd number year after 2023 unless otherwise agreed upon by the parties.

[44] I recommend that the Child lawyer continue to remain appointed in order to speak with I.N.P., if necessary.

[DISCUSSIONS]

WENCKEBACH J.