

# SUPREME COURT OF YUKON

Citation: *CTB v BAAB*, 2022 YKSC 75

Date: 20221130  
S.C. No. 21-D5359  
Registry: Whitehorse

BETWEEN:

C.T.B.

PLAINTIFF

AND

B.A.A.B.

DEFENDANT

Before Justice K. Wenckebach

Appearing on her own behalf

C.T.B.

Counsel for the Defendant

Andre Duchene (by videoconference)

**This decision was delivered in the form of Oral Reasons on November 30, 2022. The Reasons have since been edited for publication without changing the substance.**

## REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The defendant father, B.A.A.B., and the plaintiff mother, C.T.B., are separated. They have one child of the marriage, M.B., born [redacted]. The father currently has court ordered daytime parenting time with M.B. and has applied for overnight access. The mother does not agree. She wants to continue to have short daytime visits.

[2] This should be a simple issue to resolve. However, this question, as with every issue that arises in this family dispute, is fraught with difficulty, conflict, and

complications. In order to understand the concerns behind this issue, it is necessary to provide some history.

[3] The parties were married in 2017. Conflict arose and the RCMP was called to the residence in 2020. No charges resulted. The parties continued to cohabit until July 2021. At that point, the mother told the father he had to leave the home.

[4] Soon after, the mother applied for, and the father consented to, an emergency intervention order. The EIO included terms allowing for the father to have visits with M.B. The visits were not without issue, however. The mother alleged that the father created conflict and would sabotage parenting time. For her part, the mother would threaten to cancel or would cancel visits between the father and M.B.

[5] The mother commenced a divorce action on September 3, 2021. The father filed a notice of application seeking joint decision-making responsibility and primary parenting time. I granted the father daytime parenting time with M.B.

[6] In my decision, I noted that the parties communicated very poorly, expressed concerns about the father's way of interacting with the mother, and the mother's cancellation of visits for little or no reason. I also set a check-in for review of the father's parenting time. My hope was that, as time passed, the parties would learn a new way of interacting with each other that was in M.B.'s best interests. This has not occurred.

[7] This matter has come back to court on numerous occasions. I have tinkered with the location of the exchange for parenting time, identified facilitators who could assist with the exchange, and modified the ways the parties could communicate with each other.

[8] On August 30, 2022, we returned to court because the mother unilaterally cancelled the father's parenting time with M.B. At that point, I reinstated the father's parenting time.

[9] A case management conference was held again on November 1, 2022, as the mother had cancelled the father's parenting time again. The mother did not attend, having told the father's lawyer that M.B. had a play therapy appointment. At that point, I reiterated the father's parenting schedule and allowed for remedial parenting time for the father.

[10] Yet another hearing was necessary, when the father kept the child from Friday, November 18, to Tuesday, November 22, as I wanted submissions on why he chose to have M.B. for that length of time contrary to my order. I heard from the father's counsel as well as from the mother about why she cancelled the father's parenting time.

[11] With this backdrop, I turn to my decision of the father's request for parenting time with M.B. Currently, the father's parenting time with M.B. is supposed to occur every Wednesday from 8 to 5 p.m., Friday from 8 to 5 p.m., and Saturday from 8 to 1 p.m. The father is seeking parenting time on a two-week schedule.

- Week 1: Monday from 8 a.m. to Tuesday at 4 p.m. and Friday from 8 a.m. to Sunday at 4 p.m.
- Week 2: Tuesday from 8 p.m. to Wednesday at 4 p.m. and Friday from 8 a.m. to 4 p.m.

[12] It is M.B.'s best interests that decide the issue. In this case, the following factors are pertinent in determining M.B.'s best interests:

- M.B.'s needs;

- family violence; and
- the parties' willingness to support the development and maintenance of the child's relationship with the other party.

[13] I will first look at M.B.'s needs.

[14] Both parents have expressed concerns about the other's ability to meet M.B.'s needs. The father says that M.B. frequently comes to his home with cuts and bruises. He also says that M.B.'s health is poor, he is frequently ill, his speech is delayed, and he has gastrointestinal issues that he does not believe the mother is seeking help for. The mother also says that M.B. has bruises and bumps when he returns from the father's home. She is worried that the father does not put M.B. in his car seat or use a seat belt on him.

[15] Allegations have been made against both parents to Family and Children's Services. The father's concerns included whether the mother was tending to M.B.'s health. FCS investigated and have not found any of the concerns to be substantiated. I am the decision-maker about whether there is physical harm or neglect, not FCS, but I put great weight on FCS' assessment, as they have met with M.B. and have spoken to both parents at the time the allegations surfaced.

[16] I suspect that many of the concerns about M.B.'s physical health would be alleviated if the parties would be able to communicate and if they did so in a productive manner.

[17] The parties use facilitators for exchanging M.B. so the parties do not interact. The mother expresses repeatedly her concerns that the father is exposing M.B. to conflict in the way he interacts with her or the facilitators when they meet for exchanges

for visits. Previous facilitators have filed affidavits in which they describe the father's rudeness during exchanges. The father says that it is the mother that causes issues during exchanges. He, too, has filed affidavits from others about the mother's actions during exchanges. It seems to me that both parties are contributing to the conflict. However, that does not mean that the father's parenting time should end.

[18] I also have concerns with the father's abilities to recognize M.B.'s needs. I have particular concern about the father's decision to keep M.B. with him for an extended period of time from November 18 to November 22. During submissions, his counsel stated that having M.B. for that length of time was in M.B.'s best interests. He said that the father was M.B.'s primary caregiver before the parties separated and there are no concerns that he could care for M.B. He also submitted that the father had not had remedial parenting time as I had granted in the order and this was the best way for him to have it. Finally, he argued that there is nothing particularly special about a parent having the child in their care for overnights and the *Divorce Act*, R.S.C., 1985, c. 3 ("*Divorce Act*") does not make this a specific issue. That he made the correct choice is shown through the video evidence that shows M.B. did well while in his father's care.

[19] I will accept for the purposes of this decision that the father was M.B.'s primary caregiver during some of M.B.'s life. I will presume that the father was very involved in M.B.'s care before the parties separated even when his involvement did not rise to being the primary caregiver. This does not change my conclusion that the father made a decision that was not in M.B.'s best interests when he decided to keep M.B. for five days.

[20] The father and mother separated in July 2021. Since that time, the father has not had M.B. in his care for more than nine hours at a time. The father has fought to change that, but the fact remains that he has not been M.B.'s primary caregiver for approximately 18 months. M.B. is three years old. He does not remember the time when his father was so involved in his life. For him, he spends a day with his father and then goes back to his mother, who takes care of him.

[21] The father's decision to keep M.B. ignored the potential impact that adjusting to a different house, a different caregiver, and a different way of parenting for such a length of time could have on M.B. It also ignored the potential impact that being away from his primary caregiver could have on M.B.

[22] Five days is not a long time for adults. It is a very long time for a child of three years old. It is common for courts to gradually increase parenting time when the parent has not been very involved in the child's care for a period of time. It helps the child to adjust to what is significant change in their lives. This should also have been done with M.B.

[23] The father's counsel also submitted that there is nothing special about having the child overnight. Again, this submission ignores the best interests of the child. For a three-year-old being away from the only home they have known is significant. There is also additional care and concerns that arise in overnight visits that do not occur during the day.

[24] Moreover, counsel's submissions are simply disingenuous. This was not one overnight but four overnights and five days. That changes the circumstances dramatically.

[25] To be clear, this does not mean that the father should not have overnight access ever. It simply means that it should be commenced gradually and increased gradually.

[26] Counsel also said that parenting time went well. For the purposes of this application, I will assume that it did. If it did and there are no aftereffects on M.B., that is a relief. It does not excuse the father from considering what the impact could be on M.B. before taking him for such a long time.

[27] My reasoning is based on counsel's submissions and may not reflect the father's thinking precisely. Counsel himself has not shown good judgment. It is very concerning that counsel facilitated the father's breach of the court order and then attempted to justify it.

[28] Ultimately, however, it was the father's decision to take the child for five days. The father either did not understand what the child's interests were or decided to put his own needs before those of his son.

[29] I now turn to the issue of family violence. The father has been convicted of harassment against the mother. The father's counsel submits that I should not find that family violence has occurred or if I do, as I understand it, he submits that it is minimal.

[30] I find that there is family violence and that it is a factor I must take into account.

[31] The father has appealed his conviction. However, the appeal has not been heard and the conviction has not been stayed. Moreover, the issue I must consider is not whether the conviction is valid but whether I am convinced there has been family violence.

[32] The trial judge in the criminal matter found that the father engaged in threatening conduct by going repeatedly to the home, following the mother in his truck, driving by

the house, and attending where he knew the mother would be. He found that this reasonably caused the mother fear. He also found that the father gave no consideration about whether he would cause the mother fear.

[33] Under the *Divorce Act*, family violence includes behaviour that causes the other family member to fear their own safety. Harassment is enumerated as a type of family violence. In my opinion, whether or not the father is guilty of the offence of criminal harassment, he has engaged in family violence as contemplated by the *Divorce Act*. The finding that there has been family violence is critical and affects my assessment of the father's ability to parent.

[34] I will now address the factor of the parties' willingness to support the other parent's relationship with the child. On this issue, had I not had to deal with this factor and my analysis had ended at the question of family violence, I would have maintained the father's parenting time as it is. However, I have additional concerns that mean a change is required in the parenting time schedule.

[35] Firstly, while I agree with the mother's concerns that the conflict between the parties is having an impact on M.B., I have also concluded that it is in M.B.'s best interests to have contact with his father. This is not happening. The mother cancelled the father's parenting time unilaterally in August. We returned to court and his parenting time was to resume. At the hearing, I told the mother that she could not simply cancel access. If she had concerns, she could come to court.

[36] On September 28, after the oral hearing for this application, I made an interim interim order that addressed which facilitator would be used and where the exchange of



M.B. was to take place. I noted that it was important for the father to have parenting time.

[37] However, on November 1, a case management conference took place at the request of the father. I was informed that the mother once again unilaterally cancelled the father's parenting time. The mother did not attend the case management conference, having told father's counsel that day that M.B. had a play therapy appointment. I reinstated the father's parenting time.

[38] When the matter returned to court for further discussion on November 28, the mother said that she stopped the father's parenting time because FCS required that she suspend it in order to conduct an investigation. However, the mother does not say this in any of her affidavits nor is it in any of the documentation on file from FCS.

[39] A letter from FCS, which the mother referred to in her submissions, is attached as an exhibit to the father's Affidavit #10. It is dated October 21, 2022, states that FCS does not have any ongoing safety or child protection concerns, and that the file would remain open to monitor the harm to M.B. over the ongoing conflict between the parties. It does not state that it instructed that the father should not have parenting time, nor does it suggest that he should not have parenting time in the future.

[40] Cancelling or greatly restricting parenting time is a radical step and is rarely in a child's best interests. Taking into account the father's past and present actions, I conclude that it continues to be in M.B.'s best interests to have parenting time with his father.

[41] Both parties have sought the involvement of a facilitator. While facilitators can be helpful in many circumstances, here, the use of facilitators has made the situation more

complex and volatile. The father's parenting time is contingent on the availability of facilitators. I ordered that Ms. Malcolm be the facilitator in the last order but that has proved less than successful. I come to this conclusion not from the mother's affidavit but from Ms. Malcolm's own affidavit. She has chosen sides in this conflict and this has only served to further ratchet up the conflict between the parties. Facilitators up to the present have not assisted but have made things worse. Everyone, it seems, gets drawn into the parties' dispute and is unable to see what is really at issue.

[42] I will not include the requirement that a facilitator be used in my order on parenting time and I will address the issue of the release order in my order.

[43] I am speaking to both of you now. I am sure neither of you have liked what I have had to say, but it seems to me that you are both very adept at provoking each other and you do so either wilfully or unconsciously. You cannot control what the other person does, but you can decide not to respond. If you do, things escalate; if you do not, that is in your favour and it is in M.B.'s best interests.

#### [DISCUSSIONS]

[44] I am going to provide my order with explanations as warranted. It is only a draft at present because I am setting a check-in time and we have to discuss that. What I am going to do first is address the issue of decision-making on access to information, because even though it has been addressed in other orders it is probably best to place it in this order as well, and then I will turn to the requested relief in the defendant's notice of application of June 14, 2022, and we will go through the grounds one by one.

[45] I am going to skip the findings for now and I will start with the order itself.

1. On an interim basis, the plaintiff shall have decision-making responsibility for the Child, including, but not limited to, medical and educational decisions.
2. On an interim basis, the defendant shall be entitled to receive information about the Child from any of the Child's professional care providers, including medical, dental, and therapeutic care providers.
3. The plaintiff shall, within 30 days of the date of this order, file with the Court and deliver to the defendant, a copy of the Child's health record, from August 1, 2020, until present, including any records from family doctors and pediatricians. The Child's records shall be sealed when filed with the Court.

[DISCUSSIONS]

[46] I am now turning to the requested relief in the father's notice of application. The first ground of the notice of application was about B.A.A.B.'s parenting time, and that leads us to the issue of facilitators. I cannot change the release order and I cannot supersede it. What I have done is I have made a finding of fact that it is in the best interests of the child of the marriage that the plaintiff and defendant be permitted to have in person contact for the purposes of transferring the child for parenting time.

[47] I do not know if your permissions will be changed. What you can do, B.A.A.B., is bring your file back to chambers on December 6 and seek a change to the release order to permit contact. This would be not dependent on hopefully the probation officer so that we have less issues about contact.

[48] What that would take us to is your actual parenting schedule. For this week, because the circumstances have not changed:

4. The defendant shall have parenting time with the Child as follows:
  - a) During the week of November 27, 2022, if Ronnie Malcolm is willing to facilitate parenting time, then exchanges shall take place at 600 College Drive, Whitehorse, Yukon, and shall be facilitated by Ronnie Malcolm, with the plaintiff approaching the entrance to the

building but not entering, and the defendant remaining inside the building until the plaintiff has left and shall occur:

- (i) Friday, December 2, 2022, at 8 a.m. to 5 p.m.; and
- (ii) Saturday, December 3, 2022, at 8 a.m. to 1 p.m.

[DISCUSSIONS]

[49] Presuming that you will get your conditions changed:

- b) During the week of December 4, 2022:
  - (i) Wednesday, December 7, 2022, at 8:00 a.m. to 5 p.m.; and
  - (ii) Friday, December 9, 2022, at 8:00 a.m. to Saturday, December 10, 2022, at 1:00 p.m.

c) Thereafter, on alternating weeks:

Week One, commencing the week of December 18, 2022:

- (i) Tuesday, at 5:30 p.m. to Wednesday at 5:00 p.m.; and
- (ii) Friday at 8:00 a.m. to Saturday at 1:00 p.m.

Week Two, commencing the week of December 25, 2022:

- (i) Tuesday, at 8:00 a.m. to 5:00 p.m.; and
- (ii) Friday at 8:00 a.m. to Saturday at 1:00 p.m.

[50] And then:

- d) The defendant shall have parenting time with the Child from Friday, December 23, 2022, at 8:00 a.m. until Saturday, December 24, 2022, at 2:00 p.m. rather than the parenting time as set out in (c).

[DISCUSSIONS]

[51]

5. All exchanges of the Child for parenting time shall occur in front of the children's play area at the Canada Games Centre.

[52] I then go back to the Court's findings, because this is about communication. I find that it is in the best interests of the child that the plaintiff and defendant be permitted to communicate with each other in accordance with the terms of this order for the purposes of discussing care and parenting time for the child.

[53] That, again, hopefully will facilitate a change to your release order, B.A.A.B.

6. If the defendant is permitted to communicate with the plaintiff under his release order, the parties shall acquire the app "My Parenting Wizard" ...

— that will mean some costs for both of you —

... and shall communicate only for the purposes of access and to report on the care of the Child. In an emergency, such as a medical emergency, the parties may communicate by text.

7. The parties shall communicate respectfully with one another.
8. The plaintiff shall provide the defendant with a phone number through which she can be contacted by text in an emergency.

[DISCUSSIONS]

[54]

9. The defendant shall provide the plaintiff with his residential address.

[55]

10. There shall be a check-in ...

— I am going to do it the first week of January —

... Affidavit material for the check-in must be filed by December 28, 2022, and reply affidavit material must be filed by January 3, 2023. ...

— if you want to say anything at that point, you have to do it by affidavit —

... If the parties do not provide an email address for delivery, the other party need not deliver their materials to the opposing party, but the party may pick up the materials from the Registry.

[DISCUSSIONS]

[56] I am just going to go one by one through the notice of application.

[57] I have addressed the first issue, which was access.

[58] The second issue was birthday access — that is past.

3. Both parties provide for the Child's health and developmental needs as determined by the appropriate professionals.

[59] I granted that on June 22, 2022. I am vacating that. I think, on reflection, it may lead to confusion about who has decision-making responsibility and I expect both parents to make decisions in the best interests of M.B. in consultation with the professionals.

4. Neither party smoke cigarettes or marijuana at any time inside any space where the Child would be present or within 10 feet of the Child.

[60] That was granted. That has not changed.

[61] Numbers 5 and 6 have been addressed in this order.

[62] Number 7 was changed. There was an order that neither party should record the exchanges, and that was done on June 20, 2022.

[63] I have addressed facilitators.

[64] We have talked about receipt of items.

[65] That is it for the notice of application.

[66] I have considered whether or not an RCMP assist is required or useful. I am not going to put that in. RCMP assist clauses should only be done in extreme circumstances where there are urgent issues and should not be a long-term solution.

[67] What this means is that we are back at me trusting both of you to abide by the terms of the order, but we are going to have a check-in.

[68] This is what is going to happen if there is violation of the court order. After the check-in, if there has been violation of the court order and M.B. has not had parenting

time or he has not been returned as he is required to be returned, we are going to have the exchanges in the courthouse. Fifteen minutes later, we are going to come to court. If M.B. is delivered as is required under the court order, we can close court. If M.B. is not delivered as required under the court order, the party who is in violation of the court order will be explaining to me why that is so. That could lead to a contempt order. That could lead to a costs order. I am hoping that we do not have to go there.

[69] There is one more thing. C.T.B, you asked that a custody and access report be ordered rather than recommended. Under the legislation, I can only make a request; I cannot make an order.

[70] In terms of visits, I know it is difficult to take M.B. out of his house when he is sick, and that has been one of the reasons for cancellation of access. I think, in general, he should still be going to B.A.A.B.'s house with B.A.A.B. knowing that he is under the weather and should lay low. If he has being cared for one parent or another, it can still happen.

[DISCUSSIONS]

[71] I will put in the order that B.A.A.B. can have Christmas with M.B., the 25th.

[72] MR. DUCHENE: Could, Your Honour, my request be removed as counsel?

[73] THE COURT: Yes, granted.

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WENCKEBACH J.