

# SUPREME COURT OF YUKON

Citation: *N.M.N. v. D.J.M.*  
2023 YKSC 20

Date: 20230411  
S.C. No. 21-B0035  
Registry: Whitehorse

BETWEEN

N.M.N.

Plaintiff

AND

D.J.M.

Defendant

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff

Kelly Labine

Counsel for the Defendant

Amy Steele

**This decision was delivered in the form of Oral Reasons on April 11, 2023. The Reasons have since been edited for publication without changing the substance.**

## REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): Three matters remain to be decided from the three applications filed in this matter:

1. Amount of parenting time;
2. Child support; and
3. Consent for travel outside the Yukon and Canada.

[2] It is encouraging to see that despite the highly adversarial tone and content of the affidavits filed in support of these applications, the parties have agreed on the following matters:

- a. Interim joint custody of the two children of the relationship: I.N.M., born [redacted] and E.N.M., born [redacted] — and I will refer to them as “the children”.
- b. Each parent will have the children for Christmas on alternate years starting with the mother having them in 2023.
- c. Each parent will have the children for Halloween on alternate years.
- d. Both parents will sign the passports for each child.
- e. Special and extraordinary expenses will be split 50-50.
- f. In June of each year, the parties will exchange income tax information.

[3] The mother confirmed that she is withdrawing her request for relief set out in paragraphs 11, 12, and 13 of her application dated September 12, 2022.

[4] The mother and father were in a relationship from March 2017 to July 2020, according to the mother, although the father says they officially separated in October 2020. In any event, they agree that they lived together from the fall of 2017 to October 2020.

[5] The mother has a child from another relationship, H.N.T. The mother worked in various positions for her First Nation steadily throughout the relationship with the father. During her high-risk pregnancy, she was unable to work and enrolled in school to upgrade her education.

[6] The father worked at various jobs throughout the relationship. He is trained as a chef. His future goal is to return to school to become a journeyman electrician. After separation, the father moved several times and was not employed steadily. He began work at his current job as a fire alarm helper in December 2021.

[7] He has recently begun a new relationship with a friend of the mother, and at the end of December 2022, they began living together in a two-bedroom apartment in Whistle Bend. His new partner has a three-year-old daughter who lives with her full time.

[8] The mother is also in a new relationship and is expecting another child imminently. Her other child, H.N.T, lives with her 50 per cent of the time. She is soon moving into a four-bedroom home in the [redacted] subdivision. She is currently employed as an education support worker for her First Nation.

#### **ISSUE 1: PARENTING TIME**

[9] Since the separation of the parties, the children have resided primarily with the mother. The children's access arrangements with the father have been inconsistent. Generally, he picks them up after daycare on Wednesday each week and returns them to the mother's home in the [redacted] subdivision by 7:30 or 8:00 p.m. He also picks them up on Fridays after daycare and now keeps them until Sunday. The pickup time has ranged from 10:30 a.m. to 2:30 or 3:00 p.m. on Sundays by the mother.

[10] At one point during 2021 when the father lived near the mother's property, he says he was seeing the children after daycare regularly three to four times each week. He has from time to time picked them up from daycare when one or the other child is sick since May 2021 when he obtained his driver's licence. He had the children for one

week in each of July and November 2022 when the mother was on work trips out of the territory.

[11] The mother says that although recently the parenting time has been consistent, earlier the visits would vary. Sometimes the visits would be two to three times a week, while at other times, two weeks might pass without the father visiting the children.

[12] The father would like parenting time to be split 50-50- one week on, one week off. He says it will increase the stability for the children to have a regular routine.

Although this was not in affidavit evidence, his counsel advised that the father has spoken to his employer and advises that they will give him defined hours, no on-call responsibilities, and flexibility when required for childcare responsibilities. His affidavit does state that he took a week off of work to stay with the children when they were sick in November. He says the children and the three-year-old child of his partner will share a bedroom. The two three-year-old girls will share a bed and the boy will have his own bed. He says all three children are compatible.

[13] The mother is not opposed to equal sharing of parenting time with the father at some point, but not now. She has concerns stemming from incidents that have occurred which have caused her to lose confidence in his parenting abilities. One example was the father's failure to tell the mother right away about a fall E.N.M. had while he was caring for her in September 2020. The child was on a couch, strapped into a bouncy chair. She fell off the couch and hit her head. The mother noticed a large swelling on her head which required medical attention from a specialist. She says the father did not tell her about the incident that had occurred several days earlier until after she had returned home from the doctor's office. Another example was his reluctance on several

occasions to pick the children up from daycare when they were sick or the mother could not get there. The mother also has safety concerns stemming from the psychological stability of his current partner.

[14] The father says he told the mother about E.N.M.'s fall as soon as she came home that day — they were still living together then — and did not take the child to a doctor or hospital because he did not have a driver's licence. He further responds that he had difficulty leaving work at the last minute to pick the children up when they were sick, but he has worked out now the necessary flexibility with his employer. He acknowledges his partner did go through a rough patch, but she is stable and sober now and he would not allow her to be in the presence of his children if she were under the influence of alcohol or drugs. He says that he has been actively involved as a parent while he and the mother were together and since separation, and he wants more time with them.

[15] This is an evolving situation. Both parents are in relatively new relationships. The father's relationship is very new. Both have recently moved into new places. Both have introduced or are soon to introduce new children into their respective homes, the father with his new partner's child and the mother with the child that she is expecting imminently. There will be many adjustments for I.N.M. and E.N.M. over the next several months. E.N.M. has difficulty with verbal communication, so the parents will need to assess her in other ways to ensure her continued well-being. I.N.M. will be starting school in September, which will be a further new environment requiring adjustment for him. As a result, stability, consistency, and routine, which is always important for children especially of a young age, are even more important now for I.N.M. and E.N.M.

Much of the recent conflict between the parents was created by the absence of a regular agreed-upon schedule of time with the children.

[16] The father also resents the driving he must do on Wednesday evenings to return the children to the mother's house in [redacted] subdivision and says it is not in the children's best interest. He wants to have them overnight on Wednesdays or to have the mother meet him halfway for the transfer. On Sundays, the mother meets them in town for the pickup, although the time of the pickup is inconsistent and ranges from 10:30 a.m. to 3:00 p.m., also creating conflict.

[17] Pickup and drop-off of the children at daycare is preferable. This will reduce the scheduling and communication conflicts and the amount of driving for both parents.

[18] The father shall have increased time with the children by keeping them for the full weekend, returning them to daycare on Monday morning. This will allow him to have them for three overnights and will give them all the chance to have the father get them ready for daycare on Monday morning.

[19] But I see this as a temporary situation. I will order a check-in by way of a family law case conference in August. The expectation at that time will be to increase the time the father has with the children if all has gone well. If the parties can agree by that time, they may negotiate and file a consent order with the agreement. But if the parties are not in agreement by that time, then I would ask each party to file one affidavit, each providing evidence to support their position.

## **ISSUE 2: CHILD SUPPORT**

[20] The mother seeks child support retroactive to February 3, 2021, when she first requested it from the father. She also seeks ongoing monthly child support. She asks

that it be calculated on the basis of imputed annual income of the father of \$32,358 for 2021 instead of his actual income, and on the basis of his line 150 income on his income tax return for 2022 of \$46,251. She says that he was deliberately unemployed in 2021.

[21] The father acknowledges that notice of a child support claim was provided to him by the mother on February 3, 2021. He is willing to pay child support based on a 50-50 shared parenting time. He seeks to be relieved from paying retroactive support on two bases. One is his current inability to afford retroactive and ongoing support payments. The other is the amount of time he says he spent with the children. His line 150 income on his 2021 income tax return was \$7,342. He said it was difficult to find steady employment after the separation. The absence of a stable living space detrimentally affected his ability to earn a higher income. A requirement to pay child support arrears will be difficult financially for him, especially with his current monthly rent of \$1,900 shared with his new partner. Finally, he says that for several months in 2021 and 2022 he cared for the children for more than 40 per cent of the time and so should not be required to pay retroactive child support for this reason.

[22] Payment of child support is a legal obligation. Section 32 of the *Family Property and Support Act*, RSY 2002, c.83, states as follows:

Every parent has an obligation, to the extent the parent is capable of doing so, to provide support for their child.

[23] Section 36 of the *Family Property and Support Act* provides that obligations are payable according to the *Yukon Child Support Guidelines* (“the *Guidelines*”), YOIC 2000/63.

[24] Section 9 of the *Guidelines* provides that:

Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of child support for the child must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the parents;
- (b) the increased costs of shared custody arrangements; and
- (c) the condition, means, needs, and other circumstances of each parent and [the children].

[25] In this case, there is not much evidence, (a) from the mother of the father's underemployment in 2021, and (b) from the father of the financial hardship that would be created by retroactive child support, other than the financial disclosure of his actual income. There is insufficient evidence to support his claim that the children were with him for 40 per cent of his time during the course of a year.

[26] I accept that the father had difficulty getting re-established after the separation. He had several complicated living situations and difficulty finding steady employment. I accept that his annual income for 2021 was \$7,342. No child support will be payable for that year.

[27] In 2022, his line 150 income was 46,251. I will order that he be required to pay arrears of child support starting in August 2022, calculated under the *Guidelines* on the basis of his 2022 annual earnings. He will not be required to pay more than \$100 each month towards those arrears. This is in part based on the difficulties he has had in re-establishing himself after the separation.

[28] The 40 per cent of time with the children is calculated on an annual basis. Although on at least two occasions the father had the children in his care for more than

40 per cent of the time for that month last year, there is no evidence that they were in his care for 40 per cent of the time during any year since the separation. So as a result, there will be no calculation made at this time on the basis of s. 9 of the *Guidelines*.

[29] At the time of the check-in in August 2023, the father shall provide his line 150 income from his most recent tax return, as has already been agreed upon by consent. Adjustments may need to be made in the monthly child supports at that time either as a result of his income level or because of a change in the amount of parenting time.

### **ISSUE 3: TRAVEL**

[30] The father seeks an order that both parents have the ability to travel with the children within Canada and Alaska on two weeks' notice and outside of Canada on one month's notice along with provision of an itinerary. In particular, the father wants to travel with the children to Ireland to meet his father and other relatives. The father lived in Ireland for some years as a child. He is concerned that the mother will unreasonably withhold permission to travel if such a condition were imposed.

[31] The mother wants to be able to travel with the children outside of the Yukon and Canada on provision of seven days' notice to the father. At the hearing, she requested through counsel a provision that requires written permission from her and a provision of an itinerary from the father before they travel outside of Canada and specifically to Ireland. She is of the view that the children are too young at this stage to travel to Ireland with the father, even if the father has help from his brother as a travel companion. She is not opposed to the children travelling around Canada and United States with the father. Part of her concern with the travel to Ireland expressed in her affidavit stems from her belief that the father was involved in gang-related activity in

Ireland. The father denies this, although he does admit he was hurt in a fight the last time he visited Ireland.

[32] The parents have agreed to share custody of the children. Each will have to agree every time the other parent seeks to travel outside the Yukon with the children. I will add a condition that consent is required for travel outside the Yukon by either parent with the children, such consent not to be unreasonably withheld. If either parent believes that consent is being withheld unreasonably, they may come to court to have the matter adjudicated. I sincerely hope this will not be necessary, however, because joint custody requires ongoing communication and a reasonable approach to ensuring that the children's best interests are maintained. So neither parent should be making an unreasonable request for travel, and neither parent should withhold consent to travel if the request is reasonable. The notice and consent request of at least two weeks before the date of travel outside the Yukon shall be provided by the travelling parent to the other parent. The travelling parent shall provide a detailed itinerary to the other parent.

[33] So my question is what are the parties' positions on travel within the Yukon? Do either of you want a notice provision to apply to travel within the Yukon?

[34] MS. STEELE: Your Honour, D.J.M. doesn't require any notice or to have to consent to travel within Yukon.

[35] MS. LABINE: Our position would be notice if it's over four or five days. Should D.J.M. want to go to Dawson for a week, then he should provide notice of that.

[36] THE COURT: Okay, I think that is fair. I think either party, then, should provide notice if there is travel within the Yukon if the trip is going to be more than five days.

[37] Okay. So I will order, then, as follows. I think you probably want to reflect what has been consented to in the order; correct?

[38] MS. LABINE: Yes, and I had just a couple — just two clarifying comments.

[39] THE COURT: Oh, yes, and I have one more question to ask you too, sorry.

[40] MS. LABINE: I don't believe that you mentioned that D.J.M. can change the style of cause.

[41] THE COURT: Yes, I am going to order that. That is my last order. I will have that.

[42] MS. LABINE: And will it be in the order that N.M.N. has primary residence?

[43] THE COURT: Yes.

[44] MS. LABINE: And child support ongoing will be based on 2022 income?

[45] THE COURT: Yes, yeah.

[46] MS. LABINE: Okay.

[47] THE COURT: And so what is your position, Ms. Labine, on the consultation issue on major recreational, educational decisions affecting the children?

[48] MS. LABINE: N.M.N. had indicated that the parties are pretty good at communicating with each other and it's not necessary.

[49] THE COURT: Okay, good. I am glad to hear that. Great.

[50] Okay, so on consent:

1. There shall be an order for interim joint custody of the two children of the relationship.

[51] I will not repeat their names again, but I.N.M. and E.N.M. — beautiful names, all of them. I assume you have lots of family members incorporated in those names, eh? Yeah.

[52] [REDACTED]: Every single name.

[53] THE COURT: Yeah, that is great. All right. And then so interim joint custody of the two children.

2. The plaintiff and the defendant shall have care of the children on alternating years for Christmas, beginning with the mother having them in 2023.
3. The plaintiff and the defendant shall each have the children in their care for one or two hours each Halloween.

[54] Is that what was agreed to?

[55] MS. LABINE: I think it was alternating as well.

[56] THE COURT: Alternating, okay.

3. The plaintiff and defendant shall have the children for Halloween on alternate years.
4. The plaintiff and defendant shall each sign the children's passports.
5. The special and extraordinary expenses shall be split 50-50.
6. In June of each year, the parties will exchange income tax information.

[57] And you can specify whatever you have agreed to on that as to whether it is the notices of assessment or the returns or both.

[58] And that is the consent part.

[59] MS. LABINE: And the name.

[60] THE COURT: Oh, you have consented to the name change, okay.

7. The style of cause is amended to reflect the correct spelling of the father's middle name J. That is [redacted].

[61] And then the rest is my order after the hearing:

8. The mother shall have primary residence and primary care of the children.
9. The father shall pay child support to the mother for the children in accordance with the *Yukon Child Support Guidelines* based on his income of \$46,251 in the amount of \$715 a month starting from the date of this order.
10. The father shall pay retroactive child support commencing in August 2022 based on his income of \$46,251. Payment towards arrears may be limited to \$100 a month. So that means you can pay more if you want to pay it off quicker, but I am not requiring you to pay more than \$100 a month at this time towards the arrears.
11. Each of the mother and the father may travel outside of the Yukon with the children upon receiving consent from the other, such consent not to be unreasonably withheld. The travelling parent shall give a minimum of two weeks' notice of the proposed travel along with a detailed itinerary.
12. Each of the mother and the father may travel within the Yukon with the children without consent from the other, although notice shall be provided by the travelling parent if the travel will be for more than five days.

[62] And notice how far in advance? A week in advance or —

[63] MS. LABINE: A week.

[64] THE COURT: A week in advance. Is that okay? So one week in advance.

[65] And then I think that is it.

[66] I just ask counsel, then, to speak to the trial coordinator to find a date in August for a family law case conference so we can check in at that time to find out how things have gone from between now and then.

[67] MS. LABINE: Did you want that clause in the order?

[68] THE COURT: Oh, yes, there shall be a check-in, yes, we should put that into the order.

[69] MS. LABINE: Just a blank check-in, not the date?

[70] THE COURT: Yeah, just there will be a check-in, just say August or as soon as possible thereafter in case for some reason we cannot find a mutually convenient date.

13. There shall be a check-in by way of a family law case conference in August 2023 to discuss parenting time and child support.

[71] And if there is no agreement and evidence is required, then each party is limited to filing one affidavit each at that time.

[72] MS. LABINE: Was it intended to have the pickup and drop-off at daycare in the order?

[73] THE COURT: Yes. Well, I mean, I think it is obvious. Right? Because it is Friday to Monday, so I don't think . . .

[74] MS. LABINE: Unless there's a holiday, like this past weekend.

[75] THE COURT: I see, okay. So, well, I guess you will just have to work that out, because I don't want to —

[76] MS. LABINE: That's fine.

[77] THE COURT: Yeah.

[78] MS. LABINE: Okay.

[79] THE COURT: Anything else? Ms. Steele?

[80] MS. STEELE: No, Your Honour. I just wanted to make sure, like I guess just from August 2022, so it would be \$715 from August 2022 until March 2022 (sic) for retroactive child support, and then —

[81] THE COURT: Right, right, and then ongoing the same amount, so.

[82] MS. STEELE: Thank you, Your Honour. I think I've got everything else.

[83] THE COURT: Okay. All right, thank you. Good luck.

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DUNCAN C.J.