

SUPREME COURT OF YUKON

Citation: *F.A.S. v S.M.A.*,
2023 YKSC 30

Date: 20230519
S.C. No. 20-B0045
Registry: Whitehorse

BETWEEN:

F.A.S.

PLAINTIFF

AND

S.M.A.

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff

Malcolm E.J. Campbell

Counsel for the Defendant

Kelly Labine

This decision was delivered in the form of Oral Reasons on May 19, 2023. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): As I see it, there are two issues in this application brought by the defendant mother. The first is primary residence and decision-making responsibility for the children of the relationship and related orders — and this turns on a finding of whether or not the father can provide a safe and appropriate home for the children. The second is child support, both retroactive and going forward.

Background

[2] There is currently an interim interim order in place granting primary residence to the mother of the three children of the relationship: A.R.S.A.-S., born [redacted]; A.A.E.A.-S., born [redacted]; and A.D.A.A.-S., born [redacted]. Although this order has been in place since November 2022, the mother deposes — and this is not contradicted — that the children have been residing exclusively with her since January 2022, save for a few days in January and February 2022. The father has not seen the children since March 2022. He did have telephone contact for approximately one week in January 2023.

[3] Before January 2022 and starting in or about the end of 2020, the children were primarily resident with the plaintiff father. This was due to the significant substance use challenges the mother was having after the couple separated, in the absence of any stable housing or stable employment for her and evidence of a generally unhealthy lifestyle without supports.

[4] The mother was born in Yellowknife, grew up in Inuvik, is Inuvialuit, and, at that point, said she lacked supports in the Yukon Territory. However, in September 2021, the mother began treatment for her substance use and trauma issues, and successfully completed a residential program at [redacted] in [redacted] in December 2021. She has found stable housing in [redacted] in a three-bedroom house near her sister and her sister's family. She has maintained sobriety for 20 months. She has a permanent job working at [redacted] in Whitehorse. She continues to access supports through the Council of Yukon First Nations ("CYFN") Family Preservation Services, who have

provided a letter of support for this application, as well as through the [redacted]. The father is a member of the [redacted].

[5] This remarkable change in the mother's situation — for which she is to be congratulated — constitutes a material change in circumstances allowing this application to be considered. This is conceded by the father.

[6] The mother's concern about the father's access to their children is twofold: first, her belief that he continues to use illegal drugs; and second, past family violence mainly directed towards her that she feels may detrimentally affect the children.

[7] The father seeks at 50-50 shared residency of the children after a short transition period. He now has stable housing in a three-bedroom home in [redacted]. He denies drug use. In support of this denial, he provides letters from two workers at the [redacted], one from the Executive Director and one from a counsellor who he has been seen regularly since 2021. Both people from [redacted] say the father accesses [redacted] supports regularly — often daily — and never shows any signs of intoxication or hangover. He always appears clean and sober. Further, the father notes that the drug investigation referred to by a family support worker helping the mother revealed nothing.

[8] By contrast, the father says the allegations of the mother are based on hearsay and speculation based on e-Transfers of money to known drug dealers in his name, which she still receives on their shared account. He provided explanations for these e-Transfers, which were attached to her most recent affidavit.

[9] The mother's concern, however, have some foundation, in my view, for the following reasons. She admits that both she and the father used illegal drugs when they were together, and this was a reason for her leaving the relationship. The father denies

this. The letter dated May 10, 2023, from the Executive Director of [redacted] refers to past addiction issues of the father. He denies this — not specifically denies the letter, but he denies any use of drugs in the past. It appears that he is clean and sober when he visits [redacted]. This is fully credible. I do not doubt that these are accurate and truthful observations by the [redacted] workers. I note that [redacted] is not open every day and it is possible that he is using drugs on days when he does not attend [redacted].

[10] Finally, the e-Transfer explanations provided by the father, they included explanations that the money that went to [redacted], his cousin, was for shopping and the money that went to [redacted] was for rental accommodation. But these same names were attached to an earlier affidavit of the mother, dated October 1, 2020. There were many e-Transfers showing in that affidavit to both [redacted] and [redacted], the same names of the people who were on the later affidavit.

[11] The mother deposed that these names — without being specific about these particular names — of the people who are on the affidavit who received e-Transfers were drug dealers known to her because she had bought drugs from them.

[12] In the earlier affidavit, there were 24 transfers to [redacted] between July 16, 2020, and August 5, 2020, ranging in amounts from \$40 to \$160; and 13 transfers to [redacted] between August 21, 2020, to September 26, 2020, ranging in amounts from \$20 to \$80.

[13] There was no explanation provided by the father for these transfers as set out in the earlier affidavit, except that the mother either manipulated the bank account so that it appeared that they were being sent by him or she sent the e-Transfers herself.

[14] I am unable to make a definitive finding on the basis of these contradictory affidavits whether the father continues to use illegal drugs. It is enough, however, that the mother suspects drug use, based on what she considers to be valid information, and that a cautious approach is justified in allowing the father to see the children.

[15] I also note that Family and Children's Services has closed their file on the father, based on their residence with the mother. Family and Children's Services have left it to the mother to decide on access of the father to the children based on whether she feels it is safe and appropriate. They have further advised that they are close to closing the open file on the father, so this responsibility now being assumed by the mother also requires the exercise of additional caution.

[16] There was also no explanation provided as to why the children began living with the mother in January 2022 and that the father has not seen them since March 2022. I understand there were housing challenges of the father but there are other ways to access visits — for example, through CYFN Family Preservation Services, at the Canada Games Centre, in parks, through mutual friends' or relatives' homes. I recognize also that some attempt was made to facilitate access through workers at [redacted] but this does not appear to have been pursued vigorously. There is also no evidence of when the father got the house in [redacted].

[17] The mother describes a good, healthy routine in place for the children, including them taking the bus to [redacted] School in the mornings for the older two and daycare around the corner for the younger one, whom she drops off on her way to work. The mother is taking the middle child to appointments at the [redacted] and the older one to

counselling appointments regularly. The mother has assistance from [redacted] and the CYFN for afterschool care for them until she returns from work.

[18] The length of time that has passed since the father has seen the children requires a transition period for any kind of access. The father concedes this and suggests a transition of approximately one month. He wishes to see them every second weekend and two afternoons a week. After one month, the father wants a 50-50 split in time. If any access is to be provided, the mother wants the father only to have supervised access and has not indicated the frequency of that access.

[19] I recognize that the father loves the children very much and was their primary caregiver for approximately one year while the mother was struggling with her substance use issues. But he needs to demonstrate to the mother his reliability, consistency, and sobriety so that the children's stability and sense of security is maintained.

[20] At this time, I will order that the mother have primary residence.

[21] I will order that the custody be joint — we still use the word “custody” because this is a common law situation — but that final decision-making ability for the children will rest with the mother.

[22] I will also order supervised access of the father through the CYFN Family Preservation Services, if possible, or with another third party acceptable to the mother until the end of July 2023 for two times during the week to be decided between the parties. This will allow the re-introduction of the children to the father in a structured environment. At the end of July, if the mother has been satisfied that the children's best interests are being met with these access visits, those access visits can increase to

unsupervised access every second weekend and one overnight a week — those days to be agreed upon between the parties. If the best interests are not met, in the mother's view, the parties should try to work out alternative arrangements; and if not possible, return to court to discuss.

[23] When the children return to school in August, the same schedule shall remain — that is, unsupervised access by the father every second weekend and one overnight a week — until the children have settled into their school routine — that is, until the end of October 2023. If these access arrangements continue to be in the best interests of the children, at that time — so the end of October 2023 — the parties shall discuss through their counsel and a third party whether access time by the father can be increased. Again, if there is disagreement, then the parties can return to court and there will be no need in either of these cases to show material change in circumstances.

[24] I will also order paras. 4 to 7 in the notice of application be complied with — and those are on consent of the father, in any event.

Child support

[25] The mother asks for child support retroactive to January 2022. Although child support is a legal obligation of the father, retroactive payments generally are not mandated unless there is evidence that the mother has made a request to the father. Here, there is no evidence of any type of request or notice by the mother to the father for child support payments until this most recent application.

[26] Further, the father deposes he has been on a disability pension because of a back injury through social assistance since September 2022. I will not require the father to make retroactive support payments.

[27] The father's financial information for 2022 and his current status was not available at the time of the hearing. His counsel advises that they are in the process of obtaining that information and will disclose it to the mother once received. So, the request for child support is adjourned pending receipt of that information, as it may be that his financial situation will exempt him under the *Yukon Child Support Guidelines*, YOIC 2000/63 from the requirement to pay child support.

[28] I will also order that he provide not only evidence of his 2022 income, but evidence of his current income to the mother to confirm that he remains on social assistance.

Summary

[29] The order made on January 29, 2021, and filed on February 1, 2021, is set aside due to a change in circumstances.

[30] The plaintiff and the defendant shall share custody — so continue to have joint custody — but final decision-making responsibility for the three children (A.R.S.A.-S., A.A.E.A.-S., and A.D.A.A-S.), if there is disagreement, remains with the mother.

[31] The mother shall be granted primary residence of the children.

[32] The plaintiff shall be granted supervised access for up to two times a week to be provided by CYFN Family Preservation Services or another supervisor to be agreed upon between the parties until the end of July 2023. The plaintiff shall not be under the influence of alcohol or non-prescription drugs during this access.

[33] At the end of July 2023, the father shall be granted unsupervised access, if the mother agrees, for every second weekend and one overnight during the week.

[34] By October 31, 2023, the access shall be increased, if the parties agree. If the parties cannot agree, they shall return to Court to discuss.

[35] The plaintiff and the defendant shall refrain from saying disparaging comments about the other in front of the children.

[36] The plaintiff shall not communicate with the defendant, and all correspondence relating to the children shall be through a third party agreed upon by the defendant.

[37] The plaintiff shall not attend at the defendant's residence for any purpose.

[38] The request for child support shall be adjourned pending disclosure of financial information.

DUNCAN C.J.