

SUPREME COURT OF YUKON

Citation: *RAWM v JLM*,
2023 YKSC 41

Date: 20230622
S.C. No. 22-D5488
Registry: Whitehorse

BETWEEN:

R.A.W.M.

PLAINTIFF

AND

J.L.M.

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff

Andre Duchene (by telephone)

Counsel for the Defendant

H. Shayne Fairman

This decision was delivered in the form of Oral Reasons on June 22, 2023. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The parties in this matter are R.A.W.M. and J.L.M.

They were in a common law relationship starting in 2011 and were married

January 10, 2014. Their date of separation was June or July 2022. There are two

children of the marriage, J.M.P.M., born [redacted]. He has just turned seven years

old and Q.J.M., born [redacted], so he will be turning three shortly.

[2] Since separation, the children have been living primarily with J.L.M. They have had limited parenting time with R.A.W.M., and this current schedule is through a court order, where R.A.W.M. sees the children Saturday and Sunday every two weeks (J.M.P.M. from 8:30 a.m. to 6 p.m. and Q.J.M. from 8:30 a.m. to 12:30 p.m.)

[3] R.A.W.M. is seeking an immediate increase in the parenting time he has with the children. J.L.M. states that the parenting time at this point is adequate and that the parties should re-evaluate as time goes, in accordance with the children's best interests.

[4] The sole issue before me is what the children's best interests are, whether it is to increase parenting time immediately or whether it is to wait and see, as J.L.M. seeks. My only concern is the children's best interests. Now, the children's best interests are determined in a number of ways, and this is found at s. 16(3) of the *Divorce Act*, R.S.C., 1985, c. 3 ("*Divorce Act*"). The factors I have identified and which counsel have identified as well are the children's needs, such as:

- the children's needs for stability;
- the parties' willingness to support the development and maintenance of the children's relationship with the other party;
- the history of care of the children;
- the strength of the relationship of the children with the parents;
- family violence; and
- the ability of the parties to meet the needs of the children.

[5] I will address each factor in turn.

[6] Starting with the issue of the children's needs, my conclusion is that both J.M.P.M. and Q.J.M., their interests are that parenting time with R.A.W.M. should increase but that this should be done on a gradual basis.

[7] I have also identified that there are some differences in the needs between J.M.P.M. and Q.J.M., and so I will address each in turn.

[8] With regards to J.M.P.M., both parents have identified issues about self-regulation. The difference between the parents lie in how to respond to these issues. R.A.W.M. says that J.M.P.M. needs increased time with him. J.L.M. says that J.M.P.M. needs to spend the time that he has with his dad right now and see whether or not it is in his best interests that the time that he spends with R.A.W.M. be increased.

[9] Turning to the evidence, I found that there were some issues with the evidence provided. I understand that J.M.P.M. has issues with self-regulation, but it was not elaborated what that meant. There was discussion about meltdowns but not much more. I do not know what assists him in his day-to-day life to avoid these meltdowns nor what his triggers are.

[10] His mother attested to conversations she had with J.M.P.M.'s therapist but I can place no weight on that evidence. This is opinion evidence that should have been provided by the therapist. Not only was it not provided in the proper form, but it was through hearsay. I am left only with a broad statement that J.M.P.M. needs consistency and predictability.

[11] What I can conclude is that even a child without emotional regulation issues at the age of seven likely needs slow increase in terms of parenting time — and this is likely more the case with J.M.P.M.

[12] With regards to Q.J.M., his needs derive principally from his age. Like J.M.P.M., a gradual increase is warranted.

[13] J.L.M. submits that there is another limitation, and that is that Q.J.M. is continuing to nap. She is concerned that the family set-up at R.A.W.M.'s is not conducive for napping.

[14] R.A.W.M. says that Q.J.M. naps at daycare and he should be able to nap at his own family home as well.

[15] I am not convinced by J.L.M.'s concerns about Q.J.M.'s requirements for napping. There is nothing to suggest that Q.J.M. cannot nap that R.A.W.M.'s home, nor why it cannot be tried.

[16] I also have concerns that the short blocks of time that Q.J.M. is now having with R.A.W.M. does not permit him enough time to reconnect with R.A.W.M.

[17] In short, for both the children this factor points to a slow and steady increase in parenting time based on their best interests.

[18] The second factor is the parties' willingness to support the development and maintenance of the children's relationship with the other party.

[19] At this point, on this factor, I do not have an ability to draw firm conclusions. Both parties make allegations about the other. R.A.W.M. says that J.L.M. limits his parenting time with the children. J.L.M. submits that R.A.W.M. speaks to the children inappropriately about her. R.A.W.M. broadly denies this.

[20] With regards to the concerns about limiting parenting time, I can see why R.A.W.M. would be concerned. Some suggestions J.L.M. made were probably not realistic, such as spending time with her and the children or spending time at the former

family home. However, the separation is new. The parents are working towards finding a good path forward. On this basis, on the evidence before me at this point, it seems to me that J.L.M. was simply doing what she thought was best for the children given the information and the situation she had. I do not impute any negative intention to her.

[21] With regards to allegations that R.A.W.M. has been speaking to the children about J.L.M., I cannot make an assessment based on the affidavit evidence I have. Why children say what they do and how parents interpret what the children say always plays a role in these matters. I am not making any findings that R.A.W.M. has spoken inappropriately to the children. It is probably prudent in any situation to remind both parties not to speak to the children negatively about the parents and not to speak about any of the matters that bring us to court today to the children. Right now, this factor does not impact my conclusion in any way.

[22] Similarly, with regards to the history and care of the children, J.L.M. says that she was the primary caregiver of the children and R.A.W.M. says that he was as involved as possible with the children. He also submits that J.L.M. prevented him from further involvement with the children.

[23] Again, this issue turns on credibility. I conclude, based on the evidence that I have, that both parties were involved with the children as much as possible, and I draw nothing from this.

[24] With regards to the strength of the relationship, what I need to look at here is the current relationship between R.A.W.M. and the children. In particular, he has not had a lot of contact with the children since separation, though since the court order has been put in place, I expect he has had more regular constant contact.

[25] R.A.W.M.'s lawyer raised the concern that — the fact that he has not had a lot of contact with the children will not be used against him because he tried for an extended period of time to negotiate and increase contact rather than go to court.

[26] My short answer to that is that I do not use this factor against him. I recognize that R.A.W.M. voluntarily left the family home, and this meant that there was no power struggle over who stayed at home with the children. This saved the children from conflict.

[27] I also recognize that it is a better situation to try and settle out of court. I agree that R.A.W.M. has as strong a relationship as he can with the children, given the circumstances.

[28] With regards to the family violence allegations, I do have concerns about the tone and approach of R.A.W.M. in emails to J.L.M., but I am not prepared to find family violence at this point. J.L.M. provides evidence about verbal and emotional abuse of her and the children by R.A.W.M. Her lawyer cited *RGJP v CEL*, 2022 YKSC 64 in support of his submission that I find family violence. For his part, R.A.W.M. gives a generalized denial along with a specific refutation on one allegation.

[29] Unfortunately, the evidence from both parties makes it challenging to assess this matter. I have no other evidence except that of J.L.M. At times, she relies on second- or third-hand information, as well. I recognize that it is very difficult to establish family violence and that it is often done behind closed doors. However, a conclusion that family violence has occurred is serious and where there are diametrically opposed affidavits it is often impossible to conclude whether or not it happened.

[30] The case law provided by counsel is distinguishable. In that case, the child lawyer was able to provide information not present here. Everything seen in this case is through J.L.M.'s lens.

[31] My other challenge, however, is that R.A.W.M.'s affidavit evidence was fairly sparse. R.A.W.M.'s lawyer submitted that it would not have been helpful to provide a refutation point-by-point. While point-by-point refutation may not have been necessary, some more specific response would have been helpful.

[32] For instance, J.L.M. talks about teachers contacting her to meet about concerns with regards to J.M.P.M. What would have been helpful in that circumstance was whether R.A.W.M. knew of any concerns that the teachers raised, whether he wanted to attend the meetings, and what he knew about any kind of meetings that took place.

[33] J.L.M. also makes allegations about specific instances of family violence. It would have been helpful to know R.A.W.M.'s point of view. It may not have been able to resolve the contradictions, but it could have helped me understand the nature of the perception of both parties — and at times, there can be some fact finding.

[34] Ultimately, however, I have concerns about the tone of R.A.W.M.'s emails, but that is not enough to find family violence.

[35] I also find, in the end, that it is not necessary at this point to make such a determination, and I can make my decision based on other factors.

[36] The final factor that I am going to look at — and probably the most important in this case at this point — is the ability of the parents to meet the needs of the children. R.A.W.M. says he has a happy home for the children, and I do not doubt that. The issue, however, is not simply about the home, but his own capacity to meet the

children's needs that give me some pause. It is not clear that he is attuned to J.M.P.M.'s needs. A letter about an incident at the ski hill suggests that R.A.W.M. does not always respond to J.M.P.M.'s evident needs at the time. I understand that there may have been a response to that but unfortunately it was not before me.

[37] His emails show a lack of cooperation in addressing J.M.P.M.'s needs. Again, reading between the lines — well, not so much reading between the lines — I can see the parties' relationship was fraught and reading between the lines, I can understand that perhaps R.A.W.M. was concerned that J.L.M. was dictating what J.M.P.M.'s needs were. At times, however, it is necessary to be able to put those feelings aside to try and move to some give-and-take.

[38] I am also concerned that he did not take the parenting time that was allocated to him when it was part of the order. Again, I understand that there may have been some response. Mr. Duchene did say he wished he had assisted R.A.W.M. in responding to that, but I must make a determination on the evidence before me.

[39] Finally, I note that R.A.W.M. has not been very involved with third-party caregivers. In the past, it seems like this may have been a result of his heavy workload. At this point, given J.M.P.M.'s problems with emotional regulation, involvement would be very important. R.A.W.M. did say that he contacted J.M.P.M.'s therapist but got no response. I take no issue with what he said, but I would encourage him to make more efforts to do so. I would be surprised if there were no response if he expresses an interest in understanding J.M.P.M.'s situation.

[40] In conclusion, balancing all the factors, I have determined that there needs to be a slow approach to increasing parenting time — and I encourage patience to both

parties. I know that this has already been a long time for both of you, but it is going to be a long road ahead as well. Increases may not go as quickly as one would like, and we are all working towards the children's best interests. On the other hand, even if the kids have trouble adjusting, it does not mean that the changes should not occur. This is a difficult situation for everybody, including the children and they are going to react in all kinds of ways.

[41] I do not think it is appropriate at this point to increase to overnights. I am going to keep the same schedule for J.M.P.M., but the current schedule that Q.J.M. has, I do not think is in Q.J.M.'s best interests — and I also think that it probably disrupts J.M.P.M.'s day as well.

[42] So, I am going to keep parenting time every other week, Saturday and Sunday from 8:30 a.m. to 6 p.m. for both children.

[43] On weekdays — I noticed that there were suggestions about that. If the parties have — there were slight variations. We can talk about that at that point — we can talk about that now, and a telephone call or video communications as well.

[44] I will order that R.A.W.M. will be responsible for pick-up and drop-off — although I suspect that over time this will change — and the additional terms proposed by J.L.M. at para. 3 of her outline will be incorporated.

[45] As I said, this is a slow process but I do expect things to change, so I am not going to require a material change in circumstances for a change of the schedule to be

achieved, and we can set down a review time at this point.

[DISCUSSIONS]

WENCKEBACH J.