

SUPREME COURT OF YUKON

Citation: *BCS v KS*,
2023 YKSC 71

Date: 20231208
S.C. No. 23-B0021
Registry: Whitehorse

BETWEEN:

B.C.S.

PLAINTIFF

AND

K.S.

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff

Lenore Morris

Counsel for the Defendant

Mark Chandler

This decision was delivered in the form of Oral Reasons on December 8, 2023. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The plaintiff in this matter is B.C.S. and the defendant is K.S. B.C.S. is K.S.' mother. K.S. has two children, A.E.S., aged 10, and F.M.S., aged 8. For ease of reference for the rest of the decision, I will refer to B.C.S. as the grandmother and K.S. as the mother.

[2] The mother has primary care and full decision-making responsibility of her children. The children's father has, at best, extremely limited contact with the children

and no in-person contact with them. While the extent of the grandmother's involvement with the children is not completely agreed upon, the grandmother has been a significant presence in the children's lives, especially in the recent past. However, the mother and grandmother have presently a difficult relationship. It seems that problems began when the mother and her common-law partner, who is not the father of the children, separated. The grandmother's involvement in the separation has led to conflict between the mother and grandmother.

[3] Following an argument in March 2023, the mother greatly limited the grandmother's contact with the children, telling the grandmother that visits would only occur if the children wanted them to. The grandmother then brought an action against the mother. She also brought an application seeking access with the children. She is seeking access 10 hours per month on a schedule to be decided upon by the mother, which the mother would set out in advance. The mother submits that specified access should not be granted. Her position is that, as the parent, she should have the right to decide if and when the grandmother should have access.

[4] The question then is whether the Court should make an order for the grandmother to have specified access with the children.

[5] I will first outline the legal principles regarding grandparent access to grandchildren.

[6] In *G.N. and Y.N. v. D.N. and E.P.*, 2009 YKSC 75, Gower J. provided a review of the case law on this issue. From *G.N.*, the principles can be summarized as follows:

1. In the Yukon, grandparents have a legal standing to apply for custody or access (see *Children's Law Act*, RSY 2002, c 31, at s. 33(1)).

2. However, grandparents do not have legal rights to custody or access with their grandchildren (*Parmar v Parmar*, 1997 BCJ No 2094 at para. 11 (“*Parmar*”).
3. If they are granted access, a grandparent’s entitlement to access is different than that of a parent (at para. 12).
4. In making an order of custody or access, whether it involves a parent or grandparent, the best interests of the child are paramount (at para. 13).
5. Normally, it is in the best interests of the children to have contact with their grandparents and other extended family (at para. 15).
6. Some of the other factors a court may consider in determining the best interests of the child are:
 - whether the custodial parent’s reasons for denying access are reasonable;
 - whether access that is being denied is important to the child’s well-being; and
 - whether allowing access will have a negative impact on the custodian’s relationship with the child (*McLellan v Glidden*, [1996] 177 NBR (2d) 38 at para. 24).
7. Considerable weight should be given to the wishes of the custodial parent. The parent’s inherent right to determine the course of the children’s well-being must be respected (*Parmar*, at para. 16).

8. Generally, the Court and the grandparent must respect the parent's decisions about the amount and type of access the grandparent will have with the children (at para. 17).
9. However, there are limits to the Court's deference. The Court may intervene, for instance, where the custodial parent is acting against the child's best interests by being unreasonable or where a positive relationship with the non-parent is imperilled arbitrarily (*Parmar* at para. 23; *Chapman v Chapman*, [2001] O.J. No. 705 at para. 19).
10. The child's preference, if it can be ascertained, should be noted and given consideration. The weight the Court gives to the child's preference will depend on the child's age and maturity (*Parmar* at para. 18).
11. Hostility between the parents and the grandparent may be a factor in deciding whether it is in the best interests of the children to have access. The weight to be granted to this factor will depend in part on the importance of the connection between the children and the grandparent (*G(ML) V G(KL)* [1993] BCJ No. 2012 at paras. 16-17).
12. If specified access is ordered, it is usually quite limited (*Parmar*, at para. 19).

[7] Because the grandmother is seeking specified access, I must address whether the mother has made decisions about the grandmother's contact with the children that were unreasonable and against their best interests. If I do, I must then consider whether specified access is in the best interests of the children.

[8] Before I consider the issues, I think it is important to recognize that this is a difficult time in the parties' lives. The dissolution of the daughter's common-law relationship has created issues between the mother and the grandmother that are difficult and painful to manage. In making my decision, I understand that there are no guidebooks for dealing with situations such as these and everyone is responding as best they know how.

[9] Turning to my analysis, the first question before me is whether the mother has made decisions about the grandmother's contact with the children that were unreasonable.

[10] The facts are that, until March 17, 2023, the grandmother had regular and sometimes significant contact with the children. For instance, between September 2016 and the end of August 2017, the mother and the children lived with the grandmother on a full-time and then on a part-time basis. In 2018, the grandmother cared for the children on a weekly basis. In 2019, the mother and children moved to Québec but returned May 2020. At that point, the grandmother had the children once or twice a week, frequently overnight. The grandmother has also taken part in school trips and picked the children up from school when the mother was not available.

[11] Between November 2022 and March 2023, because of the mother's work schedule, the grandmother took care of the children very regularly. She estimates that they spent more than half of their nights with her.

[12] Following an argument on March 16, 2023, the mother sent the grandmother an email in which she stated:

... I will no longer ask you to care for [the children] unless it is a dire emergency and I have no other option...

They may see you when they ask to see you. They may spend time with you when they request to...

[13] Immediately afterwards, the mother significantly curtailed the grandmother's access to the children. A.E.S. did see the grandmother on March 31, 2023, when the grandmother sought access and A.E.S. said she wanted to see her.

[14] At the beginning of May, the mother told the grandmother that she could have access with the children if they wanted it on a limited, supervised basis.

[15] On May 13, 2023, the mother broke a window at the house where her common-law partner was staying while she had F.M.S. in her care. Upon her arrest, the RCMP asked the grandmother to take F.M.S., which she did. She had him overnight. In the morning, Family and Children Services told her the mother did not want the grandmother to care for the children, so she took F.M.S. to where A.E.S. was staying.

[16] On June 13, 2023, the Court ordered supervised access for the grandmother. At the time, the mother stated she was agreeable to only supervised access. Another order was subsequently made giving the grandmother specified supervised access.

[17] Access did not occur as ordered, at least partly, because it was difficult to organize access that was supervised. The mother's decision to change or limit the grandmother's access to the children following their argument is not unreasonable. There is disagreement about whether the children were exposed to the conflict. Even if they were not, however, there was a good possibility that they would have been exposed to it had access continued as before. The mother and grandmother have not resolved their problems and frequent contact would encourage the dispute to flare up in front of the children. A pause or a change in access is not problematic.

[18] Here, however, not only was the grandmother's access reduced but it was drastically curtailed. Moreover, the mother insisted that the grandmother have supervised access.

[19] The question is whether the mother was reasonable in the way she changed the grandmother's access.

[20] The mother's counsel argues that the extent of the limitation of the grandmother's access was reasonable and arose because of the conflict between the parties. For example, the grandmother filed texts that she and the mother sent to each other between April and May. The mother's counsel points out that, in April, the mother said that the parties should resolve their problems before access could resume. I also note that, in another text, the mother stated that she was limiting access because the grandmother is toxic and must repair the relationship.

[21] However, I do not accept counsel's argument that the mother limited access in this way because of the argument for two reasons.

[22] First, the argument occurred around March 15. The mother then permitted the grandmother to have access, the only limit being that visits would occur based on the children's wishes. It was only on April 17, a month after the argument, that the mother began to stipulate that access would occur after they had had discussions about their conflict. She has not explained why it suddenly became necessary to sort out their conflict before access could resume when it had not been as important before.

[23] Second, there was a discrepancy between counsel's arguments and the mother's affidavit. In her affidavit, the mother attests that she has concerns about the grandmother's communications with the children and that the argument with the mother

triggered the change in the grandmother's access. However, she also attests that the extent of the children's access with their grandmother was based on what the children wanted. She states that, if the children wanted to see their grandmother, she would accommodate it. Counsel's argument about the mother's reasons for limiting contact is therefore inconsistent with the mother's stated reasons for limiting contact.

[24] In addition, the mother's statements in the affidavit that access was based on the children's wishes is inconsistent with the texts themselves. As noted above, in April, the mother told the grandmother that access would only occur after they addressed some issues first. During texts in May, the mother stated that the grandmother could apply to court to see the children, and then states:

I am now actively working to remove or severely limit your presence in their lives...

[25] The mother admits she told the grandmother to go to court if she wanted to see the children but says it was in response to a previous conversation. The texts make no reference to any previous conversation, however, and was made in the context of the grandmother asking to see the children. I do not accept the mother's explanation. The texts therefore suggest that, contrary to her attestations, the children's wishes were not the sole factor the mother used when deciding whether the grandmother should have access.

[26] Other evidence lends support to this conclusion. The grandmother took F.M.S. into her care after the mother was arrested but was then told by Family and Children Services that the mother did not want the children to stay with her. The grandmother therefore took F.M.S. to A.E.S.' friend's house where A.E.S. had been staying for the

night. The decision that F.M.S. should not stay with his grandmother was not his, it was his mother's.

[27] Because the mother's affidavit evidence about the reasons the grandmother had limited access with the children is inconsistent with the mother's reasons as expressed in her texts to the grandmother, I find the mother's evidence on this issue unreliable.

[28] There are similar problems with the mother's decision that the grandmother have supervised access with the children. The mother told the grandmother only on May 4 that her access would have to be supervised after she had permitted or suggested unsupervised access for approximately a month and a half after the parties' argument. It does not make sense to conclude that it was prompted because of the argument, and the mother has provided no reason why she felt it was necessary.

[29] Taking all the evidence into consideration, I conclude that the mother effectively terminated the grandmother's access because of her own feelings about the grandmother and not purely because of the children. I conclude that this decision and the requirement that the grandmother have supervised access was not reasonable.

[30] I will now address whether specified access is in the best interests of the children.

[31] To her credit, the mother acknowledges that it is in the best interests of the children to have access with the grandmother. Given the mother's actions, I am concerned that, despite this, the mother will deny the grandmother access.

[32] Additionally, specified access would limit the extent to which the mother and grandmother would have to communicate. This alleviates the concern that the parties' dispute will have an impact on the children.

[33] I will therefore order specified access.

[34] My order is as follows:

1. The plaintiff shall have access with the children for 10 hours each month as follows:
 - (a) the defendant shall provide, on or before the last day of each month, by email, a schedule to the plaintiff with the dates and times that the plaintiff shall exercise access with the children; and
 - (b) the defendant shall provide at least 48 hours' notice to the plaintiff of any access times.
2. The plaintiff shall advise where the visits are to take place and not change that location without the approval of the defendant.
3. The defendant shall provide a list of people that may not be present when the plaintiff is exercising access with the children, and the plaintiff shall abide by the defendant's wishes.
4. The plaintiff shall not speak about J.F. or D.S. to the children or in their presence.
5. When the children are with the plaintiff, if there are behavioural issues that require attention, the plaintiff shall contact the defendant.
6. The plaintiff shall not physically discipline the children.

WENCKEBACH J.