SUPREME COURT OF YUKON

Citation: *C.B.* v. *S.B. and S.W.*, 2009 YKSC 12

Date: 20090304
S.C. No. 08-B0039
Registry: Whitehorse

Between:

C.B.

Plaintiff

And

S.B. and S.W.

Defendants

Publication of the name of the child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act.*

Corrected Decision: The citation of the decision was corrected. The changes were made on December 13, 2024.

Before: Mr. Justice R.S. Veale

Appearances:

Malcolm E.J. Campbell	Counsel for the Plaintiff
Fia J. Jampolsky	Counsel for the Defendant S.W.
S.B.	Appearing on her own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the maternal grandmother for interim custody of a two-year-old child.

[2] The father also applies for interim custody of the child. The father and mother are separated and do not reside in the same community. The father is supported in his application by the mother, paternal grandmother and great-grandmother.

[3] In this jurisdiction, applications for interim custody are normally decided on affidavits only. Pursuant to Rule 1(6) and the principle of proportionality, it is preferable to have a speedy and inexpensive application to grant an interim custody order. In this particular case, although there is a great deal of conflicting evidence set out in at least 18 affidavits, I do not find it necessary to hear oral evidence to grant an interim order.

BACKGROUND

[4] The father and mother of the child began dating as teenagers. They eventually became common-law spouses. The mother became pregnant when she was 16 years old and had the child when she was 17. The mother and father had a stormy relationship and they separated shortly before the child's first birthday. After the separation, the mother had increasing difficulty looking after the child on her own and relied upon maternal and paternal relatives to assist her. The mother eventually left the community in late August 2008, leaving the child in the care of the maternal grandmother.

[5] The maternal grandmother states that she has been the primary caregiver for the child since the mother and father separated. She states that the mother left the child at an unsafe residence on August 9, 2008, causing the grandmother to take care and control of the child from that date onwards. The maternal grandmother commenced a claim for custody with a statement of claim that was signed on September 27, 2008, but not filed until October 20, 2008. The statement of claim and application for interim custody were served on the father on November 9, 2008. There is a dispute about

whether the maternal grandmother restricted access of the father and paternal relatives to the child between August and November. Things came to a head on November 24, 2008, when the father and the paternal grandmother forcefully took the child from the custody of the maternal grandmother. The maternal grandmother immediately made a without notice application and obtained an interim order for custody of the child on November 27, 2008. On December 2, 2008, the grandmother's application was set for hearing on December 15, 2008, and the father was granted access to the child. On December 16, 2008, the maternal grandmother was granted interim interim custody of the child and the father was granted interim interim access to the child fifty percent of the time. The applications of the maternal grandmother and the father for interim custody were adjourned to February 4, 2009, with counsel for C.B. and S.W. present and the mother present by telephone from Alberta.

[6] The submission of the maternal grandmother is that the father and mother had an abusive relationship marked by excessive alcohol consumption. As a result, she played an increasing custodial role with the child. The maternal grandmother says that the August 9, 2008 incident, the absence of the father at a remote camp job, and the fact that the mother had left the jurisdiction, left her no choice but to make this interim custody application. The mother initially supported the application of the maternal grandmother but now opposes her application.

[7] The father brings his application for interim custody with the support of the mother as well as the paternal grandmother, with whom he resides. Counsel for the father submits that the maternal grandmother was never the primary caregiver of the child prior to August 9, 2008. They maintain that the father is capable of looking after the child with

the support and assistance of the paternal grandmother and the paternal great-grandmother. They take the position that the maternal grandmother has unilaterally taken control of the child and prevented them from having access to the child from August 9 to November 24, 2008. They also submit that the maternal grandmother is a drug dealer and is not capable of caring for the child in a suitable manner.

THE FACTS

[8] I am not going to set out the multitude of allegations and counter allegations. Rather, I will deal with certain significant events and issues and make findings of fact related to them.

The Mother and Father and Alcohol

[9] There is no dispute that the mother and father became responsible for the child while the mother was a teenager. The maternal grandmother claims that the relationship of the mother and father was unhealthy and unstable and that the father was mentally and physically abusive to her daughter. She states that there was significant alcohol abuse by both the mother and father. The father denies these allegations categorically. He does admit that he was drinking in an unhealthy manner for three weeks to one month following their break up in February 2008.

[10] The mother, on the other hand, in her affidavit supporting the father's application, states:

> I wrote a letter about my relationship with [S.] which I did not intend to have put into an affidavit. [S.] and I did not have a healthy relationship. We abused alcohol prior to my pregnancy with [the child], and were often mutually abusive to each other when we were under the influence of alcohol.

[11] Nevertheless, she strongly supports S.' ability as a parent. She further states:

> I did not drink while I was pregnant with [the child] or until [the child] was approximately 9 or 10 months old. However, I admit that I have had difficulty with alcohol in the past and I started abusing alcohol again. I was young when I had [the child]. I tried to finish my schooling, work and care for [the child] and the pressure became too much.

[12] The father confirms that the mother "was abusing alcohol significantly after we separated."

[13] The mother does not recant the statements made in her letter. They reveal a great deal about the relationship of the mother and father:

> I started dateing [the father] when I was at the age of thirteen. We had a very unhealthy relationship for the 5 years we were together. [The father] was physically and mentally abusive towards me. I had to drop out of high school for a period of 6 months because [the father] was very jelous and thought that I was cheating on him, I was not. [The father] began a job at kantung mine, so when he left and I had to go to school I employed [S.M.] to watch [the child]. The deal was she would watch her for three weeks when [the father] was gone and he would watch [the child] for the three weeks that he was back. This did not happen. I was paying [S.] 500 dollars a month for watching my daughter as well as paying her to watch [the child] wile [the father] was home and sleeping all day. [The father] would come home from camp and leave the house for days at a time, not telling me where he was going, what he was doing, or when he would be home. when he finally would come home he was very abusive to me. On one occation when I was 8 months preganant this happened. I went to go get him and when I did he became very angry with me, and assulted me. I called my mom to come and get me at 5 in the morning. This was not the only time. During our relationship I would go back and forth from his grandmothers house to my moms. There was many abusive occations while staying at this grandmothers, while his grandmother and uncle sat there and let him assult me doing nothing. On one occation my mom was outside and heard me screaming for her, she came across the road and got me once again. Although this abusive was going on I never reported [the father]. I was very young and confused because I loved him.
>
> …

> I believe it is in [the child]s best interest to stay with my mother while I am in this transition, however I love my daughter very much and I want her to be back in my care when I am completly on my feet. I know my mother is a great provider and I know [the child] is taken care of.

[14] I find as a fact that the mother and father had an unhealthy and abusive relationship which interfered with their upbringing of the child. The father's camp employment for a period of four years before their separation required his absence for several weeks at a time. It certainly contributed to their difficulties. I find that after the separation of the mother and father, it was increasingly difficult for both the mother and father to provide the necessary care and upbringing of the child. This is further supported by the fact that both the paternal grandmother and paternal great-grandmother indicate that they had a great deal of involvement in caring for the child between February and August 2008.

[15] I also find that the dispute as to whether the mother and father finally separated in October 2007 as the maternal grandmother alleges or in February 2008 as the mother and father allege, is not the most important issue or necessary to resolve. The fact is that their relationship was deteriorating over a period of time because of alcohol and physical and mental abuse. The maternal grandmother, paternal grandmother and great-grandmother all played a greater role in providing stability and safety for the child.

The Primary Caregiver

[16] The maternal grandmother has been the primary caregiver for the child since August 9, 2008, notwithstanding the fact that it has been alleged to be based upon her refusal of access to the father and paternal grandmother and great-grandmother. The maternal grandmother was also the primary caregiver of the child, from the breakdown of

the relationship between the mother and father to the incident on August 9, 2008. The father admits that the maternal grandmother was primarily responsible for the child after May 2008. The fact that the mother acknowledges in her letter that she relied primarily on the maternal grandmother when abuse occurred, supports the fact that the maternal grandmother has played the primary caregiver role for a large portion of the child's life.

[17] There is also no question that the paternal great-grandmother was an active caregiver for the child when she was not involved in camp work. I also find that the paternal family was active in the care of the child before August 2008, but not to the same extent as the maternal grandmother because of the demands of camp jobs of the father, paternal grandmother and the paternal great-grandmother. The maternal grandmother has the advantage of being employed in the community. It is not without significance that the physical confrontation and challenge to the maternal grandmother's primary care did not occur until after the father had been dismissed from his camp employment in November 2008.

The August 9th Intervention

[18] Although there is little detail given about the intervention of the maternal grandmother when the mother placed the child overnight in an unsafe house, there is no dispute that this event occurred and that the maternal grandmother took the child into her custody with the support of the community social worker responsible for child protection. I find that this was an appropriate intervention given the maternal grandmother's increasing care and involvement with the child since the separation of the mother and father. The only alternative would have been to place the child in protective custody

because the mother was not in a stable situation and the father and paternal family were involved in camp jobs out of the community.

[19] Between August 9 and November 24, 2008, the community social worker (who did not file an affidavit in this hearing), was actively involved in discussing the custody status of the child with the paternal family. Nevertheless, there is no evidence that the community social worker was in any way concerned about the custody of the child by the maternal grandmother despite the allegation that the maternal grandmother is a known drug dealer. It appears that the allegation that the maternal grandmother is a drug dealer is based on the evidence of her daughter (the mother of the child). She is the only person that provides any evidence to support the allegation. She states that her mother abused alcohol and drugs until approximately 6 years ago and that she observed her mother selling drugs out of her home. The maternal grandmother flatly denies that she is or was a drug dealer although she admits that she abused alcohol in the past. I do not attach great significance to this allegation for several reasons. Firstly, it does not appear to have been a concern for the mother when she filed her first affidavit in this proceeding supporting her mother. Secondly, it is a small community. Both the RCMP and the community social worker have been involved in this dispute and would have intervened if the allegation were true. The mother also makes it clear in her second affidavit that she knows that her mother does not abuse alcohol or drugs anymore. Further, if it was a current concern, surely the mother or father or the paternal family would have initiated court proceedings challenging the maternal grandmother's custody rather than waiting for the maternal grandmother's custody application to raise such a toxic allegation.

Access from August to November

[20] The maternal grandmother assumed the care of the child with the support of the local social worker on August 9, 2008, when the child was left at an unsafe house by the mother. When the father returned in late August for his time off, he exercised access to the child and agreed that the child should remain with the maternal grandmother. However, it is fair to say that the father did not consider this to be a permanent arrangement. He wished to assume the custody of the child with the assistance of his mother and grandmother. When he returned from camp in September, he was offered access by the maternal grandmother but refused to exercise this access because he objected to the maternal grandmother assuming greater care of the child. At this point in time, the father was not in a position to assume care of the child because of his camp job. The paternal grandmother and great-grandmother were also working at camp jobs out of town until sometime in October and would not have been able to assume care of the child. I find that the maternal grandmother was not denying access to the paternal family.

[21] When the paternal great-grandmother returned to town in October, she was granted access to the child but a dispute arose and the maternal grandmother terminated that access to the child. There has also been hostility because of the great-grandmother's smoking in the presence of the child. At this point, the informal custodial arrangements that had worked prior to the August 9, 2008 incident were no longer functioning because the mother had left the community. The maternal grandmother had stepped in and was the person determining access. What the defendants have characterized as a denial of access was really a full-blown custody dispute. Unfortunately, it does not appear that the paternal family sought legal advice even after the father was formally served on November 9, 2008 with the maternal grandmother's statement of claim for custody. The

members of the paternal family had discussions with the local social worker and the RCMP and concluded that, as there was no court order in place regarding the custody of the child, they could simply take the child from the maternal grandmother.

The November 24th Incident

[22] The paternal grandmother was particularly upset with the maternal grandmother for involving the child protection service and taking *de facto* custody of the child since August 9, 2008. When the father was dismissed from his employment in November, the paternal family had completed their camp employment and were in a position to take custody of the child. There is no doubt that there has been a great deal of strife between the paternal grandmother and the maternal grandmother. Matters came to a head when the father and the paternal grandmother confronted the maternal grandmother in the presence of the child on November 25, 2008, accusing her of kidnapping the child. There was a great deal of pushing and shoving and the father took custody of the child against the wishes of the maternal grandmother. The maternal grandmother applied without notice and obtained an interim custody order of the child on November 27, 2008. The maternal grandmother also obtained a peace bond against the paternal grandmother for a period of three months commencing November 28, 2008.

[23] Fortunately, the father retained a lawyer in early December 2008 and began to file affidavit material in support of his application for custody of his child. The situation has hopefully been stabilized with an interim interim custody order to the maternal grandmother with interim interim access to the father fifty percent of the time. The order

stipulates that no alcohol, illicit drugs, or tobacco shall be in the residence where the child is residing for the purposes of either access or primary residence.

The Mother and Father

[24] The mother candidly admits that she is not in a position to care for the child at this time. She acknowledges that she had been drinking too much and that she moved to Alberta to get her life back on track. However, she has a sincere interest in the welfare of her child and followed the hearing of this application by telephone. In November 2008, she was in communication with the lawyer for her mother. She provided a letter to the lawyer and a sworn affidavit filed December 11, 2008, confirming that she was in agreement that her mother should have interim custody of her child.

[25] The lawyer for the father filed a second affidavit of the mother on January 12, 2009, recanting her previous support of her mother's custody application. She states that she feels terrible that her child has been caught up in this family dispute. She now indicates that she had a verbal agreement that the father and his mother would care for the child with the assistance of her mother if the father and his mother were working in camp. She states that she only supported her mother's application for interim custody because she understood it to be a temporary situation or a short time-limited duration which she believes is not the case now. She also states that she only agreed to sign her first affidavit so that her mother would agree to let her start talking to her child.

[26] The father denies that his relationship with the mother was unhealthy and unstable or that he was mentally and physically abusive to the mother. He says that he does not have a problem with drugs or alcohol and that the child is not exposed to drugs or alcohol when in his care. He is supported in this application by his mother whose home he

resides in. He is also supported by S.M., one of the regular babysitters for the child. S.M. states that the mother and father are loving and devoted parents. She acknowledges that the mother used alcohol but that she has not seen the father consume any alcohol around the child nor does he drink to excess when not with the child. The babysitter has supervised the exchange of the child between the maternal grandmother and the father since December 2008.

[27] I find as a fact that while these young parents have many good qualities and sincerely love their child, their consumption of alcohol and abusive relationship has interfered with their care and upbringing of their child. Although there is no doubt that the father was emotionally and physically abusive in the past, there is some evidence that he is now taking his parental role more seriously. Nevertheless, I find that the father's application is totally dependent on his mother's support and neither of them played a significant role in the child's life from August to November through no fault of the maternal grandmother but rather as a result of their employment out of the community or the father's refusal to exercise access.

The Maternal Grandmother

[28] The maternal grandmother comes before the Court candidly acknowledging her past alcohol abuse. She is supported by affidavits from several members of the community who indicate that she is doing a good job in caring for the child in stressful circumstances. Her counsel indicates that she does not seek permanent custody of the child but rather sees her role as a temporary one pending the return of stability to the parents of the child. I do not find that her relationship with her daughter, son-in-law and his family has been characterized by any intentional maliciousness. She has legitimate

concerns about the safety and care of the child on the basis of the abuse of alcohol and the abusive relationship of the mother and father. It may be that her strict control of access to the child has contributed to the hard feelings between the families but I find it a fact that her intervention with the child was justified and her care of the child appropriate.

THE LAW

[29] Counsel for the father submits that generally the test in child custody matters is the best interests of the child. However, when it is a case of grandparent versus biological parent, counsel submits that the parents are the presumptive custodians of the child and their custody should not be lightly set aside. I do not agree with the submission that there is a legal presumption in favour of the parents. In my view, the best interests of the child is the applicable test and there is no presumption in favour of the biological parents although the parental bond is an important factor to be considered.

[30] The *Children's Act*, R.S.Y. 2002, c. 31; amended by S.Y. 2003, c. 21, s. 6, has a number of relevant provisions:

1. the best interests of the child is the paramount consideration in child custody and access proceedings (s.1, 29(a));
2. Section 30(1) sets out a number of factors to be considered for this proceeding which includes the bonding, love and affection between the child and a claimant, the length of time in a stable home environment, the ability of the claimants to care for the child, proposed plans, the permanence and stability of the respective family units and the effect on the ability of the other party to exercise access;

3. Section 30(2) states that past conduct of a person is not relevant unless it affects the ability of the person to have the care or custody of the child;
4. there is no presumption of law or fact that a male or female person is better suited because of the age or sex of the child (s. 30(3));
5. in proceedings between parents, there is a rebuttable presumption that one or other parent ought to be awarded custody (s.30(4));
6. the father and mother are equally entitled to custody of the child (s. 31(1));
7. a parent of the child, or any other person, including the grandparents may apply for custody or access (s. 33(1)).

[31] My reading of the Yukon *Children's Act* is that the best interests of the child "shall be the paramount consideration." Although s. 1 refers to "interests" rather than "best interests", the phrase "best interests" is clearly stated in ss. 29 and 30 of the Children's Act. In particular, s. 30 of the Act requires that the court "shall consider all the needs and circumstances of the child" according to a nonexclusive list of factors. It is my interpretation that that list of factors is specifically child-focused rather than focussing on parental rights. In addition, s. 33 of the *Act* indicates that parents "or any other person, including the grandparents" may apply for custody or access to a child thereby explicitly placing grandparents with procedural equality to parents.

[32] Section 31(1) states that "the father and mother of a child are equally entitled to custody of the child". It is the only section that could give rise to an interpretation of favouring the presumptive rights as parents to be custodians of their biological children. However, it is my view that this section is directed to the former notion that the mother had presumptive rights to custody over the father. This section gives each parent an

equal entitlement to custody of their children as between the parents. However, it was not intended nor does it state that parents are the presumptive custodians of their children when competing with grandparents and others.

[33] In the vast majority of custody cases, the biological parents are applying for custody and access and they are often, but not always, the persons with the greatest "bonding, love, affection and emotional ties" with the children. From a practical standpoint, the biological parents come to court in a factual context that supports their applications. However, in my view, it should not be elevated to a legal presumption that competes with or prevails over the best interests of the child. The case at bar is not a proceeding between the mother and the father giving rise to the rebuttable presumption in favour of one parent or the other as set out in s. 30(4).

[34] The case law is less clear. The watershed case of *King* v. *Low*, [1985] 1 S.C.R. 87, involved an unmarried parent who had given her child up for adoption three months earlier, applying for custody against the prospective adoptive parents. The Supreme Court of Canada concluded that the dominant factor was the welfare of the child and in that particular case the natural mother's application was dismissed.

[35] The Supreme Court stated as follows at paras. 20 and 27:

> It seems to me indisputable that there has been a significant move away from reliance upon the parental preference of the common law as expressed in the trilogy. This trend has relied for its justification on the equitable parens patriae jurisdiction of the Court which has elevated the concept of the welfare of the child to the paramount position. Reference in this regard must be made to two recent cases in which this Court exercised the parens patriae jurisdiction: Beson v. Director of Child Welfare for Newfoundland, supra, and Racine v. Woods, supra.
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> …

> … I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside. (my emphasis)

[36] It appears that those who advance the argument for the parents having a legal presumption emphasize the statement that parental claims must be given serious consideration and must not be lightly set aside. I do not interpret *King* v. *Low* to create such a legal presumption in favour of the biological parents but other cases appear to.

[37] Counsel for the father relies upon the British Columbia Court of Appeal case cited as *A.L.* v. *D.K.*, 2000 BCCA 455. In that case, as a result of relationship difficulties between the child's parents, the child's aunt and uncle were given sole custody by agreement with the parents. When the aunt and uncle moved to Mexico for 10 months of the year, the natural father took issue and was awarded custody by the trial judge. The Court of Appeal supported the decision of the trial judge with reasons for two judges provided by Finch J.A. In her concurring reasons, Newbury J.A. wrote at para. 25:

> In my view, if (as the trial judge found, and there was certainly evidence to support the finding) the parents did not by that

> agreement intend to give up custody permanently, and if (as the evidence shows) the father took reasonable efforts to regain custody once L.'s declined to return M., then surely the father was entitled to do so without having to prove from ground zero that M.'s best interests lay with him as opposed to the L.'s. Otherwise, any relative who had a better environment in which to raise a child and who might even be a better parent, could start on an equal footing in a custody contest with a parent who has entrusted the child temporarily to his or her care. Surely this cannot be correct: parents are entitled to raise their children unless there is a clear reason why they cannot do so or unless they clearly agree otherwise. As noted in a 1994 case, Seymour v. Seymour, [1994] B.C.J. No. 1970 by Master Bolton: (my emphasis)

[38] *Chera* v. *Chera*, 2008 BCCA 374, is a recent decision of the British Columbia Court of Appeal that has re-visited Newbury J.A.'s comments in *A.L.* v. *D.K.* In *Chera*, the father and paternal grandparents appealed an award of custody to the mother who had moved to Ontario. At para. 55, Smith J.A. for the Court stated:

> I am not persuaded that *A.L. v. D.K.* creates a presumption in law in favour of a parent. In my view, it merely articulates a common sense approach to custody disputes that provides for, all other matters being equal, a parent's right to raise his or her child.

[39] Counsel for the father did not cite *Chera* v. *Chera*. She did, however provide me with the case of *MacLeod* v. *Theriault*, 2008 NSCA 16. In that case, the grandmother of a child appealed the dismissal of her application for leave to seek custody. Unlike the Yukon *Children's Act*, supra, the Nova Scotia *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, requires "other persons" to seek the leave of the court to make custody applications. *The Maintenance and Custody Act* also contains s. 18(4) is similar to s. 31(1) of the Yukon *Children's Act* and states as follows:

> 18 (4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(a) provided by the Guardianship Act; or

(b) ordered by a court of competent jurisdiction.

[40] In the facts of the *MacLeod* v. *Theriault* case, the grandmother's son, the child's father, was 15 years old when the child was born and denied that the child was his. The child's mother was 17 years old. The trial judge found that the child was not at risk in the mother's care and awarded custody to her. The trial judge also found that the grandmother had been attempting to exercise an undue amount of control over the mother. In denying the grandmother's application for leave to apply for custody, the Nova Scotia Court of Appeal stated the following at paras. 15 and 16:

> The best interests of the child is the predominant consideration in any proceeding concerning children. Parents are the presumptive custodians of their children (*M.C.A.*, s. 18(4)). As such they make decisions about the best interests of their children. The courts will interfere with that decision making only for substantial reasons.
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> Parental custody is not to be lightly set aside (*King* v. *Low*, [1985] 1 S.C.R. 87 at 101). It is the role of parents to decide what is in their child's best interests and the court should interfere with their judgment only if persuaded that there is good reason to do so. …

[41] While this maybe the approach in Nova Scotia, it does not appear to hold in Ontario. In the Ontario cases of *Vanderhoek* v. *Stark*, [1999] O.J. No. 4479 (S.C.) and *Khan* v. *Kong* (2007), 50 R.F.L. (6th) 31 (S.C.), the trial judges expressly rejected any legal presumption in favour of the parent or any heavier onus or burden of proof on the grandparents.

[42] Although there is some support in the case law for a presumption in favour of the natural parents, I am of the view that the *Children's Act*, supra, does not explicitly create a presumption in law but rather makes every effort to avoid such a legal presumption.

The only legal presumption is that the best interests of the child must prevail. In my view, *Chera* v. *Chera* provides the proper interpretation that there is no presumption in law favouring the biological parents.

DECISION

[43] In this case, teenage parents attempted to provide the proper care and upbringing of their child despite their young ages. I am satisfied that the mother and father have bonded with the child and wish to be involved in the future care of the child, whether as custodians or by access. I am also satisfied that it is not appropriate at this stage for the father to have custody of the child despite the apparent agreement between the father and mother. That agreement would be an important consideration where one or other of the parents were suitable custodians of the child. But that is not the case with these young parents. I am also not prepared to give great weight to the mother's view when her lack of appreciation of risk for the child has precipitated this application.

[44] The father's application for custody depends a great deal upon the paternal grandmother with whom he resides. I accept that the father has a genuine interest in the well-being of the child but I am not satisfied that it is in the best interests of the child for the father to assume the primary custodial role at this time. At a time when his child needed him the most, he was involved in alcohol and spousal abuse. Since August 9, 2008, he has had limited involvement with the child despite offers of access from the maternal grandmother. He has given limited financial support for his child. In saying this, I do not suggest that the father does not have a role in the upbringing of the child. On the contrary, the father has indicated a willingness to seek employment near the community so that he can play a greater role in the child's life. He has also indicated that he intends

to have a house of his own. All these are good intentions at the moment, but I encourage the father to pursue these and continue his role with the child. At the same time, I do not foreclose the possibility that the mother may return to her parental role in the future.

[45] I also am very concerned about the spousal abuse indicated by the mother during the relationship of the mother and father. Such spousal abuse can be very traumatic for a child and provides very poor role modelling for the future relationships of the child. In this court, demonstrated physical or emotional abuse by a parent can lead to a denial of access or supervised access. See *R.D.* v. *U.S.D.,* 2001 YKSC 543 and *H.L.M.* v. *J.J.P.*, 2005 YKSC 3. While I am not disposed to make such an order on the affidavit record in this application, I want to send a clear message that spousal abuse with or without alcohol abuse in the home of a child may disentitle a parent to custody or access or result in supervised access.

[46] In my view, it is important that the father address the issue of spousal abuse through treatment from the Family Violence Prevention Unit, or in the community, if he wishes to pursue his custody application.

[47] Another factor in this application is the blatant physical snatching of the child from the maternal grandmother who had been exercising custody of the child for almost four months with the approval of the local social worker. The father had been served with a claim of custody by the maternal grandmother and therefore knew that the matter was before the court. While the father and paternal grandmother have attempted to justify their physical intervention based on hearsay statements from the RCMP and the local social worker, such interventions are unlawful and very traumatic to the child involved. In situations where a child has been in a grandparent’s or the other parent’s custody, as a

matter of fact, whether that fact is disputed or not, it is unlawful for a parent or other person to remove that child without a court order, unless there was evidence that the child's health or safety was at risk. That was not the situation when the father and paternal grandmother physically intervened. The appropriate remedy is to apply for a court order for custody.

[48] The application of the maternal grandmother for interim custody has been presented as a temporary measure to ensure that the safety and stability of the child. It has no doubt been a great challenge for the maternal grandmother. The informal arrangement that prevailed when the mother moved back and forth between the maternal grandmother and the paternal grandmother fell apart when the mother left the child at an unsafe house on August 9, 2008. The maternal grandmother's intervention was appropriate and not based upon any motive to remove the child from or deny access to the paternal family. The maternal grandmother has the distinct advantage of being employed in the community and having a strong network of support. However, the maternal grandmother must understand that access to the child should be given to the mother, father and paternal family so long as it does not put the child's health and safety at risk. A person granted custody of a child may lose that status if access is unfairly limited or denied.

[49] On an interim basis, I am granting joint guardianship of the child to the maternal grandmother, the mother and the father. I do so to ensure that in the short term the maternal grandmother and the parents will continue to communicate to ensure that the parental bonds with the child are maintained. I also want to make it clear that I am awarding primary care and control and primary residence of the child to the maternal

grandmother until such time as one or other of the parents are capable of assuming a custodial role. The parents shall have access to the child fifty percent of the time so long as they are residing in the community and they do not consume or possess alcohol, illicit drugs, or tobacco during access. This term also applies to the maternal grandmother.

[50] I am also recommending that a child advocate be appointed, not to take instructions but to be an independent voice for the child should there be further court applications or a custody trial. I am further recommending that a custody and access report be prepared. As a trial is not in the emotional or financial interest of either family, I would appreciate the assistance of counsel in explaining the possibility of a settlement conference to their clients.

[51] The following is the wording of my order in this matter:

1. The maternal grandmother, mother and father shall be the interim joint guardians of the child and shall have the obligation to discuss significant decisions affecting the child's health (except in emergencies), education, and general welfare and try to reach agreement on major decisions affecting the child. In the event that these parties cannot reach agreement on any major decision, the maternal grandmother shall have the right to make such a decision, subject to the right of the mother or father to seek a review either in settlement conference or in court.
2. The maternal grandmother, mother and father shall have the right to obtain information concerning the child directly from third parties including teachers, counsellors, medical professionals and third party caregivers.

3. The maternal grandmother shall have the interim primary care and control and provide the primary residence for the child in the community.
4. The mother and father shall exercise care and control of the child in the community fifty percent of the time until such time as the child attends school when new arrangements must be discussed and, if possible, agreed upon. The paternal grandmother and great-grandmother shall exercise access while the child is under the care and control of the father.
5. Paragraphs 3 and 4 of this order may be varied by written agreement of the maternal grandmother, the mother and the father, or court order.
6. No caregiver shall consume or possess alcohol, drugs or tobacco during their care of the child.
7. The maternal grandmother, mother and father shall have reasonable telephone access to the child when the child is not in their care and control.
8. This Court recommends the appointment of a Child Advocate for the child.
9. This Court recommends that a custody and access report be prepared.
10. All other matters, including child support are adjourned generally.

VEALE J.