

SUPREME COURT OF YUKON

Citation: *E.A.G. v. D.L.G.*, 2010 YKSC 21

Date: 20100604
S.C. No. 09-D4166
Registry: Whitehorse

Between:

E.A.G.

Plaintiff

And

D.L.G.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Debbie Hoffman
Carrie Burbidge

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT (Custody and Access)

INTRODUCTION

[1] E.A.G. (the mother) applies for interim custody, supervised access, child support and spousal support. D.L.G. (the father) applies for interim custody, in the alternative shared custody, primary residence, child support and no spousal support.

[2] In this judgment, I will address the interim custody and access issues. I will address the child and spousal support application in a separate judgment. The children will be referred to as S. and B. I will address the issues that pertain to the best interests

of the children in some detail but I will not address every allegation, denial and counter-allegation.

BACKGROUND

The Mother's Evidence on the Without Notice Application

[3] This matter first arose in an application for an Order Without Notice filed by the mother in September 2009. She described moving to the Yukon in 2000 to pursue a relationship with the father. They married in 2001.

[4] The mother works in the health and rehabilitation field. She opened a business. The father also runs a business from a building at the family home.

[5] The mother described the relationship with the father as a tumultuous one from the beginning because the father could be degrading, demeaning, manipulative and ultimately abusive. Her isolation as a newcomer without family or friends did not help the situation.

[6] In 2005, they had twin daughters, who were exhausting to care for and breastfeed. She hired someone to run her business for six months while she cared for her daughters. She described herself as the primary caregiver, as the father works six to seven days a week for 10 to 12 hours per day.

[7] The mother initially operated her business outside the family home but the father convinced her to rent space from his building at the family home. For the sake of convenience, she decided to rent space from the father and she paid a monthly rent of \$550 plus utilities.

[8] The mother was using the space for four hours a week. In January 2008, the father increased the rent to \$1,250 a week, which she could not afford in addition to

paying for the children's clothing and their daycare expense of approximately \$2,000 per month. The children have been attending daycare since they were approximately two and one half years old.

[9] When the mother could no longer pay the rent to the father, he became increasingly agitated and demanded to go through her business records to satisfy himself that she was not "screwing him" out of his rent money.

[10] The father wrote a letter dated September 10, 2009, threatening eviction from the building at the family home, if the mother and the instructor working with her did not agree to a new rent of \$1,936 per month. He offered to forgive rent arrears of \$10,800 if he received a payment of \$2,000.

[11] At the time, the father was out of Whitehorse attending a car show which the mother did not attend, although invited, because the children were sick. He called and asked when the rent cheque would be paid. The mother said that she had sold some of her equipment and was renting some equipment to her instructor who was going to operate from another location.

[12] The father was angry when he heard this on the phone. He said that if the equipment was sold, some of which he purchased for her to get her business started, there was going to be "a big problem" on his return. When the father called her instructor "a fucking bitch", the mother hung up on him. The mother was afraid of what the "big problem" was going to turn into and felt she had no choice but to leave. At the time of the Without Notice application, she was residing with the children at Kaushee's Place, a woman's shelter, because of her fear for her safety and her lack of income.

[13] The mother describes the father as “explosive and intimidating”. He has pushed her against a car during an argument in the past. He owns firearms but has never threatened her with them. She says he verbally abuses her, particularly when he is drinking. He says that she “can’t even take care of (her) own fucking children”. He has called her an unfit mother because she enrolls the children in daycare so she can run her business. When she objects to the verbal abuse, he responds with telling her if she doesn’t like it she can “get the fuck out”. He speaks of his former wife in a demeaning manner and says “you bitches are all the same”.

[14] The mother has developed a stress-related ulcer and other viral infections.

[15] The mother stated that she considered it important that the children maintain a relationship with their father, but she felt the father was capable of putting his own interests ahead of the children “to get back” at her.

[16] The mother, on her Without Notice application, asked for an interim interim order for custody and specified, but not supervised, access to the father. The court issued an Order Without Notice on September 29, 2010, granting interim interim custody to the mother and specified access to the father as well as a restraining order against the father from molesting, annoying, harassing or communicating with the mother. The Order did not take effect until served upon the father. It also prohibited the father from taking the children from the daycare without the express written consent of the mother. The mother also applied for interim child and spousal support which was not addressed in the order but left to a With Notice application.

The February 15, 2010 Hearing

[17] The following evidence is based upon affidavits of the mother, J.F. and D.F. filed in February 2010. J.F. and D.F. are friends of the mother. They are a husband (D.F.) and wife (J.F.) with whom the mother and children stayed after Kaushee's Place in September 2009 and after leaving the company apartment in January 2010.

[18] The September 2009 Order Without Notice was served on the father, and he retained counsel who filed an appearance on September 28, 2009. The father, on his return, made numerous efforts to contact the mother through her friends and her mother. The parties, through counsel and an exchange of letters dated October 2, 2009, agreed to not enforce the "no contact" term of the restraining order so they could work on their relationship on the understanding that the "no contact" term could be reinstated by letter notice between counsel. The primary residence of the children remained with the mother and she was given the use of an apartment owned by the father's company and financial support. The mother's vehicle is owned by the father's company and she has continued to use it after her separation. The mother has had daily contact with D.F. and J.F. off and on since September 2009.

[19] There was no further activity on the court file until a Notice of Hearing was filed setting the September 2009 application down for hearing on January 26, 2010. It appears that the lawyers agreed to set the matter down for February 25, 2010, rather than the regular Family Chambers as more time was required for preparation and the hearing. From early January 2010 forward, the father was on notice that the mother was reinstating the no contact order. What follows is evidence from the mother's affidavit filed February 22, 2010.

[20] By December 30, 2009, the mother asked her lawyer to put the no contact order back in place. She found no change in the father's controlling behaviour.

[21] The mother did not feel safe in the apartment as the father kept a set of keys and constantly threatened to lock her and the children out of the apartment. This is not to say that the father did not make efforts to reconcile as it appears they saw the same counsellor separately during that period. The mother says that she was advised by the counsellor in December not to move back into the family home. She continued to be concerned about her and the children's safety.

[22] During the period of attempted reconciliation, the father gave the mother a debit card for their joint account but insisted that she provide him with a receipt for every item she purchased. When he did not agree with a purchase, he kept a running tab on what the mother "owed" him.

[23] On December 4, 2009, while the mother was at work, she saw that her car (owned by the father's company) was about to be towed away. The mother went out and asked the driver not to tow the car away. The driver said he was told the vehicle would not start. She started it and the tow truck driver left. The mother says the father then said he was just sending someone over to change the oil. When the father's employee arrived, the mother gave him her car and kept the truck he was driving. Her car was not returned for eight days. She states that the father was sending her "a clear message".

[24] In early December 2009, the father left more than 10 messages on her voicemail which she describes as "threatening". He said he was going to change the locks on the company apartment where she and the children were staying, and he would throw all

her belongings over the bluff beside their house. He also said he would take the company car from her.

[25] The last discussion between the father and mother occurred on December 23, 2009, when the father showed up uninvited at the apartment when the maternal grandmother was present. He did not leave for over two hours. He said that the mother was dishonest, was not contributing enough financially and her contributions such as looking after the children and hosting dinner parties were not “good enough”. He wanted her to return to the family home for Christmas. She refused.

[26] The mother and her 66-year old mother left the father’s apartment on January 2, 2010 and moved in with J.F. and D.F.

[27] Counsel for the mother, by letter dated January 7, 2010, informed counsel for the father that the no contact order was back in place. The mother says that the father telephoned her nine times and left three voice mail messages prefaced with the statement that he understood the no contact order was in place.

[28] The mother, for the first few weeks of January 2010, continued to take the children for access according to the terms of the Order Without Notice. However, S. became increasingly distraught and did not wish to go to her father’s house. On January 13, 2010, the mother states that S. refused to get out of the car. When the mother returned to pick up B., the father said that B. wanted to stay overnight. The mother was able to speak to B. and take her from the father. The children began to have “accidents in their pants” which was highly unusual for them and very upsetting. The mother feels that the children are being traumatized by visits to the father. S. has become “hyper-vigilant” and does not want to be out of sight of her mother and B. is having difficulty

sleeping. The mother decided that she would no longer force the children to visit their father.

[29] By correspondence between counsel in late January 2010, a routine of supervised access was arranged. To be fair, the father did not agree to supervised access but the mother insisted as she had serious concerns about the trauma being exhibited by the children.

[30] The mother supports her view of the trauma on S. and B. based on her experience with the father's "emotional blackmail" and how he treated his son from his previous marriage. The mother feels that the children need counselling but she cannot afford to provide it and the father refuses to pay for it.

[31] The mother has arranged supervised access with the assistance of N.T., the babysitter of the children at the Canada Games Centre. On February 17, the father began visiting the children at the daycare centre. Although this access is supervised, the mother says that S. became very upset that this was an indication that she would have to start visiting the father at his house. When the mother picked up the children at the daycare with N.T., the children became concerned that it would be a visit to their father's house. The mother has not objected to the father's visits to the daycare centre, but she has concerns because of the trauma exhibited by the children.

[32] J.F. says that in September 2009, she and D.F. had to convince the mother that the mother and children would be safe and have a better environment at their home rather than the women's shelter. She describes the stress that she observed in the children over access with the father at the end of December. B. was excited to be seeing the father but S. was not and the children's maternal grandmother had to take S.

in to the father's house on the pretence that she was just going to say "hi". At the father's insistence, the children stayed 2 ½ days with the father.

[33] On the return of the children to their mother, J.F. says S. was insecure and clinging to her mother and had "accidents in her pants" up to four times a day. S. was very upset fearing punishment.

[34] J.F. says B. visited the father without her sister a week later. J.F. says that B. had an accident and was sobbing and hiding under her covers as a result. J.F. indicates that the mother has trouble functioning after contact with the father and the children are traumatized after contact with the father. J.F. says that the mother never speaks negatively about the father.

[35] D.F. confirms that he has known the mother for almost two years. He is familiar with the father through business contacts. D.F. and J.F. have four children and five grandchildren. D.F. also says that the mother never speaks negatively about the father in the presence of the children. He has observed the children having accidents in their pants after visits with their father, which D.F. describes as completely out of character for the children. D.F. says that S. now refuses to go to visit with the father. D.F. confirms the upsetting accident of B. described by J.F.

[36] There are a number of references to conversations that J.F. and D.F. had with the children that confirmed their observations.

[37] Counsel for the father had been acting on the father's behalf up to February 11, 2010. On February 16, 2010, the father filed a notice of self-representation. He also filed his first affidavit in these proceedings on February 23, 2010, setting out his reasons for an adjournment but not addressing the merits of custody and access. He advised that

his counsel advised him on February 12, 2010 that he could no longer assist because of his workload. The father spoke to new counsel but did not immediately retain that counsel, who in any event was not available for the hearing on February 25, 2010. The father applied for an adjournment to prepare a response to the mother's allegations. That counsel has since been retained.

Interim Interim Decision of February 25, 2010

[38] It is a difficult situation when a litigant appears in court in a hotly contested matter without counsel and seeking an adjournment. In many circumstances, the matter will be adjourned. However, matters involving the well-being of children often require the use of interim interim decisions to provide some stability and predictability that is in the best interests of the children. I found that this was such an occasion.

[39] Counsel for the mother stated that this application was originally set for hearing on January 26, 2010. The Notice of Hearing was filed on January 18, 2010. Counsel for the mother confirmed that counsel of record for the father was aware of that hearing date and that they ultimately agreed in late January to adjourn to February 25, 2010. There was subsequent correspondence between counsel in preparation for the February 25 hearing. Counsel for the mother wished to proceed on an interim interim basis respecting the children and child support to assist the mother. Counsel for the mother indicated particularly that the issue of supervised access was discussed with counsel for the father and produced the correspondence from counsel for the father dated January 27, 2010, disputing the necessity of supervised access but making a supervised access proposal to deal with the matter until February 25, 2010. The upshot

is that access of the father was supervised for the month of February up to the hearing on February 25, 2010.

[40] I gave the father full opportunity to address his concerns despite the fact that he had no counsel and no affidavit filed on the merits. I indicated to the father my inclination that he should have his adjournment but that the supervised access continue until the next hearing date. While not conceding that supervised access was necessary, the father indicated his availability for supervised access at the daycare centre between 11 am. and 12 noon and he also mentioned the unfairness to his mother of her being deprived of access. I made an interim order for supervised access for the father between 11 a.m. and 12 noon on Monday, Wednesday and Friday out of an abundance of caution for the well-being of the children.

[41] The father also indicated that he had no issue with child support for the children based upon his income of approximately \$80,000 a year which he said would result in \$1,500 per month for the children. Counsel for the mother was seeking twice that amount. In the circumstances, I ordered on an interim basis that the father pay \$1,500 per month for child support commencing January 1, 2010. I adjourned the spousal support issue but ordered the father to make full financial disclosure and adjourned the matter to March 25, 2010. The father had paid for the daycare expenses to the end of March.

The March 25, 2010 Application

[42] On March 25, 2010, the father appeared with counsel who made an application to remove counsel for the mother. That application was denied and written reasons for judgment are under reserve.

[43] The application to remove counsel for the mother took the morning but we were able to find time to continue later in the afternoon. Both counsel were prepared to proceed with the custody and supervised access issue. There was insufficient time to address the financial issues which were adjourned to April 21, 2010.

[44] The mother applies for interim custody and supervised access. The father applies for interim custody or shared custody and primary residence.

[45] At the outset of the afternoon hearing, the mother asked for exclusive possession of the company vehicle that she was driving and I ordered that on the condition that she was responsible for costs of maintaining it.

The Father's Evidence

[46] I will address the father's evidence first from his affidavit #2 sworn March 18, 2010. He indicates that his son from his first marriage resides with him half of the time and denies speaking negatively about his first wife. He states that his son has a close relationship with his daughters.

[47] He indicates that he and the mother disagree about how to raise their children and states that their different parenting styles have been a continuing source of tension in the marriage.

[48] He expresses their differing views as follows in his affidavit:

14. I do not believe that she has taken to motherhood the way we thought she would, and that she would prefer to focus on herself by working, doing her spiritual practice, and putting effort into her appearance, rather than taking care of the (children).
15. The Plaintiff has never taken care of the (children) full-time on her own. Until the (children) were about two years old I paid for in-home nannies to help care for the (children). After that, the Plaintiff put the

(children) in daycare and they are now in daycare 4 days a week. The Plaintiff has recently applied to have them in daycare 5 days a week.

16. My mother has also helped out by taking the (children) overnight once a week until the Plaintiff recently put an end to that.
17. I also take care of the (children) and have since their births.
18. I always opposed the (children) going into daycare and was very disappointed when the Plaintiff enrolled them in daycare. At first, they went to daycare two mornings a week, but the Plaintiff has steadily increased this to four full days a week.
19. The Plaintiff spends large amounts of time each morning on her own appearance, but then sends the (children) to daycare without proper grooming and without breakfast.

[49] The affidavit of D.L.G. continues with his concerns about the mother not spending enough time with the children and utilizing daycare or babysitters too much.

[50] The father is concerned about the mother not interacting with the children, being impatient with them and performing functional tasks with them but not interacting in a way that he expects a parent to interact with the children.

[51] The father expresses concerns that the mother has removed the children from his home and his mother's access and moved in with J.F. and D.F., who the mother refers to as grandparents. The father also had a dispute in the past with D.F. The father says that the mother suffers from emotional problems and refers to a 1993 report diagnosing a depressive and anxiety disorder as well as a 1996 journal entry by the mother referring to her deep depression. He expresses his concern about whether the mother is in a healthy state of mind to be taking care of the children.

[52] The father is surprised that the mother is afraid of him and hurt that she had made so many “demeaning, slanderous and false accusations” about him.

[53] He denies threatening her on his return from Vancouver in September 2009 and indicates he just wanted to find out where she was.

[54] He denies ever acting out physically with the exception of the push which he admits, says it was wrong and has never happened again.

[55] He denies saying anything negative or traumatizing to the children and expresses concern that the mother may be saying negative things to the children.

[56] The father says that he has uncovered many lies that the mother told him, but which he does not specify, and he confronted her with them around the New Year which caused her to become upset and cry. But he denies that he was threatening or abusive. He specifically denies leaving threatening telephone messages and states that he only uses his cell phone and his printout indicates that he made three calls to the mother between January 7 and 18, 2010.

[57] He states that he only took the car from the mother’s parking lot to do repairs and that he arranged for her to have a truck in the meantime.

[58] The father denies that he has a drinking problem and says the mother drinks excessively. He explains that before the reconciliation in the fall of 2009, he had the children as much as he wanted. He says the counselling for the mother and him was not because of any anger problem on his part. He says that the mother would have to retract her false affidavit and she would have to decide by November if she wanted to reconcile. He started to feel that she “was using me for my money”.

[59] The father states that at Christmas, he realized the mother was not coming back home and he stopped giving her money which, he says, was when the mother stopped letting him see S. and B.

[60] The father says he loves S. and B. very much and has looked after them for many overnights. He visits them at the daycare and the children are always happy to see him. During the reconciliation attempt in the fall of 2009, the father had S. and B. in October for approximately 10 days and overnights, in November for approximately seven days and three overnights and in December six days and four overnights in addition to numerous shorter visits.

[61] The father acknowledges that he works a lot but does it mostly from his office at home so that he can be available for the children.

[62] He states that S. had bowel issues before the separation and has always been a sensitive child. As to the incident where the mother says B. wanted to go with the mother, he says that B. wanted to stay with him.

[63] The father fears that the mother will leave the Yukon with the children as the mother hates the Yukon and has expressed her desire to leave in writing.

[64] The father has filed supporting affidavits from J.R. and M.R., both parents themselves, who have known him for many years. J.R. states that the father is “the more stable and patient parent” and “a kind and loving father who works hard in order to provide the best possible life for his children.”

[65] M.R., who has a working relationship with the father, says the father is “gentle, encouraging, patient and loving” and the restriction of access or supervised access “is a

travesty.” He states that the father is “not only a fit parent, but a loving parent who truly has the best interests of his children at heart.”

[66] The paternal grandmother has also filed an affidavit on March 19, 2010. She indicates that she went to her son’s house each day until the girls were six weeks old to help with their care and give the mother some rest. She states that the children have been coming to her house one day a week since they were infants. Approximately a year ago, she started having them stay overnight once a week to give them quiet time as they “play and carry on” till 12 or 1 a.m. at home.

[67] The paternal grandmother states that S. has always had bathroom problems and B. has always worn a diaper at night time. She believes that the girls throw temper tantrums to get their ways with the mother.

[68] The grandmother says that she has not had a visit with the girls at her home since January 7, 2010, although she has seen the children at the Canada Games Centre on three occasions. She does not believe that the trauma and events described by the mother and J.F. and D.F. have ever taken place. She visited the children at the daycare on March 5 and found that the girls missed her a lot.

[69] R.R., a friend and employee of the father for a long time, stated that the father has a very close and respectful relationship with his son. He describes the father as being a devoted family man who would raise his daughters with the utmost care and love. He states that the father and the paternal grandmother both have strong family values.

The Mother's Response

[70] In response to the father's evidence and the supporting affidavits, the mother states that she has not spent much time with J.R. with or without the children.

[71] As to the evidence of the paternal grandmother, the mother denies the children were up until midnight or later. She says that the bathroom problems for S. that the grandmother referred to was a constipation issue a year earlier and not the current messing her pants issue that has started since separation. The mother denies that B. was wearing diapers at night when separation occurred. In essence, the mother disagrees with the allegations of the paternal grandmother.

[72] In answer to the father's affidavit #2, sworn March 18, 2010, the mother states that she hired T. L.-D. as an "in-home" care person to assist her with her twin daughters from 9 a.m. to 2 p.m. each day. The mother has relied upon T.L.-D., N.T. and A.B. (babysitters) to assist her in caring for the twins. She states that the father was always extremely busy running his business. She states that she has regularly taken the daughters to the pool, played and read with them.

[73] The mother reiterated that she moved out with the children for their safety because the father's behaviour had escalated over the past two years to the point where there would be a "big problem" if she didn't pay rent as he demanded. She moved out of J.F. and D.F.'s home on February 15, 2010 to her current residence which is a more permanent home.

[74] The mother advises that she came to the Yukon in December 2000 because the father said he was divorced. He was actually still married and did not obtain his divorce until February 2001.

[75] As to his cell phone records, the mother states he has an office phone and a home phone that he uses regularly in addition to his cell phone. She denies that she is an excessive drinker.

[76] The mother states that the father had "occasional" overnights with the children during the period of attempted reconciliation and that the father would not say negative things to the children until reconciliation was not going to happen when the children's and particularly S.' anxiety behaviour began.

[77] The mother acknowledged that, although she has good friends in the Yukon, the climate and small population have made life difficult compared to Los Angeles where she lived for many years.

[78] The mother is of the view that supervised access at the daycare has been less stressful for the twins. S. is less anxious and not pooping her pants and knows that she will not be taken to the father's house when she is picked up. In contrast to S.' improvement, B. is more clingy and needy and has asked to sleep in her mother's room.

[79] The mother also filed a medical report dated August 5, 2009, confirming that she reported her loss of self-esteem and was on the verge of a nervous breakdown from the repetitive criticism and emotional abuse of the father.

[80] Counsel for the mother filed four additional supporting affidavits before the March 25, 2010 hearing.

[81] D.F., in his second affidavit, said that he listened to the father's voice message that said that the mother and father either resolve things or he would throw the mother's stuff over the bluff or bank (next to the family home) take the car and change the locks on the apartment.

[82] T.L.-D. was an in-home care provider for the children who started working in July 2005 after completing her Nursing Home Attendant Program. She stated that her role was to care for the children to give the mother some rest.

[83] She stated that the mother was usually exhausted from caring for the children the previous night. She says the mother was very "hands on" with the children. She described the father's contact with the children as limited. She found the father to be critical of her and the mother's care of the children which was one of the reasons that she left her nanny position with the family.

[84] N.T. is a high school student and has babysat the children since December 2008. She has observed some of the anxiety of S. in visiting her father. She says that during her babysitting on Tuesdays, Thursdays and Fridays, the father did not have a lot of interaction with the children although he was in the house. She says the children did not poop their pants prior to separation but they do now. She says S. is more clingy. She says the mother works and cares for the children and only uses her services when the mother has to grocery shop or run errands. She also says that she almost quit babysitting the children because of the critical attitude of the father.

[85] On March 25, 2010, I left the September 24, 2009 interim interim custody order to the mother in place. I increased the father's February 25, 2009 interim interim supervised access at the daycare centre to Mondays, Wednesdays, Thursdays and Fridays from 11 a.m. to 12 noon. I ordered access to the paternal grandmother for 10 a.m. to 5 p.m. on Tuesdays; such access to be for the grandmother only and not the father. I also ordered that a counsellor with child care experience report on the father's access and makes a proposal to the court for the April 21, 2010 hearing.

The April 21, 2010 Application

[86] This hearing is the final hearing on the interim custody and access application by the mother and father. Further affidavits were filed and I will discuss them chronologically.

[87] The mother states that Judy Laird has been retained by the father to respond on the access to the children as the counsellor named in the March 25, 2010 court order was not available. The mother says that S. and B. have continued to poop in their pants when visiting the maternal grandmother. She also reported that S. came home from access on April 12, 2010, with the paternal grandmother and was very excited with the new bikes and toys that they have at their father's house. B. was not as talkative but said she wanted the new bike at her Dad's house. The mother is concerned that the father's access may not have been supervised on this date.

[88] The father responded to the affidavit by N.T., the babysitter, as well as the mother's. He says that he has been involved with caring for the children and paid for child care while working full-time.

[89] With respect to the affidavit of T.L.-D., he acknowledges giving her directions when he had concerns about his daughters' care.

[90] The father repeated that he did not use any other phones except his cell phone to call the mother. He says that the emotional problems of the mother have existed for many years and are not the result of his abusive behaviour.

[91] With respect to the allegation about the children's bikes at his house, he denies both the existence of the new bikes and the visit to his house.

[92] The paternal grandmother says her access with the twins has worked well. She explained that she told the children that she would bring them bikes from their father's house to her house so that the children could ride the bikes at her house.

[93] The maternal grandmother filed an affidavit. She has visited her daughter at least once a year since she moved to the Yukon. She is supportive of her daughter's role as mother of the children. She had possession of her daughter's cell phone in December 2009 when her daughter did not want to talk to the father. She listened to his messages that said he would take the girls from her and she would not get a dime and that if she did not come home, he would throw her belongings in the river. She says the father told her directly that he would never let the mother have the children and would have his mother take care of the children. The maternal grandmother also expressed concerns about the health of the paternal grandmother. She also confirmed the anxiety exhibited by S. on a visit to the father's.

[94] The maternal grandmother also confirmed the father's phone call to her in September 2009. She says the father told her that the mother owed him \$10,000 for rent for her studio. She says the father called her daughter names, swore and ranted on the phone about her, demanding to be paid.

[95] The maternal grandmother also described a telephone conversation with the father in January 2010 after the father claimed to have called the mother's former husband of 20 years ago, which caused great distress to her daughter. She called the father to complain about this tactic which ended with the father screaming at the maternal grandmother, yelling obscenities and saying that the mother is not a good parent and spends all his money.

[96] J.F.(2), the daughter of J.F. and D.F. also babysits the children. She confirmed conversations with the children after April 12, 2010, which suggested that the children have been at their father's house on April 12, 2010.

[97] Judy Laird prepared a report dated April 19, 2010. She is a social worker with a Certificate in Therapeutic Play Skills and a Certificate in Play-Based Trauma Treatment for Children and Youth. She has assessed the children, the mother and father and employees at the daycare.

[98] Ms. Laird describes S. as being well socialized but having some difficulties with control over bowel movement which can be attributed to toilet training and psychosocial stressors.

[99] B., who was rated as normal by both parents in emotional issues, is described by daycare staff as significantly distressed which interferes with her relationships. Ms. Laird says this may be the result of high stress.

[100] Ms. Laird described the father's supervised access at the daycare centre as positive and respectful.

[101] Ms. Laird concludes her report by writing:

Both children scored high in pro-social rating and seem to be functioning at their appropriate age level in many ways. They both have signs of distress that are concerning: [S.]'s encopresis, and [B.]'s lack of emotional coping. They will be starting school in the fall. This is a transition that can be quite stressful. I would recommend that the children's environment be kept as consistent and predictable as possible. The daycare is reported to be a safe and known place for them. I would recommend that the children continue attending it as much as possible. If parental custody changes, I recommend doing it slowly, paying attention to their stress levels. These children need to feel safe and cared for by people who love them, understand what they need and protect them from adult conflicts.

Interim Custody and Access

[102] The test in child custody and access applications is the best interests of the children. Section 16(8) of the *Divorce Act* states that “the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.” Some of the other principles that may be considered are:

1. only the best interests of the child, as opposed to the interests of the spouses, are to be considered (s. 16(8));
2. the past conduct may be a factor only if it is relevant to the person’s ability to act as a parent (s.16(9));
3. maximum contact with both parents to the extent consistent with the best interests of the child is required (16(10)); and
4. a proposed custodial parent’s willingness to permit access to the other parents is a relevant factor (s.16(10)).

[103] In interim applications for custody and access, the practice is to proceed by way of affidavits on the interim application, followed by oral evidence at the trial, should the matter go that far. On the interim application, conflicting affidavits from both parents is the norm, and the challenge for the court is to determine the best interests of the child without having the opportunity to see the parents in examination and cross-examination. It is often very helpful to have affidavits from others somewhat more impartial than the mother and father may be. In this case, it is fortunate that there are other affidavits to assist in sorting out the best interests of the children as well as the report of Ms. Laird.

[104] There are many factors in considering the best interests of the children such as the status quo, the primary caregiver, the physical and emotional well-being of the children, the sensitivity of the parents to the needs of the children in addition to many other factors that come into play.

[105] The general principles relating to access are set out in *R.D. v. U.S.D.*, 2001 YKSC 543, at para. 13:

1. a child should have as much contact with each parent as is consistent with the best interests of the child;
2. the access of a child to a parent is the right of the child;
3. the best interests of the child requires consideration of the condition, means, needs and other circumstances of the child;
4. access may be denied to a parent if it is not in the best interests of the child;
5. the past conduct of a parent may be taken into consideration if it is relevant to the ability of that person to act as a parent of a child;
6. the onus is on the parent seeking access, to establish on a balance of probabilities that access is in the best interests of the child.

[106] It is also generally accepted that spousal abuse, whether physical, verbal or emotional is relevant to a custody and access determination.

Application to these Children

[107] I have no doubt that although the birth of twins is a great blessing for parents, it is also a very challenging situation that requires a great deal of support for the primary caregiver. In this case, I find that the mother is the primary caregiver: she has looked after the children from the beginning with significant support from a nanny and a babysitter. I rely on the evidence of the nanny and babysitter which confirms that the mother is the primary caregiver. The father has certainly been involved and supportive,

but he has worked hard at his business and provided financial support. The primary caregiver role of the mother is also established by the status quo since separation with the mother having interim custody of the children and the father exercising access since September 25, 2009. This has continued since the attempted reconciliation broke down in December 2009. I am also of the view that the mother demonstrates a greater understanding of the physical and emotional needs of the children. She has always taken the view that the father's relationship with the children is important to them.

[108] I am also persuaded by the report of Ms. Laird who stresses the importance of keeping the children's environment "as consistent and predictable as possible" as they approach starting school in the fall.

[109] I order interim custody of the children to the mother.

[110] With respect to access of the father to the children, I find that he has a loving relationship with them and genuinely wants their best interests to prevail. However, he has, on the evidence of those who have heard his telephone calls and observed his behaviour, a manner of being verbally and emotionally overpowering with his spouse when there is conflict.

[111] I am satisfied that this behaviour has had a negative influence on the well-being and best interests of the children. The issue of the company vehicle used by the mother is an example. There was no need to act unilaterally to pick up the vehicle as it could very easily have been arranged by mutual agreement to have the maintenance done. It is indicative of controlling behaviour that can have a powerful impact on the spouse and children. Similarly, the company apartment was never secure to the mother and

children. I find that the father, who no doubt loves his children and they love him, does not appreciate the impact of his actions on the mother and children.

[112] I also note that Ms. Laird was impressed with the daycare as a “safe and known place” for the children.

[113] I conclude that for the time being, while the father and mother are sorting out their financial affairs, the father’s access should be supervised and that the terms of access remain the same as the order dated March 25, 2010, including the access of the paternal grandmother. This supervised access maintains the paternal bond with the children and avoids the placing of too much stress on the children during what is always a stressful circumstance. This unfortunate family breakdown was triggered in part by the radically different perceptions of the financial nature of the marital relationship. It would be tragic if that dispute continues to affect the children in a negative way. Supervised access will hopefully reduce the negative consequences on the children.

[114] There is some evidence that the father has had unsupervised access at his home. While I make no finding of fact in that regard, it does raise concern.

[115] It is the usual practice in a case of this nature to order that neither parent shall leave the Yukon with the children without the express written consent of the other parent or a court order. I so order on an interim basis. If there are plans to have the children visit the maternal grandmother at her home, it should be raised at a family law case conference to determine if it can be resolved without a contested application.

[116] I also remind counsel that paragraph 5 of the September 24, 2009 Order Without Notice provides the mother with the ability to retrieve the listed items from the family home. The mother is at a great disadvantage having left the comfort of the family home

and it is not necessary to wait until settlement or trial to have these items. I include the bar and bar stools.

[117] I also order that the father pay for two counselling sessions per month from Judy Laird with the children to assist them to cope with the separation and prepare them for attending school.

[118] To summarize, I make the following interim order:

1. the mother shall have custody of the children;
2. the father shall have supervised access at the daycare Mondays, Wednesdays, Thursdays and Fridays from 11 a.m. to 12 noon;
3. the paternal grandmother shall have access to the children each Tuesday from 10 a.m. to 5 p.m., which is exclusive to her with the father not present. The pickup and drop off shall be arranged by N.T;
4. neither the mother nor the father shall leave the Yukon with the children without the written consent of the other parent or order of the court;
5. the mother may include the bar and bar stools in the items that she can retrieve in paragraph 5 of the Order Without Notice dated September 24, 2009;
6. the father shall pay for two counselling sessions per month for the children by Judy Laird.

[119] The parties may speak to costs, if necessary.

VEALE J.