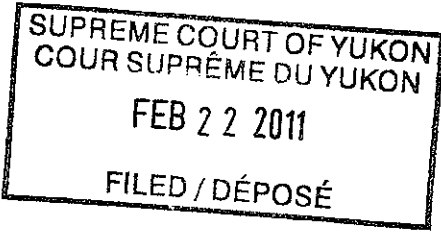


SUPREME COURT OF YUKON

Citation: *K.W. v. S.W.*, 2011 YKSC 10

Date: 20110117
Docket S.C. No.: 10-D4270
Registry: Whitehorse

BETWEEN:

K.W.		Plaintiff
S.W.		Defendant

AND:

Before: Mr. Justice L.F. Gower

Appearances:
Malcolm Campbell
Karen Wenckebach
Kathleen Kinchen

Appearing for the Plaintiff
Appearing for the Defendant
Child Advocate

**REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH**

[1] GOWER J. (Oral): These reasons are directed to the defendant mother, Ms. W., who is attending by phone, and the plaintiff father, Mr. W., who is present in court. Both parties have heard what the lawyers have said, and so their arguments will be fresh in the parties' minds, and this will make my job somewhat easier in terms of my referring briefly to those arguments.

[2] This is a situation that started badly. I have been involved with the situation from the very first day the father came to court on his own in an attempt to try and get this wrong righted. I think the mother acknowledges it was wrong to leave the Yukon without

notice to the father, and to have the children transported to Saskatchewan with the full intention that they would not be returned. That is called absconding. It is improper and it is generally frowned upon by the courts. The consequences for that kind of bad behaviour can be significant. The real issue, though, in this case is how do I right that wrong? Will that wrong be righted if the children are ordered to be returned to the Yukon, either in the father's interim custody and care, or in the mother's interim custody and care, with some form of access to the father?

[3] There is evidence that troubles me in this case about the relationship between the father and the mother, and his relationship with the children. Now, to be fair, I think Mr. Campbell has said everything that a competent, careful counsel could say on the father's behalf in terms of challenging the strength of those allegations and the situation that the father finds himself in. But, the views and preferences of the children are something that I am obliged to take into account in determining their best interests, as well as the items that Mr. Campbell has gone through: the bonding that the father has had with his children; the length of time that they have lived together under the same roof; and particularly, the effect that awarding custody to the mother, even on an interim basis, will have on the father's ability to have reasonable access to the children.

[4] So I take all of those things into account. But, in this case, we have children who are ranging in age from 15, two twins who will be 14 in about a month or two, and the youngest, age 11. They have had an opportunity to consult with their lawyer, and their lawyer tells me that they do not want to return to Whitehorse and they do not want contact with their father at this point (with one exception, K. who said that she would talk to him on the phone). They have told their lawyer that they are fearful. They have

indicated to their lawyer that they are still angry, and to use the lawyer's words, they are "very, very vocal" about that.

[5] Now, the children's lawyer tells me that the information in the affidavits about the various allegations of physical and verbal abuse by the father against the children is the same kind of information that they have been giving to their counsel. That is significant to me because it indicates a degree of corroboration; that what the children are saying to the social workers, to their mother, and to the neighbours has some credibility. This is not just about the mother's allegations; it is the mother's and the children's, and to a very large and significant extent, both the allegations of the mother and the children are corroborated by the independent, objective evidence of two neighbours, L. and C. M. It may be true that some other professionals involved in the lives of the children, such as the family doctor and the teachers and so on, have not noticed anything untoward. Also, I am aware that this is not a trial. There has been no testing of the evidence; there has been no cross-examination on affidavits or in court. So, there are certainly limits to what I can conclude from the conflicting affidavits. However, on a superficial basis, the allegations of the children appear to have credibility, because they are supported by the M.'s. That to me is very significant and it indicates that this may be, as the mother's counsel suggests, a situation where we are only seeing the tip of the iceberg.

[6] On the other hand, the M.'s have indicated that up until this past year, 2010, things in the W. household did not seem particularly out of joint, but that there has been a significant deterioration over this past year. They have noticed more drinking on the part of the father and they have noticed more difficulties in the family. We also know that there was at least one prior incident of concern involving Family and Children

Services ("FCS") in 2002. So, while this may not have been an untenable family situation for the most part, there clearly have been difficulties in the past, and those difficulties seem to have become worse in this past year. They ultimately came to the point where there was an alleged incident between the father and the daughter, D., involving an alleged assault with a knife held to her neck on, I believe it was, July 14th, shortly before the mother made the final decision to move the children to Saskatchewan.

[7] Now, a brief comment about the situation that the father finds himself in. I have referred to counsel as calling this a Catch-22, and it is very unfortunate because, although I made an interim order in his favour, FCS became involved after the mother made her criminal complaints involving threats to kill her, the maternal grandmother, and to harm the daughter, D. As a result, FCS opened a file and there was an investigation done partly in Saskatchewan and partly in Whitehorse. The position of FCS in Whitehorse at the moment is that they have done all the interviews they feel are appropriate, but they have yet to interview the father, and so cannot close their file until they do so.

[8] The father, for understandable reasons, would want to be cautious about what he tells FCS about these direct allegations, because they have yet to go to a criminal trial. He is presumed innocent of the charges and will not want to do anything which compromises his ability to make full answer and defence to those charges. But, and I think this is a significant but, the father had a trial date in mid-December 2010 in the Territorial Court. For some reason, which remains unclear to me, he chose on the advice of counsel to change direction and re-elect on those charges to this Court, the

effect of which was that he lost his December trial date and the trial is now put off. I do not think it has yet been set?

[9] MR. CAMPBELL: May.

[10] THE COURT: I am told May. So the status quo vis-à-vis the father and his ability to comply with the wish of FCS to interview him, presumably, will be put off until after the criminal allegations are disposed of. But, had the father pursued his right to proceed to trial in December, and assuming that he was successful in that endeavour, then he would have been free to meet with FCS and this matter might have taken a very different turn. So, to the extent that the father now finds himself in somewhat of a conundrum, in my view, he is the author of his own misfortune.

[11] I am, in large part, in agreement with the arguments made by the mother's counsel as to why the children should remain in Saskatchewan with their mother, pursuant to an order of interim custody and primary residence. I am also in agreement with the proposal that access by the father should be at the discretion of the mother in consultation with FCS, until the children have indicated that they want access with their father. I do find some solace in the fact that the children's lawyer has indicated that if she is contacted by any of the children in the future indicating that they want to resume contact, then she has undertaken, in effect, to bring the matter back to this Court so that appropriate orders can be made.

[12] However, the allegations of threats being made to kill the mother and the maternal grandmother, as well as to kill himself, threats allegedly made to both the M.'s who are independent, objective witnesses, is an indication of some degree of instability

with respect to the father's state of mind. This evidence is also potentially corroborative of the other forms of alleged physical and verbal abuse that the father is accused of in the past.

[13] So, suffice it to say, that I am in large part in agreement with what the mother's counsel has said, which is supported by what the children's lawyer has said. I am going to make an order based on the mother's notice of application filed October 19th, firstly, vacating my order of September 24, 2010; secondly, granting the mother interim custody, primary care and primary residence, as indicated in paragraph 4 of the notice of application. Are you seeking the relief in paragraph 5?

[14] MS. WENCKEBACH: No, Your Honour.

[15] THE COURT: All right. I will make a determination that the plaintiff's gross annual income is as set out in his 2009 tax return, which is \$36,565 gross annually. I will order that the plaintiff pay the defendant interim ongoing child support based on the Child Support Guidelines table amount of \$880 per month for the four children commencing February 1st, and then on the first day of each month following. I will make an order that the plaintiff pay on an interim basis half of the children's extraordinary expenses upon receipts being provided by the mother to the father or through counsel.

[16] I will also make an order granting the relief set out in paragraphs 9, 10 and 11 of the mother's notice of application. Now, there is nothing in here about the return of the \$1,000 in child support. Are you still seeking that?

[17] MS. WENCKEBACH: Yes, Your Honour.

[18] THE COURT: I will make that order.

[19] MR. CAMPBELL: I can provide that right now.

[20] THE COURT: Acknowledged.

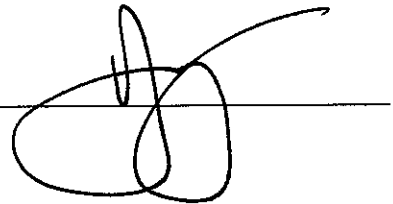
[21] MS. WENCKEBACH: I'm sorry, Your Honour, just one very brief issue. At paragraph 4, I have asked for residence in Unity, Saskatchewan. Can I -- could I say -- could it be said Unity and surrounding areas?

[22] THE COURT: So ordered. Anything else?

[23] MS. WENCKEBACH: No, Your Honour.

[24] THE COURT: Thank you.

GOWER J.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a horizontal line.