SUPREME COURT OF YUKON

Citation: *E.M.M.* v. *D.W.M.*, 2012 YKSC 81 Date: 20120913
Docket: S.C. No. 12-B0017
Registry: Whitehorse

BETWEEN:

E.M.M.

PLAINTIFF

AND:

D.W.M.

DEFENDANT

Before: Mr. Justice E.W. Stach

Appearances:
Kimberley Hawkins Counsel for the Plaintiff
Brook Land-Murphy Counsel for the Defendant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] STACH J. (Oral): At issue in these proceedings are the interim custodial and access arrangements for J.O.K.M., a child born to E.M. and D.M. on January 3, 2011. The parents of the child were common-law spouses in Carmacks for approximately seven years. They separated in the latter stages of 2011. E.M. now lives in Dawson City; D.M. in Carmacks.

[2] J. is now one year and eight months old. Since his parents separated, J. has been in the primary care of his mother in Dawson City. The parties agree that on an interim basis, J.'s primary residence should remain with his mother in Dawson City. The

parties are also in agreement that, based on D.M.'s current income, he should continue to pay child support in the sum of $300 per month, that child support is up to date, and that the next payment falls due on October 15, 2012.

[3] The parties take starkly different positions on the question of whether there should be joint custody for J. and whether D.M.'s access with J. should be supervised or not. The differing positions of the parties arise directly out of their unquestionably turbulent relationship as common-law partners. D.M. says that the presumptive status of joint custody should obtain here. E.M. says she should have sole interim custody. She says that Mr. M.'s access to J. should be supervised. He says it ought to be unrestricted.

[4] There are multiple affidavits before the Court. Many are markedly conflicting. There is common ground in that each of the parties acknowledges that their relationship was an unhealthy one. There are allegations in some of the affidavit material that E.M. was verbally and psychologically abusive to D.M. on a consistent basis, and that she demeaned him regularly. In other of the affidavits there are allegations that suggest a violently eruptive temper on the part of D.M. that manifested itself, at the very least, in some destruction of the home and its contents.

[5] To be sure, I have the sense that there are enhancements in the affidavits of the respective parties, whether by way of minimization or exaggeration, intended, I am sure, to add some colour that would tend to support the respective position of the author. I suspect that there is a kernel of truth in all of the allegations.

[6] The relationship between the parties was clearly dysfunctional. Yet I am not convinced that the bad behaviour attributed to each by the other is something that will impact in the long run on the ability of each of them to parent in their own sphere. I have the sense from the affidavit material that the dysfunction is inter-relational in that it arises out of the kind of chemical reaction that takes place while each is in the company of the other. In short, I am persuaded that each can operate effectively in his or her own sphere. There is evidence to support that in the other affidavit material filed.

[7] There is a rebuttable presumption in favour of joint custody in the Yukon, yet I am persuaded that joint custody cannot and should not be ordered in the present case. I say that because it is widely accepted that joint custody requires a basic level of respect and civility between parents in order that meaningful communication regarding the child can occur. Both parents must have the opportunity to express their views and have meaningful input into the decision-making process. One has only to read the affidavit material here to discern that when these parents are thrust together in a decision-making process, meaningful, civil, and rational communication between them seems impossible. Who then, as between them, should be the custodial parent?

[8] There is in the material evidence to support the proposition that E.M. has, on numerous occasions, been controlling insofar as access by D.M. and members of his family is concerned. That behaviour, while troubling, may have its origins in the abusive behaviour that she attributes to D.M. Troubling though it is, taken cumulatively, it is not sufficient in my view to disqualify E.M. as a custodial parent on grounds of alienation. There is independent evidence that E.M. has a clean and safe home in Dawson City

that is appropriate for children and that her behaviour as a mother towards J. is otherwise exemplary.

[9] In addition to the allegations that E.M. makes respecting the bad behaviour of D.M., there is a body of affidavit evidence that tends to corroborate the proposition that D.M. has, on multiple occasions, exhibited eruptions of temper that have, at the very least, resulted in destruction to property.

[10] D.M. acknowledges a history of regular marihuana use. While he says in his affidavit that he has stopped, there remain suggestions that his use of marihuana continues from time to time. I am not in a position from the material before me to make a definitive finding. The uncertainty, however, is disquieting. On balance, I am persuaded that E.M. should have sole custody of J.

[11] The combined effect of findings that, on a balance of probability, D.M. has exhibited aggressive eruptions of temper, and having regard for the uncertainty respecting ongoing marihuana use, I regard it as prudent in the short term to direct that there be a transitional period where his access to J. requires supervision.

[12] The care of an infant is taxing in and of itself, and help from an additional source is always welcome. More to the point, I think it will accrue to J.'s benefit for the Court to order a leavening period, where the presence of another sober and responsible adult with parenting experience can assist D.M. in transitioning to responsible care for his infant child independently of others. The basic requirements for the supervisor, and it may be more than one person, is that they be a responsible, sober adult with parenting experience. They can, and perhaps should include, members of D.M.'s own family who,

to this point, have been permitted but a minimal role in J.'s life. I think it important to require the supervising adult to read my reasons and to be mindful of the concerns that prompt me to order a transitional period of supervision. I have attempted to invoke the least intrusive form of supervision. In my view, supervision ought not to be required beyond December 31, 2012.

[13] Counsel agree that access between J. and his father ought to be prescribed for the benefit of all of the parties, so as to provide an element of certainty to replace the period of uncertainty that has heretofore existed.

[14] I direct that for the period commencing Saturday, September 22nd, D.M. shall have access to J. in Dawson City in a place other than the residence of E.M. The period of access shall commence on Saturday, September 22nd at 9:00 a.m. until 12:00 p.m. and again on the afternoon of Saturday, September 22nd from 4:00 to 6:00 p.m. On Sunday, September 23rd, he shall have access from 9:00 a.m. to twelve o'clock noon. He shall have access on alternating weekends on that basis, and with the supervision indicated, in Dawson City until February 15, 2013.

[15] I note that Thanksgiving Day falls on the second following weekend after September 22 and I direct that, in addition to the Saturday and Sunday access for the periods indicated, D.M. have access again on Thanksgiving Day, the 8th of October, from 9:00 a.m. until twelve o'clock noon. It is my expectation that the extended family of D.M. have the opportunity, at least on this first holiday weekend next following this hearing, to begin to establish a relationship with J., and he with them.

[16] I made reference in these reasons to the date of February 15, 2013, and it is incumbent on me to elaborate why I selected that date. Provided that there is a residence in Carmacks that is structurally and otherwise fit for infants, it is my view that J. should have access visits to take place in Carmacks where others of the extended family of D.M. are also present. There were mold problems with the residence that the parties occupied in Carmacks and perhaps other issues. I will require as a condition of access taking place in Carmacks that an independent third party verify the fitness of the residence for habitation by an infant. Provided that condition can be met, access may be exercised in Carmacks one weekend per month.

[17] I chose not at this stage to give any firm direction respecting summer access and other access. I do comment parenthetically that I think it preferable, if summer access is to be exercised in Carmacks, that its duration not extend beyond one week at a time. I say that having regard for the relatively young age of J. The parties are, of course, free, through counsel or otherwise, to attempt to agree on summer access. I suspect that, without the assistance of counsel, agreement will be an impossible task. If a satisfactory arrangement to each of the parties cannot be negotiated, either of the parties may, on seven days' notice, make application to the Court for summer or other access.

[18] Parenthetically [RECORDING ENDS - RECORDING RESUMES] the true copy of the income tax return as filed on or before June 1, 2013, and the same provision is to be carried forward with the necessary changes on an annual basis.

[19] I have some views about costs, but I think it pertinent to ask counsel if they have views that they should express to me at this stage.

[20] MS. LAND-MURPHY: I'm not seeking costs.

[21] THE COURT: And neither are you, Ms. Hawkins, for your client?

[22] MS. HAWKINS No, I'm not seeking costs.

[23] THE COURT: And let me add my concurrence to that position. I do not think costs, in the circumstances, are appropriate.

[24] Now, are there any other questions?

[25] MS. LAND-MURPHY: I have a few questions. Firstly, with respect to custody, was the order that Ms. M. have interim custody or sole custody?

[26] THE COURT: It is all intended to be on an interim basis.

[27] MS. LAND-MURPHY: Thank you. In addition, with respect to -- I appreciate that Your Honour dealt with Thanksgiving, but there are other holidays which are not --

[28] THE COURT: I meant to deal with Christmas as well.

[29] MS. LAND-MURPHY: Thank you.

[30] THE COURT: I am glad you reminded me of that oversight. Perhaps I can deal with it now. Christmas is a family event at bottom, and to this point at least, the extended family of D.M. have not had an opportunity to spend time with J. at Christmas. It is for that reason that I direct, with regard to Christmas 2012, that D.M. have access to J. overnight, commencing at three o'clock on Christmas Eve to 1:00 p.m. on Christmas Day.

[31] MS. LAND-MURPHY: Thank you. I'm wondering whether -- it is uncertain at this time whether the parties will indeed be returning to court with respect to at least perhaps up until summer access. That also leaves Easter and Father's Day. So I'm wondering whether perhaps it might be -- if either that could be specified that, some sharing of that, or if Your Honour agrees it would be more appropriate then to have a term of saying holiday access as agreed upon by the parties. I'm not -- I suppose in all likelihood Mr. M. would probably want to have -- actually be specified just to reduce uncertainty.

[32] THE COURT: I deliberately did not want to go as far as Easter and hoped that the parties, through counsel, might be able to sort that out. I should also add that, to the extent that I made provision for Thanksgiving and Christmas, or holiday, that, in the year following, it should accrue to the advantage of the other party. That it should alternate, in short.

[33] MS. LAND-MURPHY: The reason why I ask, Your Honour, is because both Ms. Hawkins and I are employed by Legal Aid and the practice at Legal Aid is for -- once the application is heard we'll be closing our files.

[34] THE COURT: I see.

[35] MS. LAND-MURPHY: And so it may well be that they will not, in the usual course of events, have counsel. We would typically close our files today.

[36] THE COURT: Now, the child is not at school so the holiday period from school does not have to be taken into account. What do you say, Ms. Hawkins, as

to Easter? I do not have a 2013 calendar in front of me and that was also one of the reasons I chose not to go beyond Christmas.

[37] MS. HAWKINS: Your Honour, without having the dates in front of me I would suggest that Ms. M. does consider church important; she does consider those aspects of her life quite important. So I think with respect to Easter certainly she would be seeking the Sunday morning. I take it there would be a church service that she would wish to attend, however that access falls, and I'm not sure if she celebrates Sunday or Monday. I haven't been able to reach her this afternoon. I would anticipate that she'd be seeking a Monday dinner in light of the fact that Mr. M. will be having access for the Christmas Eve dinner. That might be suitable.

[38] THE COURT: It seems to me that with D.M. and his family having access at Christmas that first dibs are probably to be given to E.M. for Easter, and I take your point that it is a religious holiday, and from the affidavit material it appears that there is regular practice of attending church on her part and she should therefore have J. in her care, for whichever day the religious holiday is celebrated. I suspect it will be Sunday rather than Monday, but Easter Sunday J. should be in her care and some arrangement can be sorted out as to the remainder of the Easter period.

[39] MS. HAWKINS: Perhaps Ms. Land-Murphy and I can sort that out before we close our files in the next couple of days. We will try to make that decision.

[40] THE COURT: All right. Let me add this, that to the extent there is some further clarification required I can be contacted through the trial coordinator here, and I will do whatever I can to be of assistance to counsel.

[41] MS. HAWKINS: Your Honour, there is one additional term that we were seeking and I don't believe that's been addressed, and that was a term that was sought in our initial application and was in the interim-interim order, and that was a clause requiring Mr. M. not to consume marihuana within 24 hours of exercising access to J.

[42] THE COURT: To the extent that the potential for marihuana concerns was one of the express concerns that I alluded to in my reasons, I think it should follow and be included as a term that D.M. not use marihuana or any illicit drug or alcohol during his access with J. or for a period of 24 hours before.

[43] MS. LAND-MURPHY: And, Your Honour, I just wanted to clarify. You said, after making the order with respect to sharing income tax returns, and you stated the same provision is to be carried forward on an annual basis, was that referring to the requirement to share the income tax returns?

[44] THE COURT: Yes.

[45] MS. LAND-MURPHY: Thank you. And can we also have an order that the requirement to the family law case conference is waived?

[46] THE COURT: Yes.

[47] MS. LAND-MURPHY: Thank you.

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STACH J.