

SUPREME COURT OF YUKON

Citation: PREB v JBB, 2015 YKSC 1

Date: 20150107
S.C. No. 14-D4704
Registry: Whitehorse

Between:

P.R.E.B.

Plaintiff

And

J.B.B.

Defendant

Before: Mr. Justice D.R. Aston

Appearances:

Kathleen Kinchen
Shayne Fairman

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

[1] The parties began to live together in February 2011, were married in April 2012 and separated in August 2013. There were subsequent discussions about a possible reconciliation but by March 2014, at the latest, it was apparent they would not get back together. The main issue now before the court concerns various ancillary orders relating to custody of their three-year-old son, J., born October 4, 2011.

[2] Both parents are devoted to their son and motivated by what they each genuinely believe to be in his best interests. In the last year or so, the father has been able to enjoy incremental time with J. without the need to resort to the court. However, he believes the time has come for J. to spend equal time in the care of each parent. The

mother's proposals include more or less equal time on weekends but would have J. in her care on weekdays, except that for two days each week J. would be with his father one or two evenings from pick up at daycare until his bedtime.

[3] The starting point in weighing the competing proposals of the parents is to recognize that the mother has been J.'s primary caregiver all his life, both before and after the parties separated. The father needs to acknowledge that fact. That said the father has been a devoted parent significantly involved in his son's care and upbringing. Given J.'s young age, one of his primary needs is a stable and consistent routine. The evidence does not establish a causal connection between J.'s negative behaviour and any conduct of the father. However, J. is showing some fragility and negativity that was not evident before the expansion of time with the father beginning last summer. He needs the security of not being away from his mother for an extended period. The day may come when the "week about" arrangement proposed by the father will become appropriate, but for now the mother's proposal is preferable. It includes four overnights out of fourteen and ample time for the father to establish and maintain a close relationship with his son while meeting J.'s need to continue maintaining his relationship with his primary caregiver. The mother's alternate proposals are found at para. 48 of her affidavit sworn December 5, 2014 and para. 23 of her affidavit sworn January 2, 2015.

[4] The father is given the option of choosing which alternative he prefers within the next 10 days, failing which the mother is to make the choice.

[5] The formal order shall also include a provision that J. is to be in his father's or mother's care "at such further or other time as the parties may agree". I make no specific order in relation to vacations, holidays or other special occasions at this time so

as to afford the parties the opportunity to recognize their mutual need for cooperation with one another in that respect. It is my hope and expectation the parties will not need the court to micro-manage such matters. For the same reason, I make no order that the parents be compelled to use one another as a substitute child minder as suggested in para. 3 of the father's application.

[6] The father has been frustrated by what he regards as an over protective and controlling attitude on the part of the mother. From his perspective, she disrespects his abilities as a parent and interferes with his parenting time. There is some legitimacy to that perspective. The mother's insistence on being able to telephone J. every evening J. is with his father is intrusive. Some of her criticisms of the father's parenting may unfairly denigrate his capacity to look after his son. On the other hand, it is clear to me that her attitude and positions (historic tight control over J.'s time with his father, her request for sole custody and a "no alcohol" provision, etc.) are not rooted in malice or retribution. Rather, they represent a genuine concern for her son's safety. Furthermore, her subjective view is not without an objective foundation. The father was given a roadside suspension after driving with J. in the car last March. The father probably violated the terms of the Peace Bond by consuming alcohol last October. His text message to T.D. (found at Tab A of her affidavit sworn December 5, 2014) is in sharp contrast to the grammar and spelling of other texts, leading me to infer that the message was not only "unfortunate" and "inappropriate" (as he now concedes) but probably written while intoxicated. Even if it was not, it clearly illustrates how volatile, angry and aggressive he can be. Though there is no evidence J. has been exposed to that volatility (except for the incident of March 23, 2014) it is not difficult to understand

the mother's concerns, including her resistance to the father having J. in his care a full week at a time.

[7] That said I am confident the father would never knowingly put his son at risk. Nor is there any evidence J. has actually come to significant harm while in his father's care.

[8] An order that the father not consume any alcohol whatsoever while caring for J. goes too far and may create more problems than solutions. However, the order will include a provision that the father is not to consume any alcohol in the two hours immediately preceding any occasion he drives with J. in the vehicle.

[9] The mother's request for telephone access between 7:15 and 7:30 p.m. each night J. is in his father's care would create an impediment to trust and to the success of co-parenting. I do not accept that those calls have been reassuring for J. or that he should need such reassurance when briefly away from his mother. The father would probably be doing himself a favour if he occasionally arranged a good night phone call but I decline to formally order him to do so.

[10] The parents have communicated poorly in the past and have needed an intermediary for pick up and drop off. In most cases that does not bode well for a "joint custody" order. However, the most recent communications between the parents have been better. It is not too late for them to choose a new path. Mindful that this is only an interim order, I am inclined to give them a chance to make it work and therefore order joint custody. Though the mother sought sole custody, she has voluntarily provided incremental access and I am satisfied her request does not reflect a desire to exclude the father from decision making. On the other hand, a joint custody order will reassure the father of his participatory role in decisions and perhaps ameliorate the anger and

frustration that has occasionally fuelled his bad judgment, for example his destruction of the mothers' entries in the communication book she initiated.

[11] Turning to child support, the residential arrangement mandated by this order does not engage s. 9 of the *Child Support Guidelines*. Effective January 1, 2015, the father is to pay the table amount of \$544 per month based on his 2014 income of \$61,200.

[12] There is no consensus on whether the parenting schedule from June 2014 to December 2014 meets the s. 9 threshold. I doubt that it does, but accede to the father's submission that the parties have an opportunity to either settle that point or present supplementary evidence to the court.

[13] On the other hand, there is no doubt that the father has an obligation to pay the table amount for the period of September 2013 to May 2014, a period of four months at \$536 per months based on his 2013 income of \$60,454 and five months at \$544 per month based on his 2014 income of \$61,200.

[14] Payment of any spousal or child support for the period August 2013 to December 31, 2014 is suspended until the final determination of the property issues. For most of that period, the father made voluntary payments of \$1,500 per month. That sum apparently exceeds his half of the joint debt payment and his share of the costs incidental to his half interest in the matrimonial home. To the extent there is an excess, that excess represents child and spousal support and should be credited to him once the accounting is done.

[15] The present rental income of \$2,000 per month from the matrimonial home may also generate a surplus, yet to be determined. However, that surplus, if any, does not

relieve the father from paying the child support effective January 1, 2015. Any surplus will be the subject of a separate subsequent accounting.

[16] The father has agreed to pay his proportionate share of s. 7 expenses and to keep J. insured on his employee health care package. The order will include those provisions.

[17] Though the mother is the more successful party in the outcome, success is divided and the father's position was advanced reasonably and in good faith based on his perception of J.'s best interests. Each party will bear his or her own costs.

ASTON J.