

SUPREME COURT OF YUKON

Citation: *JET v LO*, 2015 YKSC 44

Date: 20151007
S.C. No. 15-B0043
Registry: Whitehorse

Between:

J.E.T.

Plaintiff

And

L.O.

Defendant

Before Mr. Justice R.S. Veale

Appearances:

Kelly McGill
Rita M. Davie

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] VEALE J. (Oral): This is an application by the father for an equal sharing of residential time with the child R. who is approximately 2 ½ years old. The mother opposes the application and seeks primary residency with alternate proposals for the father's access.

[2] It is encouraging that the mother and father, despite this disagreement, have cooperated and reached the following agreements:

- a) They shall have joint custody of R.; in other words, both parents have the full bundle of parental rights including overseeing the child's day-to-day life along with major decisions like health and education;

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- b) They shall pay child support for R. in accordance with their respective incomes and the Yukon Child Support Guidelines;
 - c) They shall share proportionally the cost of special and extraordinary expenses for R. that are agreed upon in advance;
 - d) Neither parent shall temporarily remove R. from the Yukon without the consent of the other parent, which consent shall not be unreasonably withheld; and
 - e) The parents shall not change the residential schedule of R. without the written approval of the other, 48 hours in advance.

[3] The father proposes a 3-day rotating schedule. The mother submits two proposed schedules with primary residence for her; the first access for the father on alternate weekends with evening access once or twice a week or alternatively, two overnights each week on a rotating schedule and one evening a week from 4:30 p.m. to 6:00 p.m. The mother also acknowledges that as R. gets older, the periods of time apart from her will increase.

BACKGROUND

[4] The mother and father met in 2008 and have lived in a common law relationship from 2010 until July 24, 2015, when they separated. The mother remained in the father's residence until the mother moved to a new residence on September 1, 2015.

[5] The mother is from New Brunswick and her extended family is in the Moncton area. The father is born and raised in the Yukon and most of his extended family lives here. Both parents are employed, the mother with the government and the father in the private sector.

[6] R. was born in February 2013. The father took a week off work and the mother took one year of maternity leave to be with the child.

[7] While the father came home for dinner and played with the child and bathed her before bed, the mother was with the child full time for the first year and did most of the early rising with the child and getting up at night. The mother breast fed the child for a period of time and did most of the solid food feeding. She also arranged for doctors' appointments and attended them.

[8] The father began changing pee diapers immediately but had difficulty with smelly diapers although he has overcome that reticence.

[9] The mother returned to work in February 2014, and R. started daycare. The mother still did the early morning care and preparation of R. She is the parent who took a sick day when R. was sick.

[10] Both parents have attended the child's gymnastics and dance but the mother has arranged for and attended swimming.

[11] Upon separation on July 24, 2015, the father clearly stepped up his game and began changing diapers of any sort and was present at every bedtime, made plans with R. for the weekend and bought a car seat for his vehicle.

[12] The father explains that in the first year of R.'s life, their different roles were based on their different employment and their respective job locations. However, he has made arrangements with his employer to have time off as necessary while R. is in his care.

[13] Both parents report what I call transfer behaviours, which is not unexpected in co-parenting circumstances with separate residences.

[14] I find that the mother naturally has a special relationship with R. because of her breastfeeding and maternity leave but there is no doubt that this is a very involved father who wants to share parenting. Until September 1, 2015, he had daily contact with the child for a few hours. There is no suggestion that the father is being difficult or attempting to reduce child support obligations. I find that he legitimately wishes to continue his parenting role on an equal basis. However, I do say that he should work on verbally communicating with the mother in addition to text or email to show the child how to have a respectful relationship even when separated. The mother has taken the workshop *For the Sake of the Children* and the father is enrolled in three workshops in November, *For the Sale of the Children*, *Communication Skills after Divorce or Separation* and *Managing Conflict after Separation*.

ANALYSIS

[15] This application presents the classic disagreement about the appropriate age to start equal residential sharing of a young child and whether it is in the best interests of the child. At one time, courts would routinely award custody of a child of tender years to the mother. Then in the 2000s, courts began to follow the views of Joan Kelly and Michael Lamb stressing the importance of the ability of infants and toddlers to develop multiple important attachments to parents and caregivers as opposed to the priority of one parent. In my view, there is no hard and fast rule but a flexible approach that takes into consideration the age of the child, the parenting abilities of each parent and ultimately what is in the best interests of the child and those factors set out in s. 30(1) of the *Children's Law Act*, R.S.Y. 2002, c. 31. I also note the rest of s. 30:

(2) The past conduct of a person is not relevant to a determination of an application under this Part in respect of

custody of or access to a child unless the conduct is relevant to the ability of the person to have the care or custody of a child.

(3) There is no presumption of law or fact that the best interests of a child are, solely because of the age or the sex of the child, best served by placing the child in the care or custody of a female person rather than a male person or of a male person rather than a female person.

(4) In any proceedings in respect of custody of a child between the mother and the father of that child, there shall be a rebuttable presumption that the court ought to award the care of the child to one parent or the other and that all other parental rights associated with custody of that child ought to be shared by the mother and the father jointly.

[16] A recent case in this Court relied upon by the counsel for the mother provides a useful reference point, although every case is fact driven and distinguishing factors must be considered.

[17] In *P.R.E.B. v. J.B.B.*, 2015 YKSC 1, Deputy Judge Aston decided not to order alternating weeks for a three-year old child where the mother had been the primary caregiver all of the child's life both before and after the parties separated.

[18] In that case, the parents started living together in February 2011, married in April 2012 and separated in August 2013. The child was born in October 2011. The Court also found an objective foundation for the mother's opposition to equal residential sharing based on a concern for her child's safety. The father had been given a roadside suspension after driving with the child in the car in March 2014. The father had probably violated the terms of a peace bond by consuming alcohol and a text message clearly indicated how volatile, angry and aggressive he could be. The parents also communicated poorly and needed an intermediary for pick up and drop off.

[19] *P.R.E.B. v. J.B.B.* is quite distinguishable on several grounds:

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- a) While the mother in the case at bar has a closer relationship with the child, there is no two-year period of primary caregiving after separation;
 - b) The actual physical separation in the case at bar commenced in September 2015, and for the 2 ½ years prior to that, the father was a daily presence in the life of the child;
 - c) There is no safety issue or volatile conduct on the part of the father that would lead to the conclusion that an equal sharing would not be appropriate.

[20] I do not want to diminish the mother's lead in caregiving for R. She has been an excellent mother and has been very fair and collaborative with the father. The father, despite an early reluctance to be equally sharing the challenges of raising a young child, has shown that he can parent fully and to my mind, has demonstrated it.

[21] In my view, where there has been a sharing relationship in raising a child for 2 ½ years (and I don't suggest necessarily equal) and both parents are willing and able to co-parent a child, I do not find it necessary on the date of physical separation of residences that one parent becomes the primary caregiver and the other the alternate weekend access parent. The mother will continue to have a special nurturing relationship with the child but I find it in the best interests of this child to have an equal sharing of residential time with both parents on a rotating three-day schedule commencing Friday, October 9, 2015. There should also be continued communication between each parent and the child on a daily basis when the child is in the care of the other parent. This shall be limited to one 5 – 10 minute phone call at an agreed time.

[22] I also order that R. shall be in the mother's or father's care at such further times as the parties may agree. The parties do not have to be slaves to the equal sharing arrangement where there are special occasions such as family events of either parent.

[23] I make no order for costs where both parents had reasonable grounds for their positions and I encourage the parents to continue their exemplary care of R. and their own communication. I am sure that they appreciate that their child learns from their behaviour and mutual respect and it is the obligation of each of them to model respectful behaviour for their child.

VEALE J.