SUPREME COURT OF YUKON

Citation: *C.R. v. J.R.*, 2019 YKSC 15

Date: 20190308
S.C. No.: 18-D5110
Registry: Whitehorse

BETWEEN:

C.R.

PLAINTIFF

AND

J.R.

DEFENDANT

Before Madam Justice S.M. Duncan

Appearances:
Paul Di Libero — Counsel for the Plaintiff
Mark Chandler — Counsel for the Defendant

REASONS FOR JUDGMENT

[1] DUNCAN J. (Oral): There are two applications for decision in this matter. This matter was heard on March 1, 2019.

Background

[2] The parties entered into a relationship in 2006 when C.R. was 19 and J.R. was 16. They cohabited for several years and were married on April 3, 2011. They have two children together: W.R., born [redacted]; and O.R., born [redacted].

[3] C.R. currently lives with her parents and children in [Yukon community]. J.R. is currently living at the [redacted] in [redacted], Alberta. I will refer to this as the "healing

lodge". It is a minimum-security Correctional healing lodge for men that promotes effective reintegration of Indigenous offenders. J.R. identifies as Métis.

[4] On March 19, 2018, he was sentenced to three years' imprisonment for break and enter and commit; forcible confinement; and disguise with intent. All of these offences were committed in 2011.

[5] J.R.'s parole hearing is scheduled for March 13, 2019. His eligibility for parole is March 19, 2019. He has been recommended for day parole and full parole by Correctional Service of Canada parole officers, who assessed him at the [redacted] where he was incarcerated prior to his transfer to the healing lodge. If day parole is granted, he states he will remain in [Alberta], until he is granted full parole. When full parole is granted, his intention is to return to [Yukon community] to live and work. His counsel advises that his relocation will likely take some time, although a specific timeframe was no provided.

[6] C.R. and J.R. separated in late January 2018. Before their separation and since 2014, they were living on a ranch in [Yukon community]. C.R. is now in a new relationship and her new partner lives in [the United States].

[7] The first application is brought by C.R. She is seeking interim custody of the children and primary residence of the children; restricted telephone access by J.R. with supervision at her discretion and facilitated by R.H., her new partner, and recorded; a restraining order against J.R. for her; and a request for a court recommendation that a children's lawyer be appointed for [redacted] W.R.

[8] The second application is brought by J.R. He is seeking shared interim joint custody of the children; telephone access with the children consisting of three telephone

calls and one video call per week, which was later amended during the hearing to two calls per week with one of them being a video call, if possible, until full parole is granted; once parole is granted, alternate residence of the children between C.R. and J.R. weekly — that is, one week on/one week off — with the exchange occurring every Wednesday after school at the children's school; and the right of first refusal of the non-custodial parent if the custodial parent is unable to care for the children for more than 24 consecutive hours during their parenting time.

[9] The parties entered into a temporary voluntary agreement dated March 14, 2018, which dealt with the matters of access, custody, residence, support, travel, property, insurance, and communication. Parts of this agreement are outdated because of J.R.'s current circumstances. It has been necessary to take into account in these applications the changing circumstances of J.R. and the as yet unknown dates of these expected changes.

Order

[10] Until J.R. is granted full parole and has re-established himself in [Yukon community], this order will be on an interim interim basis.

1. C.R. shall have custody of W.R. and O.R.
2. C.R. shall have primary residence of W.R. and O.R.
3. J.R. shall have telephone access with W.R. and O.R. twice per week for up to one hour each time with best efforts to be made to have one of these calls a video call. The calls shall be initiated remotely by R.H. or an agreed-upon third party and shall be recorded. The third party shall not remain on the line during the calls.

[11] The balance of C.R.'s application, that is, the restraining order and the appointment of a children's lawyer for W.R. shall be adjourned generally. These issues may be brought back to court, if necessary, if and when J.R. returns to [Yukon community].

[12] J.R.'s request for an order for interim shared custody, shared residence, and right of first refusal is denied. However, when J.R. returns to [Yukon community], he may bring an application to court based on a material change in circumstances.

Reasons

Access

[13] The parties agree that the current main issue in this case is telephone access. The children have not spoken to their father since December 25, 2018, and their last telephone conversation before that was July 2018.

[14] From March to July 2018, there were irregular calls facilitated by the parents of C.R. C.R.'s parents were concerned as a result of their observations about the effect of these calls on the children. In their view, the concerns were the inappropriate content of some of the topics raised by J.R. C.R.'s mother also deposed that it appeared J.R. was angry with the children and was making them feel guilty for not wanting to talk to him. C.R.'s mother noted that the children have said that they are afraid of their father and often did not want to speak with him when he called.

[15] In July of 2018, when C.R.'s mother told J.R. that W.R. and O.R. did not want to talk with him, J.R. responded in a threatening tone, saying, "You just wait and see what happens next." C.R.'s parents perceived this as a threat. C.R's parents are no longer comfortable facilitating telephone calls between J.R. and the children because of this

perceived threat, the discomfort of the children, and J.R.'s treatment of C.R. (Referenced in Affidavit #1 of C.R.'s mother, dated February 26, 2019.)

[16] J.R.'s counsel expressed concern about the parents' decision to cut off telephone access between J.R. and the children. Counsel wrote a letter on J.R.'s behalf, dated October 24, 2018, acknowledging the inappropriateness of the topics raised by J.R. in some of the telephone calls and agreeing not to raise these kinds of topics any longer. (Referenced in Exhibit C, Affidavit #3 of C.R.)

[17] J.R. also raised concerns in his Affidavit #1, dated February 21, 2019, at para. 136, that C.R.'s parents and C.R. have distorted his image to the children.

[18] C.R. states that she is not opposed to limited telephone access between J.R. and the children. She proposed one call per week of 30 minutes for each child with the stipulation that they not be forced to continue the conversation for the full 30 minutes each if they do not want to. She also suggested that her new partner, R.H., facilitate the calls remotely, stay on the line during the calls to listen and supervise them, and have the ability to stop the calls at his discretion. C.R. also suggested that the calls be recorded.

[19] J.R. objects to R.H. facilitating the calls and listening to them. He further objects to any supervision of the calls, although he does not object to them being recorded. During the hearing, his counsel agreed to amend his request to two calls a week, with one of them being a Skype call, if possible, for up to an hour for each call. J.R.'s counsel stated that J.R. would not force the calls to last one hour if the children did not want them to.

[20] Section 16(8) to the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), provides that in making an order for access or custody of a child:

> . . . 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.

[21] Section 16(9) provides that in making an order for access or custody:

> . . . the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

[22] Section 16(10) states that in making and order for access or custody:

> . . . the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[23] I note that in the case of *Dhillon v. Dhillon*, 2001 YKSC 543 — referred to in one of the cases provided by J.R.'s counsel, *Armitage v. McCann*, 2004 YKSC 01, both of which cases deal with spousal violence — the Court set out the general principles relating to access 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.

[24] There were three specific concerns raised by C.R. and her mother relating to telephone access by J.R.: (1) the discussion by J.R. of the violent prison incidents; (2) multiple questions about C.R. and her circumstances; and (3) insistence that the children speak with J.R.

[25] In his counsel's letter dated October 24, 2018, J.R. states that he understands the concerns and agrees that he will not discuss those matters or insist that the children speak with him if they do not want to.

[26] The cases provided by counsel all deal with physical access rather than telephone access, except for *J.M.H. v. E.C.H.*, 2009 YKSC 35. On that basis, they are partially distinguishable because some of the concerns that existed on the facts of those cases do not exist in the context of telephone access. In those cases, access was granted even in the face of assaultive behaviour by the parent seeking access.

[27] In the one case dealing with telephone access, *J.M.H. v. E.C.H.*, the child was almost 16 years of age and clearly stated she did not want her father to have any access. The Court ordered access only if initiated by the child. This clear expression of preference by an almost 16-year-old is different from the observations by adults of the responses of a [redacted]-year-old and [redacted]-year-old.

[28] I am mindful of the Supreme Court of Canada case of *Young v. Young*, [1993] 4 S.C.R. 3, where the Court stated that access is the right of the child because, ultimately, the benefit and real cost and burden of all custody and access falls on the child.

[29] I also give weight to the facts in this case that C.R. is not objecting to telephone access as long as certain conditions are met and that J.R. has acknowledged his inappropriate comments and has agreed to change his behaviour.

[30] I agree with J.R.'s counsel that having supervision of the calls by C.R.'s new partner, R.H., is unnecessary and inappropriate at this time. However, given C.R.'s parents' stated discomfort in initiating the calls and R.H.'s offer to do so at least once a week with C.R.'s agreement, I believe this is appropriate. If the parties can agree on a different third party to initiate the calls, that would also be appropriate.

[31] I note that J.R. has no objection to the calls being recorded and I agree that this is an appropriate monitoring mechanism, so there can be calls twice a week for up to one hour with one call being by Skype, if that is technologically possible.

Custody

[32] The status quo, as a result of J.R.'s circumstances, is that C.R. has custody with primary residence and primary care of the children. Although it is possible, given the recommendation from the institution, that J.R. will be granted full parole soon, in my view, it is premature to make any order that gives J.R. more than telephone access at this time. There are too many unknown facts that could affect decisions about custody.

[33] Although J.R. states in his affidavit that he intends to return to [Yukon community], we do not know with certainty that this will happen. J.R. also states that he intends to return to the ranch where the family lived in [Yukon community]. However, both parties acknowledge that foreclosure proceedings have commenced on the ranch property, likely based on the failure of the mortgage holders to make the mortgage payments on the property. (Referenced in Exhibit O, page 84 of C.R.'s Affidavit #3.)

[34] C.R. and J.R. entered into a rent-to-own agreement with the mortgage holders. The status of the foreclosure proceedings is unknown. The location of the mortgage holders is unknown to C.R. and J.R. (Referenced in Affidavit #3 of C.R., para. 101.)

[35] Further, the state of repair of the ranch at this time is unknown, although it is noted that there was a break-in at some time last year which resulted in some damage. (Referenced in Affidavit #3 of C.R., para. 97.)

[36] J.R.'s employment prospects in [Yukon community] are unknown, although he has provided evidence in his affidavit of some community support — specifically exhibits F, G, H, and I — and he has found employment in the past in [Yukon community]. There are no current employment offers and it is not clear whether his conviction and sentence will affect his employment prospects.

[37] The case law in this area clearly states that the unique facts of each situation must be considered in making a decision on custody. There is no presumption in favour of or against joint custody.

[38] In this case, I am mindful of the importance of continued stability in the lives of the children. As there are several fundamental and unknown facts related to the living and financial arrangements of J.R. and the timing of those arrangements, I do not think shared custody is appropriate at this time.

[39] My order for custody and primary residence for C.R. is made on an interim interim basis, meaning that J.R. may bring an application to court if there is a material change in his circumstances which may support a request for consideration for a joint custody order.

Restraining Order

[40] C.R. has requested a restraining order against J.R. on the basis s. 36 of the *Children's Law Act*, R.S.Y. 2002, c. 31. Counsel has not supplied authority for the test for a restraining order but there was evidence in C.R.'s affidavit of J.R.'s verbal violence,

controlling behaviour, and threats of physical violence to her. (Referenced at paras. 33, 39, 41, 46, 47, 48, 49, 50, 51, 54, 55, and 60.)

[41] Further, C.R. describes the following incidents. In 2013, J.R. became angry with her and yanked her hair. In 2017, J.R. threw a full beer bottle at her, breaking a picture on the wall behind her head. Later in 2017, J.R. was lecturing C.R. about her behaviour while she was in the bathroom drying her hair. He hit the blow dryer out of her hand and smashed it with his foot. On the same day, J.R. broke down the door to the bedroom, where she was, and shoved her onto the bed. (Referenced in Affidavit #3 of C.R. at paras. 34, 64, and 67.)

[42] J.R. denies the 2013 incident. (Referenced in para. 152 of his affidavit.). He did not provide a response to the beer bottle incident. He admits that he stomped on the hair dryer in frustration at C.R.'s emotional outbursts. (Referenced at paras. 183 to 185.) He also denies that he broke the door. (Referenced in para. 186.) J.R. did not provide any comment on C.R.'s description of him shoving her onto the bed but states that the stomping on the hair dryer was the only aggression he ever showed. (Referenced in para. 184.)

[43] Given J.R.'s current circumstances, again, it is my view that a restraining order is unnecessary at this time. J.R. is not in the Yukon and may not be permitted or able to return for some time. If the situation changes and J.R. does return to [Yukon community] and C.R. believes there are grounds to request a restraining order, she may return to court for that purpose.

Request for a recommendation that a children's lawyer be appointed for W.R.

[44] Receiving views of children through a children's lawyer is always helpful to the Court in making difficult decisions about the best interests of the children in a parental conflict situation.

[45] In this case, at this time, given the limited nature of the order for access, I do not find it necessary. However, when the situation changes, it may very well be a case where it is appropriate to recommend the appointment of a children's lawyer.

[46] I note that the children are currently ages [redacted], generally considered to be too young for the appointment of a children's lawyer. However, at the time this matter may return to court, they may be of an age — either one or both of them — where a children's lawyer is entirely appropriate, depending, of course, on the circumstances of the application and the case at that time.

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DUNCAN J.