

SUPREME COURT OF YUKON

Citation: *A.E.J. v. B.G.J.*, 2019 YKSC 47

Date: 20190903
S.C. No.: 18-D5148
Registry: Whitehorse

BETWEEN:

A.E.J.
a.k.a. A.E.T.

PLAINTIFF

AND

B.G.J.

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:
Mark Chandler
Greg Johannson

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

[1] VEALE C.J. (Oral): I will give the judgment in generic terms and try not to give too much detail because we do draft them up and put them on the website.

[2] The mother and father were married on August 24, 2008, in Delta, British Columbia. They have been residing in the Yukon since 2011, subject only to a change in residence briefly when one of the children needed medical attention. They separated on February 27, 2018.

[3] I would characterize their relationship as a challenging one and particularly a high-conflict relationship since their separation. However, I commend the parents for

agreeing on certain principles, such as joint custody to ensure that each parent has full involvement with their children as they grow up.

[4] The specific issue presented this afternoon relates to the care and control of the children, whether it should be a five-day for the mother and three-day for the father or a four-on-four arrangement which would coincide with the father's shift work.

[5] The three children are a 10-year-old who has had some anxiety issues in his childhood; an 8-year-old; and a 3-year-old who I think has the biggest challenge with what I would describe as a chronic heart condition. Both parents have certainly contributed to his care over the three years of his life and have had to spend a lot of medical time with him.

[6] All the children attend the same school in Whitehorse, where their mother happens to be employed. The father works shift work with generally different shift times during the day but basically four on and four off, which results in his application to have a four-on-four care and control arrangement.

[7] This case is not about good parent/ bad parent. I think both parents are striving to do their best in very difficult situations and there have been some unfortunate interactions between the two of them, but the issue before me this afternoon is what is in the best interests of the children. It is not for me to say who is a good parent and who is not a good parent. It is really what is going to be in the best interests of the children during this particularly stressful time and into the future.

[8] For me, the most important factor is the determination of who is the primary caregiver. While the father certainly had a role in raising the children, in my view, it has

been the mother who has been the primary caregiver for the children, and particularly the attention that she has been required to give to the youngest child over the years.

[9] The other factor that I consider is availability for the children. Both parents are fortunate that the mother is working at the same school and that allows her the opportunity to keep an eye on the children, particularly when they are going through a separation that is "high conflict".

[10] I am also of the view that stability is very critical. I think the fact that the mother has been the primary caregiver and is the one who is going to be in contact with the children the most, either during her parental time or while they are at school, lends to support her as the most stable figure for the children at this time.

[11] I conclude that it is in the best interests of the children to have five days with the mother and three days with the father as presented, meaning, as I understand it, that the children would go to the mother at 3 p.m. the day before the father's shift and continue on until 3 p.m. the day after the father's shift. In saying this, I do not want to be critical in any way of the father because he is prepared to take the children for four clear days between his shifts. I have found that the best interests, in terms of stability, medical care, and continuity that the mother has provided, leads to my conclusion that the five-and-three is the best arrangement for the children.

[12] I take no issue with the matters raised about the mother's new partner.

[13] The mother is seeking child support. I find the mother's average income for 2017 and 2018 to be \$44,137 and the father's average income to be \$76,936. Based on my decision with respect to care and control of the children, the father shall pay the mother \$1,530 per month commencing May 1, 2019.

[14] On the basis that I have found with respect to the custody and child support, the mother, as I understand it, has waived her right to spousal support. I make no ruling in that regard as a result.

[15] With respect to the specifics, I am prepared to grant the order with the specifics that are at paras. 2 through 7 of the outline of the mother.

[16] This is not the end of the matter, for sure, but there will be no need to go to the spousal support issue on the ruling that I have made.

[DISCUSSIONS]

[17] I will order the arrears at \$200 per month until paid in full. I have not made a calculation of the arrears but I assume that counsel can figure that out in the order.

[18] So what does that leave us with?

[19] MR. CHANDLER: Your Honour, I believe what it leaves us with is some slight differences with respect to the other relief which relates to holidays and celebratory days like birthdays. Perhaps it would work best if we have a bit of a back and forth between my friend and I, and I can put forward my position and he can put forward his position.

[20] With respect to scheduling for holidays and celebratory days, it's quite detailed with respect to how it is supposed to work.

[21] THE COURT: I see that.

[22] MR. CHANDLER: There's eight paragraphs. The only issue is 8(d), which is how much time the non-care parent would spend with the child on their birthday. It was the plaintiff's suggestion for three hours; it was the defendant's suggestion for six hours.

[23] THE COURT: So you are saying the person that has the child on the child's birthday would get three hours?

[24] MR. CHANDLER: No, the suggestion is that the other parent would get three hours, so that both parents can see their child on the child's birthday. Let's say that the child was with the plaintiff on the child's birthday; the defendant would get to see that child for either three or six or something in between hours.

[25] THE COURT: What do you say?

[26] MR. JOHANNSON: We will agree to three.

[27] MR. CHANDLER: Okay.

[28] MR. JOHANNSON: So that's disposed of.

[29] MR. CHANDLER: And I invite my friend to jump in, but I don't think there's any issue with paras. 8(a) through (h) — and this includes things like Mother's Day, the mother's birthday, Father's Day, the father's birthday, Christmas . . . There's a schedule for Christmas, Easter, Halloween . . . It's supposed to be exhaustive so that they don't have to further communicate about it.

[30] THE COURT: Good idea.

[31] Any views?

[32] MR. JOHANNSON: That's agreeable.

[33] THE COURT: Okay. Thank you.

[34] MR. CHANDLER: With respect to extracurricular activities, the reason — and this is at para. 13 — that the plaintiff has articulated what activities are paid for is so that one party can't say "I don't want them to do that" and then saddles the other party with the costs.

[35] THE COURT: Is their agreement, though, on the proportionate share or how are you dealing with that?

[36] MR. JOHANNSON: That would be our submission.

[37] MR. CHANDLER: Proportionate on income?

[38] MR. JOHANNSON: Yeah.

[39] THE COURT: On the finding that I have made on the average incomes?

[40] MR. JOHANNSON: That's fine.

[41] MR. CHANDLER: Yes.

[42] THE COURT: Okay. The point, though, was the 3-year-old later on —

[43] MR. CHANDLER: When he's eligible.

[44] THE COURT: Soccer is agreed?

[45] MR. JOHANNSON: Yes. I believe all the extracurriculars are agreed, including para. (d). Essentially if it goes above and beyond this, it would be the party who wants to enroll that would be responsible for paying it.

[46] THE COURT: Okay. Is that clear?

[47] MR. CHANDLER: That's as — we intended it to be.

[48] THE COURT: No, that makes sense. So if you want hockey, you have to pay for it.

[49] MR. CHANDLER: If you want hockey and the other parent doesn't agree, then you pay for hockey or you bear the costs for hockey.

[50] The next set of paragraphs is 14 through 17. As I understand from my friend's outline, there's no issue with respect to 14 or 17.

[51] MR. JOHANNSON: Correct.

[52] MR. CHANDLER: And so they will only communicate by text message and that would be the only medium under which they communicate unless there's an emergency and then they will use the phone.

[53] And then it's in the agreement at para. 17 that the defendant won't attend within a hundred metres of the plaintiff's home.

[54] THE COURT: Okay, so ordered.

[55] MR. CHANDLER: Thank you.

[56] Fifteen (15) and 16 stem from the original application of the plaintiff. Because of what happened, it's the plaintiff's submission that it's entirely appropriate. I'll let my friend make his submission on that.

[57] MR. JOHANNSON: Your Honour, the problem with para. 15 is that — I mean, what the situation was born of a child making inquiries about self-harm. It could be appropriate to discuss these things as long as it's done in a tactful way. We're just worried that this could set the parties up for failure in that it doesn't really specify what is age-appropriate and not. I would hope that the parties would be able to have discretion to — as long as they are discussing these things in a responsible and appropriate way, these subjects can be broached — perhaps not all, but I think that paragraph is just not necessary.

[58] THE COURT: What specifically is wrong with 15? It says that you do not talk about suicide, self-harm, violence, violence towards others, and threats to others.

[59] MR. JOHANNSON: Right. To be sure, there's nothing specifically wrong with it. It's more a fear that — for example, take the violence issue. What if there's violence at

school and the discussion is about — I mean, it's overly broad, I guess, is the problem with it and it could capture conduct in there that is entirely appropriate.

[60] THE COURT: It is hard to police it in any event. I appreciate the sentiment that you are raising — maybe if we just said "age-inappropriate matter is . . ." rather than specifying what it is. I mean, neither party should be upsetting the children. I would add a clause that they not denigrate each other in the presence of the children either.

[61] MR. JOHANNSON: Right. And that actually takes us to para. 16. My friend is asking "The defendant shall be prohibited from communicating with the children about the plaintiff or her partner." I think a better way of wording is, "The parties shall be prohibited from disparaging the other party or their spouse", so it's clear that he's included in that.

[62] THE COURT: You might just say "or their spouses."

[63] MR. JOHANNSON: Right.

[64] THE COURT: Who knows who is going to be around or who the new spouse will be.

[65] Are travel and counselling still out? I did not hear anything on that.

[66] MR. CHANDLER: No, sorry. I was hoping to deal with it one by one.

[67] The plaintiff's position with respect to travel and counselling are as we set out. Perhaps I'll let my friend go first with respect to his position.

[68] MR. JOHANNSON: I'll begin with counselling. We do agree with counselling with — it says, "The defendant shall not be permitted to attend those counselling sessions" at the end. That's at para. 19.

[69] THE COURT: I am not clear on what the counselling arrangement is but if you both understand it, that is fine.

[70] MR. JOHANNSON: I don't think we had thought necessarily ahead to what the counselling would look like. We are in agreement substantively with that portion of it. The only portion that we would seek to modify is the end, where it says, "The defendant shall not be permitted to attend those counselling sessions".

[71] THE COURT: That is where I was not clear. Is the counselling for the kids or is it for the parents and the kids?

[72] MR. JOHANNSON: It's for the kids, is my understanding.

[73] THE COURT: For the kids to deal with separation and different parenting styles and all that stuff?

[74] MR. JOHANNSON: Correct. The only thing we would add on to that is that "unless the attending counsellor requests the presence of either party", because it could be appropriate in some situations for the parents to be in on it — only if their counsellor requests.

[75] MR. CHANDLER: I think what it stems from is earlier in their separation they talked about family counselling, which is why it comes up. I think what's best is that the children are encouraged to go to counselling and that neither parent attends because if one parent goes and the other doesn't, it creates an unevenness.

[76] THE COURT: Why not do, "Neither parent attends counselling for the children"? This is supposed to be a safe spot for them to reveal things to the counsellor. Okay, we will do that.

[77] MR. JOHANNSON: And then on the travel, we did have a substantial disagreement on that. B.G.J. is seeking that both parties provide itineraries in advance of travel, that both parties consent to the other party's itinerary but that consent shall not be unreasonably withheld.

[78] THE COURT: And liberty to apply —

[79] MR. JOHANNSON: Right.

[80] MR. CHANDLER: To the Court.

[81] THE COURT: — to the Court.

[82] MR. CHANDLER: Yeah, that's agreeable.

[83] THE COURT: Let us do that.

[84] MR. JOHANNSON: And I think that's the remainder of it.

[85] MR. CHANDLER: That's the relief in the application. There were two further points that I would like to submit to the Court.

[86] It's come to my client's attention that at some point the defendant may be relocating from the Yukon to live somewhere else and that's why she filed an affidavit this morning with a text message that includes that he might be selling his things and is hoping that the plaintiff can take care of his dog. If he does in fact leave, we would like an order that the plaintiff shall have care and control and primary residence of the children, as he will not be here anymore.

[87] And further to that, the defendant will have reasonable and generous telephone and videoconference access, and reasonable and generous in-person access when he is back in Whitehorse. It's a contingency in case he leaves and there's nothing in place.

[88] MR. JOHANNSON: My understanding of Your Honour's order was that primary residency was granted to mom, if I'm not mistaken, so that would be redundant. It's already captured in the order.

[89] THE COURT: You can say that in the order, "primary residence", and that may resolve that issue.

[90] MR. CHANDLER: Okay. Thank you.

[91] MR. JOHANNSON: The fact is my client has made general observations about potentially moving down South. That's not a concrete plan necessarily. I would be uncomfortable going into the full access thing, given — I mean, that is potentially . . .

[92] THE COURT: I guess my view is giving primary custody or care and control to the mother resolves a lot of those issues. I guess the best advice for B.G.J. if he does leave is try and resolve that before you go rather than doing it after you go. I do not think we need to make any specific terms with respect to that.

[93] MR. CHANDLER: Just so I am clear, the order will be that the plaintiff has primary residence and primary care and control?

[94] THE COURT: Yes.

[95] MR. CHANDLER: Thank you.

VEALE C.J.