

SUPREME COURT OF YUKON

Citation: *C.R. v. J.C.*, 2019 YKSC 64

Date: 20191128
S.C. No.: 19-B0040
Registry: Whitehorse

BETWEEN:

C.R.

Plaintiff

AND

J.C.

Defendant

Before Madam Justice S.M. Duncan

Appearances:

Baird Makinson

Cameron C. McLeod (by telephone)

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

[1] DUNCAN J. (Oral): As I ended with last time, in my view, this is a difficult case about the interim custody of R.C., born December 26, 2016. It is a difficult case because:

- J.C., the father of R.C., lives in New Westminster, British Columbia, and C.R., the mother of R.C., lives in Whitehorse, Yukon;
- R.C. is now with J.C. in New Westminster and has been since September 20, 2019, and the circumstances of his arrival there are troubling;

- C.R. is addressing some significant mental health issues and has only recently started on a healing path; and finally,
- There is significant hostility and animosity between C.R. and at least two of her aunts and her grandmother.

[2] I will first review the background facts and then review the applicable legal principles and finally, apply them to the facts of this case.

Background

[3] In 2016, J.C. and C.R. began living together, first, in Surrey, British Columbia, and then in Whitehorse, where R.C. was born.

[4] In October 2017, J.C. lost his job in the Yukon and decided to move back to British Columbia, where he now lives in New Westminister.

[5] C.R. was the primary caregiver from October 2017 to the end of January 2019 (17 months) and she also says she was the primary caregiver from R.C.'s birth to October 2017, as J.C. did not take much interest in R.C. even while he was living in Whitehorse. This evidence is not contradicted by J.C.

[6] C.R.'s evidence showed that she developed a good routine in caring for R.C. during the first couple of years. She also had the support of her mother and sister, as well as some friends. She began working at a local business in August 2018 and arrangements were made for R.C. to attend daycare. It appeared that things were going relatively well during this time. Throughout this period, J.C. showed little interest in R.C., although he did make some support payments and his mother did pay for C.R. and R.C. to come to B.C. for visits several times.

[7] At the end of November 2018, C.R.'s mother and sister moved to Edmonton. C.R. attributes the loss of that support, both emotional and extra childcare, in part to the beginning of her mental health breakdown. She took a mental health leave of absence from work in December 2018. The mental breakdown culminated in C.R.'s suicide attempt in late January 2019 and a 10-day voluntary stay in a hospital after that. Relatives cared for R.C. while C.R. was in the hospital.

[8] When C.R. came home in early February, she resumed care of R.C. until March 2019.

[9] On March 23, C.R. was feeling overwhelmed and asked her sister K.S. to babysit R.C. for a day. When C.R. did not return by that evening, K.S. gave R.C. to their aunt C.S. C.R. was informed of this.

[10] According to Family and Children's Services, by March 25, C.R. had not yet returned and this prompted her aunt W.K., who was by then taking care of R.C., to call Family and Children's Services.

[11] Family and Children's Services met with C.R. and W.K. on March 26. At that time, C.R. admitted that she was drinking alcohol once or twice a week, using cannabis regularly, and had used half a gram of cocaine in the past two weeks. She also admitted she was sleeping in and having a hard time getting up and parenting.

[12] An Extended Family Care Agreement with C.R.'s agreement was then entered into with W.K. in April. W.K. has four children of her own and was unable to cope with caring for R.C. as well, so she ended the Agreement at the end of April.

[13] Another six-month Extended Family Care Agreement was entered into with C.H., another aunt, beginning in April. By September, C.H., who also has children of her own,

advised Family and Children's Services that she would be unable to renew the agreement beyond the six-month period which ended in October 2019.

[14] This was a second time that Family and Children's Services had become involved in the lives of C.R. and R.C. The first time was in October 2018 when C.R.'s now ex-boyfriend kicked in the door of her apartment and neighbours reported two adults fighting and breaking things. R.C. was in the home at the time. The police were called and had to force their way into the residence. Police requested assistance then from Family and Children's Services, as the adults were not cooperating, according to them, and had put a child at risk. No charges were laid but a restraining order was placed on the now ex-boyfriend.

[15] Between April 27, 2019 and September 17, 2019, regular visits were scheduled for C.R. to see R.C. For various reasons, some of which are disputed, C.R. saw R.C. 16 or 18 times out of the 43 scheduled visits. From July 24 to September 3, there were no visits. This is not disputed.

[16] C.R.'s reliability for her explanations about why she missed some of the visits is questionable. For example, she says on July 8 to 10, she was told not to come because J.C. was present, while the evidence from Family and Children's Services is that J.C. and his mother were in Whitehorse from July 14 to 19. This is corroborated by the note from Dr. S., who saw R.C. on July 18 in the presence of J.C.

[17] In any event, C.R.'s visits were not regular and according to C.H., who was R.C.'s caregiver at the time, R.C. had night terrors and behavioural issues after C.R.'s visits.

[18] C.H. also expressed concern about R.C.'s developmental delays, particularly with respect to his speech and the appropriate expression of emotion. She also noted R.C.'s intense reaction and fear of closed doors of rooms where he was inside and noted that when she spoke to C.R. about this, C.R. said she would leave him behind a closed door in his room until 11 a.m. some days so he would not get into things.

[19] C.H. also referred R.C. to a speech therapist at the Child Development Centre — there is no report of this — and spoke extensively to an intake counsellor at the Child Development Centre about R.C.'s behavioural issues in order to get advice and strategies. There is an extensive report detailing this in the material, although I do note that the intake counsellor did not actually see R.C.

[20] In September, Family and Children's Services became aware that C.H. could no longer care for R.C. after October. J.C. had been in contact with Family and Children's Services since late January 2019, on learning of C.R.'s mental health breakdown, and had expressed interest in caring for R.C. Family and Children's Services had met with J.C. and his mother in July on their visit to Whitehorse.

[21] Children and Family Development, the British Columbia equivalent of the Yukon Family and Children's Services, performed an assessment of J.C. and his home in August. Children and Family Development concluded that there were no child protection concerns.

[22] Family and Children's Services in the Yukon began to facilitate the transition of R.C. to J.C.'s care by September 29. On giving notice on or about September 5 to C.R. of this plan, Family and Children's Services and J.C., I believe, were made aware of C.R.'s objection to this and her intention to bring a court application for interim custody.

C.R.'s counsel was also in contact with counsel for Family and Children's Services to confirm this.

[23] Legal counsel for Family and Children's Services sent a letter dated September 17 to counsel for both C.R. and J.C. It stated that in the event an application for custody was made, Family and Children's Services would hold off on their plans to transition R.C. to his father's care in British Columbia until a court determined custody.

[24] On Thursday, September 19, a Family and Children's Services social worker received a call from J.C. asking if he could take R.C. before September 29. Family and Children's Services responded that they had no legal means available to intervene if he took R.C., had no child protection concerns about J.C., and would take no position or make no recommendation. As a result, J.C.'s mother flew to Whitehorse on September 20 and took R.C. to B.C.

[25] C.H. supports R.C. going to live with his father. She observed J.C. with R.C. in July and she believes that R.C. stands a much better chance for a healthy future with the father who will provide more than his basic needs.

[26] C.R. and her counsel immediately filed a statement of claim on September 20 and an application for custody on September 23. The matter was heard on a rush basis on September 24 and adjourned to November 26 to allow counsel for J.C. time to respond. Because of concerns expressed by Family and Children's Services and C.H., the order of September 24 was to leave R.C. where he was until a full hearing of this matter could occur.

Legal Principles and Application to Facts

[27] Turning to the legal principles, it is clear that my decision must be guided by only one thing: the best interests of R.C.

[28] As noted by Mr. McLeod, counsel for J.C., it is important in these cases to resist being influenced by sympathies for and concerns about the parents. The parents' circumstances, struggles, or successes are not my primary concern in this application, except to the extent that they affect the best interests of R.C.

[29] In this case, there are five subsections of s. 30 of the *Children's Law Act* that apply, in my view.

[30] Section 30(1) states:

In determining the best interests of a child for the purposes of an application [. . .] in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including . . .

— and then it sets out sections (a) to (g).

[31] The first section that I believe applies in this case is (a), that is:

the bonding, love, affection and emotional ties between the child and

(i) each person entitled to or claiming custody of or access to the child

[32] In this case, J.C. did not appear to have much interest in R.C., except for making some support payments until January or February of 2019. Prior to this, R.C.'s bonding was with C.R.

[33] Reports, though, of the visit of J.C. and his mother in July with R.C. were positive. J.C. showed interest in and positive care and involvement with R.C. Those reports were provided by C.H. and Family and Children's Services.

[34] Since September 21, since R.C. has been in New Westminster, we have little information but there are no negative reports.

[35] The evidence about C.R.'s visits with R.C. between April and September of 2019 is not positive. C.H.'s evidence, in addition to talking about R.C.'s reactions after the visits with C.R., notes the following issues:

- C.R. was struggling with R.C. when she was changing his diapers.
- C.R. was clingy with R.C. to the point that it would cause him to be violent with her; and
- C.R. seemed unable to set boundaries with R.C. when he was misbehaving.

[36] The second applicable section is (d):

the ability and willingness of each person applying for custody [. . .] to provide the child with guidance, education, the necess[*i*]ties of life and any special needs of the child;

[37] I appreciate Mr. Makinson's expressed concern that the absence of R.C. from C.R.'s life since September 20 has made any recent evidence of this from her impossible. However, C.R. did have primary care of R.C. on her own from October 2017 to March 2019. And while there is evidence from her of a relatively stable routine for approximately a year, certainly by December 2018 that routine was falling apart. R.C.'s care before then may also not have been quite as positive as described by C.R. because C.H. has noted developmental delay concerns and behavioural issues that may have developed before December 2018. These issues of R.C. prompted C.H. to get advice from the Child Development Centre. There is no evidence that C.R. noted any of these issues or tried to get assistance from professionals for R.C. The assistance R.C. did get from the Child Development Centre was through C.H.

[38] J.C.'s affidavit does show that he has taken steps already to get R.C. assessed at the Fraser Development Clinic. He has been seen once there and referred to another specialist. In July, in Whitehorse, J.C. attended at the doctor with R.C. and also got a referral to B.C. Children's Hospital about a deformity in R.C.'s foreskin. I note that C.R. had been aware of this since his birth and was told it only required monitoring. J.C. has enrolled R.C. in a daycare centre with a connection to an Indigenous education group for children, called Spirit of the Children, so that R.C. can be educated about Indigenous culture.

[39] The third applicable section is (e):

any plans proposed for the care and upbringing of the child;

[40] Although the age of R.C., at just shy of three years, may not be conducive to many concrete plans at this stage, I note that there is no evidence from C.R. of any plans for the care and upbringing of R.C. J.C.'s plans are limited to R.C.'s enrolment in daycare with an Indigenous component and the assessment by paediatricians at the Fraser Development Clinic.

[41] The next applicable section of s. 30 is (f):

the permanence and stability of the family unit within which it is proposed that the child will live;

[42] Both J.C. and C.R. are very young. C.R. is about to move into a new apartment by herself in downtown Whitehorse on Wheeler Street, which she states is clean and bright. C.R. is not employed. C.R. is attending counselling regularly and frequently at the Mental Wellness Centre, and she is also seeing a psychiatrist regularly. Both her counsellor and her doctor say she is engaged with her treatment, showing good insights, and is stabilizing well on her medication.

[43] C.R.'s family support in Whitehorse is limited to her sister K.S. Her mother and brothers are in Edmonton. I note that she also seems to have supportive friends, as two of them appeared with her in court. Two of her aunts and her grandmother provided letters about C.R. attached to J.C.'s affidavit. I was asked by Mr. Makinson to strike these letters because they are unsworn, inflammatory, and untrue. Mr. McLeod suggested that I give less weight to them (as well as the other letters of support provided by C.R. in her material) because they are unsworn and because they may be reflective of ongoing family issues that go beyond the care of R.C.

[44] I do give little weight to the content of these letters for the two reasons identified by Mr. McLeod and shared by Mr. Makinson. But I accept that their existence shows that the aunts and the grandmother are not supportive of C.R., for whatever reason, and are unlikely to be of any help in caring for R.C.

[45] J.C. is employed as an assistant manager at a Pet Valu in New Westminster. His compensation package includes medical and dental benefits for R.C. He lives in an apartment with his girlfriend. They and their living arrangements were assessed, as I said earlier, by Children and Family Development, the British Columbia equivalent of Family and Children's Services in the Yukon, and they were found to have no child protection concerns.

[46] Although there is no affidavit from J.C.'s mother, it is assumed that she is supportive of him, as she travelled to Whitehorse twice, took R.C. to New Westminster on the second occasion, and she also paid for C.R. and R.C. to visit several times in 2017 and 2018.

[47] The fifth applicable section is (g):

the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child;

[48] The different locations of J.C. and C.R. in New Westminster and Whitehorse make reasonable access a problem no matter who gets custody. Video access at mutually convenient times to be worked out by the parties is essential and in-person access visits will also be permitted.

Conclusion

[49] In sum, considering all of the needs and circumstances of R.C., the factors I have just described, and the evidence under each, I do find that it is in the best interests of R.C. at this time for him to be in the care and custody of J.C. This is a difficult decision for the reasons I noted at the outset.

[50] I recognize and acknowledge, C.R., that you are working very hard to improve your life and your circumstances, to confront the difficult issues that you have had since childhood, and I also recognize that you love R.C. very much and that you miss him terribly. But the evidence before me shows that you still need time to heal, to improve your living situation, and I think you need that time to focus on your healing without the significant responsibility of raising a three-year-old child.

[51] You are on the right path and I respect and acknowledge how much hard work you are doing. Please do not stop. Keep it up. This is an interim order, which means that if there is new evidence in the future, at some point, you may ask the Court to reconsider the order.

[52] I know it is a disappointment but my only task is to look out for the best interests of R.C. Based on the evidence I have before me about your current situation, I think it is in his best interests now for him to stay with J.C.

[53] Finally, as I have said already twice now on the record in this matter, I do not condone the way in which R.C. was removed from the Yukon in September by J.C.'s mother and I think Family and Children's Services does bear some responsibility for this. I recognize that they may have had no legal ability to intervene and they had no child protection concerns about J.C., but there is no evidence that J.C. or his mother were told about the position of Family and Children's Services as communicated in the letter of their lawyer, dated September 17, to both counsel (Mr. McLeod and Mr. Makinson) that Family and Children's Services would stop facilitating the transition of R.C. to B.C. until the court application for custody could be heard. The fact that this did not happen has understandably caused feelings of hurt and betrayal in C.R. and, as well, has created some prejudice to her in this application.

[54] However, I cannot let my concern about this aspect of the case override my consideration of R.C.'s best interests. For the reasons I have given, I do grant J.C.'s application.

[55] The order will go that:

- J.C. shall have interim custody of R.C., born December 26, 2016.
- C.R. shall have regular access to R.C. via video, FaceTime, telephone, or other such means at times to be agreed upon by the parties.
- J.C. shall share with C.R. information about R.C.'s physical, emotional, and social health and development, including results of medical appointments as well as his progress at daycare and with the Spirit of the Children group.

- C.R. shall have in-person access to R.C. at times to be agreed upon by the parties with the costs of travel for such access being split equally between the parties. Access at this time shall be supervised by a mutually agreeable third-party.

[56] The main reason for the supervision is because it may be some time before you see R.C. again and just to make sure that the adjustment of him seeing you again goes smoothly. That is the reason for my order for it to be supervised.

[DISCUSSIONS]

[57] THE COURT: Thank you.

DUNCAN J.