

**PUBLICATION OF IDENTIFYING INFORMATION
IS PROHIBITED BY SECTION 172 OF THE *CHILDREN'S ACT*.**

Citation: *L.J.H. v. L.J.P.*, 2002 YKSC 51

Date: 20020927
Docket: 01-B0054
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

L.J.H.

PETITIONER

AND:

L.J.P.

RESPONDENT

**REASONS FOR JUDGMENT OF
MR. JUSTICE VEALE**

[1] This is an extremely troubling case about the custody of a child named W. W. is six years old and resided with his parents in Atlin, British Columbia until they separated in September 2001. The mother says the separation occurred because of verbal, physical and psychological abuse from the father. She is clearly terrified, or at the very least intimidated by the father, and resides at the shelter in Whitehorse. The father acknowledges the discord and describes a violent incident in 1996, but denies the rest.

[2] This matter was set for trial on October 15, 2002. However, both parents require new counsel and the trial has been adjourned until the new counsel are appointed and can set a new date.

[3] The background of court orders is as follows:

1. On September 19, 2001, an *ex parte* order granted the mother interim interim custody of W. with reasonable and generous access to the father.
2. On November 5, 2001, the September 19, 2001 order was vacated and interim joint custody of W. was awarded to the mother and the father with a condition that neither party remove W. from the Yukon Territory on a permanent basis without a court order. W. resided with his mother during the week and his father on weekends.
3. On June 20, 2002, an order granted the mother the right to travel to Almonte, Ontario, with W. and return to the Yukon with W. no later than August 27, 2002, to enrol him in school in Whitehorse. It was on this visit that the mother consulted specialists in Ontario regarding W.'s problems.

[4] This application is brought by the mother requesting the court to allow her to return to Ontario with W. before the trial commences. In her view, and that of Dr. Scott Wilson, by letter dated September 20, 2002, "[W.] has some intensive medical, developmental and speech therapy needs which cannot be met adequately here in the Yukon and all of the appropriate connections have been established with the medical and therapeutic community in Ontario."

[5] The needs of W. have been examined by numerous experts while W. was in the Yukon. From the psychological assessment of Norman E. Brodie, Ph.D., dated June 5, 2002, and the Custody and Access Report of Geoffrey S. Powter, C. Psychologist, dated January 28, 2002, the following picture of W. emerges:

1. He suffered from a congenital condition called hypospadias, an atrophy of the urethra. He required corrective surgery and will need future corrective surgery. Geoffrey Powter reports that he has an obsession with his penis.
2. He is clearly developmentally delayed or, at worse, mildly mentally deficient. He has high receptive speech skills but low expressive speech skills. He requires the services of a speech and language pathologist.
3. He also has a mild level of clinical impairment on the inattentive scale, which has resulted in a poor educational performance as well as inappropriate behavior called perseveration, which means repetitive or obsessive story telling. He will require extensive psychological services to manage his behaviour, particularly in school.
4. He has also been inappropriately sexualized in a manner that has had very unfortunate consequences. He discusses his penis inappropriately, uses sexual language and has attempted to put his penis in another child's mouth. This matter was apparently under investigation by Family and Children's Services.

[6] As a result, W. has needs that, according to the principal of the school he is in, exceed the ability of the school and any Yukon school to cope with. Some of the behavioural problems may result from the family violence and separation. The mother alleges the problems are greater after the father's access. The father tends to minimize the problems and alleges that the mother's emotional instability is part of the problem. I cannot resolve these issues on affidavit evidence.

[7] Geoffrey Powter describes the mother as over protective, which may contribute to W.'s lack of emotional independence and maturity. However, she is clearly the psychological parent.

[8] The father, perhaps as a reaction, is more reserved with W. and had been bad-mouthing the mother in W.'s presence. However, he has realized the dangers in this and claims to have stopped.

[9] However, this decision must address the best interests of W.. In addition to the clear position of Dr. Wilson that W. must leave the Yukon, Geoffrey Powter made this recommendation at page 26 of his report:

Although I do have some concerns about L.J.H.'s emotional stability, I would suggest that, if the court could order her to attend supportive, in-depth counselling, awarding L.J.H. sole custody of [W.], and permitting her to take him out of the territory to seek the best academic and psychological resources possible, would be in [W.]'s best interests.

[10] Geoffrey Powter also agreed that the father has a strong bond with W. but that "continuity and contiguous frequency" are not the most important factors since W. is no longer a very young child.

[11] Further, Norman E. Brodie made the following observation in a letter dated September 12, 2002:

Based upon the provided information and the findings from my previous assessment of June 5, 2002, it is my considered professional opinion that the range and depth of services available within the local area in and around Ms. H's residence in Ontario are more than adequate to address [W.]'s special educational, speech-language therapy and emotional/behavioural treatment needs.

[12] The father agrees with this assessment, although he maintains that the services in Atlin, British Columbia or Whitehorse have not been properly addressed by the mother.

[13] As this is an interim application, there must be a change in circumstances before a change in W.'s circumstances can be made. I am satisfied that there is some professional doubt about the required resources being available in Whitehorse or Atlin. Given that these resources are readily available in Ontario, I am satisfied W. should be moved to Ontario pending this court's decision following the trial of this action.

[14] I make this order with some reservations. I am not able to determine on affidavit evidence as presented by these two self-represented litigants whether a serious attempt has been made to utilize all the services available in Whitehorse. However, there is sufficient evidence before me that the education system and resources in Ontario are better suited to deal with W. In my view, the best interests of W. will be better served in Ontario and he should remain there until further order of this court.

[15] I should also note that the mother appeared to take the position that the father should not have any access to W. to allow for a period of healing for her and W. This is

completely contrary to the view of Geoffrey Powter, the expert in these matters, who recommended a visitation schedule for the father.

[16] I am also mindful of the emotional instability of the mother indicated by Geoffrey Powter and how this may be contributing to W.'s problems. But I believe that returning to the Ottawa, Ontario area, even if it is short term only, will benefit W. both in terms of treatment, the emotional stability of his mother and the availability of maternal and paternal grandparents for support.

[17] I have indicated to the parties that all these matters will be considered in depth by the trial judge who may come to a different conclusion. In that regard, I am ordering that the discovery and trial dates be expedited.

[18] I make the following order to replace the previous orders:

1. The mother and the father are granted interim joint custody of W., born January 19, 1996.
2. The mother may remove W. to the Ottawa, Ontario area and, more specifically, West Carleton. The mother shall ensure that W. receives speech therapy, and counseling and support for his developmental delay, inattentive impairment and inappropriate sexuality.
3. The father shall have weekend access as before, if he is able to exercise it, at his parents' residence in the Ottawa area. The paternal grandparents should also have reasonable access if the father is unable to exercise access in Ontario.

4. In the event the trial does not take place until 2003, the father shall have one week of access during the Christmas holidays, to be exercised at his parents' home near Ottawa.
5. The mother shall communicate weekly with the father's parents to advise on all developments, including medical, developmental and educational regarding W. in order to keep the father informed.
6. In the event the father is unable to exercise access to W. in Ottawa, he shall have telephone access to W. for a period not exceeding 30 minutes each week.
7. The father shall continue to pay child support to the mother in the amount of \$267.00 per month on the first day of each month, based on an income of \$30,000 per year. This order shall be enforced by the Director of Maintenance Enforcement and the amounts to be paid pursuant to this order shall be paid to the plaintiff through the Director of Maintenance Enforcement.
8. The mother shall take supportive in-depth counseling to deal with her past relationship with the father and her present relationship with W.
9. The father shall attend regular meetings of Alcoholics Anonymous and shall enrol in and attend an anger management course.

I note that paragraph 9 was included from a previous order.

[19] As the parties were without counsel at this application, when counsel have been retained a pre-trial conference can be convened to consider any difficulties arising out of the details of this order. The formal order can be filed by counsel when appointed.

Veale J.

L.J.H. Unrepresented

L.J.P. Unrepresented