

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *M. v. P.*, 2005 YKSC 03

Date: 20050107
Docket No.: S.C. No.: 04-B0017
Registry: Whitehorse

Between:

H.L.M.

Plaintiff

And

**J.J.P. and
B.A.M. and W.J.M.**

Defendants

Publication of the name of the child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act*.

Before: Mr. Justice R.S. Veale

Appearances:

James Van Wart
Christina Sutherland
J.J.P.

For the plaintiff
For the defendants B. and W. Mason
On his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This case involves the custody of and access to a fourteen-month old female child. The father has been convicted of assaulting the child's mother. Custody was initially granted to the mother. The maternal grandparents have now stepped in to look after the child and are seeking interim custody. The father, who is now in the Domestic

Violence Treatment Option program, wishes to maintain unsupervised access to the child. I ordered that his access be suspended for the reasons that follow.

FACTS

[2] The mother and the father had a short common-law relationship that resulted in the birth of the child. The mother and father are in their early twenties.

[3] The common-law relationship ended on December 31, 2003, when the father assaulted the mother in front of the child. The father's behaviour throughout the relationship was violent and assaultive towards the mother. The mother did not give precise details in her initial affidavit.

[4] In the months following the separation, the father had no involvement with the child. However, in April 2004, he began to harass the mother by telephone and on one occasion, attempted to force her vehicle off the road while both the mother and father were in British Columbia.

[5] The mother commenced a custody application in May 2004. She obtained an interim interim order in June 2004 enjoining the father from harassing her and limiting his access to what the maternal and paternal grandparents agreed upon. The order also prohibited the mother and father from communicating with each other except in writing for the sole purpose of access arrangements.

[6] It is clear that the maternal and paternal grandparents have played an important and stabilizing role for this child. They have cooperated in the care of the child and show mutual respect. They have made every effort to facilitate access for the father.

[7] The maternal grandparents, with the consent of the mother, have taken a greater role in the care and custody of the child. At the end of June 2004, the mother granted full parental rights to the maternal grandparents.

[8] During the summer of 2004, the maternal grandparents became concerned that the mother and father of the child were again communicating. They also insisted that the father's access to the child should be supervised by them.

[9] In August 2004, the father objected to this supervision, as it was not specifically stated in the court order. He wished access arrangements to be made by him and the mother as permitted in the June 2004 order. His affidavit did not respond to what he referred to as the "inflammatory allegations" of the mother, referring to her allegations of his assaults and violence.

[10] The maternal grandparents learned that, while the father was exercising access to the child, a teenager was residing with the father. This teenager was apparently "hiding out" from the RCMP and was later arrested.

[11] At this point, the maternal grandparents became defendants in the action and applied for custody of the child, with the consent of the mother. They also applied for the father's access to the child to be supervised.

[12] The application of the maternal grandparents was filed at the end of August 2004. An interim interim order was made granting custody of the child to the maternal grandparents with specific unsupervised access to the father, to take place at the residence of the father or the paternal grandparents. The access of the father was also subject to the condition that only relatives of the child could be present.

[13] Several adjournments were granted to the father as his counsel sought to be removed from the record. His counsel's application was granted on September 23, 2004.

[14] The application of the maternal grandparents was adjourned to September 29, 2004, to allow the father to get new counsel. New counsel for the father appeared on September 29, 2004. As the matter was becoming urgent, it was set over to the afternoon of September 30, 2004, at which time counsel for the father anticipated filing an affidavit of the father.

[15] However, on September 29, 2004, the father made oral representations to the Court about the allegations made by the mother. The mother responded to those representations by an affidavit filed September 30, 2004, alleging that the father was minimizing the physical violence inflicted by him during their relationship.

[16] The mother stated that the father had assaulted her on numerous occasions. Three of the assaults were in the presence of the child.

[17] She described two events:

1. In May 2003, when she was eight and one-half months pregnant, the father assaulted her at their home. He smashed a VCR tape over her head and threw her to the ground. He grabbed a chainsaw and began to cut down one of the interior walls of their home. When she tried to leave, he picked up the chainsaw and held it to her throat, threatening to kill her. He then took an extension cord and threatened to hang himself.
2. On or about December 31, 2003, the father hit the mother on the lip with a ring of keys causing a cut to her lip. The assault occurred in front of the child. As a

result of this assault, the father was charged with assault with a weapon. He pled guilty. It is my understanding from the father that he is participating in the Domestic Violence Treatment Option program under the supervision of the Territorial Court. This program provides counselling, risk management and hopefully behaviour modification.

[18] On September 30, 2004, the father's new counsel applied for and was granted removal from the record as the father failed to instruct the new counsel. As a result, the father represented himself at the hearing and presented no additional affidavit evidence. The mother's evidence about the violence and assaults was the only evidence before the Court.

[19] At this time, I invited counsel for the grandparents to apply for an order suspending the father's access to the child. That application was made based on the September 30, 2004 affidavit of the mother. I granted the order suspending the father's access to the child on the condition that he could make an application for access to his child in the future, hopefully with evidence from the Domestic Violence Treatment Option program in support.

[20] On November 9, 2004, the Court granted the maternal grandparents interim custody. The Court ordered that the father have no contact with the child.

ANALYSIS

[21] This Court has previously summarized the general principles that apply to access to children in *Dhillon v. Dhillon*, 2001 YKSC 543, in paragraph 13 as follows:

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.

[22] Applications for interim orders in family law are rarely accompanied by expert evidence on the impact of violence by a parent witnessed by a child. I take judicial notice of the fact that such violent behaviour is not in the best interests of the child. Violence between spouses, which may or may not be directly witnessed by a child, may have the following undesirable effects on a child:

1. the abuser may abuse the child;
2. the abuse may result in developmental and attachment difficulties;
3. the child may be more likely to enter an abusive relationship as an adult.

[23] There is no evidence before me that such events have occurred in this case. They are possible consequences for children whose parents have an abusive relationship.

[24] However, the onus is on the father to establish on the balance of probabilities that his access to the child is in the best interests of the child. I am not satisfied that the father's access to the child is in the best interests of the child as there is no evidence

from the father that addresses his violent behaviour in the presence of the child. See *Dixon v. Hinsley*, [2001] O.J. No. 37 at paragraphs 56 – 62 for the references to case law denying access to a parent where there is a history of spousal abuse or violence.

[25] This present case involves pre-separation violence and post-separation harassment. The father is presently in treatment.

[26] The father quite clearly has some serious issues to address before it will be appropriate to consider granting supervised or unsupervised access.

[27] The father is in the Domestic Violence Treatment Option program and that is to his credit. In the meantime, I expect that the paternal grandparents will continue to have access to the child and keep the child in touch with the father's extended family as is appropriate.

[28] The father is at liberty to bring an application for access to his child.

Veale J.