SUPREME COURT OF YUKON

Citation: *B.B.B.* v. *A.E.B.,* 2012 YKSC 105

Date: 20121212
Docket S.C. No.: 08-D4092
Registry: Whitehorse

BETWEEN:

B.B.B.

Plaintiff

AND:

A.E.B.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

B.B.B.	Appearing on his own behalf
Debbie Hoffman	Appearing for the Defendant
Anna Pugh	Child Advocate

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): In this matter, the father has brought an application seeking interim sole custody of the child, K., who is six and half or more. He also seeks primary care and primary residence, and an order granting him primary decision-making authority. For any access by the mother, the father is asking it be supervised.

[2] The mother has brought a cross-application seeking specific residential time with the child this Christmas and in even-numbered years thereafter, and an order than in odd-numbered years, starting in 2013, that that Christmas break time will be with the father. The mother also asks for an order directing that the child attend counselling with

Nicole Bringsli at Creative Play Works and that the parties equally share that cost. Lastly, for today's purposes, that the child shall alternate between her parents' homes on a one week - one week basis with the switch between the homes to take place on Friday's after school effective immediately and if Friday is a holiday or a professional development day, then K. shall remain in the care of the parent with whom she is residing that week until 5:00 p.m.

[3] There are other items of relief in the mother's notice of application including a couple relating to child support issues, and the mother's counsel has asked that those be adjourned to a date to be set, and I so order it.

[4] What is somewhat unusual about the history in this matter is that the parties consented to a divorce order in April 2010, which they personally signed; which specified that they would share joint custody of the child and that they would agree to an equal access schedule in writing, but not change that schedule without the consent of the other party, and that if they could not reach an agreement with regard to access, each party would have the right to seek a review of the child access.

[5] There is conflicting evidence on how much time the child has actually spent with each of the parties. The father takes the position that since the separation which occurred in 2008, he has had the child about 90 percent of the time and the mother disputes that, indicating that she has had the child more or less on an equal time basis. That is a matter that will have to be resolved at trial.

[6] Since the 2010 divorce orders, a matter arose on September 15, 2012, where the father alleges that the mother became intoxicated and passed out while the child was in her care, requiring the intervention of Emergency Medical Services taking the mother to

the hospital and the family having to attend at the mother's home to collect the child. Now, that resulted in an application and three orders dated September 21, 26, and October 2, by Justices McIntyre, Goudge, and Maisonville, respectively all deputies of this Court, and that was to address the father's application, which I have already referred to and which is now before me. However, in each of those orders specified time between the child and the mother was ordered and then the matter was adjourned to a further date to allow the father to obtain further evidence. The last of the orders referred to the child being in the father's care from November 8 until November 14, 2012, and that, of course, is now passed. So, by default, the divorce order of April 2010 would seem to govern. That was a final order in which the parties agreed to equal time with the child, although they have never actually sat down and reduced that to writing. But the importance of that sequence of events in terms of these orders is that I view the onus on the father in this application to establish on a balance probabilities that there has been a material change in circumstances since the 2010 divorce order.

[7] What the father relies on today are two incidents; one is the fact that the mother was charged with an impaired driving criminal matter arising July 13, 2012, for which she pled guilty in late August and apparently had readings of 150 milligrams at that time. The father points to the fact that prior to the divorce order, there was an interim interim order made October 7, 2008, which specified that neither parent would possess or consume drugs or alcohol while the child was in his or her care; however, we do not know whether the child was in fact in the mother's care at the time of the July 13 incident. Nevertheless, I agree with the father that the incident is concerning, given that the readings are almost close to twice the legal limit, which is .08 or 80 milligrams.

[8] The father next points to the incident of September 15, and he has provided an expert report interpreting the alcohol that was found in the mother's blood when she was taken to hospital that evening about two hours after the incident, which began with a phone call from the child to family members indicating that her mother was asleep and would not wake up. That expert report was based on an assumption of the mother's weight of 130 pounds and indicates that the mother would have had a blood alcohol content of between 213 and 231 milligrams at the time of the phone call by the child when the child said the mother was asleep, and that in order to have that blood alcohol content, she would have had to have consumed the equivalent of approximately five and half to six bottles or cans of beer at 12 ounces and 5 percent alcohol, which I take note would be the rough equivalent of the same number of glasses of wine which she was apparently consuming that evening.

[9] The issue today is what weight I can make of that report because the mother's counsel now refers to the rule in the *Rules of Court* which requires a notice period of an intention to rely on an expert written report, and that notice has not been provided. She also points to the fact that the report is not in sworn form and is therefore effectively hearsay evidence.

[10] The extent to which I can put weight on the report at the end of the day is really not the issue. As I indicated to the father during his submissions, even if I accept his expert evidence at face value and there is, in addition to that evidence, although the mother contradicts how much alcohol the expert suggests she must have consumed, she did admit to consuming, I think, a glass and a half of wine to the Emergency Medical people who responded, and she also admitted to the doctor at the hospital that

she consumed a glass of wine. Clearly, the child was in her care at the time, and therefore she was in contravention of the 2008 order which contained the initial no alcohol condition. While that is clearly serious and I acknowledge that it is, if in fact, according to the mother's counsel, the reason it happened is because she forgot about the 2008 no alcohol condition, then that is certainly no excuse.

[11] It is a serious matter, but in my view, it is not of sufficient weight, even in conjunction with the impaired driving charge and conviction, to justify the change sought by the father in these particular circumstances. The father alleges that these two incidents are indications of the mother having an addiction and needing counselling, and being, in effect, an alcoholic. I am not satisfied that those two incidents standing alone rise to that level in terms of allowing a court to draw that particular inference.

[12] The father has indicated there are several other incidents which both he and his parents have deposed to in various affidavits where the mother has exhibited alcohol abuse, but those allegations are contested by the mother and will have to await further probing at trial. For today's purposes, I am limited to what evidence is relatively uncontested, which is the admission of the impaired conviction and the consumption of alcohol on September 15. I have to also weigh the significance of that evidence against what has been the status quo with the child since approximately April of this year, where the child has more or less been in equal care of each of the parents, with the exception of some summer holidays during the month of August when the mother was away from Whitehorse.

[13] There is a child advocate in this proceeding who has spoken with the child and others, and takes the position that there is no compelling reason at this particular juncture to make the rather drastic change sought by the father.

[14] Because the father has not met his onus, I am dismissing his application with respect to his seeking sole custody and primary care and primary decision-making responsibility and supervised access. Rather, I will grant the specific relief sought by the mother in her notice of application, which is effectively confirming the status quo with the change in a pick-up day as set out in para. 3 of the notice of application. And that will last until the trial, which counsel inform me may possibly be able to take place this coming spring, 2013.

[15] There are other issues, and the first of those I will deal with is the issue of counselling. The father does not strongly oppose an order that the child attend counselling, but wants to be involved and be informed as to what that will involve and have an opportunity to speak with the child's counsellor. I am satisfied that there are sufficient reasons in this case to order that the child attend counselling as sought in para. 2 of the notice of application. There is evidence before me of the child exhibiting some bed wetting behaviour, having some difficulty with adjustments at school, and having some difficulty with aspects in her relationship with her mother. All of those, combined with the fact that this is a relatively high conflict and difficult separation and divorce, support the conclusion that it would be in the child's best interest to attend counselling as sought. Before I move off that point, I just want to acknowledge for the record that the same test applies for the consideration of the father's application to vary the divorce order terms regarding the child's residency, that it is the best interests of the

child that must prevail, and I am satisfied that preserving the status quo between now and the trial is in the child's best interest.

[16] The next issue has to do with the residential time for the child over the upcoming Christmas break and in the years following. Now, Ms. Hoffman, I will turn to you and ask you to indicate what you expect those days to actual be or will it just be the Christmas school break allowed by the child's current school.

[17] MS. HOFFMAN: That's -- that's correct. So whomever the child is with that week, she stays with that week that she's in school. And I believe the last day in Whitehorse is the 20th, and that the 21st is the first day of the actual Christmas holiday. That runs through until January 2nd, so that's what we're seeking.

[18] THE COURT: That the child would be with the mother for that entire period?

[19] MS. HOFFMAN That's correct.

[20] THE COURT: Okay. Given the evidence that the child was with the father last year, although there is some dispute about what happened in 2010, I am prepared to make the order as sought in para. 1 of the notice of application, and I will leave it to counsel to discuss the particulars, if need be.

[21] Now, going back to the issue of the shared parenting and the residential schedule of the child, although it is not specifically indicated in the notice of application, there was a good deal of discussion in this hearing about the notion of parallel parenting and this arises for a variety of reasons, one of which is that the child has been raised since birth with the father's Jehovah's Witness religion. Although the mother apparently

initially participated in that belief system, since the separation, has taken a different spiritual path, and that there is a chance that conflicts will arise in the future because of that fact. An example of that was referred to in this hearing which concerned the child's potential participation in a Christmas play this year, which apparently has been put off because the school ultimately decided that it was not a good idea for this year, but that it could be revisited in the future, and that the child was relieved to have had the decision made for her according to the child advocate. But it is a perfect of example of how important it is not to place the child in the middle of competing belief systems and competing rule systems in the two households.

[22] So, as I understand it, counsel for the mother has urged me to consider a parallel parenting regime to be referred to as part of this order, and the general understanding about such a regime is that while the child is in the care of the father, that the child will be bound by the father's rules and regulations and beliefs, and that the same would apply while the child is in the mother's care. The expectation is that the parties will, therefore, have less need to communicate about the differing systems in each household because it will be understood that the foregoing regime would be in place. However, there inevitably will be a need to discuss issues such as the Christmas play. There is an overlap between the households where, for example, the child might be rehearsing a Christmas play while in the mother's care, but when the actual performance date occurs, the child would be in the father's care, and if the father decides that she should not participate in a Christmas play because of the family's belief system, then that would be an unfortunate consequence and would not be in the child's best interest to expose her to that sort of inconsistency. Therefore, it will be necessary

on some points for the parents to continue to communicate, and I have urged them to do so with civility and to do so in a business-like fashion, preferably by e-mail if possible. And I expect and hope that that will continue between now and the trial.

[23] The last thing that I would say in closing is - and I have already alluded to it - that I am concerned about the allegations regarding the mother's drinking, and I do sympathize with the concern of the father in that regard. But I think it is important to note that there has been approximately two and half months or more have passed since the September 15th incident, during which the child has gone back and forth on a week-on, week-off basis between the households and there have been no further concerns or incidents noted or raised by either side, and that this indicates a pattern of reliability on the part of the mother. If in fact the mother does have an alcohol problem and something happens between now and the trial, then that is only going to hurt her chances, and no doubt she is fully aware, would put the child at risk and would not be in the child's best interest. And so I am expecting that that will be a very strong motivator for the mother to toe the line and abide by the no alcohol condition, which is not only something that she is willingly instructed her counsel to seek in the current order, but it is something that has been part of the series of orders since 2008.

[24] So those are my reasons. Do either counsel or Mr. B. have any questions?

[25] MS. HOFFMAN: Only with respect to costs, Your Honour.

[26] THE COURT: Pardon me?

[27] MS. HOFFMAN: Only with respect to costs.

[28] THE COURT: I think costs will be in the cause.

[29] MS. HOFFMAN: Very well.

[30] THE PLAINTIFF: What were the dates in December?

[31] THE COURT: I am going to leave that to counsel to work out with you because I do not think they should be specified if we're not entirely certain of them. You mean the Christmas dates?

[32] THE PLAINTIFF: Yeah. Sorry, I missed that.

[33] MS. HOFFMAN: December 21st to January 2nd. That is the period of time that Whitehorse schools are closed for Christmas break.

[34] THE PLAINTIFF: And when would my time -- can commence on this new schedule of the Friday to Friday. Like, she's with me currently, so would that end on the 13th? Because that, actually, I wouldn't see K. for three weeks complete. It's a huge amount of time.

[35] THE COURT: I do not have a calendar. Just hold on a second. Ms. Hoffman?

[36] MS. HOFFMAN: Well, what I would say is that in previous years that has been the situation where K. has been with Mr. B. for three weeks to a month at Christmas because he has gone away. And so if that is the way it unfolds, then that is the way it unfolds. If K. is currently with Mr. B., today is the 12th, then the switch day to Ms. M. would be the 14th, and then K. would in fact be with her for all of the week 17th through 21st and then carrying on to January 2nd. And in my submission, given previous Christmases, that is entirely appropriate.

[37] THE PETITIONER: Up to three weeks, I agree with that statement, but this is -- K. hasn't been away from me like this. This is new. She's been repeatedly been away from Ms. M. for that period of time, just randomly, throughout the years.

[38] MS. HOFFMAN: That's disputed.

[39] THE PETITIONER: Not related to holidays, but this is -- it's such a big period of time, it's brand new. I don't think that's in K.'s best interests.

[40] THE COURT: Well, Mr. B., I have to make a ruling on this one way or the other. I do not really have much of a choice, so I am going to proceed with the order as suggested by Ms. Hoffman, that there should be a clause in the order which indicates that the parties can agree otherwise in writing if, you know, there is a decision made or if a wish expressed by K. that she wants to spend a couple nights with you to ease the transition, then that can be agreed to in writing between the parties.

[41] THE PETITIONER: All right. Secondly, I do not understand Ms. Hoffman's statement with regards to costs. I do not know what that means.

[42] THE COURT: It just means that there are court costs which usually follow a hearing like this where there is taxable court costs that can be imposed either for or against. Usually, it is in favour of the successful party and against the so-called losing party. But in this case, the costs will be rolled along until the trial. If the trial judge determines that one side is deserving of costs, then the costs for today's application can actually be considered part of those overall trial costs, or taxable court costs.

[43] THE PETITIONER: Thank you.

[44] THE COURT: Your lawyer can advise you more about that.

[45] MS. HOFFMAN: And so to -- just so that we are clear in terms of the order, Your Honour, what I would say is that for the -- for the specific clause that the switch will occur on December the 14th, that is this Friday, to Ms. M.'s home, and the switch then to Mr. B.'s home would occur on January 4th. I had originally said that the holiday time is December 21st through until the 2nd, and so for keeping with the schedule, it would be -- the switch day would be the 4th which would be the Friday, unless otherwise agreed in writing by the parties.

[46] THE COURT: I will make that order.

[47] MS. HOFFMAN: Thank you.

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GOWER J.