

SUPREME COURT OF YUKON

Citation: *M.W.U. v. J.A.J.S.*, 2012 YKSC 87

Date: 20121030
S.C. No. 12-D4477
Registry: Whitehorse

Between:

M.W.U.

Plaintiff

And

J.A.J.S.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Tess Lawrence
Carrie Burbidge

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] These are cross-applications by the mother and father respecting custody and access for the three children, J, age 8, K, age 5, and R, age 2. The father has had sole custody of the children since the parties entered into a separation agreement on March 14, 2012. However, the mother has cared for the children at different times over the intervening months, during periods of attempted reconciliation. The father now applies

for sole custody and primary residence of the children. He also asks for an order that the mother's access be supervised, as determined by him. The mother has filed a cross-application seeking joint custody of the children and an alternating residency schedule on a week on/week off basis. She also seeks related orders for time with the children during the summer months and for travel outside the Yukon Territory. In addition, she asks that the father have no contact with her, either directly or indirectly, except through e-mail and only for the purposes of discussing matters relating to the children.

[2] Each party is also seeking child support orders. However, I was informed at the hearing that counsel expect to be able to reach an agreement on the gross incomes for each parent. Further, the payment of child support will, of course, depend on my ruling regarding custody and access. Therefore, I expect counsel will likely be able to reach a consent order on the payment of child support, once I have made a determination on the cross-applications.

BACKGROUND FACTS

[3] The parties began living together in February 2003 and were married in February 2008. On February 12, 2012, the mother told the father that she wanted to separate. On February 27, 2012, the mother was hospitalized. She has deposed that she admitted herself to the hospital because she was worried about her emotional state. Family and Children's Services have indicated in a letter dated June 8, 2012, that they received a report (from an unspecified source) that the mother was hospitalized on that occasion because of a suicide attempt. However, a letter from the mother's psychiatrist,

Dr. Heredia, dated September 10, 2012, makes no reference to a suicide attempt.

Rather, Dr. Heredia stated:

"...It appears that she was hospitalized secondary to severe family stressors that in my opinion were related to her borderline personality disorder. I was also made aware that the patient was engaging in alcohol and illicit substance use. ... During this hospitalization I did not find that the patient presented as a danger to self or others...."

[4] The mother moved out of the family home permanently on March 3, 2012.

[5] The parties signed a separation agreement on March 14, 2012, in which they agreed that "sole legal custody is in the best interests of the children" and that the father "is granted sole legal custody". The mother was granted access at the father's home, out of the home for activities, and also on holidays and birthdays, at school and day care functions, and on family vacations. The clause respecting access ended with the following sentence: "Should at any time the arrangement change and [the mother] has primary custody, these terms shall change exactly as per." [as written]. That sentence was crossed out by hand during a subsequent occasion when certain provisions of the separation agreement were amended by the parties. The mother's signature appears on each page where these amendments were made.

[6] On May 29, 2012, the mother again admitted herself to the hospital. She deposed that she mistakenly overdosed on some new medication she had been prescribed, but denies that she was suicidal on that occasion. Family and Children's Services have indicated, in their letter dated June 8, 2012, that they received a report (again from an unspecified source) that this was a suicide attempt. The mother's psychiatrist made no mention of this hospitalization in his letter of September 10, 2012, however he does note that patients suffering from borderline personality disorder "can

present with recurrent suicidal behaviour". The father has deposed that the mother admitted to him that this was indeed a suicide attempt. He says that, when he visited the mother in the hospital, she asked him to retrieve a suicide note she had left at her bedside before her mother found it. He also says that the mother admitted that this was a suicide attempt during a marriage counselling session on June 29, 2012. The mother did not deny this allegation in her subsequent affidavits. I am satisfied that this was a suicide attempt.

[7] In their letter of June 8, 2012, Family and Children's Services informed the mother that because of their concerns over the mother's mental health and substance abuse "all access with your children must be supervised", and that they would intervene if the father allowed any unsupervised access.

[8] In late July and early August 2012, the parties planned a vacation with the children in Salmon Arm, British Columbia, where the mother's parents reside. The father alleges that they were attempting to reconcile during that vacation. The mother's counsel disputes this, but the mother herself never denied that that was the case in any of her subsequent affidavits. I find that the parties were in fact attempting to reconcile. The mother also admits to having an affair with M.W., of Kamloops, British Columbia, during that vacation. When the father discovered this, he returned early to Whitehorse with the children.

[9] The mother has had a total of eight counselling sessions pursuant to her Employer Assistance Program ("EAP"). Those took place on February 25, March 1, 7, 15 and 29, June 29, July 5 and September 1, 2012. The last of these was a telephone session. The others appear to have been in-person counselling.

[10] The mother has also been in consultation with her psychiatrist, Dr. Heredia. In his letter of September 10, 2012, he states that the mother is continuing to suffer from symptoms of borderline personality disorder, which he describes as follows:

"...Individuals who suffer from the condition present with a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation. In many cases these individuals will make frantic efforts to avoid real or imagined abandonment. They can suffer from an identity disturbance with persistently unstable self-image or sense of self. They can experience it [as written] impulsivity that can be potentially self-damaging such as spending, sex, substance abuse, reckless driving and binge eating. They can present with recurrent suicidal behaviour, gestures, or threats. They can also engage in self-mutilating behaviour. They can experience affective instability due to reactivity of mood with intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days. They can suffer from chronic feelings of inking this [as written], inappropriate intense anger or difficulty controlling anger. Some individuals can also suffer from transient, stress-related paranoid ideation or severe dissociative symptoms...."

[11] It is these kinds of concerns that trouble the father. In particular, he points to the largely undisputed evidence of the mother's numerous sexual relationships, her substance abuse, and her eating disorder, as consistent with this diagnosis. He also maintains that the mother is continuing to use and abuse alcohol and drugs, including cocaine.

[12] On the other hand, the mother relies heavily on Dr. Heredia's conclusion, which is stated as follows:

"I believe that her current psychiatric symptoms are stable at this time but she will require more treatment in the areas of personality disorder and substance use. I do not feel that [the mother] is currently suffering from any psychiatric condition that would impair her ability to provide for herself or

others. I do not feel that she suffers from any condition that would impair her ability to make appropriate informed decisions or to impair her ability to distinguish right from wrong."

[13] The mother has had a number of meetings with Family and Children's Services since June 2012 and ultimately received a letter from them dated October 4, 2012, which retracted their earlier concerns about unsupervised access. The letter states:

"We have now had an opportunity to meet on several occasions and further assess the steps you have taken to effect positive change in your life. I am writing to confirm that, at this time, FCS is satisfied that you have addressed the child protection concerns as outlined in the letter of June 8, 2012. As a result, FCS does not have any concern about unsupervised access or you parenting your children provided that you continue to access all your supports and participate in counseling...."

[14] In her affidavit sworn October 16, 2012, the mother deposed as follows:

"2. To be clear, I am currently attending regular counselling with a personal counsellor who is helping me work through the DBT program, and also a counsellor with Alcohol and Drug Services ["ADS"].

3. Specifically concerning Alcohol and Drug Services Counseling [as written], I meet once a week with [K.S.] on an indefinite basis."

"DBT" is Dialectical Behavioural Therapy, which was "strongly" recommended to the mother by her psychiatrist and was noted to be "offered locally through Mental Health Services".

[15] In her affidavit sworn August 28, 2012, the mother claims to have stopped drinking alcohol and using drugs, and also that she has stopped communicating with the friends she was spending time with around the period of the separation. However, at

the hearing of these cross-applications, the mother's counsel confirmed that the mother has only been attending ADS counselling for the last two weeks.

[16] At the hearing, the mother also indicated through her counsel that she started doing the DBT therapy in March 2012, stopped in April, and then started the therapy again in either June or July. The mother also indicated that she has been undertaking the DBT with the assistance of one of her counsellors in her EAP program. At best, I find that submission disingenuous. At worst, it would seem to be an attempt to mislead this Court, with a view to creating the impression that she has already established a sound beginning with this therapy, when the evidence suggests otherwise. I come to this conclusion for the following reasons:

1. In her affidavit sworn August 28, 2012, the mother deposed at para. 18:

"I receive treatment for Borderline Personality Disorder ("BPD"). I am in the care of a psychiatrist, Dr. [H], and taking an antidepressant, and I'm scheduled to begin DBT Therapy, which is a type of therapy designed to help people with BPD." (my emphasis)

Obviously, it is glaringly inconsistent for the mother to claim at the hearing that she began this therapy as early as March 2012, when she had already deposed that she had not yet begun the therapy as of August 28, 2012.

2. In his affidavit sworn October 16, 2012, the father deposed, at para. 11:

"... In June 2012, the [mother] and I met with Dr. [H] where he informed us that dialectical behavior therapy would not be available until late October. In later conversation with the [mother], she confirmed this."

Although the mother would not have received this affidavit until the day before the hearing, she did not instruct her counsel to take issue with this allegation.

3. In his letter of September 10, 2012, Dr. Heredia wrote:

"I strongly recommend that she follow up with mental health services for entrance into a Dialectical Behavioural Therapy program." (my emphasis).

This clearly suggests that the mother had not yet begun the DBT as of that date.

4. In the letter from her EAP counselling firm dated September 12, 2012, the firm states that their counsellors "are unable to make diagnostic statements or recommendations, as well as informed clinical judgments about legal or work-related matters based upon information gathered from [their employee and family assistance counselling] sessions.". Although the evidence in this regard is lacking, the inference I draw from this statement is that the EAP counsellors the mother has been meeting with would likely have been unqualified to engage in DBT in any event. I would also add that Dr. Heredia said in his letter this counselling is offered through Mental Health Services. He made no mention of it being available from any other counsellors.

[17] In the result, I am left with very unsatisfactory evidence as to when the mother actually commenced the DBT and no evidence as to how she is progressing with that therapy.

[18] The mother claims to have had only limited access to the children since her return from British Columbia, following the vacation in Salmon Arm. She says that the father's insistence on her access being supervised has unreasonably restricted her opportunities to spend time with the children. The father maintains that the mother has a history of instability due to her borderline personality disorder and her substance abuse. Further, he says that the mother has not yet shown that she is undertaking regular treatment and counselling for her personality disorder; nor has she

demonstrated that she is able to remain substance free for any significant period of time. While he agrees that it is in the best interests of the children to have maximum contact with their mother, given the recency of her treatment program and sobriety, is still too soon and too risky to allow the mother equal time with the children. Further, he suggests through his counsel that this Court should proceed carefully in allowing any increase in access.

ISSUE

[19] The issues on these cross-applications are:

1. Whether the mother has demonstrated a material change in circumstances to justify a variation of the custody and access provisions in the separation agreement; and
2. If so, whether it is in the best interests of the children for the mother:
 - a) to have equally shared residency of the children on a week on/week off basis; or
 - b) to have unsupervised access, in some combination of specified and unspecified access.

ANALYSIS

[20] The mother's counsel argued that there was no need to establish a material change in circumstances, because there were provisions in the separation agreement which anticipated that primary custody might revert back to her. In other words, the change in the custodial status of the children was foreseen or reasonably contemplated by the parties. I reject that argument, as the provisions relied upon were crossed out when the agreement was amended. Although the mother's counsel briefly alleged that

the mother was under duress at the time of the amendment, she did not pursue the argument.

[21] While an agreement between parents concerning the custody of their children cannot oust the jurisdiction of this Court, such an agreement is a factor to be taken into account when determining the issues of custody and access: *Stonier v. Stonier*, 2004 BCCA 307. Indeed, in *H.H.L. v. J.T.S.*, 2006 BCSC 1928, the court held that the separation agreement respecting custody was "entitled to substantial weight, similar to that afforded to a provision settled by judgment" (para. 27). However, this Court may vary a separation agreement if it is not in the best interests of the children, providing the applicant has established a material change in circumstances: *Holland v. Holland*, [1986] B.C.J. No. 2789 (S.C.).

[22] The father's counsel argued at the hearing that there has been no material change in circumstances. However, the argument appeared to be somewhat of an afterthought, as it was not addressed at all in the father's outline.

[23] I am satisfied that there has been a material change in the mother's circumstances since the separation agreement, consisting of a number of aspects:

1. The mother has had five additional counselling sessions through her EAP;
2. She has apparently stopped her alcohol and illegal drug usage;
3. She has obtained her own residence;
4. She was evaluated by her psychiatrist on September 4, 2012. He opines that the mother is currently stable and is able to "provide for herself and others", such as her children, but that it is strongly recommended that she pursue DBT and substance abuse counselling;

5. She has attended two parenting after separation workshops on September 10 and 15, 2012; and

6. Family and Children's Services, as of October 4, 2012, no longer has any concern about the mother's unsupervised access with her children, provided that she continues "to access all [her] supports and participates in counseling".

[24] It is also important to remember here that the separation agreement did not entitle the father to supervise access. That only came about following the June 8, 2012 letter from Family and Children's Services, and they have now retreated from that position, albeit conditionally. Thus, to allow a return to unsupervised access would simply restore the *status quo* created by the separation agreement.

[25] Having said that, there are risks to the children if the mother reverts back to exhibiting some of the more disturbing symptoms of her borderline personality disorder. I am concerned here about of a number of possibilities which could arise while the children are in the mother's care:

1. that she might again become involved with violent sexual partners;
2. that she might reengage in self-mutilating behaviours;
3. that she might reengage in substance abuse; or
4. that her eating disorder may once again interfere with her ability to provide meals for the children.

[26] Admittedly, at the present time, these concerns remain possibilities and not probabilities. Therefore, I am satisfied that the level of risk is acceptable for the mother to have unsupervised access with the children, providing she continues with all recommended therapy and the ADS counselling.

[27] However, I am not satisfied that the level of risk effect is acceptable for a wholesale change to equally shared residency of the children on a week on/week off basis.

[28] Further, my worry about the level of risk is exacerbated by problems with the mother's credibility. I have two serious concerns in that regard:

- a) The mother continues to deny that the self-admission to the hospital on May 29, 2012 was because of a genuine suicide attempt. In my view, this demonstrates a desire to minimize the seriousness of her mental health issues; and
- b) The mother has potentially attempted to mislead this Court on the very important question of when she actually started her DBT.

This in turn calls in question the sincerity and reliability of the mother's position at the hearing, i.e. that she has pulled herself together, turned herself around, and is no longer a danger to the children. I agree with the father's counsel that what is required here is for the mother to demonstrate, over time, a greater degree of consistency in her behaviour. Part of that demonstration should include additional evidence from her psychiatrist, as well as her therapists and counsellors, as to her progress with her DBT and her attempt to remain clean and sober. Eventually, the level of risk may be objectively reduced to the point where equal time with each parent may become a realistic option.

[29] Therefore, I am going to adjourn generally the mother's application for joint custody and equally shared residency of the children, as well as the related relief. On an interim basis, I grant custody of the children to their father. If the mother brings her application back to this Court in the future, she will not be required to demonstrate a

material change in circumstances between now and then. The children shall reside primarily with the father. However, the father's application for supervised access is dismissed. It is my intention that the mother's access will be unsupervised, reasonable and generous. However, in the event that the parties are unable to agree on access, it is my intention that the mother be guaranteed a minimum amount of specified interim access, until a further order of this Court or a further agreement between the parties.

That access will be:

- a) On Mondays, Wednesdays and Fridays, after the mother's work day is finished, she may pick up the children from their daycare, provide them supper, and return them to the father by 6:30 PM. On alternating weeks, this access will take place on Tuesdays and Thursdays, in the same week as in (c) below;
- b) Every second Sunday from 9 AM to 6 PM;
- c) On alternating weeks, from noon Saturday until noon Sunday; and
- d) For the upcoming Christmas season, from noon Christmas eve to noon Christmas Day, and for the following Christmas season, from noon Christmas Day to noon Boxing Day, with this alteration continuing from year-to-year.

[30] I further order that the only form of communication between the parties be by e-mail and only for the purposes of matters relating to the children.

[31] The respective applications of the parties for child support will be adjourned generally, in anticipation that they will be able to come to an agreement on that issue.

[32] With respect to the mother's application for joint custody and equally shared residential time, I will remain seized of this matter. Should things progress favourably

for the mother, and should she wish to reargue her application, she may do so on five days' notice to the father.

[33] I did not hear submissions from counsel on costs. Ordinarily, since there was mixed success on the cross-applications, I would expect each side to bear their own costs. However, if counsel wish to make further submissions on this issue they may do so.

GOWER J.