SUPREME COURT OF YUKON

Citation: *S.L.H. v. A.W.H.,* 2019 YKSC 24

Date: 20190313
S.C. No.: 18-D5076
Registry: Whitehorse

BETWEEN:

S.L.H.

PLAINTIFF

AND

A.W.H.

DEFENDANT

Before Madam Justice E.M. Campbell

Appearances:
Shaunagh Stikeman — Counsel for the Plaintiff
A.W.H. — Appearing on his own behalf

REASONS FOR JUDGMENT

[1] CAMPBELL J. (Oral): On March 8th, I indicated to the parties that I would give oral reasons with regard to the plaintiff's application for an interim parenting plan or protocol with regard to the parties' children. I also indicated to the parties that I would give oral reasons on costs with respect to the plaintiff's application for financial disclosure that I heard and decided on December 7, 2018.

[2] The plaintiff and the defendant were married on July 4, 2012. They separated on April 3, 2018. During their marriage, they had three children together: M.H., born on June 29, 2014; as well as A.H. and her twin B.H., both born on August 8, 2016.

[3] The plaintiff and the defendant have been before the Court on a number of occasions since September 2018 regarding a number of issues arising out of their separation, such as financial disclosure; interim residence and care of the children; use of the parties' vehicles; interim child support; and, most recently, regarding the choice of an elementary school for their oldest son. All remaining issues are set to proceed to trial or summary trial the week of July 15, 2019.

[4] The parties presently share custody of their three young children. The parties also have shared interim interim care and residence of the three children, pursuant to the schedule set out in the order of Justice Mahoney of September 20, 2018, that I amended somewhat earlier this year.

[5] Under the three-week rotating schedule set by Justice Mahoney, the plaintiff has the three children in her care for 17 out of 21 nights. The three children attend daycare on weekdays. They spend a few hours every Monday and Wednesday evening until 6:45 p.m. with the defendant. The defendant has the children in his care two weekends out of three, from Friday after daycare until Sunday at 5 p.m.

[6] The plaintiff's application and proposed parenting plan is not aimed at managing the daily routine and care of the children when they are in either parent's care.

[7] The plaintiff submits that the proposed interim parenting plan is a mechanism that will allow the parties to make important decisions regarding their children without having to resort to courts.

[8] The plaintiff submits that a plan is necessary because the parties have been unable to reach agreement on a number of issues concerning the health, education, and extracurricular activities of their children since their separation. According to the

plaintiff, this, in turn, has led to one party or the other making unilateral decisions or taking unilateral steps toward obtaining services or enrolling their children in activities without the agreement of the other parent.

[9] The plaintiff submits that it is in the best interests of the children to have a parenting plan in place between now and the final resolution of the parties' family matters.

[10] While at first the defendant disagreed that an interim plan was necessary, he indicated at the hearing that he, too, now thinks that an interim parenting plan needs to be put in place.

[11] Both parties agree that the parenting plan should include a clause providing that each party shall inform the other of any significant matters that may arise pertaining to the children. They also agree that they both shall have the right to obtain copies of all educational and medical information with respect to the children. They agree, as well, that they both shall discuss significant decisions respecting the health, education, religion, and general welfare of the children and, where possible, make reasonable efforts to reach an agreement.

[12] The parties' positions differ with respect to who should have the final say or decision-making authority regarding these issues in case of disagreement — and again, we are talking about something that is on an interim basis.

[13] The plaintiff submits that she should have final decision-making authority regarding these significant decisions.

[14] The defendant is of the view that he should have final decision-making authority with respect to significant decisions regarding the health, including emergencies, when

possible; education; and safety of the children. According to the defendant, the plaintiff should be responsible for making the final decisions in areas of religion; extracurricular activities; recreation; and daycare for the children.

[15] Each party filed an affidavit in support of their respective positions. They also refer to previous affidavits filed in this matter.

[16] The plaintiff submits that the parties have a high-conflict relationship that prevents them from making significant decisions with respect to the well-being of the children. According to the plaintiff, since their separation, the parties have been unable to make any decisions together regarding, among other things, a residential schedule for the children; a consistent bedtime for the children between households; their joint attendance at functions for the children; protecting the children's RESP savings for their education; the parties' use of their two vehicles; the occupation of the family home; and the shared rental property.

[17] The inability of the parties to agree on a number of these issues is documented in text messages exchanged between the parties during the summer and fall of 2018 and attached as exhibits to the plaintiff's affidavits, more particularly her fourth affidavit filed in this matter.

[18] A clear indicator that the parties have been unable to reach agreements on a variety of issues is evidenced by the various orders this Court has had to make since September regarding financial disclosure; interim care and residency of the children; interim and retroactive child support; interim sharing of special and extraordinary expenses; the use of the vehicles; as well as a number of issues that are still presently before the Court for final disposition.

[19] The defendant submits that the parties are not in a high-conflict relationship. The defendant acknowledges that there were a few high-conflict situations between the parties since they separated, all of which, he submits, were instigated by the plaintiff. As an example, the defendant relies on the fact that the plaintiff unilaterally cancelled M.H.'s specialist appointment in Vancouver in order to prevent him from attending the appointment with M.H.

[20] The defendant submits that the parties are generally able to communicate with respect to the children's welfare and their day-to-day life. According to the defendant, the plaintiff is the one doing everything she can to bring conflict into the relationship.

[21] The defendant submits that although the parties have joint custody of the children and are supposed to be co-parenting, the plaintiff is acting as if she has sole custody of the children. The defendant submits that the plaintiff is completely inflexible and that co-parenting only occurs when he agrees with what she wants. He uses, as an example, the fact that the plaintiff went ahead and pre-registered their son M.H. in [redacted] School without his consent.

[22] For these reasons, he now believes that an interim parenting plan is needed and that he should be the one having decision-making authority on a number of matters relating to the children, including health and education.

[23] The plaintiff takes exception with a number of the examples provided by the defendant in support of his submissions.

[24] The defendant relies on a memorandum of agreement the parties were working on before they ended mediation with the Yukon Family Mediation Service, as an

example, that the parties are able to cooperate when they are both willing to do so. This memorandum is attached as an exhibit to his latest affidavit, Affidavit #6.

[25] The memorandum indicates that the parties worked on an agreement in principle with respect to the children that would have included co-parenting; shared decision-making for the children; and that the daily routine and care of the children would alternate between the parents, depending on the children's residency schedule. The memorandum indicates that the parties were unable to agree on a residential schedule for the children.

[26] Their attempt at mediation outside the court process failed. Both parties are blaming each other for their failed attempt at mediation.

[27] On balance, I find that the evidence before me reveals that when faced with having to make real-life decisions on specific issues other than simple day-to-day issues, the parties have been mostly unable to reach agreements. As mentioned most recently, the parties have been unable to agree on an elementary school for M.H., who will start kindergarten in August of this year. As a result of this disagreement, this Court had to make that decision for them. This Court determined on March 8, 2019, that M.H. will attend [redacted] starting in August.

[28] I therefore come to the conclusion that an interim parenting plan is in the best interests of the children, even though we are just a few months away from the date of a trial or summary trial in this matter. I order that the clause the parties are in agreement with be part of the interim parenting plan.

[29] As stated by Justice Veale in *E.J.M. v. D.D.I.*, 2008 YKSC 21, at para. 21:

> It has been a practice in this court to make joint custody orders despite communication breakdown between the

> parents to encourage the parents to rebuild their relationship for the benefit of their child. There are, admittedly, some relationships that are so toxic that joint custody makes absolutely no sense as it leads to continued conflict which is harmful for the child. I do not find this parental relationship to be so irreparable that they cannot communicate about their child. …

[30] I do agree that this statement also applies in this case.

[31] In *E.J.M.*, Justice Veale ordered interim joint custody and an interim parenting regime that is similar to the one proposed by the parties with one party having final decision-making authority with respect to health, except for emergency; education; religion; and general welfare of the child of that relationship.

[32] In the matter before me, both parties are also at odds with respect to who provided care for the children prior to separation and which parent is best positioned to make decisions in their best interests.

[33] The defendant has made submissions before me, from time to time, that the parties' professional qualifications should be taken into consideration when determining who should have decision-making authority in relation to health issues. The defendant was a chiropractor; the plaintiff is a dental hygienist. The defendant submits that his professional qualifications make him better suited for making health care decisions with respect to the children. He also recognized, at previous hearings before me, that the plaintiff is in a better position to make dental healthcare decisions with respect to the children.

[34] The plaintiff submits that she has always been the parent responsible for caring for the children in the home, for bringing them to and from daycare, and for communicating with the daycare regarding their well-being. She also submits that she has always been the parent responsible for bringing the children to their medical and

dental appointments. Similarly, the plaintiff submits that she has always had the responsibility of bringing the children to their ongoing physical and speech therapy appointments at the Child Development Centre. The plaintiff relies on her affidavit, as well as on her father's affidavit in that regard. The plaintiff, therefore, submits that she is in the best position to make ultimate decisions with respect to the children's health, welfare, and education.

[35] The defendant submits that before the separation, the parties provided for their children together. He also submits that due to his motor vehicle accident, he was a stay-at-home parent and spent more time caring for the children in the home they lived in than the plaintiff. He submits that he has given undivided attention to the education; guidance; necessities of life; and special needs of the children, such as their children's nutritional needs and eating requirements and one of the twins orthopaedic needs and speech therapy needs. He also submits that he always cared for the children when they were sick and unable to attend daycare. He submits that he has regularly taken the children to their medical and specialist appointments since they were born. He also attended daycare functions and communicated with the daycare on a regular basis prior to separation.

[36] The defendant also submits that since separation, the plaintiff has taken the children to the daycare even when they were sick instead of leaving them in his care. The defendant relies on his affidavits, the affidavits of his mother, his sister, and a neighbour in support of his submissions.

[37] Most of the evidence before the Court comes from affirmations made by the parties themselves and by family members. Most of that evidence is contradictory in

nature. However, attached to one of her affidavits, the plaintiff filed a letter from the children's family doctor, dated November 6, 2018, in which he states that the plaintiff has attended most medical appointments for the children on her own, often with the other children present since they were born.

[38] While the defendant does not agree with the children's family doctor's account, he acknowledges that he is a good family doctor.

[39] The plaintiff also attached to one of her affidavits a letter from Jennifer Bugg, a program coordinator at the Child Development Centre which the children attend for, among other things, physical and speech therapy. The letter indicates that between 2015 and the fall of 2018, the plaintiff attended 27 of the 32 visits to the Child Development Centre with the children. The letter also indicates that both parties attended three of the visits and the defendant attended two visits on his own with the children. During the year of 2015 and the beginning of 2016, email communication on file was with the defendant. However, visits during this time were attended by the plaintiff. From 2016 to June 2018, most communications and visits were with the plaintiff. Since August 2018, communication has occurred separately between both parents and the Child Development Centre.

[40] I acknowledge that these two letters constitute unsworn, out-of-court statements. However, they were provided by third-party health care professionals who are not involved in the parties' marital dispute. While I am not prepared, for the purpose of this application, to rely on the opinions they may have expressed in these letters, I find that, in order to assess the parties' claims regarding their respective involvement with the children before and a short time after separation, I can rely on the objective information

the letters contain with respect to the parties' attendance to their children's medical appointments and the communications the parties had with the health professionals.

[41] I find that the information provided by the children's family physician and the Child Development Centre confirms the plaintiff's position, that she has been the primary contact and the most involved parent with respect to the children's health from the time they were born and up until the fall of 2018.

[42] I am not prepared, however, to give as much weight to the letter provided by the children's daycare supervisor, considering the close relationship that exists between her and the plaintiff.

[43] Nonetheless, I do find that the plaintiff, due in part to her working full-time downtown where the daycare is located, has been the parent who has been primarily involved with respect to the children's attendance at daycare.

[44] I also have to recognize that according to the schedule set out in Justice Mahoney's interim interim order, the children spend most nights in the plaintiff's care and that the children primarily reside with her during the week.

[45] I therefore find that, at this time in the proceedings, the plaintiff should be granted interim decision-making authority with respect to health; education; general welfare; and extracurricular activities of the children when and if the parties do not, after reasonable efforts have been made, reach an agreement on these issues.

[46] More specifically, with regard to the children's extracurricular activities, considering the fact that at this time the defendant has the children in his care for a few hours on Monday and Wednesday evenings and that he also has them in his care two weekends out of three, the children's extracurricular activities may end up having an

important impact on his parental time with the children. The plaintiff must ensure that the planned activities do not interfere with any of the children's already planned and scheduled activities. The plaintiff must also ensure that the activities do not interfere in an unreasonable manner with the defendant's parenting time with the children or the children's daycare or school schedule.

[47] As religion does not appear to be an issue between the parties, the parents will continue to have joint decision-making authority over religious matters.

[48] Considering the fact that I have granted interim decision-making authority to the plaintiff with regard to health, education, and general welfare of the children, it follows that the plaintiff shall have the children's healthcare cards and their birth certificates in her possession.

[49] Since the defendant has the children two weekends out of three, which gives him more opportunity at this point to travel to places such as Skagway, Alaska, with the children, the defendant shall have possession of the children's passports. The defendant must provide the children's passports to the plaintiff in a timely manner, in any event, within 24 hours of a request, if she requires them to travel with the children when she has the children in her care.

[50] Each party should bear his or her own costs with regard to this application.

[51] I will now move on to the issue of costs regarding the plaintiff's financial disclosure application. I indicated on March 8th that I would give my oral decision regarding costs with respect to the plaintiff's application for financial disclosure that I heard and decided on December 7, 2018.

[52] The *Rules of Court* provide that parties have to provide full financial disclosure in family matters. Notwithstanding the *Rules*, the plaintiff had to make repeated requests; bring a formal application that I granted, for the most part, on December 7, 2018; and raise the issue of lack of financial disclosure before me on a number of occasions after December 7, 2018, before the defendant fully complied with his disclosure obligations.

[53] While I acknowledge that the defendant provided substantial financial disclosure to the plaintiff prior to the December 7, 2018 hearing and made efforts to comply with the order I made on December 7, 2018, the plaintiff should not have had to make repeated requests and file an application prior to full financial disclosure being provided to her earlier this year.

[54] I therefore find that the plaintiff is entitled to costs with respect to her financial disclosure application.

[55] Considering the circumstances of this case, I find that awarding a lump sum is appropriate. Considering the materials filed in support of the application and the time spent in court regarding this issue, I fix costs at $1,500 payable forthwith, in any event of the cause.

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CAMPBELL J.