SUPREME COURT OF YUKON

Citation: *F.S. v. T.W.S.*, 2019 YKSC 27

Date: 20190528
S.C. No. 17-D4962
Registry: Whitehorse

BETWEEN

F.S.

PLAINTIFF

AND

T.W.S.

DEFENDANT

Before Madam Justice S.M. Duncan

Appearances:
Kathleen M. Kinchen — Counsel for the Plaintiff
Michelle K. Chan — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the defendant father to vary an order of October 31, 2017 for interim custody, primary residence and access, as well as to impute income of a certain amount to the plaintiff mother for the purpose of calculating support payments.

[2] This is a high conflict case arising from the end of a marriage of 21 years. There were seven children of the marriage. The current application relates to the three youngest children, S., J. and E., currently ages 14, 11 and 8. There are allegations of

parental alienation being made by each parent. It appears from the affidavit evidence that this is a family that has divided itself into 'camps', with the mother, her parents and, possibly the three youngest children on the one side, and the father, the great-aunt, and the four oldest children on the other side.

VIEWS OF THE CHILDREN

(i) Assessor or Advocate Required

[3] The difficulty in this case is the absence of information about the views of the three children at issue here. Counsel did request the preparation of a custody and access assessment under s. 43 of the *Children's Law Act*, R.S.Y. 2002, c. 31 (the "*Act*"), to be funded by Family and Children's Services ("FCS"). FCS denied this request primarily because of ongoing criminal charges brought in the summer of 2018, of historical assault and assault with a weapon against the mother and the grandfather. These charges were based on reports by the oldest child, K.

[4] K. was convicted in 2015 of two counts of sexual interference and two counts of uttering threats between 2010 and 2014 towards two of his sisters, one of whom, S., is a subject of this application. He completed his probation in November 2018.

[5] The practice of the Director of FCS is that "she will not facilitate and bear the costs of these assessments if there are open criminal or child protection matters." The rationale for the policy was set out in a letter from Tara Grandy, legal counsel, Yukon Department of Justice dated March 29, 2019 as follows:

> … not overwhelming children with multiple interviews, jeopardizing the RCMP investigation, contaminating evidence, and/or making assessments prematurely before the outcome of the criminal matters, particularly if the outcome influences placement (i.e. no-contact orders).

[6] Counsel also canvassed the availability of a child advocate. None of the lawyers who regularly act as the child advocate in the Yukon was able to act in this case because of a conflict of interest, insufficient interest or inadequate experience.

[7] As a result, the Court has no information on the perspective of the three youngest children about the conflict in the family, or their preferences for residential and access arrangements. This creates a significant difficulty in a high conflict case involving allegations of alienation where the guiding legal principle is the best interests of the children. In a situation of a divided family such as this, with parental alienation issues and criminal activities by a sibling, a child assessor or advocate with significant expertise and sensitivity is required. That expertise is necessary to determine as accurately as possible the effect of the ongoing conflict on the children; if parental alienation is occurring and by whom; and to assist the Court in making a decision in the best interests of the children.

[8] The decision in this application will be an imperfect interim one, until the views and perspectives of the affected children can be ascertained. To achieve this, I would first request FCS to reconsider their refusal to do a custody and access assessment at this time. While their reasons in general are justified, I note that the criminal allegation has been made by the oldest child against the mother and grandfather for alleged historical assaults and does not involve the three youngest children who are the subject of this application. I also note the length of time that the criminal charges may take to be resolved, given that the preliminary inquiry is scheduled to be heard in July 2019, and the effect that the delay of an assessment of the three youngest children may have upon them.

[9] If the Director of FCS still declines to order an assessment before the criminal charges are completed, then I recommend that such an assessment be done as soon as possible after that time, especially because of the effect of any new criminal convictions on the family.

[10] Alternatively, I recommend that a child advocate from outside of the Yukon be retained as soon as possible. In this situation a child advocate is not as useful as an experienced child assessor, but a child advocate with significant experience with and knowledge of effects of alienation and abuse on children would be of assistance to the Court.

(ii) Judicial interview request

[11] Counsel for the father requested a judicial interview of the children. Counsel for the mother does not support a judicial interview because she states the children have all been alienated from their mother and to be put in the middle of this very high conflict situation is not in their best interests. Further, counsel for the mother stated that any interview of the children should be performed by an individual qualified to conduct interviews of children who have suffered abuse, including sexual abuse.

[12] Recent research supports the involvement of children in the decision-making process after separation of their parents, in order to promote their well-being, as noted by Rachel Birnbaum & Nicholas Bala in “Views of the Child Reports: The Ontario Pilot Project - Research Findings and Recommendations”, for presentation June 21, 2017. Further, the rights of children to express their views on matters affecting them has been guaranteed by the *United Nations Convention on the Rights of the Child*, (the “*Convention*”) that has been adopted by Canada. Justice Martinson in *B.J.G. v. D.L.G.*,

2010 YKSC 44 in considering whether a 12 year old boy should be allowed to express his views to the court in an application to vary an existing custody order, cited Article 12 of the *Convention* in concluding that "all children in Canada have legal rights to be heard in all matters affecting them", (para. 2). The Court went on to say that information from children regarding their preferences and views "can lead to better decisions … that have a greater chance of working successfully", (para. 21).

[13] A judicial interview in this case would be for the purpose of gathering information about the views and preferences of the children to be considered in the determination of custody, primary residence and access. It would also be to assist with the determination of whether or not parental alienation was occurring by either parent. In "Guidelines for Judicial Interviews and Meetings with Children in Custody and Access Cases in Ontario", co-sponsored by the Association of Family and Conciliation Courts, Ontario Chapter and The Advocates' Society, the authors write that judges should be aware that:

> a. Many children will feel loyalty binds or a sense of guilt or responsibility about being asked to express their preferences between their parents:
>
> b. A single interview with a child may not yield accurate views and preferences; and
>
> c. Judicial interviews and meetings with children are not a substitute for children's counsel and assessors.

The Guidelines also set out factors suggesting that an interview is not appropriate, including where one or both parties do not consent to a judicial interview of the child. The Guidelines also specifically address situations of alienation allegations. While in and of itself it should not be a reason for a judge to agree to or decline an interview or

meeting, “significant caution is recommended regarding the form and format of the interaction if alienation is alleged. Judicial interviews and meetings can exacerbate this already unstable environment if they are not well-timed and well-executed”, (para. 10). Similarly, the premise of the “Guidelines for Judges Meeting Children” in a paper published in the *Family Law Quarterly*, Volume 47, Number 3, Fall 2013 is not that a meeting with a judge will be the best source of information for courts or parents about the views, feelings, and preferences of children. Rather the premise is that, where available, evidence about a child’s needs, wishes and feelings are usually best ascertained and presented to the court by means of an evaluation report prepared by a mental health professional appointed by the court or by representations from a *guardian ad litem* or counsel appointed for the child. Such information can be gained through a series of meetings with the child that can occur as part of broader inquiry into the circumstances of the child. The judicial interview is complementary to the involvement of an evaluator, or lawyer for the child. A single meeting by a judge with a child will generally not provide as much reliable information as can a child’s lawyer, a *guardian ad litem* or a mental health professional, who has had the opportunity to meet with a child a number of times and develop a relationship with the child.

[14] Given these cautions and limitations from children’s law experts about judicial interviews, combined with the lack of consent by the mother and the complex family dynamics and sensitivities in this situation, I do not believe a judicial interview would be a prudent course of action or ultimately helpful in resolving the issues. I must do the best I can on the basis of the material before me.

BACKGROUND

[15] The parties separated in February of 2017. At that time they were living in British Columbia during the school year so that the five youngest children could attend Abbotsford Christian School, ("ACS") where they were initially enrolled in September 2015. The family returned to the Yukon for the summers and went back to British Columbia in September. The children did well at ACS. In September 2017, the family returned to British Columbia for the beginning of the school year.

[16] This matter was most recently before the Court in October 2017. On October 31, 2017, the Court confirmed a consent order that the mother be granted interim custody and primary residence of the four youngest children - Z., S., J. and E. - and the parties would share joint custody of R., who could decide where she would reside. The parties would agree upon the father's access. The remainder of the consent order related to support payments and assets.

[17] After hearing the application, the Court ordered that the father's weekly in-person access be professionally supervised due to a justified fear by the mother that the father was continuing to try to alienate the children from her. The Court found that the history of the father's manipulation and control of the children was relevant to his potential ability to alienate them (s. 30(2) of the *Act*). Telephone access with the father by the four youngest children was granted any time the children wanted to speak to him. The mother was allowed to monitor the calls.

[18] In concluding in October 2017 that the father had the potential to alienate the children, the Court relied in part on an incident from the summer of 2017 described by the mother and grandfather. They said the father lined up five of the children beside him

in the kitchen in front of the mother to tell her that they did not want to live with her any longer and they wanted to live with their father. The mother had just returned to the Yukon from British Columbia with the youngest child and the daughters had been staying with the father in the Yukon. The father said that during those weeks before the mother returned, the daughters were voluntarily asking to live with him on their return to British Columbia in September. The Court found that the description by the grandfather of the event and his conclusion that it was "choreographed" by the father was not unreasonable. In the application before me, the father describes the incident differently, saying that the grandfather was bullying and manipulating the children, and denigrating the father. The father also says the mother was calling the father names and lashing out at the children. The father agrees with the grandfather's description of the children crying but says it was because of the way the grandfather and the mother were talking to them, not because of him. This evidence was not before the Court in October 2017.

[19] However, this incident was not the only basis for the October 2017 order for supervision and monitoring. It was also based on the mother's description of years of controlling behaviour by the father of her and the children during the marriage, as well as the father's admissions that he had been manipulative and controlling towards the family in the past and had improperly talked to the children about aspects of the conflict between him and the mother.

[20] The supervised access and monitored telephone calls continued more or less as ordered from November 2017 to April 2018. In mid-April 2018 the mother had an emotional breakdown and left the home where she was living with the children and her parents, who had travelled to British Columbia from the Yukon shortly before she left.

The mother wrote a note that appeared to be a suicide note and left it on her bed. The mother says her fourth oldest child, Z., running away from home precipitated her breakdown. Z. ran away to the home of her great-aunt, an experienced parent and foster parent, and with whom Z. and two of her sisters, R. and N., had stayed on occasion for periods of one-two months, at the request of the mother and father. The mother found out not from her aunt, who is her father's sister, but from the school, that Z. had run away. She learned where Z. was from the father initially, later confirmed by police. R., the second oldest daughter, had helped Z. run away. R. was living with the father and had a very difficult relationship with the mother. The mother says she was devastated by the loss of another child. She believed that the father, with R.'s help, was successfully turning another child against her.

[21] The father says he had nothing to do with Z. running away from home. He says the mother's emotional breakdown had nothing to do with him. He and the oldest daughter N. raise credibility issues around the "suicide note", suggesting that perhaps it was "staged". The grandparents did not call the police, went to sleep the night the mother left, and sent the note to the four older children by email. The father did call the police when he learned of the note late on the night of April 15th from one of the children. The grandfather conceded in his evidence in this application that sending a copy of the note to the older children by email was not the wisest choice.

[22] When the police first approached the grandfather in their attempt to locate the mother, he initially pleaded with the police to give her a little more time as he wanted to honour her desire to be left alone. The police did speak to her the following day at a

friend's home and took no further action. The mother stated in her evidence that the note was not intended to be a suicide note, but a cry for help.

[23] The mother met with the grandparents in the pastor's office several days later and asked them to assist with caregiving of the children as she needed time to recover. At that time the grandfather described her as weak, hollow and deadened in her appearance. The grandmother also noted that she had been present when the mother received the call from the school that Z. and R. were missing and also when the police did not offer help to the mother to have Z. returned to her home. She described her daughter as worn-out, defeated and hopeless.

[24] The grandparents became the primary caregivers of the three younger children, first in British Columbia and then in the Yukon, when they moved back for the summer of 2018. The mother entered into a custody agreement with her parents. Although that agreement was not cancelled until April 2019, counsel for the mother advised that gradually the mother returned to her parents' home from the friend's house where she had been staying, and resumed caregiving responsibilities for the children. The grandmother says that by June 2018 the mother had moved back to the house with all of them, although she was still very fragile.

[25] The mother, grandparents and three youngest children did not return to British Columbia in September 2018 for school. Instead, the mother enrolled the children in school in the Yukon. The mother says that this is in part because although she preferred that they attend ACS, she could not afford it and the father did not agree to pay the fees, nor was he ordered to. Further the mother wanted to protect her three youngest children "from being taken as Z. was."

[26] Remaining in the Yukon had consequences for in-person access by the father, as he remained in British Columbia, in order to continue his work as a heavy duty mechanic, and earn sufficient income to support his family.

[27] The telephone access did not occur when the grandparents assumed caregiving responsibility because they said they could not find anyone to monitor the calls, despite multiple attempts. The mother and the grandfather were unable to do so because when the criminal charges were instituted against them in August 2018, a no contact order between them and the father was made. The no contact order extended to the three oldest children as well – K., R. and N.

[28] The father has not seen the three youngest children for an in-person visit since April 2018. He was not able to speak to them by telephone from approximately July 2018 until approximately mid-March 2019.

[29] In March 2019, after the father brought this application, telephone access with the three youngest children was facilitated and monitored by a third party. They were able to talk to their father on March 24th, 31st, and April 7th. Although the mother agreed to two calls per week, she told the father that she was unable to find a monitor for the second call so at the time of the application this has not yet happened.

CUSTODY, RESIDENCE AND ACCESS

(i) Parental alienation allegations

[30] The father says the lack of contact he had with the three youngest children for approximately eight months is evidence of parental alienation by the mother against him. He says the fact that the children say now they only want to talk to him once a week, that the youngest child, E., does not want to participate in the calls, and that they

do not want to write letters to him, represents a change from their earlier statements that they wanted to spend time with him. This dramatic change he says is evidence of a damaged relationship, caused by the mother and the grandparents.

[31] The oldest daughter, N., supports the father's belief that the mother and the grandparents are attempting to alienate the three youngest children from him. She believes that the mother and grandparents twist words and mischaracterize events and conversations involving the father and fears that they are telling the children false and misleading things about the father. She recounts an incident from the summer of 2018, where the grandfather read her mother's affidavit filed for the October 2017 application to her and asked her whether she thought S. should live with her mother or with her great-aunt. N. did not answer directly and interpreted this event as her grandfather's deliberate attempt to turn her against the father. She also describes in detail a number of times her mother and grandparents have not permitted her to see her younger siblings. She attributes this to her mother's and grandfather's anger that she may be a Crown witness in the criminal proceedings against them and so they are withholding visits as punishment.

[32] The great-aunt is also supportive of the father although her information is primarily from the three oldest children, who she says all say good things about their father. She does not believe the father is manipulating them. From her limited observations of him, she concludes that he has done nothing to alienate the children from the mother. The great-aunt further denies the allegations by the mother that she encouraged Z. to run away and resisted getting Z. into school in Sechelt. She also expresses concern about the three youngest children being isolated from their siblings

and father and “very likely being given a sense of the world that is not based on fact.” She also fears they could be subject to verbal abuse from the mother.

[33] The mother says the father has alienated or tried to alienate the children for years against her, during their marriage and after their separation. Her counsel noted that the father sowed the seeds of alienation with the children at an early age, as he undermined her role as a parent and told the children they did not have to obey her. After the separation and for two or three days after the supervised visits with the father, the children would fight with each other and attack her for breaking up the family and making their father sick. As noted above, the mother also believes the father and R. planned and encouraged the fleeing of Z. from her home. She says the past context provides the reasons for her current and ongoing fear that the father will alienate the three youngest children from her.

[34] The mother also raises the concerns expressed by Suzanne Edmundson of Axiom Investigations Ltd., the company that provided the supervision for the visits, about the father’s behaviour. Ms. Edmundson stated in an email to the mother and the father dated March 20, 2018 that an “Us vs her” mentality had been created and fuelled at recent visits. She attributed the unacceptable way that S. and J. were speaking to her and challenging her, to the way that the father was speaking to her, which she also found unacceptable. She wrote:

> I would not allow my daughters to think that is ok to allow *any* man to speak to them in the manner in which these children see their father speak to me (and then *they* speak to me in the same manner, which goes uncorrected); resulting in the “*Us vs Suzanne*” dynamic. As mentioned, this seems to be escalating. (emphasis in original)

[35] The grandfather also describes the father as making himself the victim and carrying out a systematic campaign to persuade the children that the problems in the marriage were caused by the mother. He describes a controlling, manipulative approach to parenting by the father, based on fear, and that approach has extended to influencing the children negatively about their mother.

(ii) Analysis

[36] The question I must decide is whether there has been a material change in circumstances sufficient to justify a change in the interim custody, residence and access order of 2017. The father says that the complete denial of access to his three youngest children for a period of approximately eight months is sufficiently material to justify the change. The mother does not deny that she and her parents did not facilitate access to the father. She explains it was a result of her breakdown from the loss from her household of her 16 year old daughter, Z., and her fear of losing the other three children to the father, based on what has occurred in the past and to date. She also says it was not deliberate, but a result of the difficulty she and her parents had in finding a suitable monitor for the telephone conversations, especially once the no contact order was in place.

[37] There are two legal principles to guide the decision in this case. The first is that any decision must be in the best interests of the children (*B.A.J. v. V.L.*, 2010 BCSC 514, para. 13). The decision must recognize that the children are the ones who suffer the most in these conflicts. It is important to remember that the role of the courts is not to reward or punish the parents, but instead to maximize for the children the benefits

that each parent can provide them. The courts are left to make a choice about the least detrimental alternative.

[38] The second legal principle is whether there has been a material change in circumstances. Has there been a change in the condition, means, needs or circumstances of the child or in the ability of the parents to meet the needs of a child, which materially affects the child, and which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order? (*Gordon v. Goertz*, [1996] 2 S.C.R. 27.)

[39] Another relevant concept in this case is the conclusion set out by Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3, para. 161, that "maximum contact between the child and the non-custodial parent is a worthwhile goal which should be pursued to the extent it is in the best interests of the child."

[40] In this case, both parties accuse the other of engaging in parental alienation of the children against the other parent. This is a serious allegation and some courts have said that expert evidence is required. Even where courts do not require expert evidence they normally have evidence from the child through an advocate or assessor. It is very difficult to decide whether alienation exists without hearing from the child.

[41] Alienation has been defined as one parent turning the child against the other parent without justification (*Williamson v. Williamson*, 2016 BCCA 87 at para. 41). This is to be distinguished from estrangement, in which there is a logical and rational reason for the rejection of a parent (*D.S.W. v. D.A.W.*, 2012 BCSC 1522, at para. 28). The difference between alienation and estrangement lies in the cause.

[42] The determination of alienation is done by assessing the reasons given by a child for rejecting a parent. The reasons need to be assessed based on the particular personality and experience of the child involved and to determine whether it is proportional to the decision to reject. As noted by the Court in *D.S.W. v. D.A.W.*, at para. 64, "[w]hat may seem a thin or unconvincing rationale for one child may have a much more convincing force in the context of the personality and experience of another child."

[43] In order to make the drastic change to the custody, residence and access order requested by the applicant here, (the first request, not the alternative request) it is necessary to find the mother "guilty" of alienation. It is also necessary to determine whether the father has engaged in alienation behaviour, because if he is awarded interim custody and residence, and he is, as the mother says, attempting to alienate the children, there is a danger that the mother may lose the children to the father, as she fears.

[44] There are many allegations on both sides of this divided family and their respective supporters, but in the end a full determination of alienation by either parent is not possible to make without hearing from the children themselves.

[45] The children now appear to be settled in their living arrangements and at their school. Over the past school year, they have been doing well both academically and in extra-curricular activities. There appears to be some stability in their lives, after a significant amount of upheaval in the previous two years or so. They are living in the Yukon, where they were born and mostly raised to date. I find it is in their best interests, to the extent I can determine on the material before me, for them to remain in the

Yukon, living with the mother and the grandparents. The mother shall continue to have interim custody, primarily because the no contact order between her and the father makes joint custody at this time impractical. While there may have been a change in circumstances, it is not material enough to warrant another upheaval in the lives of the three youngest children.

[46] However, access by the father to the children must be restored immediately. The mother's breach of a court order by denying access by the father to the children is inappropriate behaviour that is not to be rewarded. Although access to the father has been partially restored, it is not to the point of the court ordered access in October 2017, and it was not until this application was brought that this occurred. There has been a lack of meaningful effort to facilitate telephone access between the father and the children. While some gaps in access because of certain events such as Z. running away, the family moving back to the Yukon and the criminal charges instigated by the son against the mother and grandfather, may be understandable, the long period of time that has passed without any in-person or telephone access by the father is not acceptable.

[47] Research has generally concluded that children benefit from a continuing relationship with both parents after separation and court decisions have encouraged those relationships. This case is no different. The children should continue to have a relationship with their father, and the mother and her parents should not discourage it.

[48] Given that the father is remaining in British Columbia, and they are in the Yukon, in-person access will necessarily not be as frequent as ordered in 2017. The father shall have the ability to have in-person access whenever he comes to the Yukon at times to

be worked out by the parties. There is no evidence before me to suggest that the children are unsafe with him. I will vary the order to allow him to have unsupervised access to the children.

[49] I also do not see sufficient evidence at this time to support monitoring of telephone calls between the father and the children. The wording of the October 2017 order about monitoring of telephone calls was that the mother shall be allowed to monitor the calls. It made no provision for the situation if the mother was not able to. It also left it to the mother to monitor or not - in other words if she chose not to monitor the calls, there was no provision setting out an obligation to find another monitor. I will order that the father may also have telephone access with the children whenever they wish to call him, and he may call each of them twice per week, and that access is not required to be monitored.

[50] As indicated at the outset, this order will be interim, hopefully pending an assessment of the children and in particular the effect the conflict has on them and a determination of their preferences.

[51] As noted in many decisions, it is the children who are affected the most by the adults' inability to cooperate or communicate civilly with one another. The children of separated parents are entitled to form healthy relationships with both parents to the extent it is in their best interests and to maintain contact with all of their siblings to the extent it is in their best interests (in this case, contact with the oldest son K. is likely not in their best interests at this time). The evidence in this application shows that the mother, the father and the grandfather have all engaged in behaviour that is manipulative, negative and attacking. The affidavits show the absence of trust among

the adults and adult children in the family, leading to ascribing motives to statements and actions of family members that may not be correct or at least highly disputed. The children may be confused in their loyalties and about what is true or not. I hope that in moving forward the allegations by the mother and father against one another and by the grandparents against the father will stop. I will add to the order that neither party will speak negatively about the other in front of the children, and neither party will discuss any aspect of the litigation in front of the children.

IMPUTED INCOME

[52] The father seeks to impute annual income to the mother of $25,000, a calculation based on the current minimum wage in the Yukon. He says that although she was the primary caregiver of their seven children, she is capable of earning more than $2,000 - $5,000 per year, the annual amount she has reported to date. He says that her recent reports of working 39 hours per month is not justified, especially with all three children in school all day and with all of them living at her parents' home.

[53] The mother states that she has celiac disease that was undiagnosed for many years. She also has an iron deficiency for which she requires shots every two or three months. She says she tires easily and this has affected her ability to maintain full time employment. She has a long-term goal of completing an interior design program and is currently taking two courses through distance education.

[54] The mother has come through a major upheaval over the past year or so. She is embroiled, as is the father, in ongoing adversarial litigious disputes over her children. She is facing criminal charges initiated by her oldest child. She has recently left a 21 year marriage that began when she was 18 and where she was the primary caregiver

for seven children while her husband was the income earner. While she has some bookkeeping experience, she did not have the opportunity to gain marketable skills during her marriage. Her youngest is still only eight years old. She is trying to upgrade her skill level so that she may become more employable. I agree with the mother that given the current and past context this will take time and so I decline to impute income to the mother at this time.

CONCLUSION

[55] I therefore order that the October 2017 order is varied as follows:

i. The mother shall have interim custody and primary residence of the following children of the marriage: S., J., and E. (the "Children");

ii. The father shall have in person access to the Children at times to be agreed upon by the parties;

iii. The Children shall be allowed to telephone the father at any reasonable time, and the father shall be entitled to initiate a telephone call with each child twice per week;

iv. Neither party will speak negatively in any way about the other party at any time to the Children or in the presence of the Children; and,

v. Neither party will speak about this litigation to the Children or in the presence of the Children.

[56] Costs may be spoken to if necessary.

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DUNCAN J.