

IN THE SUPREME COURT OF YUKON

Citation: *A.O.J.T. v. C.A.T.*, 2008 YKSC 10

Date: 20080207
S.C. No. 04-B0001
Registry: Whitehorse

Between:

A.O.J.T.

Plaintiff

And

C.A.T.

Defendant

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

Before: Mr. Justice R.S. Veale

Appearances:

Emily Hill
Robert Dick
Christina Brobby

Counsel for the plaintiff
Counsel for the defendant
Counsel for Family and Children's Services

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a high conflict custody dispute that began in April 2004, when the father commenced a court action for joint custody of the child who is now approximately four years old. All applications have been based upon affidavit evidence and hotly contested. The father now seeks interim custody and primary residence of the child. The mother

opposes but she has not filed any response affidavits to answer the affidavits of the father filed August 13 and October 1, 2007.

BACKGROUND

[2] The father filed the court action in April 2004 because the mother refused to grant him access since the child's birth in 2003. The mother initially contested the paternity of the father but I ordered that the father is the biological father of the child on July 27, 2004. That order granted the father's first access to the child for two hours from 4:00 to 6:00 p.m. Monday, Wednesday and Friday each week so long as it was supervised by his mother, the paternal grandmother. The father resides with his mother and she has been in attendance at most of the court hearings.

[3] The father's access was to be reviewed on September 21, 2004, and on October 4, 2004, in a written judgment cited as 2004 YKSC 68, I ordered interim interim joint custody of the child to the parents with the child residing primarily with the mother except each Monday from 9:00 a.m. to Tuesday at 5:00 p.m., when the child resides with the father. Both parents were ordered not to smoke or use alcohol or drugs when the child resides with them. The residency of the child was contingent upon the father participating in the Healthy Families Programme which was already in place with the mother. Both the mother and father were ordered to take the separating parents programme "For the Sake of the Children".

[4] The court recommended that a custody and access report be prepared with a review to follow the filing of that report.

Custody and Access Report

[5] A very comprehensive report was prepared by Dr. Joanne Tessier, a Chartered Psychologist, on May 5, 2005. The report covered the child, her birth parents and their respective spouses. The respective spouses are no longer in the picture.

[6] Dr. Tessier concluded that both parents and their partners have adequate parenting characteristics that would permit shared responsibility in parenting their child. However, she identified three conflict issues: the child-parent attachment bond between the father and the child, the mother's unwillingness to foster the father-child relationship and the conflict between the mother and father.

[7] Dr. Tessier confirmed that current research indicates that a child functions best with minimal parental conflict and can benefit from equal parental care and involvement provided a sufficient attachment bond has developed.

[8] Dr. Tessier employed a parenting questionnaire that utilized a Child Abuse Potential Inventory (CAP Inventory). The CAP Inventory was designed as a screening tool for the detection of physical child abuse. Scores above the cut-off scores are indicative of possible areas of concern.

[9] Regarding the father, Dr. Tessier stated that he:

“... scored below the recommended cutoff score on measures of potential for abuse. He scored above the mean and median of sample groups on the ‘distress’ and ‘problems with family’ and ‘problems with others’ scales, and below the mean and median of sample groups intended to measure problems with rigidity, problems with child and self, and unhappiness. There is indication of adequate ego strength with respect to parenting. Overall there is no indication of potential for child abuse.”

[10] Regarding the mother, Dr. Tessier stated that she:

“... scored below the recommended cutoff score on measures of potential for abuse. As well, she scored below the mean and median of sample groups on the abuse scale, and with the scales intended to measure problems with child and self, problems with family, and rigidity. She scored slightly above the mean and median on the scales intended to measure problems with others and distress. Overall there is no indication of potential for child abuse.”

[11] Dr. Tessier recommended a parenting schedule that maintained joint custody in terms of shared decision-making and equal access to both parents with a schedule, while the child is young, for short stays being modified to longer stays once she is of school age. She recommended an arrangement that progressed gradually until the child spent half time with her father.

THE FACTS

[12] Following the filing of Dr. Tessier's report, on November 23, 2005, the court was to review the custodial arrangement for the child. The parents filed affidavits. The mother opposed the joint custody recommendation and raised the fact that the father and his mother were having problems with lice with the other children at their residence. The father addressed the lice issue and indicated that his relationship with the mother had improved to the point where they might be able to agree on a shared residency schedule for the child.

[13] A consent order was filed on February 16, 2006, providing for joint custody and residence with the child residing with the father from Sunday at 9:00 a.m. to Wednesday at 12:00 p.m. each week.

[14] In October 2006, the mother filed an application for an order that the child reside with each parent for alternating 30-day periods. Significantly, she indicated that the new sharing arrangement was working satisfactorily for the most part and the child had adequately bonded with each parent. However, the mother was having difficulty finding an appropriate residence in Whitehorse and she was considering a move to Terrace, British Columbia, where her mother resides and she has extended family support. Terrace is 1,252 kilometres from Whitehorse and the mother proposed that she would drive the child back and forth to Whitehorse each month or meet the father half way. The mother's application was not set down for a hearing. The mother has not filed any affidavit material since October 2006 although she has appeared at some court hearings.

[15] The father applied in August 2007 for interim custody of the child and a prohibition from removing the child from Yukon. He stated that the mother had 13 different residences since August 2006 and that as a result, the mother agreed that the child would reside with the father on a full time basis for a brief period. The mother secured a residence and the regular sharing resumed.

[16] The mother also encountered problems with her new spouse. She pled guilty to assaulting him and received a conditional discharge with six months probation on March 20, 2007. They no longer reside together.

[17] The mother was also charged with assaulting the father's mother, who is closely involved with the care of the child. This incident arose when the grandmother refused the mother access to the child. No evidence has been presented on the outcome of this charge.

[18] There are additional issues. The father was not receiving any support from the mother whose consent was required for the child to attend a medical appointment for allergy testing.

[19] The child was also exhibiting disturbing behavioural problems, suggestive of sexual abuse, and the day care recommended counselling for the child at the Child Abuse Treatment Service (CATS) but the mother did not consent to the treatment until the Family and Children's Services (the child protection authorities) intervened.

[20] However, a child protection social worker advised the father in April 2007, that there was an allegation that he had sexually abused the child. The allegation was made by the mother based upon disclosure by the child. The father's access was temporarily revoked while the child protection service investigated and eventually his access to the child resumed. The sexual abuse allegation has been unsubstantiated but the investigation is ongoing. Apparently, new disclosures have been made by the child against the father and a new partner of the mother. They have not been investigated because of the child's young age.

[21] The investigation of the Family and Children's Services is contained in a letter dated May 31, 2007, to the father. The letter advises that allegations of physical abuse of the child have been made against both the mother and father. The letter also concludes that both parents have exposed the child to unnecessary trauma because of the unhealthy conflict of the parents.

[22] The court responded to concerns about male caregivers by ordering that all male caregivers shall have only adult supervised access to the child. This includes the father and the mother's partner.

[23] Counsel for Family and Children's Services has participated in this proceeding to the extent of filing an affidavit of a social worker. This affidavit is the only independent evidence before me. It presents a disturbing picture. The father has been investigated previously for a complaint of sexual interference against a female youth as well as the disclosure of sexual touching by his child. The father has declined to participate in a polygraph test on both occasions.

[24] The father has denied these allegations in a subsequent affidavit.

[25] Family and Children's Services does not support any change in the current status of custody and makes the following recommendations:

- a) Both [parents] will have assigned Social Workers to monitor further follow up regarding concerns of emotional abuse of [your child], and to ensure that you are both able to follow through with appropriate community supports.
- b) Both [parents] will follow through with connecting with Child Abuse Treatment Services (CATS) for yourselves, and for [your child]. While [your child] is on a waitlist with CATS, you [both] will make a connection with family counselling services available through Gloria Baldwin Schultz. [Your child's] paternal grandmother, is also encouraged to connect with CATS services. It is important to understand that as much as [your child] needs assistance in sorting through the issues she has been exposed to over the last while, you as her parents need to learn how to respond appropriately to [your child's] behaviour and disclosures. CATS can provide that learning.
- c) Once [your child's] spot at CATS becomes available, you [both], as her parents will ensure that she makes it to her appointments.

- d) Until [your child] has made a significant connection with a counsellor at CATS, or another agency offering similar services, she is not to be left alone with [the father], or any other male caregiver that has not been approved by a Social Worker at Family and Children's Services.
- e) [Your child's] caregivers will not discuss sexual abuse concerns, custody and access matters or any other adult problems with, or in front of [your child].
There is to be no verbal or physical fighting in front of the child.
- f) To provide [your child] with an opportunity to begin recovering from her exposure to the unhealthy conflict between her various caregivers; each caregiver will tell [your child] one positive thing about the other parent at least once a day.

DECISION

[26] This court is always guided by the best interests of the child. In some cases, especially high conflict cases such as this one, it is questionable whether the best interests of the child are met by either parent. On the one hand, the mother has not been in very stable circumstances as to residence or partners, has been assaultive and her animosity to the father and his mother remains high. There may be valid reasons for this but none have been put forward by the mother.

[27] On the other hand, the father presents as a stable alternative for the child with his mother assisting and now supervising in his child care. However, there are disturbing allegations about his conduct that would disentitle him to anything but strictly supervised access.

[28] I am not in any position, on affidavit evidence alone, to second guess the recommendation of Family and Children's Services, who are fortunately monitoring this difficult situation very closely. Family and Children's Services do not support any change in the current status of custody. In my view, the best interests of this child are to leave the existing joint custody consent order of February 16, 2006, in place with the added conditions (a) to (d) set out above and recommended by Family and Children Services.

[29] I also order that this matter be set down for a case management meeting to determine an appropriate date for review of the joint custody of the child. It would be most helpful if a CATS report was filed. I recommend that a Child Advocate be appointed. Counsel for Family and Children Services may attend case management meetings.

VEALE J.