

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *C. v. C.*, 2005 YKSC 67

Date: 20051208
Docket No.: S.C. No. 05-B0055
Registry: Whitehorse

Between:

N.C.

Petitioner

And

J.P.C.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Kathy Kinchen
Edward Horembala, Q.C.

Counsel for the Petitioner
Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the father for interim joint custody of his six month old daughter. The mother opposes and applies for interim custody with supervised access to the father, or alternatively unsupervised but no overnight access.

ISSUE

[2] The main issue is a factual one of whether the father viewed a child pornographic site or link on a computer. Numerous affidavits in support of each parent have been filed. Cross-examination took place on the affidavits of each parent and the principal

where the father teaches school. On October 3, 2005, prior to the cross-examinations, and on an interim interim basis, I ordered that the father have unsupervised access to the child for four hours on each Tuesday, Thursday and Saturday.

[3] I will discuss the background, the evidence in dispute and make findings of fact. I will then decide the custodial regime on an interim basis. As the custody issue may continue to trial, I recommend that a custody and access report be prepared. Counsel may request a pre-trial conference to set an early trial date.

BACKGROUND

[4] The father and the mother are employed. They are both in their thirties.

[5] The mother and father began dating in May 2004. They commenced a common-law relationship in the summer of 2004. The relationship was volatile, although not in an abusive sense.

[6] The mother became pregnant in September 2004. She felt insecure in the relationship, particularly with a baby expected in May 2005. She also found it stressful to be the perfect girlfriend as well as operating a successful business.

[7] Matters came to a head on the first occasion in January 2005. The mother was on her computer which she and the father both used. She discovered by chance that the father was accessing pornographic websites on her computer. She was naturally quite upset by this, especially having just learned that she might have possible foetal complications.

[8] The mother phoned the father at his school informing him that she had found the websites that he had visited. The father readily admitted to visiting the sites and promised never to do it again. The mother was angry because some of the sites had

images of teens. The father explained that he was on the sites partly by accident and partly out of curiosity.

What websites did the father view?

[9] The mother alleges that the father visited child pornographic sites on her computer. The father admits that he visited pornographic sites of consenting adults on December 27, 2004, and January 10, 2005. He denies that he ever visited child pornographic sites.

[10] In a letter dated January 11, 2005, the mother wrote that she was shocked that a teacher who works with teenage girls could visit a child pornographic site. She said that she would be leaving him by the end of the month.

[11] The mother learned of the visits when she received an e-mail from a client with an attachment that had pornographic pictures, some of children being around the ages of 12 to 16. At first, she thought her client had sent them. She then discovered that her temporary internet files were filled with child pornography. The log showed that the father viewed pornography from 12:30 p.m. to shortly before 4:30 p.m. on January 10, 2005. She states that he admitted looking at the images.

[12] The mother went to the links that were saved on her hard drive. One of the websites was called *milk and cookies.com* which had links entitled *www.twelfefifteen.com*; *www.thechumps.com* and *www.sexyfunpics.com*. She alleges there were more. The sites are no longer saved on her hard drive.

[13] The father states that he readily admitted visiting the sites “partly by accident and partly out of curiosity”. He acknowledged that he viewed the website *milkandcookies.com* that had links to sexually explicit pictures on two occasions: once in

December 2004 and once in January 2005. However, he stated that his visit on January 10, 2005, was for about an hour and the sites did not contain child pornography. He used the term “accident” to refer to the unintentional nature by which some of the pages were accessed via pop-ups which he states he closed without viewing. He explained that the word “curiosity” referred to the viewing of explicit images of consenting adults.

[14] In his cross-examination which was long and arduous, the father did not waiver from his evidence that he only viewed consenting adults in sexually explicit images. He did not view any child pornography. He acknowledged they may have popped up but he deleted them without viewing the images.

[15] A web administrator printed pages from the website called *www.milkandcookies.com*. He printed off the home page, the latest links page and the Frequently Asked Questions (FAQ) pages. While the website is not a pornographic site itself, it encourages users to submit links “that are stupid, geeky” etc. but it claims that “porn sites and sites with porn banners” will not be listed. However, it also states that all links are initially “unmoderated” which means that the “link hasn’t been looked at yet, or that it hasn’t been deemed worthy of being a permanent link”. I conclude that the website has pornographic links for limited times before they are removed as well as permanent links to pornographic sites.

[16] The significance of the difference between viewing sexually explicit images of consenting adults and child pornography is that the latter is a criminal offence. Child pornography is defined in s. 163.1 of the *Criminal Code* as a representation of a person being under the age of eighteen years and depicted as engaged in explicit sexual

activity. The father was well aware that viewing child pornography could lead to being fired as a teacher.

[17] To conclude this section of the evidence, the father admitted that he went to websites with sexually explicit images of consenting adults. He denies that he viewed any child pornography but he admitted that there were pop-ups but he never viewed any of them. He stated that he did not know the pop-ups were of child pornography.

What did the father tell his principal?

[18] The father filed a letter from his principal stating that the father is an “excellent teacher” and “a person of high integrity”. The father also testified that he advised the principal of the allegations and of the situation. Specifically, he said that he advised the principal that he had viewed adult pornography and that the mother was alleging that he viewed child pornography.

[19] Counsel for the mother cross-examined the principal to determine what information he was given by the father before writing the letter of good character. The principal recalled that the father disclosed that he had viewed some adult pornography at home and that it could come up in court. The principal said there was no discussion of child pornography. He was not sure whether he was advised of this before he wrote the letter or the day after but “it was around the same time”.

[20] The principal agreed that if anyone working in a school disclosed that they were watching child pornography, there would be a serious investigation. However, he would not change his letter based on an admission of viewing adult pornography but he would have changed it if there had been an admission of viewing child pornography.

The Evidence of the Mother

[21] The father stated that the issue of viewing pornography was very upsetting to the mother at the time it occurred. He said he apologized for hurting the mother and promised never to do it again. He testified that the issue was not raised again until he commenced this court action for interim joint custody and unsupervised access to his daughter.

[22] The mother moved out of the father's house on January 22, 2005. In her e-mail of the same date, she did not mention the pornography issue which she set out in her letter of January 11, 2005. In describing the pressure she was feeling, the mother said:

“... I am in a bit of a state right now, and I am fending for myself. I don't know what will happen to us, as a couple, or as a family. I told my mother I was going to abort and she was very angry. I am still undecided. You have no idea the burden, stress, pressure, expectations I carry around with me each day. You have a pretty easy existence compared to me. This whole situation is very stressful and frightening. It is difficult to make these decisions on my own. ...”

[23] On January 25, 2005, the mother e-mailed the father's mother. She stated that she may have made a terrible mistake, as it was not her intention to leave the father for good. She wanted both of them to have some space to think and reflect. In speaking about the stress and pressure she has felt, the mother said:

“... I have felt like a pressure cooker for sometime time [*sic*] now, and I think I exploded on Saturday. I want [N] to be in my life and I have told him I want to work through this ... I want to rebuild. Anyway, I am so frightened right now that I will be a single mother. I want my child to have more than just visitation rights to his father..I want him to have a father, and [N] would be an amazing father and husband. Everything has just happened so fast for us, I can't keep up, let alone adjust. ...”

[24] On March 16, 2005, the mother e-mailed the father and stated:

“I have never needed anybody so much as I need you right now. You denying me this has caused me great pain. I can not deal with this pain right now. I want you out of my life right now...possibly for good. ...”

[25] The father began seeing a counsellor in November 2004 to deal with the issues in their relationship. He continued to see the counsellor in 2005. When the mother indicated she wanted to reconcile, they met with the counsellor and were advised to begin dating slowly. They successfully reunited on May 1, 2005, when the father moved into the mother’s home. The child was born on May 31, 2005. Both the mother and father were involved in caring for the child but it was a difficult time emotionally for the mother.

[26] On August 1, 2005, the mother suggested they have a trial separation. The father moved out. He immediately advised the mother that he wanted to see their child. The mother indicated that she wanted to be present. She expressed her view in an e-mail on August 2:

“... [N], I also don’t feel comfortable you “visiting” [the child] right now as I am doing all of the parenting and household stuff and don’t feel it fair right now that you get to just take her for walks. I want us to be a family. I want to talk to you and discuss solutions. ...”

[27] The mother said that her doctor advised she was suffering from post partum depression and needed time to get back on her feet.

[28] In an e-mail dated August 8, 2005, the mother said she wanted the father to come home to his family. She said:

“... You have hurt me more than words can describe [N]. You were such a wonderful man to me up to last week. You were wonderful during [the child]’s birth and the weeks following ... but I need you here in the house.. it is too hard otherwise. It is tiring taking care of [the child] unsupported. I want her to have a father [N]...and that is you. Please...yes I am begging because this is way too important...come home!!!! ...”

[29] On August 12, 2005, the mother wrote in an e-mail:

“[N], I am so hurt by your actions today. I Love you very much and was willing to do whatever necessary to get us back on track. I wish you could see how much I care for you. My heart aches. Please understand that having contact with you is too hurtful for me right now. I can not let you see [the child] until I have healed, I am sorry. I hope you can forgive me for whatever wrong I have caused you. You will be a part of [the child]’s life, just not right now. I will let you know when I feel strong enough for this to happen.”

[30] The mother then took counselling, and, on the advice of her counsellor, wrote a lengthy conciliatory e-mail dated August 15, 2005, to the father. After offering to meet the counsellor together, she wrote:

“You are a patient and caring man that deserves trust and respect. How I treated you in the past was disrespectful, untrusting and uncaring. I am sorry. I own this behaviour and am willing to change. I am taking steps towards change and I know I will make progress.

...

... I am also willing to let you take [the child] for visits, without me being there. This is very difficult for me to do as I love her so much and find it hard to part with her, but to show my trust and love for you I want you to be with her as you see fit, on your terms. For now- 1 – 2 hours is the most I can handle away from her. As time goes on I will be willing to let you be with her for longer. I hope you can understand that.”

[31] The mother never raised the issue of viewing pornography with the father after her letter of January 11, 2005. However, she testified that the subject never left her mind. She explained that she was afraid and physically weak and “it was something I chose to overlook at the time”.

[32] In further explanation of her e-mails she stated:

“... I think ... when I read these e-mails, it’s almost like I didn’t write them. I wasn’t myself. I wasn’t myself physically, I wasn’t myself emotionally, and back and forth, I mean it’s even in the e-mails, the manic, the back and forth. It was an emotional roller-coaster for me. I didn’t know what to do.”

[33] The mother denied that the father’s refusal to move back in was the motivation for not allowing him to have unsupervised time with their child.

[34] There is a further document dated August 16, 2005. The father states that there was an agreement arising out of a joint session with the mother’s counsellor requested by the mother. Paragraph 5 of the document states:

5. Set hours to visit [child] solely or with me depending on your preference leading towards overnight visits.

[35] The mother claims that she did not read the document which was prepared by her counsellor. The document was not signed by either the mother or the father.

[36] The mother also states that she was in a fog from May 31, 2005 to September 1, 2005 and that :

“... Since September 2005, I have regained my emotional and physical strength and don’t feel as vulnerable and realize that the conduct of the plaintiff that I discovered on January 11, 2005, had to be addressed in and for the best interest (of my child).”

[37] The mother does not think it would be easier to share the load of raising the child together as she has the child on a schedule that works for her with the assistance of her mother. However, she did indicate on November 1, 2005, that she was comfortable with the interim interim access rights.

[38] As to the specific concern of the mother on the pornography issue, she expressed concern that the father would access child pornography while her daughter was on his lap. However, she has no evidence that the father has an interest in or is inappropriate with children.

[39] The father has made arrangements to take parental leave from his employment in order to be involved in the upbringing of his daughter. He will be on leave from January 1 to September 2006.

FINDINGS OF FACT

[40] I make the following findings of fact:

1. The mother did not raise the issue of child pornography after her initial telephone call and letter of January 11, 2005.
2. I accept the father's evidence that he viewed adult pornography. There is no evidence to suggest this would have a negative impact on the child. While there were minor discrepancies in the evidence of the principal and the father, it would not result in a different letter of good character.
3. While the mother was undoubtedly in an emotional state throughout their relationship, she had nothing but praise for the father's relationship with the child and his assistance in raising the child.

4. The mother's concern about the pornography issue appears to be motivated by her desire to have the father at her home as a full-time father rather than merely having visiting rights.
5. There is no evidence that care and control of the child by the father would not be in the best interests of the child. Indeed, when not contemplating a dispute over custody and wanting to reconcile with the father, the mother felt he was an excellent father.
6. The mother no doubt has a very protective relationship with their daughter, but there is no basis on which to limit or place conditions on the father's care and control of their daughter.

DECISION

[41] I conclude that there is no basis on which to limit the father's involvement with his daughter. The father has, on the mother's own evidence, demonstrated excellent parenting skills.

[42] An allegation that a father is accessing child pornography is always a disturbing element in a custody application. It conjures up speculation of all sorts of concerns about the welfare of the child. In *M.D.B. v. D.A.B.*, 1999 ABQB 973, the mother was informed by the police that the father was about to be charged with possession of child pornography. She had discovered child pornography on their computer. She applied for the father's access to be supervised. The court found that the mother did not establish that the father's behaviour in accessing child pornography raised concerns about the child's best interests. The children were two and nine years old.

[43] In the case at bar, I have found that the father did not access child pornography but he admitted to viewing adult pornography. However, I do not find that behaviour has diminished his parenting skills, to which the mother attests, or put their daughter in any danger.

[44] Unfortunately, the father's decision not to return to what was clearly an emotionally volatile relationship has resulted in a certain amount of animosity between the parents. However, I see no reason that their child should not have the benefit of a joint custody order to express the full and equal role of each parent in the life of their daughter. As I have stated before, joint custody does not mean that there is a 50 – 50 sharing of time with the child. Rather, it is a statement that both parents share equally in the rights and obligations regarding the child. This is in the best interests of the child and the parents to ensure that the child remains loved and cared for by both parents as much as possible.

[45] Joint custody is also particularly appropriate where both parents have a relationship with the child from birth. It is also very appropriate where the father has made plans to take parental leave from his job for the purpose of solidifying his relationship with the child. I therefore order interim joint custody of the child to the mother and father.

[46] The father acknowledges that he does not need to have care and control of the child on Christmas and Boxing Day this year as the mother's extended family will be visiting and they should have that special time with the child.

[47] I also order the father to continue paying child support to the mother in the amount of \$440 per month based on his income of \$51, 453.

[48] I make a parallel parenting order so that each parent controls the agenda of the child when under his or her care and control. This will avoid conflicts between the parents. Obviously, they should share information about the child and sometimes it is appropriate to pass a book back and forth to ensure full communication in addition to e-mails. However, communication does not permit one parent to control the child's time with the other parent.

[49] I also urge the parents to communicate respectfully with each other. They should remember to show respect for each other, particularly in the presence of the child. Parents must realize that their negative behaviour to each other can negatively affect the child's development.

[50] The terms of the joint custody order are as follows:

1. Up to and including December 31, 2005, the father shall have care and control of the child Tuesdays from 9 a.m. to 6 p.m., Thursdays, from 9 a.m. to 6 p.m. and overnight on Saturdays, from 1 p.m. Saturday to Sunday at 1 p.m. except for this Christmas and Boxing Day;
2. As of January 1, 2006, the mother shall have care and control of the child for four days in the first week and three days in the alternate week. The father shall have care and control for three days in the first week and four days in the alternative week. I will leave the specific times to the parents and their counsel to determine. The matter may be spoken to if necessary.
3. The father and mother are prohibited from permanently removing the child from the Yukon without the written consent of the other or an order of this court;

4. The mother and father may make alternative care and control arrangements to accommodate visits to family or trips outside the Yukon.

[51] The parties may speak to costs, if necessary. In the event this matter does not go to trial, the custodial regime will continue after the father returns to work in September 2006. However, each parent should offer care and control to the other parent during their workday before placing the child in daycare. Counsel may speak to any of these terms if they need some adjustment to accommodate unforeseen circumstances.

VEALE J.