IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *D.I.* v. *S.D.*, 2003 YKSC 33

Date: 20030626
Docket: 02-B0084
Registry: Whitehorse

Between:

D.I.

Plaintiff

And:

S.D.

Defendant

Restriction on publication: Publication of identifying information is prohibited by s. 172(2) of the *Children's Act*.

Appearances:
Ms. Kathleen M. Kinchen — Counsel for the Plaintiff
Ms. E. Joie Quarton — Counsel for the Defendant

Before: Mr. Justice Veale

REASONS FOR JUDGMENT

Introduction

[1] This is an application by each parent to change the residential arrangements that they have worked out in the past for their son, J., who is now 13 years old. The parents, mother D. and father S., entered into a parenting agreement with laudable principles on May 20, 1994. However, they have not been able to work out care and control arrangements with each parent having a different proposal. There is also an issue about child support, holidays and whether or not a custody and access report is required. D. and S. have agreed that there should be joint custody of J. and that neither parent may

permanently remove J. from the Yukon without the written consent of the other or a court order.

Care and Control of J.

[2] D. and S. had a common law relationship from May 1986 to August 1993. J. was born January 1, 1990. D., S. and J. have always lived in a small Yukon community in the western part of the Yukon.

[3] D. and S. now reside in residences that are within 500 metres of each other. After separation, they negotiated and signed a parenting agreement on May 20, 1994, containing the following principles, among others:

> [4] Shared Parenting Principles
>
> 1. Both D. and S. love their son J. very much, and each of them wishes to continue to be a good parent to J. even though they will be living in different houses.
>
> 2. J. has the right to have a good relationship with his mother and his father separately; therefore, S. and D. are prepared to honour the other's parenting style, privacy and authority and not to interfere or infringe upon the parenting style of the other.
>
> . . .
>
> [5] Residency
>
> 1. S. and D. agree that it is in J.'s best interest to be able to spend as much time as possible with both parents.
>
> . . .
>
> 2. S. and D. acknowledge that there will be circumstances (work, activities, work-related travel) that may require variations in the above noted schedule, therefore they are prepared to be flexible in making accommodations for such situations.

3. They also agree that it is in J.'s best interest to have easy access to both his parents, therefore they are prepared to make every possible effort to remain living in the local area.

[6] The present arrangement, which has been in place for some time, is a three-week rotation, where J. resides with D. from 7:00 p.m. on Sunday to 7:00 p.m. on Thursday, and with S. from 7:00 p.m. on Thursday to 7:00 p.m. on Sunday for two consecutive weeks. On the third week, J. resides with D. from 10:00 a.m. on Saturday to 7:00 p.m. on Thursday, and with S. from 7:00 p.m. on Thursday to 10:00 a.m. on Saturday. This schedule was agreed upon to accommodate the work location of S.

[7] D. now proposes a schedule that allows J. to spend every third weekend with her to allow her family to make plans for that weekend with J. This change results in S. having one less day with J. every three weeks. D. remarried in 1997 and has one three-year-old son.

[8] S. proposes that J. spend alternating weeks with each parent, with a mid-week dinner with the other parent. This is possible, as S. now works full time in the local area and is no longer on the road for portions of the week. Such a schedule would give J. two weekends per month with each parent.

[9] D. opposes the alternating week schedule, on the ground that J. needs someone to supervise and motivate him to complete his school homework. J.'s school performance has improved this year, and D. credits the assistance of J.'s stepfather.

[10] I have no doubt that D. should have a full weekend with J. for family activities. However, I am also of the view that J. should have a longer period of time with each parent, so that he is not changing residences with quite the same frequency. This also meets the objective of paragraph 2(a) of the parenting agreement, that it is in J.'s best

interest to be able to spend as much time as possible with both parents. It gives D. two weekends a month with J. It also gives S. an opportunity to assist J. with his homework.

[11] There is also a problem with summer holidays. Apparently, D. and S. have very little communication and the result is frustration and conflict when holiday plans are made in isolation. The only way to resolve this problem is to give each parent one-half of J.'s summer holidays, alternating each year. This will give predictability, but not flexibility, which can only come from D. and S. reaching their own agreement.

[12] I am ordering the following:

> [13] D. and S. will have interim joint custody of J.
>
> [14] D. and S. will have care and control of J. every other week, with the change-over occurring on Sunday night.
>
> [15] J. will have dinner with each parent mid-week during the other parent's care and control of J.
>
> [16] Each parent will have care and control of J. for one-half of J.'s holidays, including Christmas, spring break and summer holidays. This summer, J. will be in the care and control of S. from June 28 to July 22, 2003, and each summer D. and S. will alternate the half of the summer in which they have care and control of J. The split of Christmas holidays shall be alternated.
>
> [17] Neither D. nor S. can change the residence of J. from the Yukon Territory without the written consent of the other or a court order.
>
> [18] I do not recommend that a custody and access order be prepared. D. and S. have been able to negotiate a parenting agreement and make appropriate changes by consent. Hopefully, that will continue. J. appears to be a happy

child, with the love of both parents. Counsel may speak to me regarding any fine-tuning to be made with respect to the above order.

Child Support

[19] In their parenting agreement, D. and S. agreed to calculate the annual cost of caring for J. and pay for it in proportion to their income. They also agreed to pay for major health, eyeglasses and dental care in proportion to their income. Their agreement was prior to the Territorial Child Support Guidelines, which took effect on April 1, 2000. Under the parenting agreement in May 1994, S. was earning $50,700 per year, and D. was earning $29,390 per year. S. paid $350.00 per month for child support and forwarded it to D., whose share was $203.66. In September 1996, the parties agreed to reduce S.'s child support payment to $211.00 per month.

[20] S.'s income for 2002 was $71,775, and D.'s income was $37,120. This will be their incomes for the order that I make.

[21] There are two issues:

[22] Should there be retroactive child support paid by S. to D.?

[23] As I have made a shared custody order, where each parent has care and control for at least 40% of the time, what amount of child support should be paid by S. to D.?

[24] With respect to retroactive child support, D. and S. have not been able to renegotiate their parenting agreement since March 1998. The Territorial Child Support Guidelines came into force on April 1, 2000. S. has been paying $211.00 per month since 1996, which has been taxed in the hands of D.

[25] The British Columbia Court of Appeal has set out the factors governing the exercise of the discretion to avoid retroactive child support in *S.(L.)* v. *P.(E.)*, [1999] B.C.J. No. 1451 at paragraph 66:

> Factors militating in favour of ordering retroactive maintenance include:
>
> [26] the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent;
> [27] some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order;
> [28] necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses;
> [29] an excuse for a delay in bringing the application where the delay is significant; and
> [30] notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.
>
> Factors which have militated against ordering retroactive maintenance include:
>
> [31] the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations;
> [32] the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and
> [33] a significant, unexplained delay in bringing the application.

[34] I accept that D. did not have the financial ability to bring this matter to court. I also find that S. has the ability to pay since he earned $66,230 in 1999, $66,821 in 2000, $65,303 in 2001 and $71,775 in 2002. Negotiations were commenced in 1998 to implement the Federal Child Support Guidelines. No agreement was reached, and S. refused to provide copies of his income tax returns. I also find that there has been some unfairness with S. paying such a small amount for child support while having a greater opportunity to provide extra recreational equipment and holiday travel. He should have been paying $560 per month in April 2000, $549 per month in 2001 and $596 per month in 2002-03, assuming no shared custody deduction.

[35] In my view, my discretion should be exercised in favour of making a retroactive award. In doing so, I take into account the fact that a shared custody award would also be appropriate in that S. was in care and control of J. close to 40% of the time. I therefore award retroactive child support of an additional $200 per month from April 1, 2000 to February 1, 2003. This will be a total of $7,000, and I order it to be paid by way of an additional monthly payment of $200, commencing July 1, 2003 and each month thereafter until paid.

[36] The joint custody order that I have now made means that the shared custody clause of the Territorial Child Support Guidelines now comes into play. Section 9 reads as follows:

> **Shared custody**
>
> **9** Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of child support for the child must be determined by taking into account
>
> [37] the amounts set out in the applicable tables for each of the parents;
>
> [38] the increased costs of shared custody arrangements; and
>
> [39] the condition, means, needs and other circumstances of each parent and of any child for whom child support is sought.

[40] Unfortunately, there is no simple formula to apply s. 9 in all cases. Applying the guidelines tables, S. would be required to pay $596 per month, and D. would be required to pay $282 per month. I do not know the entire financial picture, as I do not know the income of D.'s husband, although I understand he is a seasonal worker.

[41] It is clear from *Green* v. *Green* (2000), 138 B.C.A.C. 121 (CA) that the intent of s. 9 is to grant some relief to the parent who exercises greater care and control beyond 40%

of the time, presumably based upon the increased expense to that parent. Unfortunately, the assumption of increased expense to S. may be valid, but the assumption of a corresponding decrease for D. in this case is more problematic because it doesn't take into account the fixed costs associated with caring for a child, especially a teenager.

[42] S. undoubtedly has the greater asset base. He appears to have a four-bedroom split level home with 1,200 square feet on each level, $80,000 in RRSPs and a Government of Yukon superannuation pension. D., on the other hand, has an $85,000 house, with a $73,000 mortgage, an $8,000 RRSP and no pension plan. D. has debts and S. is debt-free.

[43] Considering first a straight set-off approach under s. 9(a) of the Territorial Child Support Guidelines, S. would be required to pay $278 ($596 ÷ 50%) less $141 ($282 ÷ 50%) or $157.

[44] In my view, S. will have some increased expenses under s. 9(b), as he will have the care and control of J. for 50% of the time, rather than his previous 40% or less. D. will not have significantly reduced expenses on balance as she will have more weekend care and control of J.

[45] Under s. 9(c), D.'s circumstances are much less favourable than S.'s.

[46] Finally, one must always consider the best interests of J. in this situation, regardless of whose home he resides in. Taking all these factors into consideration, S. shall pay child support to D. in the amount of $300 per month, commencing March 1, 2003. In other words, I grant a deduction of $296 per month to S.'s child support obligation. S.'s total monthly child support payment will be $500 per month, until the retroactive amount is paid, at which time he will pay $300 per month.

[47] The other major expenses for J. shall be shared on a proportional basis, as stated in the parenting agreement.

Costs

[48] Although the outcome is mixed, I consider the failure to pay adequate child support to be the most important one, and D. has achieved substantial success on that issue. D. will have her costs against S. on scale 3.

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VEALE J.