

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: K.A.B. v. T.A.S., 2004 YKSC 64

Date : 20040901
Docket: S.C. No. 04-D3661
Registry: Whitehorse

Between:

K.A.B.

Petitioner

And:

T.A.S.

Respondent

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:
Debbie P. Hoffman
Fia Jampolsky

For the Petitioner
For the Respondent

**REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): This is an application by the father for interim custody of the child, A., who was born on January 9, 2000. The father and mother were married on August 5, 2000 and separated in June, 2001.

[2] For the purposes of this application, I am not going to rely on the evidence of S.B., which was filed August 31, 2004 simply because it was late and counsel for the mother was unable to respond to it. I am satisfied that there is sufficient evidence before me to make a decision on interim custody.

[3] I should also indicate that there was an Order by Justice Gower on June 8, 2004 giving interim interim custody of A. to the father, followed on June 29 by an Order giving reasonable access to the mother, on the condition that she not consume any alcohol immediately before or at any time during her access with A. I am satisfied on the basis of the affidavit of the father and the affidavit of G.M., as well as the letter of M.G., the social worker, dated May 6, 2004, that it is most appropriate for interim custody of A. to be awarded to his father.

[4] The evidence, in my view, is overwhelming that the mother has a serious problem with respect to alcohol consumption that is an ongoing problem. It is not a problem that is in any way being resolved. I take note of the fact that she completely denies any alcohol problem. In the face of the independent evidence of M.G. and G.M., she has what I would consider to be a serious alcohol problem.

[5] The task of this court is to determine what is in the best interests of the child. In my view, the best interests of the child clearly lie with him being in the interim custody of his father. I note as well that the mother essentially conceded the custody issue but I am not going to make this Order on the basis of her consent but on the basis of the evidence before me.

[6] The real issue before me is the access that should be accorded to the mother in the circumstances that I have described. I have said in this court many times that access to a child is not a parental right but a right of the child, and I believe strongly that the child has the right to have access to both parents.

[7] I say that even in circumstances where one parent has a problem of some nature. In this case, the mother has a serious alcohol problem. But in spite of that, I think that the child does have the right to see his mother in appropriate circumstances. I point out that on many occasions the court makes supervisory access orders whereby the parent has access under the supervision of an independent party. That has not been applied for in this case but I simply raise it as a possibility for a future application, if necessary.

[8] However, with respect to this access issue, I am going to order that there be access to the mother on the following conditions:

1. that she not consume any drugs or alcohol eight hours before the exercise of the access or during the access period itself; and
2. that during the exercise of such access to the child, that he not be left in the care of a babysitter but would be returned to the father if the mother was no longer able to care for the child.

[9] At the present time, in my view, the access should not be overnight but should be exercised during the day. I am not going to put any limitation with respect to the hours that it might be exercised but I will leave it to the good common sense of the father to

ensure that access does occur only when the mother is capable of exercising that access and the child will be safe. I should point out that if there is dispute with respect to the father making a decision on whether access should be exercised, I don't think it appropriate to have a person, or at least there is no person in my view, that would be capable of making a final decision on that because in my view the final decision should be the father's.

[10] Ultimately, if the mother has objections to the father's exercise of that discretion, she can bring the matter to this court to determine whether or not access is being exercised or granted appropriately. The mother would have every opportunity to speak to other sober people in the community who could make an independent assessment of whether she is sober when she attempts to exercise access and those parties could support her in an application to this court if the father is not allowing appropriate access.

[11] I should point out to the father that allowing appropriate access to the other parent is something that should take place if she is in a sober condition and it is safe for the child. If access is denied repeatedly when the mother is sober, that can be a reason for removal of custody and granting of custody to the mother. So you have to exercise that decision responsibly.

[12] I am also going to make an Order that the mother is prohibited from removing the child from the Yukon Territory without an order of this court. I do so on the basis of the past experience of the mother removing the child without the agreement of the father.

[13] I am also going to include in the Order the RCMP Assist Clause that is set out in paragraph five of the Notice of Motion of May 27, 2004. The only change, as suggested

by Ms. Hoffman, is that the authority is not to arrest the respondent but rather to apprehend the child and return the child to the Yukon if the prohibition against removal is breached.

[14] I am also making an Order that other access, as agreed upon by parties, can take place.

[15] I am not going to order that the telephone number of the father, which is unlisted, be given to the mother. The parties live close together in a small community and there is no difficulty with communication between the mother and the father, nor indeed communication between the mother and the child.

[16] If I have not dealt with anything that either counsel has applied for, please raise it with me now and I will make a decision.

[17] MS. HOFFMAN: I think that is everything, My Lord.

[18] MS. JAMPOLSKY: I think that is everything. Thank you.

VEALE J.