IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Wright* v. *Wright*, 2004 YKSC 76

Date: 20041119
Docket No.: S.C. No. 00-D3306
Registry: Whitehorse

Between:

JENNIFER WRIGHT
also known as
JENNIFER HARRIS

Petitioner

And

SKEETER ANDERSON WRIGHT

Respondent

Before: Mr. Justice L.F. Gower

Appearances:
Edward J. Horembala, Q.C. — For the Petitioner
Debbie P. Hoffman — For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the respondent/father to vary the terms of a corollary relief order specifying the amount of time his daughters, nine and seven years old, will reside with him. The corollary relief order was made approximately two and a half years ago and gave primary residence of the daughters to the mother. The father currently has the girls one night each week and on weekends, but seeks to share his time with them equally with the petitioner/mother. A custody and access report (CAR) has been prepared for this application.

[2] The mother objects to the variation on the general ground that it would not be in the children's best interests. Specifically, the mother emphasized two points:

1. The CAR recommends that continuity of care by the mother should be paramount to the competing desire of maximum contact with both parents.

2. The father has not yet developed a "track record" establishing his ability to care for the girls during the working week. Consequently, any increase in the father's time with them should be gradual, and no more than one full week plus two additional weekends each month.

BACKGROUND

[3] The parties were married in 1993. Each had been previously married, but without children. The daughter N. was born December 12, 1994, and the daughter K. was born February 27, 1997. The parties separated in October 2000. They made a written separation agreement in May 2001. The corollary relief order was consented to in March 2002.

[4] Both the separation agreement and the corollary relief order specify that the parties have joint custody of the children, but that the primary residence was to be with the mother. In particular, the essential terms are that the children were to live with the mother from 7:30 p.m. on Sundays to 5:30 p.m. on Fridays. They would then live with the father each weekend and would also visit with him every Wednesday evening from 5:30 to 8:00 p.m. Importantly, both the separation agreement and the corollary relief order also specify these living arrangements would be reviewed every six months. Both also refer to an allowance for an "adjustment period" if there are "substantial changes" to the childcare schedule. Finally, both say that each parent shall continue to have as full and active a parental role as possible with the children.

[5] The father filed his current application in August 2003, at which time the CAR was recommended. That report was eventually filed in November 2003, by psychologist Geoffrey S. Powter. In preparing the CAR, Mr. Powter had the benefit of reviewing an Adoption Home Study prepared by Yukon Family and Children's Services in May 2003, for the proposed adoption of an infant girl from the Republic of China, by the respondent and his new wife, L.M-W.

[6] I understand from the submissions of the parties that discussions continued between them and their respective counsel over the following several months. The father's application to vary was eventually heard before me on November 8, 2004, 15 months after it was filed and 12 months after the CAR was filed. Just prior to the hearing, each party filed updated affidavit material. There are a number of disputed points between the parties in their respective affidavits relating to this application; however, I intend to restrict my comments to the differences which I have found most relevant to this decision.

ISSUES

[7] There are two issues:

1. *Should continuity of care by the mother remain paramount over the objective of maximum contact with both parents?*
2. *Has the father sufficient parenting skills to be able to care for the daughters half-time?*

POSITIONS OF THE PARTIES

[8] The father's position is that he always intended to seek 50/50 time-sharing with the girls and that this is evidenced by the six-month review clause in both the separation agreement and the corollary relief order. He says he refrained from pressing for the review until both girls were in full-time attendance at school. The youngest daughter, K., started grade one in September 2003. The father says that he unsuccessfully tried to negotiate with the mother on the proposal for equal time with the children and that this resulted in the two of them consulting with a child psychologist, Dr. Joanne Tessier. The father recalls that Dr. Tessier supported his application for equally shared time with the daughters.

[9] The mother maintains that the parties' consultations with Dr. Tessier related to the father's request to have the children on Sunday nights and her request to have the children one weekend each month. She recalls that Dr. Tessier concluded the children should continue to reside primarily with her.

[10] There is nothing in writing from Dr. Tessier to prove what her recommendations actually were.

[11] In her first affidavit, the mother deposed at paragraph 17:

> … the discussions with the Respondent have never been regarding a fifty-fifty time-sharing arrangement. The children were too old to be put in daycare and the extra-curricular activities they attend could not have been accommodated by the Respondent's work schedule. …

That comment was made specifically in response to the father's statement that he had broached the subject of a 50/50 time-share with the mother and she had refused to explore the option, telling him that the children should be with her after school each day because she only works part-time.

[12] Later in her first affidavit, at paragraph 22(g), she proposed that:

> The children shall not be placed in day care and thereby miss scheduled activities or events during the school year.

[13] Also in her first affidavit, the mother deposed that the father did not request 50% of the time with the children until she was served with the application in August of 2003. The father responded to that statement in his second affidavit by attaching an e-mail he sent to the mother on March 21, 2003, in which he said:

> For quite a while now I have been trying to get more time with my children. I have tried it per the 6 month review, gone through the family counsellor stage after you agreed to forego the mediation stage and you still will not agree to a schedule change.
>
> Your reasons for denying my request change from time to time. …
>
> I propose that when school starts in the fall of 2003 and [K.] begins fulltime [as written] school attendance, the child care schedule be changed such that the girls spend one week with me and the subsequent week with you. …
>
> This proposal is a continuation of my attempts to have more time with my children pursuant to the terms of the separation agreement. …

[14] In her second affidavit, the mother acknowledged that she and the respondent communicated in large part by way of “copious e-mail” regarding the childcare schedule and that she had “forgotten” the father’s e-mail which I just quoted from. The mother attached her responsive e-mail to the father dated April 10, 2003, in which she said:

> … By the way, any work that I have or will take in the future will always be arranged around the children. For the past years I have been able to arrange my work and life so I can put the girls on the bus in the morning and I have been there

> for them at the bus after school. I plan to continue that. They will not be going to a daycare.
>
> Because I am at home they have a consistent life and stability that all children should have. They feel secure, happy and like coming home on the bus. I plan to continue that for them. I donot [as written] plan or agree that someone else will care for them after school. …
>
> … Coming HOME afterschool and having a healthy snack, having some down time and getting in a routine to do homework at 4:30 is important. It creates stability and consistency which is what we need to give the kids. Not more change plus daycare especially when it is not required. Going to daycare everyday doesn't allow them any down time and I will not agree to it.

[15] The mother's proposal is that commencing in September 2004, the father would have access to the children for one additional day during the first week of that month, and that one more day would be added to the first week of each successive month until the father has access for a full week. Specifically, in September 2004, the father would have the children on the Monday of the first week of that month. In October he would have the children on Monday and Tuesday of the first week of that month. In November he would have the children for Monday, Tuesday and Wednesday of the first week of that month. Then in December he would have the children for Monday, Tuesday, Wednesday, Thursday of the first week of that month. Finally, in January 2005, he would have the children for one full week each month.

[16] The father also proposes that there be a gradual transition from the current state of affairs to equal time with the children. Starting in January 2005, he suggests having the girls for one week per month, plus Wednesday evenings, plus two weekends per month. Then at spring break (commencing March 21, 2005), his time would increase to every second week, that is, equal time, and the Wednesday evenings would be dropped.

ANALYSIS

Continuity of care versus maximum contact

[17] It is clear from the CAR that both parties are good caring parents. Neither suggests the other is anything but, and both agree that the girls would benefit from spending the maximum amount of time possible with each parent. However, as I have said, the mother relies heavily on the recommendation of Mr. Powter (CAR, at para. 149) that:

> When children the ages of the W. children are considered, needs for stability and predictability of contact are often seen as paramount. Such children need to know where they will be and who they are with, and time schedules that are easy for adults to understand may be exceptionally hard on younger children. To facilitate the need of younger children for stability, the research often suggests schedules which maximize time in one home, especially during the school week. This does leave one parent with less contact, and thus seems to contradict the previous point [of maximum contact with each parent], but here the needs of the child for immediacy might have to take precedence over the desires of the adults.

[18] On the other hand, Mr. Powter clearly recognized that the CAR should be forward-looking and that the needs of the girls "should not be considered fixed". Rather, their need "to spend more time with their father in the future is a reasonable prediction and should be built into a flexible plan" (at para. 151). Further, Mr. Powter said (at para. 155):

> I feel it is also fundamentally important that the plan builds in increasing contact with Mr. W. as the children get a bit more sense of stability and independence. It might be in the children's interests (and Mr. W.'s as well) to establish this plan into the future at this time, and to establish a schedule for greater contact …

[19] Mr. Powter also recognized that children do best when parental conflict is minimal and that “Any arrangement that serves to reduce the amount of parental conflict [e.g. by solidifying schedules] is of the greatest use, according to the research” (at para. 147).

[20] And finally, Mr. Powter acknowledged that “When possible, the research on divorce shows, children profit most from maximized contact with both parents” (at para. 148).

The father’s capacity to parent

[21] As for the mother’s concern that the father has not established a sufficient track record as a true custodial parent, Mr. Powter indicated to the contrary (at para. 138):

> Both parents have strong parenting skills according to both observation and testing.

And later (at para. 140):

> Although Ms. W. has spent more time with the children because she has been a stay-at-home mother (and has been with the children more since the separation due to the schedule), both parents have been extensively involved with the children since birth. Both show complete bonding with both children.

Earlier he said:

> … Mr. W. has a strong relationship with the girls. He appears to love them deeply, interacts very easily and fluidly with them and appears to be completely trusted by them. [at para. 80]
>
> The parenting awareness testing done suggests that Mr. W. has a good and broad understanding of the girls’ likes and dislikes, and an appreciation of them as individuals distinct from each other and from him. [at para. 81] …
>
> On the parenting skills assessments, Mr. W. demonstrated an objectively measurable breadth of skills, with good flexibility and a good sense of the children’s developmental level. … [at para. 85]

[22] The CAR does not mention the mother's concern, as expressed to me through the submissions of her counsel at the hearing, that the father needs more time to establish a track record of "raising" the children during the work week, as opposed to weekends only. Nor do the mother's affidavits specifically identify that issue. Rather, the mother's evidence in those affidavits tends to focus on the potential for daycare, albeit somewhat inconsistently.

Daycare

[23] As I have noted, at one point the mother said that the children "were too old to be put in daycare" and at the same time suggested that the issue was that the extra-curricular activities they attend could not be accommodated by the father's work schedule. Yet, by proposing (in the alternative) that the father have access to the children for at least one week each month, the mother is presumably prepared to accept that there may be some interference with the children's extra-curricular activities, resulting from the father's planned reliance upon daycare after school. On the other hand, in the mother's responsive e-mail to the father dated April 10, 2003, she stressed the importance of the fact that she is able to meet the children after school, provide them with a snack and some "down time" to prepare them for doing their homework at 4:30 in the afternoon.

[24] Thus, the mother's reasons for opposing daycare seem to vary somewhat and her position on the issue is not entirely consistent.

[25] Further, in her e-mail she said "They will not be going to a daycare … Going to daycare every day does not allow them any down time and I will not agree to it". These unilateral and conclusory statements would seem to run counter to the provisions in the

separation agreement (para. 4.12) and the corollary relief order (para. 6) which focus on joint decision-making, consultation and co-operation about things such as daycare.

[26] The mother's counsel also confirmed at the hearing that she would be working in the near future, presumably as a result of the termination of the spousal support from the father in June 2005. I understand the mother is already working on a part-time basis, so I take her counsel's submission to mean that she will be working more hours on a more regular basis. While it may be possible for the mother to arrange her work schedule so that she does not require daycare for the girls after school, it is nevertheless increasingly likely that she too may have to rely upon daycare at those times.

[27] Finally, while it may be less than ideal, daycare has become an accepted part of the modern reality of families where both parents are more or less fully employed.

Change in Circumstances

[28] A significant amount of time has passed since this application was filed in August 2003 and, circumstances have changed significantly since the CAR was filed in November 2003. Of course, it is necessary for the father to demonstrate that there has been "a change in the condition, means, needs or other circumstances" of the children in order to vary the corollary relief order (*Divorce Act*, R.S., 1985, c. 3 (2nd Supp.) s. 17(5)). Counsel for the mother did not specifically argue that there has been no material change in circumstances.

[29] The changes I recognize are as follows:

1. Keeping in mind the relatively young ages of the two daughters, they are now significantly older than they were when this application was filed. N.

will be 10 years old next month and is currently in grade 5. K. will be turning 8 in February 2005 and is in grade 2.

2. The father and his new wife adopted an infant female child from China during the summer of 2004, whom they have named L. The father said in his second affidavit that N. and K. have consistently told him they want to spend more time with him and with their new sister and that these requests have increased now that L. has been adopted into the father's family. He says the daughters both adore L. and he believes they would like to spend more time at his home. Those assertions are uncontradicted and unchallenged by the mother.

[30] The mother apparently recognizes the importance of the relative increase in the age of the children through her reference to the "For the Sake of the Children" program in her e-mail to the father of April 10, 2003. For example, she noted the differences between children aged 5-6 and those aged 7-9. Logically, the differences would be greater for children aged 8 and 10.

[31] Mr. Powter also recognized that the needs and interests of the children would change as they grow older and develop more of a sense of stability and independence. For example, it appears from all accounts that the youngest child, K., has now successfully adapted to the transition from pre-school to grade school.

[32] While not specifically argued, it is also important that both the separation agreement and the corollary relief order contemplated that the parties would review the children's living arrangements at six-month intervals and that adjustment periods may be required if there were to be substantial changes to those arrangements. Thus, even if there had not been clear evidence of a change in the circumstances of the children since the corollary relief order, which I find there is in this case, I would be inclined to give effect to the intentions of the parties to proceed with a review of those circumstances, as they relate to the children's residency schedule, in any event.

Conduct of the parties

[33] Incidentally, I also note that I am not to take into consideration the conduct of the parties, unless it is relevant to the ability of a party to act as a parent (*Divorce Act*, s. 17(6)). Thus, I have omitted reference to such matters, even though they were raised by the parties in their respective affidavits.

CONCLUSION

Time with each parent

[34] I find that it would be in the children's best interests to have maximum contact with both parents. I further find that the children are now old enough that it is no longer necessary to give precedence to their need for continuing care by one parent, maximizing their time in one home. Although I do not have an update to the CAR since November 2003, I take it from the submissions of counsel that the girls continue to be mature, pleasant and well-adjusted, as they were initially described by Mr. Powter. I find that the father's desire for equal time is likely to promote a sense of stability in the girls' lives. I also find that they would likely benefit from more extensive contact with their new younger sister.

[35] It is clear that the children get along well with the father's new wife. Ms. L.M-W. is currently at home full-time with her new daughter L. I am told that she is able to drive and I assume that she can assist from time to time with the after school needs of the girls to minimize any disruption in their extra curricular activities.

[36] I also expect that the father's proposal for equal time will, perhaps in the longer term, minimize the apparent conflict between the parties. That was noted by Mr. Powter

to be a factor which, more than any other, is hardest on children in a divorce (CAR at para. 147). The 50/50 schedule is solid, simple and predictable. It is preferable to the one proposed by the mother in her first affidavit. While I appreciate that the mother's desire to gradually increase the amount of contact with the father is presumably grounded in her theory that the father needs to develop greater capacity as a true custodial parent, her proposed schedule could be difficult for both parties and the children to follow and predict. If so, it would lead to more conflict.

[37] Counsel for the mother, as I understood him, submitted that the mother's initial position was to preserve the existing state of affairs, as supported by the CAR. However, that would seem to conflict with the mother's proposal in her first affidavit, which would gradually increase the father's time over several months.

[38] In the alternative, the mother's counsel suggested that there should be no more than one week with the father plus two additional weekends each month. That proposal would result in the girls spending the better part of approximately 15 days each month with the father. Every second week with the father would result in a very comparable amount of time. Therefore, it is difficult to understand how the mother's alternative proposal would vary significantly from the father's proposal in that regard.

[39] Further, the father's proposal to gradually increase his time with the children would not change the current arrangements at all until January 2005, and fully equal time would not be achieved until approximately the end of March or beginning of April. By then the girls will be 10 and 8 years old respectively, and more than half way through their school terms. This proposal is reasonable and respects the agreement of the

parties to allow for an “adjustment period” where “substantial changes” are to be made to the children’s schedule.

ORDER

[40] The consent corollary relief order of Mr. Justice R.S. Veale dated March 5, 2002, will be varied as follows:

1. Paragraph 2 will be vacated and a new paragraph substituted stating that, subject to paragraph 3, the children will reside 50% of the time with the Petitioner and 50% of the time with the Respondent.

2. Paragraph 3 will be vacated and substituted with a paragraph stating:

    a) Commencing January 2005, the children shall reside with the father for one full week, from Sunday at 7:30 p.m. until Friday at 5:30 p.m., as well as every Wednesday evening from 5:30 p.m. to 8:00 p.m., as well as two additional weekends per month from Friday at 5:30 p.m. until Monday morning, returning the children back to the Petitioner, or transporting them directly to school.

    b) If the Respondent’s access falls on a long weekend, the Respondent shall have access to the children until Tuesday morning returning them to the Petitioner, or transporting them directly to school.

    c) Commencing April 1, 2005, the children shall reside for seven consecutive days with each parent on an alternating basis, with the switch between the homes taking place every Friday at 5:30 p.m. The parent who has just finished caring for the children will be responsible for dropping the children off with the other parent.

    d) This schedule may change if the parties agree.

[41] In all other respects the consent corollary relief order remains in effect.

[42] I heard no submissions from the parties on the issue of taxable court costs. Therefore, I decline to rule on that unless and until I hear such further submissions.

POST SCRIPT

Child Support

[43] The father deposed in his first affidavit that he would continue to pay the existing child support of $857 per month to the mother for a one-year period, less his monthly daycare expenses, estimated to be approximately $200. However, the father's counsel submitted at the hearing that he may be reconsidering that position, given his new circumstances with his adopted daughter and his new wife being at home full-time. Specifically, the father said he may not be able to honour his commitment to pay child support for a full year, but could do so for six months. This, of course, would be in the context of a 50/50 timeshare with the children.

[44] Given the lack of clarity in the father's position on this point, I decline to make any order reviewing the child support provisions in the corollary relief order and I invite the parties to return to court to argue the issue, if they are unable to agree.

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GOWER J.