*B(R)* v *C(A)*, 2023 NWTSC 6

Date:  2023 04 13

Docket:  S-0001-FM-2023 000 013

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

B(R)

Applicant

-and-

C(A)

Respondent

**MEMORANDUM OF JUDGMENT**

**INTRODUCTION**

1. The parties each seek joint interim custody and day-to-day care of their child, J, who is approximately 3.5 years old, under the *Children’s Law Act,* SNWT 1997 c 14. The father, R, lives in Fort Good Hope and the mother, A, lives in Yellowknife. For simplicity, I will refer to R as the “father” and to A as the “mother”.
2. J is currently in the mother’s care full-time. The father has had some parenting time with J while he has been in Yellowknife.

**BACKGROUND AND FACTS**

***General Comments on the Affidavit Evidence***

1. It is common for chambers applications to proceed based on affidavit evidence. Invariably, that evidence will contain conflicts which may be difficult to reconcile in the absence of hearing oral testimony, tested on cross-examination. In this case, the parties’ versions of certain events conflict, but at the same time the evidence of both parties is consistent with respect to where and with whom J has lived up to now, and how he came to be living with the mother in Yellowknife. It is possible to reconcile some of the conflicts and I have done so to the extent I can.
2. One of the mother’s affidavits, sworn March 21, 2023, has letters from third parties attached to it supporting her application. Because these are not sworn documents, they are not admissible evidence. Accordingly, I have not considered the letters in reaching my conclusion.
3. The affidavits also contain some statements which provide narrative, but which do not assist in determining the issue of interim parenting arrangements. For that reason, not all the facts are included in the summary below.

***Summary of Evidence***

1. The parties were in a common-law relationship starting in 2018. They lived together in Fort Good Hope. The mother has two daughters from a previous relationship who also lived with the couple as well: S, age 17 and Z, age 5. At present, Z lives with the mother in Yellowknife. S remained in the parties’ former home in Fort Good Hope, with the father. The father has two adult children from a previous relationship who live in Edmonton.
2. The first time the parties separated was in September of 2020. At that time, the mother moved to Yellowknife with J. He remained in her care for about a year and a half. In March of 2022 the mother’s eldest daughter, S, was sent to Edmonton for medical care. The mother accompanied her. J and Z went to live with the father in Fort Good Hope.
3. The parties reconciled in June of 2022 and moved back in together in Fort Good Hope. This lasted until December 2022 when the mother moved out. The father has remained in the parties’ former home.
4. The mother says she tried to stay in Fort Good Hope after she left the parties’ home, but the father did not approve of her housing arrangements. She moved to Edmonton to stay with her own mother in her apartment, taking Z with her. J remained in Fort Good Hope with the father. The mother says she cannot return to Fort Good Hope because she does not have employment there and housing is difficult to secure.
5. According to the mother, there was an agreement the father would bring J to her in Edmonton around Christmas to live with her and Z. The father does not dispute the fact of the agreement; but he says when he arrived in Edmonton, he discovered that besides the mother and Z, there were seven other people staying at the two-bedroom apartment. He did not feel this was an appropriate living arrangement for J. He says he remained in Edmonton for five days so the mother could spend time with J and then returned to Fort Good Hope with J and the mother’s eldest child, S. The mother also says the father promised he would send J to Edmonton later, after he returned to Fort Good Hope, but then told her he would not.
6. The mother moved back to Yellowknife in January of 2023 and she asked the father to bring J to live with her. The father says he agreed to this initially, but then changed his mind because the mother did not have permanent accommodation and was living with a friend who had two children of her own. As well, the mother had just started a new job and the father did not know what arrangements she had made for J’s care. Finally, he says the mother had threatened him with legal proceedings and he was worried she would not return J to him.
7. The mother says she brought up legal proceedings with the father because he would not facilitate parenting time over Facetime and would not update her on J’s health and other day-to-day matters. In response, the father says there were no issues with J which he felt warranted a call or an email and, in any event, the mother communicated regularly with her eldest daughter and J by telephone and video. He indicates he never prevented the mother from spending time with J over Facetime, but that he conveyed his displeasure at having to speak to the mother while their breakup was still “fresh”.
8. The mother’s affidavit of March 20, 2023 includes as an exhibit a series of screen shots of text messages between the parties following the separation. It appears the mother is attempting to get information about J from the father. In several of the messages, the father’s words are hostile. He refers to the mother as a “whore” and accuses her of infidelity during their relationship.
9. On February 13, 2023, the mother flew to Fort Good Hope. She went to the father’s house, where J was being cared for by his paternal grandfather. She took J and went to a friend’s house. She did not advise the father of her intention to take J in advance, but she sent a text message to the father afterwards to say she had picked him up. She also advised him she was taking J to Yellowknife with her. The mother says she did this because she was unable to get parenting time with, and information about, J.
10. The mother cites two instances of domestic violence during the relationship. The first happened in 2020 and left her with bruising and scratch marks on her face and neck. The mother says the police charged the father and a no-contact order was imposed on him. It is unclear whether a prosecution followed. The parties reconciled after the no-contact order expired.
11. The second incident happened in September of 2022. The mother says she and the father were at a party in Fort Good Hope, playing games and having drinks. The mother says the father became angry because she was dancing and “trying to act sexy for the guys there”. He later apologized to her and went home. The mother returned home about 45 minutes later and remembers the father getting angry and the two of them arguing. She tried to leave the house, but the father physically pulled her back, pushed her, and choked her until she lost consciousness. This left her with red spots around her eyes, bruising on her neck and pain in her neck and throat. She continues to have pain in her throat, and she experiences sleeping problems. The children were present in the home when this happened.
12. The father acknowledges these two incidents occurred and does not offer evidence to contradict the mother’s versions. He says they were both very drunk and they both “behaved badly”. After the 2020 incident, he started therapy and limited his alcohol intake; and since the 2022 incident, he has mostly abstained from drinking alcohol. He says the mother has become aggressive with him on numerous occasions, including November 12, 2022. The nature of the aggressive behaviour is not specified. In response, the mother says she yelled at the father on that date.
13. The mother receives counselling to help her deal with the effects of the father’s conduct as well as post *partum* depression and anxiety.
14. In his reply affidavit, the father raised for the first time his concerns about the mother’s mental health and alcohol consumption. With respect to her mental health, the father says the mother “relocates frequently and does not place the children’s best interests first . . .” He cites her move to Edmonton, followed by a move to Yellowknife just over a month later. He also says that while the mother was in Edmonton, she did not enroll her daughter, Z, in school. In response, the mother says it was too close to the Christmas break to enroll her daughter in school.
15. With respect to the mother’s alcohol consumption, the father says the mother “struggles” with alcohol and drank alcohol “almost daily” during the relationship. He says to the best of his knowledge, she continues to do so. As well, he recounts that in December of 2022 when he arrived in Edmonton, the mother was “out partying” and not at her own mother’s apartment to greet him and the children.
16. In response, the mother says she neither struggles with alcohol, nor drinks daily. She denies drinking in front of her children and says if she goes out, she leaves her children in the care of a responsible babysitter. She also says that in December 2022 when the father arrived in Edmonton, she was sober when she met him at the apartment.
17. The father says he noticed bruising on J’s cheek when he picked him up for parenting time on March 1, 2023. He asked the mother about it, and she explained J had tripped and fallen into a steam cleaner. The father says he later noticed bruises on J’s leg and ankle. In response, the mother says J is an active child and he gets bruises and scratches while in the father’s care, too.
18. At present, the mother is sharing accommodation with her friend. She is in the process of securing her own housing. She has a full-time job and plans to remain in Yellowknife. J is currently in daycare.
19. The father also works full-time. J attended daycare in Fort Good Hope while there. From time to time, the father arranged for childcare with S, the mother’s elder daughter and sometimes with his own father.
20. J requires speech therapy. This was identified prior to the parties’ separation. The mother says it will be easier and more affordable for J to access speech therapy if he is living in Yellowknife. Further, if he stays in Yellowknife and starts junior kindergarten in the fall, he will be able to access speech therapy at school.

**ISSUE**

1. As noted, the issue in this case is where J should live pending final determination of this case.

**LEGAL FRAMEWORK**

1. Interim parenting orders are intended to offer temporary stability for the period between separation and ultimate resolution of the case, whether by trial or settlement. The Court must determine what temporary arrangement will be in the child’s best interests, with emphasis on what interim arrangements will be the least disruptive, most supportive, and most protective for the child. *Kalaserk v Nelson,* 2005 NWTSC 4.
2. The parenting arrangements during the relationship (including which parent was the primary caregiver) and in the time following separation are commonly referred to as the “*status quo”.* This can be helpful in determining what interim arrangements will be the least disruptive and it is not unusual for courts to order the *status quo* continue pending a final order. This said, Court must ultimately assess what is in the child’s best interests overall and if the *status quo* does not serve those interests, other interim parenting arrangements must be ordered.
3. Section 17(2) of the *Children’s Law Act* requires the Court to consider all the child’s circumstances and needs in custody applications and it sets out a non-exhaustive list of factors the Court is to consider in determining what is in the child’s best interest. Those most relevant in determining interim custody include: which parent has been the child’s primary caregiver; the emotional ties between the parents and the child and between the child and other family members; each party’s parenting ability; each party’s ability to provide for any of the child’s special needs; the proposed plans for the child’s care; and the willingness of each parent to facilitate access between the child and the other parent.
4. Section 17(3) of the *Children’s Law Act* requires the Court to consider evidence that a person seeking custody has committed an act of violence against their partner and the effect that conduct has or may have had on the child.

**ANALYSIS**

***Status quo/Primary Caregiver***

1. Both parties have actively participated in J’s care; however, the *status quo* favours the mother. It is true J came to be in the mother’s care most recently because she traveled to Fort Good Hope and removed him from the father’s care. The evidence is clear, however, that other than a period of about three months, from March until June of 2022, when the mother was assisting her eldest daughter with a medical issue, and during the six months the parties reconciled between June and December of 2022, the mother was J’s primary caregiver.

***Housing Stability***

1. The father has a home in Fort Good Hope where J has his own bedroom. The father does not feel the mother can offer the same stability because, among other things, she shares accommodation with a friend who also has children and J does not have his own room. Respectfully, I disagree.

1. The mother’s current housing situation, and what led to it, must be viewed in context. It is not unusual for separating parties to experience uncertainty and instability in the period immediately following separation. The mother was living with the father in Fort Good Hope until they separated in December. She did not have a job or her own housing there when she left and so she decided to relocate. She first tried living in Edmonton with family for a very brief time and she says she considered moving to Fort Smith to attend college. Ultimately, she moved to Yellowknife in January of this year, where she has been sharing accommodation with a friend. While the mother’s housing situation is relatively new and different than the father’s, there is nothing to support a finding it is precarious or unsuitable for a young child.
2. In my view, both parties can provide stable housing for J.

***Relationship with other Relatives***

1. J has a sibling in each of Fort Good Hope (S, who is 17) and Yellowknife (Z, who is 5). The mother says J is very close to Z, who is close in age to him.
2. J also has aunts and uncles, and cousins in both places. His paternal grandparents live in Fort Good Hope and his maternal grandfather is in Yellowknife. His maternal grandmother lives in Edmonton. I infer from the evidence of both parties he enjoys close relationships with all of them.

***Childcare Arrangements***

1. As both parents work full-time, J will be in childcare regardless of where he lives. If he is in Yellowknife come the fall, he will be attending junior kindergarten.

***Special Needs***

1. While certainly not determinative, J’s need for speech therapy can best be accommodated if he is living in Yellowknife. It is where the services are available.

***Willingness of Each Party to Facilitate Parenting Time/Share Information***

1. The mother states she is willing to co-parent with the father. The father’s affidavits do not address this, but in his Originating Notice he seeks an order which would grant reasonable access to the mother on reasonable notice. There is no evidence the father has had any difficulty getting parenting time with J since J has been in his mother’s care.
2. The mother submits the father did not cooperate in facilitating parenting time between her and J while J was in Fort Good Hope. She also points to the father’s apparent unwillingness to share information with her about J’s health and day-to-day life, including the hostile text messages he sent in reply to her request for information about J.
3. The father says there was regular video contact between J and the mother, and that the mother could obtain any information about J from eldest daughter. As noted, he also says that while J was in his care, there were no health or other issues which he felt warranted a telephone call or an email to the mother.
4. There is conflict in the evidence on this, but it is clear the mother was not cut off completely from J while he was in the father’s care: the father facilitated in-person parenting time between the mother and J in December; and there was *some* video and telephone interaction between the mother and J while he was in Fort Good Hope following the separation. The troubling aspects, however, are the father’s apparent misapprehension of the importance of sharing information on a regular basis with the mother and his hostile reaction to her requests for information when it was not forthcoming. From his own evidence, as well as the text messages appended to the mother’s March 20, 2023 affidavit, it is clear the father blames the mother for the parties’ breakup, and he allowed his feelings to interfere with his obligation to share information with her about J.
5. With some exceptions, parents have the right to information about their children. If the parents are together, sharing information is relatively easy. What happened at school or at the doctor or dentist etc. and any necessary next steps or consequences can be discussed between the parents in day-to-day conversations. When parents are not together, however, the information sharing is not as easy. Separated parents must make a deliberate effort to facilitate the exchange of information, including creating, at the very least, a neutral environment where neither is discouraged from seeking information.

***Parenting Ability***

1. The mother raised no significant issues with father’s parenting ability; however, the father expressed concerns about the mother’s alcohol use, her mental health, and the effect of these on her ability to care for J.

1. The father’s concerns about the mother’s alcohol use are described in the summary of evidence above. As noted, the father raised this for the first time in a reply affidavit. It was new information, not raised by the mother in the affidavit she swore in response to the father’s application and in support of her own. The father says he did not put it before the Court in his original affidavit because he did not wish to speak negatively about the mother. Respectfully, I do not find this evidence, nor his explanation as to why he did not raise it in the first instance, credible.
2. Common sense dictates if the father had serious, credible concerns about the effects of the mother’s alcohol use on her ability to parent, the information would form part of the evidentiary foundation of his application in the first instance. Instead, it was tendered only after the mother provided affidavit evidence which reflected poorly on the father, including the incidents of domestic violence. Moreover, the father’s stated concern about the mother’s alcohol use is not supported by evidence of it interfering with her ability to parent. While the father has provided examples of when the mother was drinking alcohol, the children were not in her care at those times.
3. The father’s evidence that the mother’s mental health interferes with her ability to parent also lacks credibility. Like the father’s concerns about the mother’s alcohol use, this was not raised in the first instance but rather, in a reply affidavit, after the mother submitted evidence she was attending counselling for post *partum* depression and the emotional effects of the father’s attack on her in 2022. Again, common sense dictates if the father had credible concerns that the mother’s mental health was adversely affecting her parenting ability, he would have put them forward as part of the initial case.
4. What the father relies on to support his concern about the mother’s mental health is that the mother “relocates frequently and does not place the children’s best interests first . . .” Specifically, he points to her short-term move to Edmonton immediately after the parties separated; her move to Yellowknife about a month and half later; her failure to enroll her daughter Z in school while she was in Edmonton; and her one-time intention to move to Fort Smith to attend college. This is not evidence that the mother has mental health problems which interfere with her ability to care for her children.
5. I do not view the father’s evidence about seeing bruising on J in March as something which reflects poorly on the mother’s parenting ability and certainly, it does not support a conclusion that J is at risk of bodily injury while in the mother’s care. The bruising was something the father noticed on one occasion. There is no evidence of J suffering either regular injuries or the kinds of injuries which would raise concerns about physical abuse or neglect. I accept the mother’s evidence that J is an active young child who at times gets bruises from regular childhood activities.

***Family Violence***

1. As noted, s 17(3) of the *Children’s Law Act* requires the Court to consider acts of violence committed by one parent against another and its effects on the child. In *NDL v MSL,* [2010 NSSC 68](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021447680&pubNum=0006619&originatingDoc=Ic0d48f0214aa668be0540010e03eefe0&refType=IC&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), MacDonald, J described the effects of family violence on children:

[35] Children are harmed emotionally and psychologically when living in a home where there is domestic violence whether they directly witness the violence or not. Exposure to domestic violence is not in the best interests of children and those who are the perpetrators of domestic violence, who remain untreated and who remain in denial are not good role models for their children. The fact that there is no evidence the perpetrator has actually harmed the child is an insufficient reason to conclude the perpetrator presents no risk to his or her child. One risk is that the perpetrator will continue to use violence in intimate relationships to which the child will be exposed in the future. Another is that the child may model aggressive and controlling behaviour in his or her relationship with others. . .

1. More recently, the Supreme Court of Canada addressed the effects of family violence on children and on the ability to parent, in *Barendregt v Grebliunas,* 2022 SCC 22:

143 The suggestion that domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator’s parenting ability is untenable. Research indicates that children who are exposed to family violence are at risk of emotional and behavioural problems throughout their lives: Department of Justice,*Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce* (February 2014), at p. 12. Harm can result from direct or indirect exposure to domestic conflicts, for example, by observing the incident, experiencing its aftermath, or hearing about it: S. Artz et al., “A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence for Children and Youth” (2014), 5 *I.J.C.Y.F.S.*493, at p. 497.

1. Each of the two events the mother described in her affidavit are very serious. Both left her with visible injuries. The most recent incident, which occurred in September of 2022, is particularly troubling. The mother was pushed and then choked to the point of blacking out and she continues to require treatment for both the physical and mental effects. J was present in the parties’ home when this occurred.
2. The father’s evidence in response, that the parties were intoxicated at the time and they both “behaved badly”, suggests he does not feel he is responsible for his actions, nor does he appreciate their effects on the mother and the children. The father says he has mostly abstained from alcohol since the 2022 event; however, there is no evidence he has sought any treatment focussed on changing his on behaviours. The evidence leads me to conclude there is a significant risk J will be exposed to more family violence in the future if he is in the father’s full-time care.

**CONCLUSION**

1. Considering all of the circumstances, it is in J’s best interest that he remain in the mother’s day-to-day care in Yellowknife on an interim basis and that the father has reasonable parenting time as agreed by the parties. An order will issue granting the relief sought in paragraphs 1 to 5 of the mother’s Notice of Motion and dismissing the relief sought in paragraphs 4 to 9 of the father’s Originating Notice. The balance of the applications sought by both parties are adjourned without a date and can be brought forward by Notice of Motion at the instance of either party. Counsel for the mother may submit a draft order for approval. As the father is now unrepresented, she will not be required to first circulate the draft to the father.

 K. M. Shaner

 J.S.C.

Dated at Yellowknife, NT, this

 13th day of April, 2023

Counsel for AC: Anastasia Kiva

RB was self-represented

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