

## SUPREME COURT OF YUKON

Citation: *R.K.K. v. B.M.M.*, 2010 YKSC 59

Date: 20100929  
S.C. No.: 08-B0053  
Registry: Whitehorse

BETWEEN:

**R.K.K.**

Plaintiff

AND:

**B.M.M. and R.S.**

Defendants

Before: Mr. Justice L.F. Gower

Appearances:  
Debbie Hoffman  
Paul Daltrop

Counsel for the Plaintiff  
Counsel for the Defendant B.M.M.

### REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): These are cross-applications by the father and mother of the two children, C. and M. The father is asking for an update to a custody and access report that was prepared by one Dr. Allan Posthuma dated December 30, 2009. The reason for that is an alleged material change in circumstances, which came about because of an incident on June 21, 2010, which resulted in C. going to the residence of her mother and remaining there since, contrary to the terms of an earlier consent order, which was made January 11, 2010. That order dictated that the residence of the two children, C. and M., would be shared between the parties on a week on, week off basis.

[2] There was also a suggestion made by the father's counsel that C. has been

placed into some counselling with Many Rivers, a local counselling agency, without the father's express consent and that he is not being provided with information as to the nature of that counselling so that he can participate in it.

[3] The other relief sought by the father is: that Dr. Posthuma be authorized to speak with both children without the mother's consent; that he also be authorized to meet and speak with third parties who have information relative to the update; that the update be performed next week when Dr. Posthuma will be present in Whitehorse on two other files, that being the week of October 4th to 8th; that the parties share the cost of the report, including disbursements and fees, equally; and that C.'s residential time be ordered such that the father will have time with C. while Dr. Posthuma is in Whitehorse undertaking the update.

[4] There is a cross-application by the mother that, rather than going the route proposed by the father, a parenting coordinator, namely one Craig Neville from Vancouver, be appointed by the parties to assist in resolving disputes and that the costs of Mr. Neville be shared equally. Implicit in that application is that this particular dispute regarding C.'s residence, and whether that should change, would be resolved by going through the parenting coordinator, as opposed to getting an update to the custody and access report and having the matter adjudicated, if it cannot be settled.

[5] Secondly, the mother seeks a "Views of the Child" report, to be prepared by a registered psychologist in the Yukon, if one can be agreed upon by the parties, to specifically and concisely give C.'s views about where she prefers to reside and why in this particular context.

[6] Both parents agree that C.'s views need to be introduced into this dispute. She has apparently indicated to her mother that she would prefer to remain in her mother's residence and wants only limited contact with the father, if any, at the moment. Again, this seems to have resulted from a fairly 'high emotion' incident that happened involving the children and the father as a result of a boating outing on June 21st in Whitehorse. The question is how to get the views of the child C. before the Court and what would be the most appropriate avenue for that.

[7] Because of time pressures, I am going to summarize my reasons by indicating that in large part I accept and agree with the submissions of the father's counsel that the most appropriate professional to do that in these circumstances would be Dr. Posthuma. He is a recognized expert in this field. He, in fact, was originally selected by the mother to undertake the first custody and access report and her choice in that regard was consented to by the father. I have only had a brief opportunity to scan that report, but Dr. Posthuma did, in that assessment, spend a significant amount of time on C.'s involvement in the family matrix and obviously has some familiarity with C., who is now 11 years old. I agree that it would be less intrusive and less disruptive to C. to continue to involve Dr. Posthuma on whatever follow-up needs to be done, rather than introducing two additional new professionals into the picture to perform the assessment.

[8] The counter-argument by the mother's counsel is that Dr. Posthuma has already interviewed C. and, notwithstanding that he heard her express her views on the first assessment that she would prefer to be in the mother's residence, he felt (and I am paraphrasing here) that C.'s views perhaps were as a result of suggestions made by the mother, rather than being genuinely her own feelings and views. The mother's counsel

suggested that there would be an apprehension that perhaps Dr. Posthuma has pre-judged this issue, and may be of the same view going into the update. I have to balance that potential for an apprehension of bias against the alternative, which is to introduce yet two new professionals into the equation to do an assessment which, as I said, would be disruptive in this conflictual dynamic.

[9] On balance, it would be in C.'s best interest to work with somebody that she has previously worked with and presumably has some familiarity with. It is my view that Dr. Posthuma is the best person to do this. In addition, he is already committed to coming up to Whitehorse next week and can undertake this assessment on an expeditious basis. Presumably, he will have his report available to the parties and to the Court soon after, so that we can (if the matter cannot be resolved) get an early adjudication on the issue, because time is of the essence in these matters.

[10] Having made that determination, I am prepared to agree, then, that paragraphs 2, 3 and 4 of the father's application be part of the order.

[11] With respect to the issue of the costs of doing the update, I have heard from the mother's counsel that the mother paid for the entire cost of the first custody and access report, which was in the vicinity of \$8,000, and that, in these circumstances, it would only be fair that the father should pay for the update, at least on an upfront basis. Those costs are estimated to be about \$4,500 in fees, with the additional disbursements for airfare, accommodation and meals to be shared equally with the other two files that Dr. Posthuma will be working on next week in Whitehorse. However, it has to be remembered that the initial order for recommending the preparation of a custody and

access report, I believe it was in April 2009?

[12] MS. HOFFMAN: April 29, 2009.

[13] THE COURT: April 29, 2009. That order was sent to the mother's counsel for approval as to form, and for some reason which has not been disclosed or argued, the approval was not done in a timely fashion. As a result, there was a missed opportunity to have the report done by a registered psychologist at no expense to either party, paid for by the Yukon Government.

[14] Presumably, as a result of missing that opportunity, Ms. M. felt that it was prudent to go ahead with a private assessment, which resulted in her selection of Dr. Posthuma, and the first report was done. But, given that history, it does not seem to me that there is a compelling argument why Mr. K. should pay the entire upfront cost of the update. Rather, it is my ruling that the costs, given my authority under s. 33 of the *Children's Act*, SY 2008, c.1, ss.199(1), it should be shared equally by both parties, and that includes disbursements and fees.

[15] The only remaining matter that needs to be addressed is the residential time which the child C., will have with the father. In my view, and I am open to further tweaking on this by way of submissions from counsel, it would be appropriate for C. to return to the father's residence after school this Friday, which was the normal exchange time under the previous consent order, to allow her at least the weekend to become settled again within the father's household before Dr. Posthuma arrives. I am just looking for the calendar on dates.

[16] MS. HOFFMAN: Friday would be October the 1st.

[17] THE COURT: Right. So the 4th would be the Monday.

[18] MS. HOFFMAN: That's correct.

[19] THE COURT: I have the calendar now.

[20] MS. HOFFMAN: That's correct.

[21] THE COURT: Yes, that would allow C. to become settled within the father's household before the initial meeting with Dr. Posthuma, presumably, which would take place on Monday or shortly thereafter. But, it does also occur to me that, rather than allowing C. to reside with the father for that entire week, perhaps on the morning of the 6th, she should be returned to the mother's household for the 6th, 7th and for the balance of that week, so that Dr. Posthuma can have an opportunity see C. in both households, interacting with the respective parties. Thereafter, I am going to suggest that C. would return to the father's household after school on October 15th and that the weekly schedule would resume, pending a further order of the Court, or an agreement by the parties, which of course will be influenced greatly by Dr. Posthuma's update. Is that clear enough for counsel?

[22] MR. DALTROP: Yes, Your Honour. But I do have an inquiry about the scope of Dr. Posthuma's report.

[23] THE COURT: Yes.

[24] MR. DALTROP: I don't believe Your Honour's orders determine what

he is to be looking at and who he is to be speaking to.

[25] THE COURT: Well, you had indicated that the report should not involve, as I understood you, M.

[26] MR. DALTROP: Yes.

[27] THE COURT: That it should be limited to C.'s views.

[28] MR. DALTROP: Yes, Your Honour.

[29] THE COURT: I think, given the nature of this family's dynamic, it will be necessary for Dr. Posthuma to use his best judgment as to what extent he needs to involve M., because he is part of the dynamic, and I do not want to artificially put M. 'on the shelf' and say that he cannot be talked to. I think that would result in a less than fulsome inquiry.

[30] MR. DALTROP: Then, what -- what would be the scope of Dr. Posthuma's report, then? Because you did not, as I understood Your Honour's orders, you made the order set out in paragraphs 2, 3, and 4. But I did not see anything about what scope.

[31] THE COURT: I think the focus --

[32] MR. DALTROP: Sorry, Your Honour, I hope I didn't interrupt you.

[33] THE COURT: No, it is implicit that the focus would be to deal with the issue of C.'s residency, and what her views are with respect to ongoing residency, but unless I have missed something, I am open to further suggestions by counsel.

[34] MR. DALTROP: Well, my -- if I -- I expect that there will be some issue about this so I do ask Your Honour to be -- make an order about what Dr. Posthuma is to do. Is his report to focus on where C.'s residency and her wishes? Is that what Your Honour is ordering the report to be about? The reason I raise that is because the application expressed, particularly in terms of paragraph 1, it's very general and I think it may be of some value to the parties and to the children if you could clarify what his role is to be in the preparation of this report.

[35] THE COURT: Ms. Hoffman, any submissions on that?

[36] MS. HOFFMAN: Well, with -- we on purpose made it quite general because when updates to custody and access reports have been done in this jurisdiction, it's basically everything one year later. So we have asked for a general update, the custody and access report look at this family. Yes, the issue that has prompted this has been C. and her residential arrangements, but we're asking for the update one year later, quite generally, and that's what we -- that's what I've told Dr. Posthuma, that we would be looking for if he came up, that we would -- he would, in that case, as I had said in my submissions, be speaking with M., with C., with Mr. K., with Ms. M., and also the collateral people involved in their lives, C.R., as an example, and teachers as an example. That's what we're looking for. We believe it's necessary in this instance to have a full update, and to take advantage of him being here.

[37] MR. DALTROP: Well, that's unfortunate that my friend has spoken to Dr. Posthuma, and in what he is supposed to do. All the more reason for what, I submit, should be the focus of what his work is. He should not be speaking to all these people.

This is -- this is not -- there ought not to be another full custody and access dispute, which is what Mr. K. seems to be anticipating. In my respectful submission, Dr.

Posthuma's report should be focused on C.'s residency and her wishes, not a repeat of a general custody and access report.

[38] MS. HOFFMAN: I did misspeak myself, in terms of speaking with; I did not do that. What I did do is, I received an e-mail from Dr. Posthuma's assistant who relayed to me that if C., M., both of the parents and collateral people were going to be involved, the cost would be \$4,500. So I actually spoke with his office and they outlined for me that if it was a report or an update of that nature, that that would be the cost. But I have not spoken specifically to Dr. Posthuma about anything like that because I just asked him whether or not he would be available.

[39] THE COURT: Well, counsel, I am left a bit perplexed. I mean it seems to me that the clear focus of the inquiry should be on C.'s residency, whether she is capable of forming her own views about that, whether she wishes to participate, and if she does, what her wishes are, but that those issues should not be dealt with 'in a silo'. Those issues have to be assessed, it seems to me, in terms of the overall family dynamic, which is going to necessarily involve some re-interviewing, possibly, of M., the two parents, as well as the other caregivers and third parties that are involved in C.'s life. Otherwise, a complete assessment will not be done, and that is what I want. I think you have my views on that, and I will leave it to counsel as to how the wording of the order should be. Mr. Daltrop?

[40] MR. DALTROP: Well, I think I have your views on the matter, Your

Honour.

[41] THE COURT: Okay. Thank you. Is there anything more that we can address today, then?

[42] MS. HOFFMAN: Just because I am concerned about this wording of this paragraph, because of course the order, or at least the wording of the order, if it is not yet filed, will be going to Dr. Posthuma's to tell him what to do. So I'm thinking of -- what I had asked for was that Dr. Posthuma shall conduct an update to the custody and access report dated December 30, 2009, and filed in this proceeding, and that there should be a general update with some concentration upon C.'s residency and whether or not she can form her own views about that.

[43] THE COURT: I think that is going further than we need to. I think the focus of the assessment should be the issue of C.'s ongoing residency, whether she is capable of expressing her views on that, whether she wishes to be involved, and if so, what her wishes are. However, Dr. Posthuma should be at liberty to interview the other immediate family members and any other caregivers or third parties who have relevant information to provide on that focus issue.

[44] MR. DALTROP: I think that's clear, Your Honour.

[45] THE COURT: Perhaps the clerk can give you the wording on that if you need it later.

[46] MS. HOFFMAN: Okay.

[47] THE COURT: Okay. Anything more?

[48] MS. HOFFMAN: We had asked for costs of today's application, Your Honour.

[49] MR. DALTROP: I take it that -- is Your Honour dismissing Ms. M.'s application?

[50] THE COURT: That would be the impact of my decision, yes.

[51] MR. DALTROP: All right. In my submission, as far as costs are concerned, the issue should await the outcome of Dr. Posthuma's report and any subsequent application to see where this is going to take us.

[52] THE COURT: Well, initially, Ms. Hoffman, you did not ask for costs as part of today's relief. You did not mention paragraph 11, and we are now short of time. So I am going to adjourn the issue of costs until we have seen the report and we can readdress it if counsel needs to.

Okay. I think we are done.

[53] MR. DALTROP: Thank you, Your Honour.

[54] MS. HOFFMAN: Thank you.

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GOWER J.