

# SUPREME COURT OF YUKON

Citation: *RKK v BMM*, 2017 YKSC 1

Date: 20170111  
S.C. No. 08-B0053  
Registry: Whitehorse

Between:

RKK

Plaintiff

And

BMM and RS

Defendant

Before Mr. Justice L.F. Gower

Appearances:

Debbie P. Hoffman and Joni  
Ellerton

Counsel for the Plaintiff

André W. L. Roothman

Counsel for the Defendant, BMM

## REASONS FOR JUDGMENT

[1] This is an addendum to my reasons for judgment filed November 21, 2016 and cited as *RKK v BMM*, 2016 YKSC 59. In those reasons I recommended, over the objection of the father, the appointment of a child lawyer for M., who just turned 14 years old, and who was diagnosed with autism when he was four years old. The purpose of the child lawyer was to present M.'s views and preferences at a subsequent hearing when the parents will be making cross-applications for sole custody of M. The recommendation was made pursuant to s. 168 of the *Children's Law Act*, R.S.Y. 2002, c. 31 (the "*Act*"), which provides that the "official guardian" (the office of the Public Guardian and Trustee) has the exclusive right to determine whether a child requires

separate representation by a lawyer “or any other person” that will be paid for at public expense. In determining whether separate representation is required, the official guardian must consider any advice or recommendations from the judge before whom, or the court in which, the proceedings take place. The application for the recommendation of a child lawyer proceeded as a binding judicial arbitration, pursuant to the terms of a consent order, dated January 11, 2010. I am the judge seized of this matter.

[2] After I made my decision recommending the appointment of a child lawyer on November 21, 2016, counsel for the parties made their best efforts to determine whether a lawyer was available to be appointed within the Yukon bar, assuming the official guardian was prepared to proceed with the appointment. Difficulties were encountered in trying to locate an available lawyer and a case management conference was held on December 7, 2016 to discuss the issue. At that time, the father’s counsel suggested that I could conduct a judicial interview with M. to get his views and preferences on the custody issue. Alternatively, the father’s counsel suggested that an appropriate interviewer would be Evelyn Wotherspoon, a social worker from Calgary, Alberta, who holds a Master’s degree in social work. Counsel informed me that Ms. Wotherspoon recently conducted a continuing legal education workshop in the Yukon for local lawyers and has also done a “Views of the Child Report” in a case in this Court involving a child with some mental health issues. Counsel also informed me that Ms. Wotherspoon specializes in high conflict cases. The father’s counsel further provided me with a copy of Ms. Wotherspoon’s two-page draft engagement letter, in which she

sets out the terms and conditions for how she approaches the interviews she conducts with the child.

[3] At the case management conference on December 7, 2016, the mother's counsel indicated that the mother was agreeable to Ms. Wotherspoon being involved to obtain M.'s views and preferences, and that any judicial interview of M. should be supplemental to that process.

[4] During the application for the recommendation of a child lawyer, I received an affidavit from one of M.'s caregivers, S.R. She is a support worker who has known M. since birth. S.R. has known the mother for many years and came to know the father through her relationship with the mother. She has deposed that she respects both parents and is well aware that they have different approaches in raising M. S.R. further deposed that she has had regular contact with M. since he was little and, over the years, as he has grown older, she and M. have been spending more time together. She deposed that, based on her conversations with M., she believes that he is capable of making up his mind regarding his choice of residential arrangements and is able to express those to views to others. The father expressed concerns over the lack of objectivity of S.R. because of her close relationship with the mother.

[5] At the conclusion of the child lawyer application, I determined that it may be of assistance to have S.R. present during some or all of any interviews of M. by the child lawyer. I included in that non-binding recommendation a non-exhaustive list of suggestions for the prospective child lawyer in my reasons.

[6] At the case management conference on December 7, 2016, the father's counsel submitted that the father did not agree with S.R.'s participation in any interview of M. by

Ms. Wotherspoon, or by me as the seized judge. This position was repeated by the father's counsel in a string of email exchanges following the determination that no one was available to be appointed as M.'s child lawyer. On the other hand, the father's position seems to have shifted somewhat on his preference for a judicial interview over an interview with Ms. Wotherspoon. One of counsel's emails (my copy was undated) stated "Our position remains that Ms. Wotherspoon is the most qualified person to interview [M.]"

[7] The email immediately preceding that from the mother's counsel stated, "My client has instructed me to request that [M.] be interviewed by a judge, whether Justice Gower, Justice Veale or a Deputy Judge, in the presence of [S.R.] as an alternative to the appointment of a child lawyer." However, I do not understand that position to exclude the mother's willingness to have Ms. Wotherspoon also conduct an interview.

[8] I understand that counsel are content to have me make a further ruling, in the continuation of this binding arbitration, as to who should conduct any interviews of M. and how those interviews should proceed. I conveyed my decision to counsel by email on December 30, 2016, indicating my recommendation that Ms. Wotherspoon be appointed to attempt to obtain M.'s views and preferences regarding custody and access pursuant to s. 168 of the *Act*. I further directed that if the official guardian (or the Yukon Department of Health and Social Services) should approve such an appointment, then it should be left up to Ms. Wotherspoon to determine the extent, if any, to which S.R. should be involved in the interview process. I indicated my written reasons would follow as soon as possible, as the anticipated arbitration on sole custody is currently scheduled for February 9, 2017.

[9] As the parties are well aware, this is a lengthy and ongoing high-conflict custody dispute. Although I am persuaded that every effort should be made to seek to obtain M.'s views and preferences insofar as they relate to that dispute, whether that will ultimately be possible is unknown due to the potential challenges resulting from his autism.

[10] Suffice it to say that any attempt to interview M. must be done with extreme care, caution, and skill. I have never conducted a judicial interview of a child. While I have had some judicial education about how to conduct such interviews, I confess that my state of knowledge of the area is limited at best. This is not to say that I am opposed philosophically to conducting interviews of children. On the contrary, I appreciate that in certain situations these types of interviews can be very valuable. On the other hand, in the Yukon, it is rare that judges are called upon to perform such interviews, because the official guardian has been extremely cooperative in following through with almost all recommendations for the appointment of child lawyers. Accordingly, the views and preferences of children are usually obtained in that fashion, rather than through the necessity of a judicial interview.

[11] In the alternative, Ms. Wotherspoon appears to be well-accredited to attempt an interview with M. Further, both parties seem to agree that she should be involved.

[12] As for the father's objection to S.R. being involved in any interview by Ms. Wotherspoon, I am content to leave that determination to Ms. Wotherspoon herself. Her draft engagement letter makes it very clear that she is alive to the issue of parental manipulation and coaching. Indeed, she states "I strongly caution parents not to coach the children since parent coaching is inevitably apparent during child interviews." I am

satisfied that Ms. Wotherspoon would be in the best position to determine whether S.R.'s involvement might give rise to some form of manipulation of how M. expresses his views and preferences.

[13] I also should repeat that the non-exhaustive list of suggestions for the child lawyer, which I included in my previous reasons, should not be considered binding upon Ms. Wotherspoon, assuming she is ultimately appointed to conduct any interviews with M.

[14] I do not foreclose the possibility of a subsequent judicial interview with M. However, if one is to take place, I feel that it should logically be with me as the judge seized of this matter, as opposed to Justice Veale or a Deputy Judge. In any event, that is a determination which can be made once we have heard from Ms. Wotherspoon.

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GOWER J.