

# SUPREME COURT OF YUKON

Citation: *R.K.K. v. B.M.M.*, 2017 YKSC 35

Date: 20170609  
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

André Roothman

Counsel for the Plaintiff

Counsel for the Defendant, B.M.M.

No one appearing for R.S.

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] This is a binding arbitration to decide cross-applications for sole custody of the child M., born December 10, 2002, who is now 14½ years old. M. has been diagnosed with Autism Spectrum Disorder and is the biological son of the parties. M.'s sister, C., was born July 5, 1999 and is the biological daughter of the mother and the defendant, R.S., who resides in British Columbia. C. is 17 years old, and will soon be turning 18. R.S. did not participate in the cross-applications. The plaintiff, R.K.K., has acted in the role of father to C. since she was about 2½ years old.

[2] The plaintiff father and defendant mother began living together in approximately November 2001 and separated in July 2005. The separation occurred because the mother began a new relationship with S.R., with whom she currently resides. In April 2007, the father began a relationship with C.S., who has a teenage son, L. Communications between the parties became extremely strained soon after the separation.

[3] For a long period of time after the separation, M. and C. alternated their residency between the father's home and the mother's home on a week on, week off basis.

[4] The father commenced this litigation in November 2008. On April 29, 2009, I ordered that the parties share interim joint custody of M. and C. and that the week on, week off alternating residency continue.

[5] On January 11, 2010, I made an order following a case management conference, confirming the *status quo* and ordering, among other things, that a reassessment of M.'s autism be done by a private assessor. I further ordered that the parties choose a mutually agreeable assessor by no later than February 28, 2010. The order also specified that, in the event the parties could not agree upon an assessor, "or any other joint decision that must be made by [them] for the Children", they were required to attend binding judicial arbitration with a judge of this Court to decide the question.

[6] Because the parties were unable to communicate effectively, they were unable to agree upon a private assessor for M. However, they did not return to court for binding judicial arbitration until these cross-applications were filed in May 2017.

[7] Previously, on April 14, 2015, the mother consented to the father having sole custody and residence of C., with access to the mother only in accordance with C.'s wishes.

[8] One of the items sought by the mother in her current application was an order that M. be assessed at the Centre for Autism and Related Disorders ("CARD"), which, according to the mother, is the largest diagnostic facility for assessing autism in the United States. The branch which the mother plans to have M. assessed at is in Woodland Hills, California. The multifaceted assessment is expected to cost \$1,800 USD, plus the cost of transportation and accommodation. The father initially opposed this, preferring to have M. assessed in Whitehorse or Vancouver. However, the mother has since offered to cover all of the travel and accommodation expenses for M. to attend this assessment. She also agrees that M. can be taken to the assessment by the father, but that she will be present and will participate in the process, to the extent that the assessors permit. On this basis, the father has withdrawn his objection and has agreed to take M. to CARD for the assessment, providing this does not involve M. missing a significant amount of school. Accordingly, I understand the parties are presently engaged in making the necessary arrangements to have M. assessed in the latter part of this coming summer school vacation, as he will be on vacation in Europe with his father's family for the first half of the summer break.

[9] For clarity, and to avoid further disagreement between the parties, I did not understand the mother's offer to include covering the father's transportation and accommodation costs. Rather, I assume the father will cover his own costs in that regard.

[10] With the assessment issue resolved, the principal remaining issues are: (1) which parent should be granted sole custody of M.; (2) what M.'s residential schedule should be (I will address the father's proposals for shared holiday time under this issue); and, (3) whether the mother should be required to repay the funds she withdrew from C.'s Registered Education Savings Plan ("RESP"). There was a fourth and final issue on the father's notice of application, which neither counsel addressed at the hearing. That is whether the parties shall share equally the cost of counselling and/or play therapy services for C. and M. With a view to minimizing future conflict between the parties, I propose to address that issue on my own motion at the end of these reasons.

## **ANALYSIS**

### ***Issue #1: Which parent should be granted sole custody of M.?***

[11] There have been numerous applications before me over the years starting from late 2008, when this action was commenced and I have rendered a number of decisions on various issues. Accordingly, I am familiar with the history of this high conflict litigation. Further, the parties have each filed nine affidavits to date.

[12] Both parties agree, as does Ms. Evelyn Wotherspoon, the author of the "Voice of the Child Report", dated March 13, 2017 (the "Report"), which I will discuss next, that joint custody is not a viable option in this case, because of the high degree of conflict.

[13] There are a number of points of disagreement between the parties, some historical and some more recent. Counsel for the parties spent a good deal of time going through these flashpoints in the conflict over the two days that the cross-applications were argued in front of me. I do not propose to deal with each of those issues. In many cases, the evidence is conflicting and there has been no cross-

examination on affidavits, although there was an examination for discovery of the father done several years ago.

[14] Suffice it to say that, at times, both parents have regrettably acted inappropriately, impulsively, and in a less than admirable fashion. Little would be served by a painstaking chronicling of those disagreements here. Both parties were present at the recent hearing and both will be familiar with the arguments raised by their respective counsel. Rather, my approach to these reasons will be more minimalist in nature.

[15] Decisions on sole custody are among the most difficult that a judge can be asked to make. That is particularly so in this case, as I found many of the arguments on both sides to be thorough and persuasive. However, for me, the balance of probabilities tips in favour of the father as the sole custodial parent because I feel he is more likely to put M.'s best interests ahead of his own, and to attempt to facilitate a healthy relationship between M. and his mother, whereas I have some significant concerns that the mother will be unable to do so. Before I get into my specific reasons for coming to this conclusion, I want to make a brief reference to the Report prepared by Ms. Wotherspoon, which has been referred to extensively by both counsel in this hearing.

***Ms. Wotherspoon's Report***

[16] As the parties are well aware, Ms. Wotherspoon is a social worker registered to practice in the province of Alberta. She has a Master's degree in social work. In anticipation of these cross-applications coming before me for binding judicial arbitration, I made a decision on November 21, 2016, upon the mother's application, recommending that a child lawyer be appointed to represent M. for the purpose of obtaining his views and preferences on the issues of custody and residence.

Unfortunately, neither counsel were able to find a lawyer within the family bar in Whitehorse who was able to take on this role. Accordingly, having been advised that Ms. Wotherspoon was available to provide an alternative means of putting M.'s views and preferences before the Court, and that she had done so in at least one previous difficult and sensitive case, I made an order on January 11, 2017, recommending that Ms. Wotherspoon be appointed to attempt to obtain this information, in lieu of a child lawyer. In conducting her interviews for the report, Ms. Wotherspoon agreed to attempt to comply with the conditions for the child lawyer which I set out in my reasons cited as *RKK v. BMM*, 2016 YKSC 59, which I paraphrase as follows:

- a) Interview M. and report his views and preferences with respect to his living arrangements;
- b) Consider involving Ms. S.R. (a friend of the mother's and an occasional caregiver for M.) in interviews with M.;
- c) M. should be told that he is not responsible for making a custody decision and that he will not be asked to do so;
- d) M. should be told that the Court will not decide based solely on his wishes;
- e) M. should be told that the discussion will be private and that Ms. Wotherspoon will report only what M. wishes to report;
- f) M. may be asked if he was encouraged to say anything in particular in the interviews:
- g) M. should be asked if there is anything he specifically wishes to convey to the Court or his parents; and

- h) M.'s statements should be reviewed with him to confirm what may be disclosed.

[17] Ms. Wotherspoon met with M. and C., the parties, and each of the step-parents. She also interviewed Ms. S.R. and J.S. The latter was M.'s educational assistant for several consecutive years in grade school. These interviews included home visits and one visit with M. alone. They were conducted over the period from February 15 to March 13, 2017. Neither party has raised any objection to the methodology used by Ms. Wotherspoon in conducting these interviews and preparing her report.

[18] According to this Report, M. expressed a preference to reside with his mother. However, Ms. Wotherspoon was not confident that M. had the capacity to freely express his views in this regard. I will summarize her reasons for this conclusion briefly:

1. M. is sensitive to adult feelings and is eager to please adults.
2. M.'s presentation and opinions varied markedly, even when he was interviewed alone, depending on which parent was caring for him at the time of the interview.
3. M. consistently sought approval from his mother regarding his behaviour and his statements to Ms. Wotherspoon. Ms. Wotherspoon expressly stated that this should not be taken to mean that M. was coached on what to say by his mother, but it left her with the impression that he was anxious about her reaction to his conversation with Ms. Wotherspoon.
4. Ms. Wotherspoon observed that M. was spontaneously affectionate, relaxed, joking, and assertive with his father during her two visits with the

two of them. She said this did not match M.'s statements to S.R. that he hated and feared his father and stepmother.

5. M.'s statements about his wishes were contradictory and variable.
6. It was not difficult to get M. to change his opinion on various issues.
7. Ms. Wotherspoon was concerned that M.'s comprehension did not match his expressive language/vocabulary, potentially causing some misunderstandings.

[19] Ms. Wotherspoon agreed with the parents that the level of animosity between them is unhealthy for M. and that the conflict needs to be substantially reduced as an immediate and urgent priority. She also agreed with the parents that a collaborative decision-making structure is likely unworkable.

[20] I will now turn to the reasons why I feel it is more appropriate for the father to have sole custody of M. In summary, my reasons turn on my conclusion that, as between the two parents, the father is the one who is more likely to facilitate a healthy relationship between M. and the non-custodial parent. I have little confidence that the mother is capable of acting in a similar capacity.

### **1. "Chooseday"**

[21] The father deposed, that on November 22, 2016, the day after I ordered that the child lawyer be appointed for M., he came back to the father's house after having been at the mother's home, saying that "Chooseday" is coming.<sup>1</sup> When the father asked M. what he meant by that, he said that is the day when he gets to tell the judge which house he chooses to live at. The father described M.'s demeanour during this

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<sup>1</sup> Father's Affidavit #9, paras. 32 and 33.



conversation as “hyper, agitated, anxious and uptight”. He also said that M. told him that he would get more rest and eat better at his mom’s house.

[22] The mother denies any responsibility for having put this idea into M.’s head. She deposed as follows<sup>2</sup>:

Choseday is a term the plaintiff coined. I made it clear to both of my children they were not choosing between us. In the case of [C.], I said she was choosing a primary residence for stability, not whom she loved, and that we would not prevent her from spending meaningful time with the plaintiff. In the case of [M.], I made no such characterization. The plaintiff has used the term in interviews and conversations. I have never uttered the term to anyone involved in this matter. Choseday was a term used extensively in the [K.] household in an attempt to manipulate [M.] in the months leading up to Ms. Wotherspoon’s visit... (my emphasis)

I am unable to accept that these statements are likely true.

[23] First, the mother has given contradictory evidence about whether she made C. choose between her home and the father’s home in the months leading up to the change of custody confirmed by the consent order on April 14, 2015. In her email to the father dated December 1, 2016, the mother admitted that she had “insisted” that C. choose a primary residence at that time.<sup>3</sup> Further, in an email to C. dated January 2, 2015, the mother stated<sup>4</sup>:

... If you choose to stay with [the father], he will have sole custody of you. If you choose to stay with us, we will seek sole custody. We are in the process of making this change official and legal... (my emphasis)

Still further, in an email to C. dated December 16, 2016, the mother wrote<sup>5</sup>:

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<sup>2</sup> Mother's Affidavit #9, para. 34.

<sup>3</sup> Mother's Affidavit #9, Exhibit N, p. 29.

<sup>4</sup> Mother's Affidavit #8, Exhibit M, p. 41.

<sup>5</sup> Mother's Affidavit #8, Exhibit M, p. 42.

...I feel your life and your grades reflect you made a poor choice, and I believe you responded to bribery over our care for you...

...

And I would encourage you to stop blaming me for all of your issues and problems. I think if you really want to move past this, you need to realize that we asked you to choose in order to stabilize you and get you through school... (my emphasis)

[24] Secondly, given the relative lack of communication between the parties, I find it improbable in the extreme that the mother would know that the father “has used the term [Chooseday] in interviews and conversations”. In a similar vein, I completely fail to understand how the mother would know that “the term was used extensively in the [father’s] household”. She simply would have had no source of information in that regard. She has not been on speaking terms with C. for quite some time, since the father acquired sole custody of C. Nor is there any suggestion that the mother obtained this information from M.; and, in any event, it would have been inappropriate for her to involve M. in this way.

[25] Thirdly, Ms. Wotherspoon reported that M. said it was the mother who told him about “Chooseday”<sup>6</sup>:

I asked [M.] what ‘Chooseday’ meant. He said, “*it’s the day you choose where you want to live, one place.*” I asked [M.] who had told him about Chooseday, and he replied, “My mom. She said it’s coming up pretty soon.” I asked him how he felt about Chooseday and he said, “*I’m okay with it.*” He told me that he chose his mother’s house. I reminded [M.] that the Judge would make decisions and would think about many things, not just what [M.] chose. [M.] asked why he was the only one getting into trouble and I wondered if he meant ‘why am I the only one who has to choose’... (my emphasis)

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<sup>6</sup> The Report, para. 37.

[26] Fourthly, in an email to the mother dated December 1, 2016, the father stated<sup>7</sup>:

[M.'s] behaviour and mood are a direct result of your conversation about "Choose Day", that is the day he will have to choose which house he lives in, a concept raised by you shortly after our last court appearance...

Interestingly, the court appearance the father is referring to here is the one where the mother applied for an order recommending the appointment of a child lawyer in order to obtain M.'s views and preferences on the upcoming cross-applications for sole custody. The mother was successful on the application and I conclude it is likely that the mother did have the conversation alleged by the father because of this fact. In other words, I find that the decision on the child lawyer is circumstantial evidence making it more likely that the mother spoke with M. soon after about his ability to choose where he would like to live. More importantly, although the mother included the email in her own affidavit, she did not expressly deny the truth of its contents.

[27] For these reasons, I conclude that it is more likely than not that the whole concept of "Chooseday" emanated from the mother. As a result, I find that she was not truthful when she denied ever uttering the term to anyone involved in this matter<sup>8</sup>.

[28] It was not in M.'s best interests for the mother to put M. in the position of having to choose between his parents.

[29] The second significant point arising from this conclusion relates to one of the suggestions I made for the child lawyer in my reasons recommending the appointment of same:

M. should be told that he is not being made responsible for making the custody decision and he will not be asked to do so.

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<sup>7</sup> Mother's Affidavit #9, Exhibit M, p. 28.

<sup>8</sup> Mother's Affidavit #9, para.34.

It is therefore apparent that the mother was also incapable of complying with this express suggestion. Rather, it appears that the mother was intent on drawing M. into the conflict by giving him the idea that he could choose which parent he would prefer to live with, rather than giving first priority to M.'s best interests. An inability to abide by court directions, or even suggestions, is not a characteristic of a custodial parent who is likely to respect the role of the other non-custodial parent in facilitating their involvement in the child's life.

## **2. *Insisting that C. choose***

[30] I find support and general corroboration for the above conclusion from the evidence relating to C., not only surrounding the change in her custodial status in 2015, but also when she was interviewed in the past by Dr. Posthuma, a psychologist who prepared two custody and access reports for the parties in 2009 and 2010. In the 2010 report, C. said that she wanted to be in the primary care of her mother. However, Dr. Posthuma concluded that C. had "been coached directly and/or indirectly by her mother" in this regard.

[31] I acknowledge that the mother and her counsel have challenged the credibility of Dr. Posthuma, particularly by submitting a report of the mother's own expert, Dr. Koch, who reviewed and criticized Dr. Posthuma's methodology and performed his own personality assessment of the mother. With this countervailing evidence in mind, I make no finding of fact that the mother coached C. prior to either assessment by Dr. Posthuma. Rather, I simply observe that he made that conclusion.

[32] In any event, C. clearly indicated to Ms. Wotherspoon that she felt pressured to take sides in the custody dispute in the past and felt that the same thing may be happening to M. currently<sup>9</sup>:

[C.] said she was pressured to take sides in the custody dispute in the past. She said, for example that when Dr. Posthuma interviewed her for the assessment, it was a bad experience because she felt compelled to side with her mother. She said, "I was under immense pressure to make her happy. I'd always agree with everything she'd say about [the father] because, to me it was the only way I could connect with her." [C.] said she was worried the same thing was happening to [M.]. She said, "I'm worried that he may be getting influenced in the other house because...when I was little, she used to say rude things about [the father] and it would affect me and how I'd act when I came here [the father's home]. I'm seeing some parallels" [C.] recognized that [M.] has recently been echoing many of the mean things her mother has said about [C.S., the father's wife]. She said that when [the father] began talking about a trip to Europe, "all of a sudden, [M. has] got this weird obsession with going to Alberta and nowhere else." She thought that he might be saying that to please his mother. (my emphasis)

[33] As I noted above, this theme of pressuring C., and involving her in the familial dispute, recurred when the mother was considering granting sole custody of C. to the father. This began in late 2014 and early 2015 when C. was only 14 years old. As I have already indicated, the mother clearly put C. in the position of having to choose which home she wanted to live in. In my view this was totally inappropriate, as it drew C. into the conflict, in much the same way as the mother has apparently recently done with M. One of the unfortunate consequences of the mother having acted in this manner with C. is that the two of them stopped talking to each other for well over a year. It was not until

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<sup>9</sup> The Report, para. 18.

December 9, 2016 that C. reached out to her mother by an email, to which the mother replied in her email of December 16, 2016, which I have partially quoted above.

[34] Interestingly, the mother's response to this breakdown in her relationship with C. was to blame the father for alienating C. This was canvassed by Ms. Wotherspoon in her Report and in a manner that suggests Ms. Wotherspoon felt the idea was conclusory on the mother's part and without any hard evidence to support the theory<sup>10</sup>:

[The mother] believed that [the father] has undermined her relationships with both children from the beginning. [The mother] alleged that [the father] had successfully alienated [C.] so that [the mother] was no longer on speaking terms with her daughter. She said, "*my daughter doesn't speak to me anymore, she is completely estranged from me. [the animosity] plays out through the children.*" When I asked [the mother] if the children said things that led her to conclude [the father] alienated [C.], she said, "*I know I'm being alienated. The proof of the pudding is in the eating, right? My daughter is alienated from me - therefore I was alienated. There's been a steady campaign for quite a while.*" [The mother] acknowledged that she has been emotional with [the father] at times. She said, "*I'm not going to suggest that I haven't let loose on [the father] before. But this has been a very frustrating and heartbreaking situation... How am I supposed to be not upset when my daughter won't speak to me anymore and thinks I'm crazy?*" (my emphasis)

[35] All this indicates to me that the mother has shockingly little insight into the extent to which she is responsible for having created the rift between herself and C. Again, that is not a characteristic of a custodial parent who is likely to respect the role of the non-custodial parent in the joint upbringing of M.

### **3. Directly involving M. in the conflict**

[36] One of the other consequences of the estrangement between the mother and C. is that C. has undertaken psychological counselling and psychiatric treatment. The

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<sup>10</sup> The Report, para. 7.

father had not informed the mother of the psychiatric treatment, because he was attempting to rebuild a trusting relationship with C., and was vigilant about protecting and respecting her privacy. However, in the course of the exchange of affidavit material in these cross-applications, the mother learned of the psychiatric treatment. In particular, she learned from M. that C. was taking pills from a bottle with her name on it. The mother then recruited M. to write down the name of the pills from the bottle, the next time he had the opportunity to do so at the father's house. However, M. was caught in the act by the father, as the father described to the mother in the following email dated April 26, 2017<sup>11</sup>:

I walked into the kitchen last night and found [M.] standing at the table, a bottle of [C.'s] prescription pills in one hand and a pencil and the other. When I asked him what he was doing he said he was writing down what the pills were. I asked why. He said after a brief hesitation: "Because Mom wants me to." The guilt and fear and anxiety on his face in that moment of hesitation was heartbreaking. I explained to him (as I am explaining to you now) that [C.'s] personal and medical issues are nobody's business but her own and she will share what she wishes to share when and with whom she chooses. I told [M.] that it was big people stuff and nothing that he need concern himself with and that I would pass that message on to his mother...

[37] The mother did not deny this accusation and acknowledged that, in hindsight, it was "perhaps inappropriate". Nevertheless, I found her response to be defensive and inflammatory. Immediately after deposing that M. told her the pills made C. sleepy and that she frequently skips out of school and lays around all day and then goes to sleep immediately after school, the mother stated<sup>12</sup>:

... I could not have asked what the pills were if I had relied on the [father] to apprise me she was even on any pills at all.

<sup>11</sup> Father's Affidavit #9, Exhibit D, p.11.

<sup>12</sup> Mother's Affidavit #9, paras. 31 and 32.

In hindsight, it was perhaps inappropriate to ask [M.] to write down the name of the pills, but I acted out of the deep concern that the [father] is over medicating and chemically restraining my child

...[M.] showed no signs of guilt or upset when he returned to us the following Friday. I apologized for putting him on the spot. It seemed to me there was no harm done. (my emphasis)

It is important to remember here that the mother granted sole custody and residence of C. to the father on April 14, 2015. Accordingly, she technically had no right to receive information from the father about what medication C. was taking, in the absence of C.'s consent. More importantly, it was totally inappropriate for the mother to put M. in the position of having to spy on his beloved sister. Finally, it was inflammatory for the mother to suggest that the father would have been intentionally "over medicating and chemically restraining" C. Incidentally, the father subsequently denied that C. skips out of school and lays around all day, although he allowed that she may occasionally nap in her bedroom after school<sup>13</sup>. Once again, the mother seems to have put her agenda (i.e. her curiosity about the medication) ahead of M.'s best interests.

#### **4. The mother's anger and hatred towards the father**

[38] Ms. Wotherspoon reported that the mother admitted to her "I'm not gonna suggest that I haven't let loose on [the father] before"<sup>14</sup>. This was corroborated by the mother's partner, S.R., who referred to the mother as capable of being "hot-blooded". He also referred to the mother's "emotionality" and her "emotional outbursts". Ms. Wotherspoon reported, in the context of a discussion with S.R. about disagreements between the mother and the father, that S.R. said:

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<sup>13</sup> Father's Affidavit #10, para. 7.

<sup>14</sup> The Report, para. 7.



*... [I]t goes back and forth until [the mother] gets frustrated with it, she overreacts a little bit, sometimes more than a little bit. In my opinion it's just words... (my emphasis)*

[39] In my opinion, it is more than just words. It is evidence of the mother's inability to refrain from expressing her anger and hatred towards the father. Having been involved with this conflict since 2008, this is a theme which has been ever present. It is inevitable that M. would pick up on this anger and hatred. Thus, the mother's seeming inability to restrain herself in this regard does not serve M.'s best interests, because it interferes with the ability of the two parents to communicate civilly and respectfully for M.'s sake.

[40] Like S.R., the mother's counsel tried to explain this behaviour by suggesting that it is brought on by the father's continual oppositional behaviour and his refusals to agree with everything that the mother proposes. In other words, the mother is provoked by the father's taunts until she explodes with anger. However, there are two examples in the evidence which do not bear this theory out.

[41] On October 16, 2016, the father sent a relatively innocuous email to the mother inquiring about the status of C.'s RESP. The subject of the email was stated to be "[C.'s] resp"<sup>15</sup>:

Hi...[C.] career planning this week and looking at post ed opportunities. Could you pls send us the latest status update on her education plan? Thanks.

The mother's reply on the same date included the following statements:

When we saw [C.'s] school career plummeting down the toilet due to your continuing influence, we asked her to make a sensible choice and stay here. When we saw that she couldn't or wouldn't make a sensible choice, perhaps due to coercion or bribery, and moved in with you, we stopped payment on the RESP... [W]e cashed in the RESP and went to Vienna...

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<sup>15</sup> Father's Affidavit #9, Exhibit B, pp. 7 and 8.

There is no RESP...

...

You really should have taken your responsibility to [C.] beyond simply digging at me. You have probably completely eliminated her chances of graduating at all, much less with anything she can use toward post sec or a job. I hope you beam with pride when she serves up your Egg McMuffin next time you're driving down to get on your boat, you sick piece of shit. (my emphasis)

(As an aside, there is further corroboration in this email about the mother forcing C. to make a choice between the two households.)

[42] This cannot be fairly described as an emotional outburst that was provoked by the father. He simply made an innocent inquiry as to the status of the RESP. The mother's vitriolic response was not the result of a long drawn out series of back-and-forth disagreements.

[43] Another example of the mother's anger and hatred towards the father is more historical, but nevertheless probative. The father deposed that when C. was in elementary school, at a time when he shared joint custody of her with the mother, the mother had changed C. from French immersion to the English stream without discussing or informing him. He said that when he raised the issue with the mother, she told him to "suck cock". The mother did not deny this, but instead referred to an earlier email she had sent to the father on March 22, 2012, suggesting that C. transfer into the English stream because she was having difficulty maintaining her marks. However, there is no evidence that the mother actually obtained the father's agreement on this issue or attempted to consult with him further about it. When the father wrote to the

mother to confront her about this outburst, the mother's responsive email of August 30, 2012, was defensive, evasive and demeaning towards the father<sup>16</sup>:

I should not have said Suck cock. What I meant in that vulgarity was that I wish you were more comfortable with who, and what, you are (and no, getting married won't change what you are). Of course, I just may have been caught off guard by being attacked on what was supposed to be a happy day.

[44] Interestingly, the mother's capacity to lose her temper has also been noted by M. According to Ms. Wotherspoon, when she asked him whether his mother ever got angry with him, he replied "she loses it sometimes" and said "I shake and vibrate. First of all, I am not a nitwit." When Ms. Wotherspoon asked M. who told him that he was a nitwit, he would not answer.

[45] It is also worth noting that the mother's own expert, Dr. Koch, in his report dated September 28, 2011, following a personality assessment of the mother, stated as follows:

Although [the mother] is average in Neuroticism, she did have high scores on the following facets of Neuroticism, anxiety and angry hostility. The implications for these elevations are that [the mother] is more likely than the average person to be anxious, generally apprehensive and prone to worry. She likely feels frustrated, irritable, and angry at other people more often than the average person. (my emphasis)

[46] My last point on this issue is to note something M. reported to Ms. Wotherspoon about how each parent described the other in the context of their fighting and arguing<sup>17</sup>:

...He said the thing he liked best about being with his Mom was that she let him sleep in (on weekends). He said that the thing he would change was "*I'd change the fact that we should all just be nice to each other. We should all just be*

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<sup>16</sup> Mother's Affidavit #9, Exhibit R, p. 59.

<sup>17</sup> The Report, para. 34.

*nice and no fighting and arguing. [The father] said my Mom's a difficult lady. Why would he say that? It's hurtful and mean. It hurts her feelings...My mom said my Dad is a horrible man. She's not a difficult lady, ok? Trust me."* (my emphasis)

Assuming that M. was truthful in briefly describing these conversations, then the first thing to conclude from this passage is that neither parent should be talking in disparaging terms about the other. Having said that, the mother's description of the father as "a horrible man" is arguably more acerbic than the father's description of the mother as "a difficult lady". It is also further evidence of the mother's anger and hatred towards the father.

[47] As a result of the father being granted sole custody of M., he will have the exclusive authority to make all major (and minor) decisions for M.'s upbringing going forward. Of course, it would be desirable that he attempt to consult with the mother on truly major decisions (e.g. health care or schooling), but he will be under no legal obligation to do so.

***Issue #2: What should M.'s residential schedule be?***

[48] I take it to be a generally accepted fact in this case that M. is very dependent on consistency in his life, and conversely is very averse to change. In my general knowledge of people with autism spectrum disorder, this is not uncommon.

[49] To her credit, the mother seems to have recognized this fact as a central pillar in M.'s life, since she did not seek to change M.'s residential schedule, in the event that she was granted sole custody of him, subject only to any change in M.'s wishes as he matures.

[50] The father, on the other hand, seeks to change the residential schedule to reduce M.'s time with his mother to every second weekend (Friday after school until

Monday morning, or Tuesday morning if Monday is a holiday), with a midweek visit from after school until 8 PM every week. The only rationale put forward by the father's counsel for this reduction is that, firstly, it is not in M.'s best interests to have equal time with his mother and that, secondly, the residential schedule should change to reduce the conflict.

[51] With respect to the first rationale, I conclude there is no clear evidence that it would be contrary to M.'s best interests to continue to spend half his residential time with his mother. On the contrary, the Report suggests pretty clearly that M. has a strong bond with both his parents and loves them both very much<sup>18</sup>:

[M.] told me that he loved both of his parents. He said that he wanted things to stay the same and he did not want to choose between them. He wished that everyone got along and would stop fighting. He missed [C.]. He said that if he had to choose, he would choose to live at his mother's home...

[52] As for the second rationale, I am not persuaded that having a weekly exchange where M. is dropped off or picked up at the mother's house, or alternatively, picked up or dropped off at the father's house is likely to do anything to diminish the level of conflict between the parents. On the contrary, it would seem more likely to create opportunities for increasing the conflict, especially if there are face-to-face exchanges between the parties. As I understand it, the pickups and drop-offs currently take place at M.'s school, after school on Fridays. Accordingly, there is no need for the parents to see each other at all at those times.

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<sup>18</sup> The Report, para. 47.

[53] There is also the question of M.'s close bond with his sister, C. This is an undisputed fact. By allowing the residential schedule to remain as it is, M. will be able to see his sister for a week at a time, every second week.

[54] Finally, it is most important to recognize and fully appreciate that the week on, week off schedule has been in place, at least with respect to M., since shortly after the parties separated in July 2005, that is, for almost 12 years.

[55] In order to justify such a radical reduction in M.'s time with his mother, significantly more evidence would be required. Simply put, the father has not met his onus in this aspect of his application.

[56] Accordingly, I conclude that it is in M.'s best interests that the residential schedule should remain as it has been. Having said that, I conclude that the father's requests for specified holiday time in his notice of application are reasonable, and specifying them in the order arising from these reasons may do a great deal to reduce the conflict between the parties. On that basis, I also rule that M.'s holiday time will be shared between the parties as follows<sup>19</sup>:

- a. Each parent will have half of the summer break with M. The father will have the first half of the summer vacation in 2017 and in every odd-numbered year following. The mother will have the first half of the summer vacation in 2018 and in every even-numbered year following.
- b. Each parent will have one week of school Christmas vacation with M. The father will have the first week until Boxing Day in 2017 and in odd-numbered years following. The mother will have the first week until Boxing Day in 2018 and in even-numbered years following.

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<sup>19</sup> Of course, the final wording of the order is left to counsel to agree upon.

- c. Spring break will be shared so that each parent has one week of spring break with M. In the event that spring break is only one week long, that week will alternate between the father and the mother from year to year.
- d. M. will celebrate his birthday with the mother in 2017 and with the father in 2018, alternating from year to year.
- e. M. will spend Mother's Day with the mother and Father's Day with the father.
- f. M. will spend the father's birthday with the father and the mother's birthday with the mother, overnight in each case.

***Issue #3: should the mother be required to repay the funds she withdrew from C.'s RESP?***

[57] In the father's application, he seeks an order that the mother repay forthwith the funds she withdrew from C.'s RESP. As I noted above, the mother cashed in the RESP sometime after C. moved in with the father full-time in September 2014. Her counsel clarified that she used the funds to take herself on a holiday in Vienna (there was no joint trip with S.R.). The mother's counsel also clarified that the amount withdrawn by the mother was \$16,853.42, representing her total contributions to the plan. There is no dispute that the mother was the sole contributor to this RESP. Although the father speculated that the plan may be worth as much as \$52,000, the mother's counsel has persuaded me that this is actually the "illustration value", which is the best estimate from the plan administrators of the plan's maximum worth, upon its maturity. This estimate is, in turn, greatly dependent on market fluctuations. It is not the value which the mother received when she cashed in the plan.

[58] The main issue here is whether C. has any proprietary interest in the RESP. I am not persuaded that she does. Rather, I am satisfied that the mother was the legal owner of the plan and that she was within her rights to cash in the plan and use the money as she saw fit.

[59] The mother's counsel referred me to *C.S.M. v. W.S.L.*, 2015 BCPC 252, as authority for the proposition that the mother was the legal owner of the plan. The case also mentions that there is little to no case law dealing with RESP's. There, Saunders J. states:

#### THE NATURE OF A RESP

16 There is no specific reference to an RESP in the *FLA* [Family Law Act] or in the Federal Child Support Guidelines and little to no case law in the provincial court dealing with RESPs.

17 The Canada Revenue Agency defines an RESP as a contract between an individual (the subscriber) and a person or organization (the promoter). The subscriber names one or more beneficiaries and the promoter agrees to pay educational assistance payments to the beneficiary who pays income tax on the payments. If the payments are not made to the beneficiary the promoter pays the subscriber. There is a reversionary interest vested in the subscriber.

18 There are group plans in which contributions of a large number of subscribers are pooled. There are individual plans set up for a single beneficiary or family plans for more than one family member. The subscriber has discretion over how the assets are invested and the timing and amount of the payments of the education assistance.

19 Another categorization of an RESP is that it is property and falls within Part 5 (Property Division), or Part 8 (Children's Property) of the *FLA*. The RESP, according to the Canada Revenue Agency is the property of the subscriber contributing to the education fund for the child as beneficiary. The provincial court would not have jurisdiction to deal with the application under Part 5. (my emphasis)



[60] The father's counsel was only able to provide two cases in support of her proposition that C. had a proprietary interest in the RESP. Both are distinguishable.

[61] The first case is *England v. Nguyen*, 2015 MBQB 139 ("*England*"). The case has some factual similarities to the case at bar in that the respondent mother had withdrawn some RESPs because of her bitterness over the decision of the children to move in with their father. This is noted by Johnston J., as follows:

60 There is no question that the respondent can be criticized for her conduct regarding the child support issue. Likely owing to her personal bitterness over the children's decision to ultimately relocate to reside with their father, she has stubbornly refused to appropriately provide for their financial support, although very aware of her obligation in law to do so.

[62] *England* is a complicated case because there were three different trials. However, at the end of the day, the mother was required to repay a portion of the RESPs to the children. What distinguishes this case from the case at bar is that, during the second trial, the father was designated by the court as the "trustee" for the RESPs. At the third trial, the mother claimed she was mistaken about this designation when she admitted transferring the RESPs into other forms of investments. Johnston J. rejected this explanation:

51 As part of the previous disposition upon the completion of the second trial, this court directed that the petitioner be designated as trustee for any remaining RESPs. A great portion of the financial disclosure motion and evidence received on the second day of the third trial, was largely focussed on what has become of the parties' RESPs accumulated for the children's benefit.

52 While not particularly disputing the value submitted by the petitioner, the respondent acknowledges that she transferred the RESPs into other forms of investments, and submits she was "mistaken" with respect to the court's

previous disposition regarding the designation of the petitioner as trustee.

...

62 Regarding the RESPs, this court does not accept that the actions undertaken by the respondent after the completion of the second trial, to transfer the RESPs into another form, is based upon a "misunderstanding." Rather, it is this court's view that it was a further blatant attempt to avoid affording a financial benefit to the children themselves. (my emphasis)

[63] Thus, unlike the case at bar, the mother did not assert that she was the legal owner of the RESPs. On the contrary, the father had previously been designated as the trustee for the RESPs, and therefore was entitled to have those funds, or what remained of them, returned to him.

[64] The second case relied upon by the father's counsel is *C.A.S. v. A.M.S.*, 2002 BCSC 1558 ("C.A.S."). There, the plaintiff was a child who sued her mother for allegedly misappropriating funds from the child's RESP. The claim was characterized as a breach of trust and fiduciary duty. The mother was the registered subscriber of the RESP, but several years after the plan had been established, she began to withdraw funds from it. She also changed the designated beneficiary from the plaintiff child to another one of her children. Loo J. explained the reason for this as follows:

9 The defendant was examined for discovery at length on why she removed her daughter as a beneficiary but the defendant, I think it is fair to say, does not give a straight answer. Reviewing the entire examination for discovery transcript, it appears that she was given a number of opportunities to explain why she removed her daughter as the beneficiary. While she insisted on maintaining control and discretion over the funds, at no time does she suggest that the RESP was her money. Rather, her excuse for not providing the RESP to her daughter was because she considered her daughter was rude and arrogant. In her

words, "She cut me off and I decided to cut her off." (my emphasis)

[65] Again, there are some factual similarities between that case and the case at bar. However, what distinguishes C.A.S. is that the mother and her former spouse had earlier entered into a consent order that the mother "shall continue to hold the RESP for the child of the marriage, C.A.S., for her university education". It was that term of the order, which Loo J. said gave rise to the action for breach of fiduciary duty (para. 4). In other words, the consent order effectively placed the mother in a position of legal trustee for the RESP in favour of the child.

[66] I conclude that the mother in the case at bar was not in a similar position. Rather, as the sole subscriber and contributor, she was the legal owner of the RESP. While she may have had a moral obligation towards C. to ensure that the funds were preserved for C.'s post-secondary education, she had no legal obligation to do so.

***Issue #4: Shall the parties share equally in the cost of counselling and/or play therapy services for C. and M.?***

[67] This was the final item of relief the father sought in his notice of application. However, there was no argument about the point at the hearing and there is little or no evidence relating to it. That said, with a view to minimizing the need for further court applications, at least in the immediate future, and also with a view to minimizing the level of conflict between the parties, I feel it is appropriate to deal with this issue on my own motion.

[68] It is important to note here that the mother will be incurring a significant expense to have M. assessed at CARD (\$1,800 USD, plus her and M.'s travel costs to Southern California, as well as the accommodations during the assessment, which is expected to

take two to three days). Further, the father now has sole custody of both C. and M. Accordingly, he has the exclusive authority to determine what counselling and therapy regimes are appropriate for each child. While one hopes that he would consult with the mother in that regard, the history of this conflict suggests that this may not happen. Or, at least, the prospect of success in obtaining agreement will be unlikely, even if consultation is attempted. In these circumstances, it would seem unfair for the mother to be required to pay 50% of any counselling or therapy for either child, if she has no input into the counselling or therapy that may be considered appropriate. Thus, for the time being, I am declining to make such an order and the father shall be responsible for these expenses.

#### **COSTS**

[69] Costs were not specifically addressed by either counsel at the hearing. However, as there was mixed success, I feel it is appropriate that each party bear their own costs.

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GOWER J.