

# SUPREME COURT OF YUKON

Citation: *J.K.H. v. R.D.H.*, 2018 YKSC 28

Date: 20180531  
S.C. No. 11-D4328  
Registry: Whitehorse

**BETWEEN**

**J.K.H.**

**PETITIONER**

**AND**

**R.D.H.**

**RESPONDENT**

Before Mr. Justice M. Macaulay

Appearances:

Shaunagh Stikeman

R.D.H.

Counsel for the petitioner  
Appearing on his own behalf

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] MACAULAY J. (Oral): At the conclusion of a chambers hearing on May 28, 2018, I varied the order of Gower J. for joint custody and guardianship of the parties' daughter, whom I will refer to as M., made August 21, 2012, and ordered that M. live solely with her mother, J.K.H., until the conclusion of the mother's application for sole custody, unless the court otherwise orders. I also recommended that the official guardian appoint Kathleen Kinchen to represent M. on the mother's application.

[2] I did not address the question of the father, R.D.H.'s, access at the time and will do so now. I will also give reasons for all my decisions. First, I will set out the relevant background.

### **BACKGROUND**

[3] J.K.H. and R.D.H. had two children. The eldest, whom I will refer to as P., is a boy. He was born in November 2002 and is now age 15. M. was born in January 2005 and is now age 13. On August 21, 2012, the parents divorced and the court ordered shared joint custody and guardianship of the two children. The court further ordered that the children share their residence equally between their parents' homes on a "one week / one week alternating basis subject to other arrangements as agreed by the parents from time to time to accommodate flexibility with this residential schedule, as the need arises".

[4] The parents and the children followed the terms of the order until P. moved in full time at his father's residence in August 2016. Since that time, P. has lived full-time with his father and, on the evidence, has had minimal contact with his mother and, it appears, does not want a continuing relationship with her at this time. There has never been any formal variation of the order respecting P.'s residency.

[5] Before P. moved to live with his father, an incident occurred at J.K.H.'s home while P. and M. were present. J.K.H. was drunk and some form of altercation involving P. occurred that resulted in the involvement of the police and Child Service workers. Of importance for the present application and to her credit, J.K.H. immediately embarked on alcohol addiction treatment and

counseling which continues through to the present. I am satisfied that J.H.K. has successfully maintained a sober lifestyle since the event of August 2016 in spite of her addiction.

[6] Until my order at the end of the hearing, M. had continuously lived alternate weeks with each parent as contemplated by the earlier court order. Close to the heart of the issues raised on the present applications are M.'s assertions of her preference to live full-time with J.K.H. Both parents assert that they want what is best for M. and agreed that I should recommend the appointment of a particular experienced lawyer, Kathleen Kinchen, to the Public Guardian and Trustee for the purpose of the full hearing.

[7] A copy of these reasons will likely be transcribed and forwarded to the Guardian. If my direction is required for that to happen, I so direct. In recommending the appointment of a specific lawyer, I am not intending in any way to circumscribe the Guardian's discretion to appoint another suitable lawyer instead.

[8] At age 5, M. was diagnosed with high-functioning Autism Spectrum Disorder. After her diagnosis, M. continued to see a psychiatrist annually for several years and, since age 10, has continued by tele-health conference. The psychiatrist has also been involved in an ongoing basis with recommending educational supports for M. who is now finishing grade 7.

[9] The parents and others agree that M. is high functioning, in spite of her autism. The family doctor opined that M. demonstrates an ability to identify and understand many of her emotions and can do so in a way "that enables her to

recognize situations that make her uncomfortable or make her anxiety worse”. Of significance in considering the impact of M.’s expressed wishes, which I refer to in detail later, the doctor opined that M. “demonstrates capacity to decide with which parent she would prefer to primarily reside”.

[10] Others expressed similar views. A school counselor describes M. as fully aware of her autism and apparently able to discuss its impact on her daily functioning. The same counselor described M. as “verbally articulate and has a clear awareness of her own feelings and opinions” and as well, “able to communicate her needs”; and finally, “able to voice her frustrations with clarity and personal examples”. The counselor does not see autism as barring M.’s ability to articulate her personal opinions and feelings.

[11] One of M.’s previous teachers still interacts frequently with M. at the school. He describes her communication skills as clear, both with her peers and adults. An educational assistant at the school who is also M.’s applied behaviour analysis therapeutic worker provides a similar description. According to the assistant, M. has become very good at self-advocacy.

[12] M. has communicated her desire to live only with her mother, both in writing and in conversations with adults. As to the former, M. wrote a diary entry in 2017 entitled “Bucket List” which included a desire to “move with my mom forever (until 18)”. In April 2018, M. wrote a list of her reasons for wanting to move from her father’s residence to her mother’s. Leaving aside the validity of M.’s complaints, she presents them in a coherent way. They strike me as a

legitimate age-appropriate expression of M.'s feelings and her assessment of the causes.

[13] As to oral conversations, the evidence of J.K.H. satisfies me that she and M. are very close confidants. Also, J.K.H. works at M.'s school, so they have frequent contact there as well as at home. According to J.K.H., M. has consistently stated her dislike of living at her father's home and her desire to live full-time with her. These views have been expressed more forcefully since March 2015.

[14] M. has also expressed similar sentiments about her dislike of living with her father and wanting to live solely with her mother to [redacted], the educational assistant and therapeutic worker at M.'s school; her maternal grandfather; and to a more limited extent, her school counselor.

[15] R.D.H. contends that M. changes her views depending on whom she talks to but I don't think that is likely. It is more likely that M. only confides in those she is comfortable with and that circle does not presently include her father and his current wife. R.D.H.'s wife has two daughters, ages 15 and 10, living with them as well as P. Recently, they have also taken on the responsibilities of fostering an additional child, a teenage girl.

[16] According to J.K.H., M. likes space, order, routines and quiet spaces. Loud noises and banging cause her stress and anxiety that can sometimes be overwhelming unless she successfully employs therapeutic calming techniques or removes herself to a calmer place. There is, in my view, a live risk that neither R.D.H. nor his wife fully understands that M. has these needs, which appear

legitimate. This is potentially harmful for M. and her self-awareness of that may well underlie her requests in spite of her love for her father and her unwillingness to discuss them directly with him.

[17] The father contends as well that M. is being over treated for her disorder. The evidence does not support that conclusion although it is clearly shared by other members of his family. This increases the risk that M.'s legitimate needs are not being met as well in the father's home as in the mother's.

[18] In addition to the appointment of a child advocate, R.D.H. also asks, without any formal application, that a Custody and Access Report be prepared. I am not prepared to make that order at this point without the consent of both parties. I do not see any present need for such a report taking into account the expense and delay usually associated with their preparation. I consider the appointment of a child advocate will assist greatly in determining the legitimacy of M.'s concerns about living with her father.

[19] Counsel for J.K.H. contends that the threshold requirement of a material change of circumstances is made out based on the above and other factors that I have not referred to. The evidence set out above is sufficient in my view to establish the threshold requirement before varying an existing custody order. The original order was made when M. was very young and now, almost six years later, her maturity and experiences with addressing her disorder have significantly changed the situation. Accordingly, I need not address the other alleged material changes.

[20] In reaching my decision to change the order so that, on an interim basis, M. can live solely with her mother, I had regard to all the factors respecting a determination of her best interests as set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, as well as in s. 30(1) of the *Children's Law Act*, R.S.Y. 2002, c. 31. In reaching my conclusion that the balancing of each of those factors overwhelmingly supports the move to the mother's home on an interim basis, I am not concluding that R.D.H. is an unfit parent. It is apparent, however, on the evidence that the living arrangements at his home are inevitably more chaotic than at the mother's. At the very least, there is more noise, more people, and fewer opportunities for privacy at the R.D.H. home. This creates unnecessary risk of emotional harm for M. that, at this point, is best addressed by permitting her to move to the quieter environment at the J.K.H. home as she clearly wishes to do.

[21] To this point, R.D.H. has tried to increase his bond with M. by fully including her in day-to-day family life in his home and their group activities. There is an opportunity here to try something different and hopefully, more productive. I conclude that the father shall have interim reasonable and generous access to be exercised alone with M. unless she specifically agrees in advance to include other persons such as her brother. I point out, without making any further order, that such visits may well give R.D.H. the opportunity to better understand his daughter's situation and needs.

[SUBMISSIONS BY COUNSEL]

[22] Continued interim joint custody, with primary residence with the mother, access as I have outlined, with joint custody subject in the event of

disagreement, the mother having the sole decision-making, final decision-making capacity in respect of M.'s ongoing medical and therapeutic treatment.

[23] That concludes my reasons.

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MACAULAY J.