

**SUPREME COURT OF YUKON**

Citation: *A.K.M. v. B.T.R.*, 2014 YKSC 70

Date: 20141121  
S.C. No.: 11-B0040  
Registry: Whitehorse

BETWEEN:

**A.K.M.**

**PLAINTIFF**

AND:

**B.T.R.**

**DEFENDANT**

Before the Honourable Mr. Justice L.F. Gower

Appearances:  
Kim Hawkins  
Lauren Whyte

Counsel for the Plaintiff  
Counsel for the Defendant

**REASONS FOR JUDGMENT**

[1] GOWER J. (Oral): This is the mother's application for a variation of the order of Justice Veale of September 13, 2011 (the "2011 order"), seeking interim custody of the three children. The two boys are eight and six, and the girl is four years of age. The mother also seeks an order that the primary residence of the children shall be with her in Burnaby, British Columbia; that the father be granted weekly telephone access at a regular time to be agreed between the parties and in-person access during school holidays in the mother's city of residence at times to be agreed between the parties. There are other provisions sought in the mother's notice of application filed

September 30, 2014, which I will come back to in a minute.

[2] The principal issue on this application is whether there has been a material change in circumstances to justify a variation of the 2011 order. I am satisfied that the mother has established such a material change. That change is constituted by the alienating conduct of the father over the last three years since the 2011 order, culminating in the father's refusal to return the daughter to the mother after the daughter had summer access with the father in Faro this past August. It was as a result of that refusal, which was unilateral on the part of the father, that the mother was required to travel to the Yukon to retain counsel and to make this application, not only for the return of the daughter, but ultimately for a variation of the 2011 order.

[3] The 2011 order provided that the mother would be responsible for purchasing airfares for the two boys, both during Christmas holidays and summer holidays, from the Yukon to the Lower Mainland, and that the father was to accompany the boys on those occasions and pay for his own airline ticket on each occasion, so that the mother could spend time with the boys in her home city.

[4] That has not happened. It did not happen during the Christmas 2011 season, the Christmas 2012 season, or the Christmas 2013 season, because the father indicated that he could not afford to pay for the airfare. There may be some confusion on the father's part as to whether he thought that he was responsible for paying for the airfare for the two boys but, in my respectful view, that simply indicates his ignorance of the terms of the order and is not an excuse -- certainly not a reasonable excuse.

[5] There were also difficulties with the mother not having access to the boys in the summer of 2012. She has deposed in her affidavit that it was apparent that the boys did

not want to come to Burnaby, British Columbia, so she, in turn, decided to travel up here to the Yukon to have what access she could to the boys over the summer. That resulted in a camping trip which did not end up successfully for the family. In the summer of 2013, the boys again indicated that they did not want to come to Burnaby and the mother had decided that, given the previous unpleasant experience for the summer of 2012, there would be no summer visit that year. In the summer of 2014, the mother had an injury that prevented her from coming to the Yukon to visit with the boys.

[6] However, in each of the last three years, the mother has lived up to her end of the bargain under the 2011 order to facilitate the transportation of the daughter to the Yukon so that she could spend time with the father in the spring break of 2012, the spring break of 2013, and for the summer holiday of 2014.

[7] The father agreed to return the daughter to the mother before the start of the 2014 school year; however, he failed to do that.

[8] There are a number of indications in the evidence of alienating behaviour by the father, which I am satisfied gave rise to the expressed opinions of the two boys not to want to visit with the mother in Burnaby in the summers of 2012 and 2013. The mother referred to a phone call that she was having with the boys on one occasion where she heard the father say in the background to one of the boys, "Oh, you're stupid like your mother." She also referred to the fact that one of the boys called her a "schizophrenic", which she is not, although she is under medication for an anxiety disorder which is under control. This is an eight-year-old boy who, I am satisfied, would not have known about the term "schizophrenic" unless that had been told to him by the father.

[9] There is another reference in one of the mother's affidavits to the father coming

to the phone during a conversation on Monday, August 18, 2014, that the mother was having with one of the boys. The father yelled, "You're a lousy fucking mother. You're not getting [H.] back, go ahead and phone the cops, I will see you in front of a judge, don't call here anymore!" He then hung up on her.

[10] Since the mother has come to the Yukon, she has been exercising telephone access with the boys during the weekdays. She filed an affidavit which includes statements from two workers at Kaushee's Place who were present at the time the mother was having a telephone conversation with the two boys on October 18, 2014.

[11] The father's counsel has pointed to the fact that there are a number of discrepancies between the two statements of these workers. I take her point.

[12] However, it must be remembered that while there is no evidence as to how long in particular this conversation took place for, there is a general indication that the mother has a habit of speaking with the boys for up to an hour or an hour and a half at a time. That is a long period of time for a witness to be recalling verbatim what was said by various speakers. I also note that in each case, the statements provided by these workers were dated and apparently signed several days after the conversation took place: in one case, October 21st; and in the second case, October 24th. So in my view, that explains why there may not have been a complete correspondence between the two statements. In fact, the discrepancies between them are understandable and, if anything, add to their credibility.

[13] In the one case, the worker overheard a man in the background saying, "Your mom is going to get charged with fraud." She overheard the daughter asking her mother if they were "going to live with Daddy forever." This worker could overhear the

father tell the daughter to say that she wants to stay with her daddy. When the daughter protested and said, "But Daddy, I haven't seen Mommy in a long time," the man said, "Just go, I don't fucken care." One of the boys was overheard saying, "Daddy says you're a butt face. Daddy says you're a witch." That same boy said, "[T.] says you're a butt face" -- T. being the name of the oldest boy. This worker then heard the father put on a game or a movie for the boys which distracted them from the phone and they did not respond after that.

[14] The second worker overheard the father several times in the background. She says that he stated, "Either way you lose," and then later yelled, "You'll be charged with perjury and fraud." He was also overheard to say, "They're staying with their dad forever." This worker noted that the children were upset. One of the kids made a comment about someone saying "you're a butt face."

[15] Since the first two affidavits of the mother were filed and delivered to the father, the father responded with his own affidavit which was sworn on November 19, 2014. It is very telling to me that nowhere in this affidavit does the father deny any of these allegations.

[16] With respect to the phone calls, his only point is to say that it is not within his control to facilitate attentive phone calls with the boys, because the plaintiff often calls and speaks for an hour or more. The father says that the young boys have a short attention span and will become bored and revert to watching television or even walk away from the phone. That is certainly understandable if that is what was happening, but the evidence indicates that much more than that was happening. In fact, what the father was doing was interrupting the boys during the phone calls and calling them away

from the phone because of meals, which are being held during the phone calls, even though the times of the phone calls were known in advance to the father. The evidence indicates that the father is actively putting on movies or games to distract the boys from the phone calls. What is worst of all is that the father is interrupting by saying foul things to the mother over the phone, which are obviously overheard by the boys, and making other statements which upset the children generally.

[17] The upshot of all of this is that neither of the boys have had a single visit with the mother in her home city since she moved to Burnaby in 2011. And prior to this fall, when she came to Court and got interim-interim orders to provide her with face-to-face access with the boys, she had not seen them in person for a year and a half. That situation is simply intolerable.

[18] The situation is made even worse by the fact that the father refused to return the daughter to the mother, before the end of the school vacation, unilaterally and without coming to Court to seek a variation of the 2011 order.

[19] I am happy to hear that the father now understands that that was wrong and that he was obliged to seek the permission of the Court to make such a radical change. However, his affidavit indicates that he believed that it was in the daughter's best interests not to return her because of things that she told him. In the affidavit, he says, "[H.] has told me that she wants to stay with me forever." Further, during one of the previous court appearances, when I challenged the father about his unilateral action in failing to return the daughter, he indicated to the effect that that was because the daughter did not want to return. I responded at that time, and I say again, that a four-year-old girl does not get to call the shots on when and how she has access or

residential time with either parent.

[20] The father has also made a number of disparaging allegations against the mother in his affidavit where he seems to go out of his way to try and, if you like, dig up dirt or throw mud at the mother to discredit her reputation. He has referred to what he believes to be an ex-boyfriend named M. whom he believes to be involved in drugs. The mother has subsequently denied this and indicates that M. is simply an old friend. The father has indicated that when he first saw the daughter this summer, he suggests that she was skinny to the point where he thought that she was malnourished. The mother has denied this also, and indicates that the daughter is simply of a slender build. The father accuses the mother of telling or teaching the daughter how to steal, which the mother completely denies. The father suggests that the mother was evicted from a previous rental premises for "for endangering the landlord." The mother's response to that allegation is that she brought the matter before the B.C. Residential Tenancy Branch, which ruled in her favour.

[21] So, in every case where the father has made a disparaging allegation against the mother, she has responded appropriately with a denial and an explanation. That causes me to view the father's attitude toward the mother as being consistent with the alienating comments that he has been overheard making to the children during phone conversations, as well as his general conduct in failing to facilitate access or a relationship between the boys and the mother over the last three years. This attitude of alienation is also consistent with the father's more recent interference with the mother's relationship with the daughter.

[22] There was another example of what I will refer to as the father's "game playing"

during an occasion on the weekend October 24-26, 2014, when I had ordered the mother's access with the two boys to begin in Whitehorse. The father was obliged to transport the boys from Faro to Whitehorse, return, in order for that access to happen. The mother was required by my order of October 21, 2014, to return the children to the father by 2 p.m. on Sunday, October 26. It is apparent from the mother's affidavit that the mother and the father agreed to meet at a certain hotel at 2 p.m. on that afternoon. The mother indicated that she arrived before 2 p.m. and waited for just over half an hour but the father did not arrive. The mother returned to Kaushee's Place where she was given a message that the RCMP had called. When she returned the call, the RCMP said that the father had just come to the hotel to pick up the boys but she had not been there. The mother asked for and received information from Kaushee's Place that the call from the RCMP had come in at 2:35 p.m. She then returned to the hotel and returned the boys to the father who was now present. (The mother's date on this is incorrect. She said this happened on October 24, but it must have happened on Sunday, October 26, 2014.)

[23] The mother subsequently met with an employee of the hotel who checked, through viewing security camera footage, and verified that the mother was present in the hotel lobby from 1:46 p.m. up to and including 2:35 p.m., which was the time when the call was placed by the RCMP to Kaushee's Place, presumably in response to the father's complaint that he had been to the hotel already, but that the boys were not there. That simply cannot be true because the cameras in the hotel lobby do not indicate any presence by the father in the hotel lobby until 2:46 p.m. That kind of obstructionist behaviour, again, is consistent with the pattern of alienating conduct by



the father over the last three years.

[24] Lastly, on a similar point, the mother deposes that on October 30, 2014, she received a call from the RCMP who said that the father had reported a bruise on one of the boy's cheeks. The mother claimed that she did not see any bruise and she had no knowledge as to how the boy could have received a bruise. However, eventually she was interviewed by the RCMP on November 14 where she was told that there was no indication from the children that she had caused the bruise. Her lawyer also informed her that the RCMP had called to confirm that there were no charges being laid against her. I infer from all of this that it was the father who made the complaint about the bruise, apparently on a spurious basis and, again, it is a sign of the type of confrontational, negative, and vindictive behaviour which is consistent with the father's alienating conduct over the last three years.

[25] There is no question from the case law that has been filed by the mother's counsel that that kind of alienating conduct is not in the best interests of the children.

[26] I am prepared to grant the mother the relief sought in the notice of application filed September 30th, specifically the relief in paras. 3(a)-(d), 4, 5, 6, 7, and 8. I will skip the financials for now and order paras. 14 and 15, which is the police assist clause.

[27] Ms. Hawkins, I have not heard from you on this but I am wondering whether it would make sense to order the relief in para. 9 for financial disclosure from the father so that your client can make a determination in due course as to whether she wants to come back and seek child support from the father.

[28] MS. HAWKINS: Yes, Your Honour, I think that it would be sensible at this point to have a further conversation with my friend about financial information and as

well -- for the implications for access, if the Court would be prepared to make the order in para. 9, that would be sufficient on the financials.

[29] THE COURT: I will make that order.

[30] Is there anything I have omitted or do counsel have any questions?

[31] MS. HAWKINS: Thank you, Your Honour.

[32] The only question that would be remaining from the Court would be the date, sort of, of the transfer when the boys would come to my client. She's indicated to me that her current residence would allow her to care for the boys there. She would be seeking a larger place. She's in a position --

[33] THE COURT: This is in Burnaby?

[34] MS. HAWKINS: In Burnaby. She's in a position to care for them. Certainly her hope would be that she can accompany them down during the course of this trip while she is up in the Yukon.

[35] THE COURT: That would be my expectation. In fact, I was thinking of making an additional order, say, that the father have 48 hours to return the boys to Whitehorse so that she can then make plans to fly back with all three children to Burnaby, say, within the week. I gather that Kaushee's is at overcapacity and that this is a real issue.

[36] You are shaking your head, again, Ma'am?

[37] UNIDENTIFIED FEMALE: She could stay.

[38] THE COURT: She can stay?

[39] UNIDENTIFIED FEMALE: Yeah, yeah, yeah.

[40] THE COURT: Okay. So, a week or so would be all right?

[41] UNIDENTIFIED FEMALE: Yes, yes.

[42] THE COURT: Thank you.

[43] Any other questions?

[44] MS. HAWKINS: I'm sorry, just what you just mentioned now, was it 48 hours or is it a week?

[45] THE COURT: Well, I will hear from you on that but I think that is a reasonable period of time. I want this order to be implemented quickly.

[46] Do you want to get instructions from ...?

(PAUSE)

[47] MS. HAWKINS: Your Honour, I was unaware of this but my client has just indicated that the birth certificates and health cards are with the boys and so she would be seeking to be included within the order that those need to be transferred with the boys. Certainly 48 hours, I think, from my client's perspective is agreeable and she will make arrangements to transport all the children to Burnaby while she is at Kaushee's.

[48] THE COURT: Sorry, the last part? She will ...?

[49] MS. HAWKINS: Certainly the 48 hours from my client's perspective is agreeable and she will make arrangements to transport all three children from Kaushee's.

[50] THE COURT: To Burnaby?

[51] MS. HAWKINS: To Burnaby, yes.

[52] THE COURT: Right. But it is the father's responsibility to bring the boys down to Whitehorse.

[53] MS. HAWKINS: Yes, that's correct. My client does not have a vehicle here.

[54] THE COURT: All right.

[55] Ms. Whyte, anything from you on that?

[56] MS. WHYTE: That's fine. Perhaps just to be very clear, the transfer location could be specified as Kaushee's, so the father is to be --

[57] THE COURT: What about the High Country Inn?

[58] MS. WHYTE: Okay.

[59] MS. HAWKINS: I think the High Country Inn is preferable just because Mr. R. can't come into the Kaushee's building. Perhaps, Your Honour, it may be easier instead of saying 48 hours, which may be difficult to determine, perhaps just choosing a time on Sunday or Monday as a deadline?

[60] THE COURT: Okay, so we are Friday now.

[61] First of all, I will make the order requiring the father to provide the birth certificates and health cards to the mother upon delivery of the boys.

[62] The boys are to be delivered to the mother no later than 6 p.m. on Sunday, November 23, 2014, at the lobby of the Coast High Country Inn.

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GOWER J.