

# SUPREME COURT OF YUKON

Citation: *SLH v AWH*,  
2024 YKSC 46

Date: 20240826  
S.C. No. 18-D5076  
Registry: Whitehorse

BETWEEN

S.L.H.

PLAINTIFF

AND

A.W.H.

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff

Shaunagh Stikeman

Counsel for the Defendant

Kulbir Vaid (by videoconference)

Counsel for the Children

Kathleen M. Kinchen

## REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The parties in this matter are S.L.H. and A.W.H. They were married on July 4, 2012, separated on April 3, 2018, and their divorce was pronounced on September 4, 2019. There are three children of the marriage: M.H., born [redacted], he is 10 years old; and B.H. and A.H., both born [redacted].

[2] The parties have been in court before today. There was, in fact, a full trial that addressed issues, including custody, access, and child support. A final order was made that gave joint custody to both parties with S.L.H. having the final decision-making authority. The residential schedule was a three-week rotating schedule that provided

less than 50% of the time to A.W.H. Orders were also made with regards to travel, child support, and s. 7 expenses.

[3] The parties have now brought cross-applications.

[4] S.L.H., in her application, seeks that the children be supported to attend their extracurricular activities during A.W.H.'s parenting time. She also seeks that A.W.H. pay s. 7 expenses retroactive to 2019, and that the Maintenance Enforcement Program ("MEP") register the order against the property.

[5] A.W.H. is seeking extensive variation of the order and additional orders. He seeks a residential schedule of 50-50, joint decision-making, and that he have decision-making in some areas while S.L.H. has some in others, as well as changes to child support and the s. 7 expenses order.

[6] At the hearing, the parties addressed the residential schedule, decision-making and ancillary orders to those orders, and adjourned the child support and s. 7 application.

[7] A child lawyer was appointed to act on behalf of M.H. There was a preliminary issue about whether the child lawyer's information should be relied upon.

[8] I will first address the preliminary issue and then I will look at the substance of the application.

[9] With regard to whether the child lawyer's information should be taken into consideration, A.W.H. submits that the child lawyer, Kathleen Kinchen, is either in a conflict or biased because she represented S.L.H.'s lawyer, Shaunagh Stikeman, in her own family law proceedings. The child lawyer and S.L.H. submit that there is no issue with her representation of M.H. A.W.H.'s counsel was not completely clear about the

legal basis for alleging conflict. So, it is useful to turn to the Law Society of Yukon's *Code of Conduct* ("*Code of Conduct*"), which establishes the rules for identifying conflicts of interest.

[10] The *Code of Conduct* states that a lawyer is:

3.4-1[2] ... prevented from acting [for a client] if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. ...

[11] These duties include the duty of loyalty. As to the duty of loyalty, the *Code of Conduct* notes that the lawyer's relationship with the client:

3.4-1[6] ... may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. ...

[12] The nature of the risk is that of a genuine serious risk to the duty of loyalty or to client representation arising from the retainer. The factors that may be used to determine whether there is a conflict of interest include:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

[13] In the case at bar, the factors outlined by the *Code of Conduct* are, by and large, not directly helpful in determining if there is a conflict, as they focus generally on how the legal interests of different clients are affected. The issue here is more akin to the situation in which a lawyer is in an oppositional relationship to someone who is close to them, such as where the opposing party is a friend. Because of this, the factors I will take into account in assessing whether there is a conflict is the nature of the relationship between Ms. Kinchen and Ms. Stikeman, the length of the relationship, and whether there was overlap between the relationship and Ms. Kinchen's representation of M.H.

[14] The nature of the relationship is that of a lawyer and client. Ms. Kinchen has represented S.L.H.'s lawyer for a considerable period of time and her representation of Ms. Stikeman does overlap with her role as child lawyer. While these two factors may pull toward the conclusion that there is a conflict of interest, in my opinion the nature of the relationship is far more important and, in this case, a decisive factor.

[15] Ms. Kinchen and Ms. Stikeman are in a lawyer-client relationship, as I said before. As a lawyer, Ms. Kinchen's role is to provide objective advice to Ms. Stikeman and act on her instructions. The solicitor-client relationship can develop into a strong bond; however, even within this bond, the lawyer must be able to view the client's matter clinically and logically.

[16] I do not see then how the fact of Ms. Kinchen's representation of Ms. Stikeman in and of itself creates a conflict. I conclude that Ms. Kinchen is not in a conflict nor is she biased.

[17] I will now turn to the merits of the applications.

[18] The real issues here are about decision-making authority and parenting time. A.W.H. seeks a change to both decision-making authority and parenting time. S.L.H. seeks an order that implicates both issues. Because this matter went to trial and there is a final order in place, a change to the order can only be considered if there is a material change in circumstances.

[19] The question to be asked in considering a material change in circumstances is whether the child's needs or the parent's abilities to meet those needs have changed in a fundamental way. Put another way, the Court will look at whether the previous order might have been different had the circumstances now existing prevailed earlier.

[20] Parenting time and decision-making are separate issues but, in this case, for the consideration of material change in circumstances, the application of the factors overlap. I will therefore consider whether there is a material change in circumstances in both the decision-making and the residential schedule together.

[21] Here, A.W.H. submits that there has been a material change in circumstances because the mother has engaged in alienating conduct. He alleges that she speaks to the children about him; that she has spoken to others about him, both in a negative manner; that she schedules extracurricular activities during his time with the children on purpose to diminish the amount of time he has with them; that she discourages his relationship with the children; and he also submits that S.L.H. does not consult with him on issues that involve the children, thus making unilateral decisions that are important to the children. She also, in his submission, does not inform him of decisions.

[22] I agree with A.W.H. that there are issues in the parenting relationship. On a review of the evidence, I note that there are circumstances in which S.L.H. has not

provided A.W.H. with real input into decision-making and where he has not been informed about issues involving the children. There is also a strained relationship with poor communication between the parties. The children are also older and that warrants a review in these circumstances, given the trial judge's decision that the residential schedule may change as the children get older.

[23] I therefore find that there is a material change in circumstances.

[24] Before I get into the substance of the application, I do want to note that I recognize both parents love their children deeply. They are both interested in the best interests of the children. As I go through my decision, it may feel like to the parties as if their actions are under a microscope and that are being judged unfairly. That is not my intention. I say often that living in a separated relationship as parties try and raise their children is an extremely difficult task and my hope is that, with this decision, I can assist in developing the parties' abilities to fulfil their roles as separated parents.

[25] In looking at the best interests of the children, the *Divorce Act*, RSC, 1985, c 3 (2nd Supp) ("*Divorce Act*") provides specific factors that I can take into consideration. In this case, the factors that are pertinent are: the parties' willingness to support the development and maintenance of the child's relationship with the other party; the ability and willingness of the parties to communicate and cooperate; the child's views and preferences; and the ability and willingness of the parties to care for and meet the needs of the children.

[26] I will address each factor in turn, beginning with the parties' willingness to support the development and maintenance of the child's relationship with the other party.

[27] A.W.H. submits that S.L.H. undermines his relationship with the children. I have gone through a few of A.W.H.'s allegations and I will highlight some of those: she speaks negatively to the children about A.W.H.; she plans extracurricular activities during A.W.H.'s time with the children; and she has contacted Family and Children Services ("FCS") unnecessarily. He also submits that she monitors his relationship with the children and will interfere with his access time.

[28] I find that there is some truth to A.W.H.'s allegations; however, the extent of the issues is less than he states.

[29] I find that S.L.H. does speak negatively to the children about A.W.H. This was made evident through a report provided by the children's psychologist and filed in court by S.L.H. S.L.H.'s counsel reasonably conceded this point to an extent. This is problematic. Speaking negatively to children about A.W.H. harms M.H., B.H., and A.H. This should never occur. I recognize that communication between S.L.H. and A.W.H. is poor and it may feel like S.L.H. needs to fight back or state her case, but that does not help. It is important for both parties, if they feel like the other party is speaking to the children about them, to not fight back but to take the higher road. Each party can control themselves. They cannot control the other party.

[30] I do not have enough evidence to conclude that S.L.H. interferes with A.W.H.'s parenting time with the children when she schedules their extracurricular activities. I am not persuaded that S.L.H. registers the children for extracurricular activities to affect A.W.H.'s parenting time. While A.H.'s extracurricular activities did take place during A.W.H.'s parenting time, other extracurricular activities did not. There are also times

where S.L.H. proposed an extracurricular activity that could take place during A.W.H.'s parenting time, he objected, and other arrangements were made.

[31] Finally, while I conclude that S.L.H. contacted FCS unnecessarily, I also conclude that she did not have bad intentions in doing so. Some of S.L.H.'s concerns, such as leaving their children in the car unattended, were legitimate but were not such that FCS should have been contacted. With regard to the other concerns, it seems to me most likely that, for the most part, the children gave S.L.H. information that sounded alarming but ultimately had innocent explanations.

[32] A.W.H. has made much of the statements made by a social worker from FCS that they were treating S.L.H.'s complaints as a family dispute. No one from FCS has provided testimony in this matter, so it is difficult to make any assessment of the reported comments. Based on the evidence presented, I have questions about the basis upon which the FCS worker came to her conclusions and why she determined that she should share it with A.W.H.'s friend, who was a third party and uninvolved in the allegations.

[33] Based on my examination of all the evidence, what the reports to FCS really demonstrate is that S.L.H. and A.W.H. have significant difficulties communicating. Had the parties been able to communicate, S.L.H. would have approached A.W.H. with the concerns and he would have been either able to correct her, adjust his behaviour or found another way to address them.

[34] In conclusion, looking at the first factor, S.L.H. has engaged in some problematic behaviour by involving the children in the dispute with A.W.H., but it is not as severe as that described by A.W.H.



[35] I will now consider whether the parties are able to communicate and cooperate.

[36] A.W.H. alleges that S.L.H. makes decisions without consulting or informing him. S.L.H. denies this. I conclude that there are times when S.L.H. does not ask A.W.H. for his input before making a decision. It is always essential that you do that, S.L.H. At the same time, A.W.H. does not make it always easy for S.L.H. to do so. S.L.H. attests that A.W.H. does not always respond in a timely fashion, for instance. This is corroborated in emails about A.H.'s involvement in gymnastics. In addition, A.W.H.'s refusal to take the children to extracurricular activities when S.L.H. has decided to enrol them in them or to assist in paying for a psychologist, for instance, undermines her decision-making authority and the intent of the order made by Justice Aston that S.L.H. have the final decision-making authority for the children.

[37] Ultimately, neither party is particularly good at this point at cooperating in making decisions with regard to the children. I come back to the recurrent theme that the parties are unable to communicate with each other. There is no trust between the parties. Each expects the other to respond badly and to behave out of selfish motive. They are both also reactive, which exacerbates and confirms their beliefs about each other.

[38] For her part, S.L.H. mistrusts A.W.H. as a parent. This makes it difficult for her to distinguish issues of legitimate concern from simply different kinds of parenting or mistakes that any parent can make. This influences her approach to decision-making. There are times that, though she does consult with A.W.H. about decisions, she does not really hear him. This occurred, for instance, when the parties were discussing counselling for the children. While S.L.H.'s worry that there would be a wait list for free counselling was realistic, her worry was explained in her affidavit after the fact rather

than to A.W.H. while they were discussing the possibilities. Moreover, there would have been no harm in exploring different options, but S.L.H.'s tone was that she was intent on using Kim Scott as the counsellor.

[39] A.W.H., in turn, gets defensive when S.L.H. brings up concerns. Sometimes, just like S.L.H., he comes across as simply not valuing her input as a parent. Some of it, however, is also in reaction to S.L.H.'s approach.

[40] The result I see is a vicious cycle. S.L.H. communicates in a way that A.W.H. takes as disdainful of his parenting, or vice versa. A.W.H. reacts to what he takes to be a criticism rather than considering whether his responses are reactive or really in the children's best interests. This then confirms to S.L.H. that A.W.H. does not take the children's interests into account.

[41] One example I saw is that when M.H. was healing from surgery, A.W.H. did not acknowledge that M.H. may very well be more comfortable or capable of bathing himself in a home with running water. Possibly the benefits of staying with A.W.H. still outweighed the downsides, but because A.W.H. did not also recognize those downsides, it did not appear that M.H.'s interests were front and centre.

[42] For both parents it seems that there is a battle of wills. I am saying this not to say that they are not concerned about your children's best interests. What I am saying is that it is difficult to make decisions in their children's best interests without hearing each other out.

[43] I will now look at M.H.'s views and preferences.

[44] The child lawyer reported that M.H. would like to spend less time at his father's house. She states that he talked about issues ranging from not liking the food at his

home to feeling unsafe. A.W.H. submits that M.H. is not expressing his wishes but is simply parroting S.L.H.'s views. S.L.H. submits that M.H. is not influenced by her. He has spoken of issues at his father's house to several different people. The complaints are similar everywhere.

[45] It is challenging to determine what weight to get M.H.'s views. He is still young, being 10 years old. Moreover, given that S.L.H. does speak to the children about A.W.H., there is reason to question how genuine his statements are. On the other hand, the child lawyer, who has met M.H., was able with confidence to state that she did not believe that M.H. was being influenced by either parent.

[46] What I suspect is happening to a certain extent is that there are some minor issues occurring at A.W.H.'s home in which neither parent is dealing with effectively. A.W.H. is not in tune with these issues and when they are pointed out, ignores them. A.W.H.'s counsel notes that he has taken suggestions and changed behaviours when they were identified; however, the evidence shows that he has but only after Family and Children Service interventions.

[47] S.L.H. does not address the problems in a constructive manner or determine which really need to be addressed rather than simply lived with. Her interventions I think have only magnified the problems for the children.

[48] However, I also conclude that M.H. has identified some real concerns in his life with his father. He states that he does feel unsafe with his dad in some ways. I accept that he is stating this because this is how he feels and not because his mother is telling him so. Those feelings need to be taken seriously.

[49] However, I also believe that his feelings can be addressed. His worries seem to stem from his father's heart attack and accident; thus, his feelings came about after difficult situations and not because of A.W.H.'s parenting *per se*. At the same time, I also suspect that A.W.H. has not recognized or responded to M.H.'s fears as M.H. needs. If A.W.H. can work with M.H., and possibly the other children, to address those concerns, this will be better for A.W.H.'s relationship with the children.

[50] This leads me to the final factor, which is the ability and willingness of the parties to care for and meet the needs of the children.

[51] Overall, based on the information I have, I conclude that both parents are capable of providing the children the care they need. Both parents should work on aspects of their caregiving, but that can be said about all parents.

[52] At this point, I will not change the order with respect to decision-making. Because A.W.H. does have legitimate concerns about S.L.H.'s communication and cooperation, his counsel's submission that the parties each have areas of decision-making is, on the surface, appealing. However, as I have noted, A.W.H. can also be dismissive of S.L.H.'s point of view. I am concerned that if I grant the order requested, the parties will end up in silos, each making decisions in their area without really consulting the other and causing further conflict. Right now, I will leave the order in place.

[53] I encourage both parties to learn a different way of interacting. As S.L.H. has final decision-making authority, I encourage her to seek out assistance to learn to communicate effectively with A.W.H. I hope the situation can change — and I think it can — but if it does not, there may be changes to the way decisions are made in the future.

[54] With regard to residential time, given some of the issues raised and particularly given M.H.'s statement that he does feel unsafe with his father, I will, for six months, change the parties' parenting time. The children will have parenting time with A.W.H. for one weekend every two weeks. I am open to hearing submissions, but my proposal would be Thursday to Sunday. I am hopeful that if A.W.H. squarely addresses M.H.'s concerns, the parenting schedule can change. It may be useful for A.W.H. to reach out to Kim Scott. I know that he has had communications with her, and I expect that she would be willing to speak with him. She may be able to provide some insight about M.H. and perhaps provide a referral so that he and M.H. can address the issues together.

[55] I will not, at this time, order that the parties take part in any kind of counselling. It is premature to go down that route.

[56] I will also order that A.W.H. take the children to any extracurricular activities that fall during his parenting time unless otherwise agreed to by the parties.

[57] Turning to the review, we can set down another two hours for the review six months from now. If there is a difference in positions about how to proceed, affidavit evidence will need to be filed. Counsel should communicate a couple of months before the date to determine if a contested review will occur. A Family Law Case Conference can be set down to determining filing deadlines.

[58] Because of this, I will therefore also recommend that the child lawyer stay on the file.

[59] Ms. Vaid, I will start with you to ask about the change to the schedule — and you may want to speak to A.W.H. as well — but the Thursday to Sunday every two weeks ...

## [DISCUSSIONS]

[60] MS. VAID: My only question, Your Honour, if I may, before I speak with my client — it would probably help him understand this a little bit better as well — in our evidence, we did present steps that my client has taken particularly related to M.H.'s concerns of that accident I guess that occurred, you know, the heart attack situation, you know, emergency drills, neighbours being aware, and the children knowing where to go. Those were steps that he did take to address M.H.'s concerns and I just want to make sure that was not overlooked.

[61] THE COURT: That was not overlooked. That is why I said in a way that makes M.H. feel better; right?

[62] MS. VAID: Okay.

[63] THE COURT: I understand that there were practical steps that were taken. I'm wondering if there is still an emotional underlay that M.H. is feeling that A.W.H. has not — I mean, we have a different relationship with each parent; right? So there may be something that S.L.H. sees that A.W.H. does not.

[64] MS. VAID: I'm just wondering if a step further within the six months to help facilitate that emotional issue, I guess, that we want to address is therapy sessions, if it's Kim Scott or another one, between dad and M.H.; that might be helpful. I'm wondering if that's something you can endorse. And I'll have to speak to my client, but those are my thoughts to make sure that we have a game plan and not six months of, you know, nothing really happening and there's no way to track it other than through Ms. Kinchen.

[65] THE COURT: If I did not make it clear in my decision, then, yes. That is why I suggested that he speak to Ms. Scott and that perhaps Ms. Scott could provide a referral for him. She may not be in a position to provide counselling to them together because of her alignment with M.H. but hopefully she could provide a referral.

[DISCUSSIONS]

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WENCKEBACH J.