

SUPREME COURT OF YUKON

Citation: *ADM v TJH and KLM*,
2025 YKSC 19

Date: 20250409
S.C. No. 25-B0003
Registry: Whitehorse

BETWEEN

A.D.M.

PLAINTIFF

AND

T.J.H.

DEFENDANT

AND

K.L.M.

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff

Joselynn Fember (by videoconference)

Appearing on his own behalf

T.J.H. (by telephone)

Appearing on behalf of K.L.M.

D.S.

REASONS FOR DECISION

This decision was delivered in the form of Oral Reasons on April 9, 2025. The Reasons have since been edited for publication without changing the substance.

[1] WENCKEBACH J. (Oral): This is an application for custody of a child, K.D.R.H., born [redacted]. The parties in the proceeding are A.D.M., K.D.R.H.'s maternal aunt; T.J.H., K.D.R.H.'s father; and K.L.M., K.D.R.H.'s mother. K.L.M. has passed away. Her

mother, D.S., was K.L.M.'s guardian and is applying to be administrator of K.L.M.'s estate. For this family matter then, D.S. represents K.L.M. For the purposes of this decision, I will refer to the parties as the "aunt", the "father", the "mother", and the "grandmother".

[2] The father and the mother were in a relationship between 2015 and 2018. They then entered into a consent order for shared parenting of K.D.R.H. The aunt states that, despite the order, the mother had care of K.D.R.H. about 75% of the time. This is disputed, however, by the father.

[3] In 2023, the mother and father renewed contact. There is a dispute about the nature of their relationship. The aunt states that the parties did not reconcile nor live together, while the father states they did.

[4] Tragically, in early September 2024, the mother had a medical crisis and a few months later passed away. K.D.R.H. has been primarily in her father's care since the mother passed away. The aunt also provided K.D.R.H. assistance and care until the father denied the aunt further access with K.D.R.H.

[5] The aunt now seeks joint custody or sole custody, primary residence, and guardianship of K.D.R.H. She submits that the father is not acting in K.D.R.H.'s best interests and cannot provide her with adequate care. The father opposes the aunt's application. The grandmother appeared as guardian but only to answer questions if required.

[6] The question then is whether it would be in K.D.R.H.'s best interests for her father or her aunt to have custody, primary residence, and guardianship of K.D.R.H. Before I address this issue, however, there are three preliminary matters to address.

[7] First, there is an imbalance in the evidence presented. The aunt provided detailed evidence with specific concerns about the father's care of K.D.R.H. The father did file one affidavit; however, it addressed very little of the aunt's evidence. He had the opportunity to file further evidence but did not do so. At the beginning of the oral hearing, he confirmed that he understood he could not provide additional evidence at the hearing.

[8] When evidence is uncontradicted, it is generally taken to be true. In this case, however, I have taken into consideration that the aunt is represented by counsel while the father is unrepresented. Rather than simply accept that the aunt speaks the truth, if it is uncontradicted by the father, I have reviewed the aunt's evidence critically and, as much as possible, have relied on her evidence only if it is consistent with other evidence or is corroborated in some way.

[9] Second, the aunt filed audio and video recordings of interactions between the father and the mother. There are three recordings. The first is a lengthy audio recording of the mother and father. The second is a short video recording of the mother and father, and the third is a short video recording of the mother, the father, and K.D.R.H. In the second recording, the father knows that the mother is recording him; however, it is not clear whether in the first and third recordings the father knew the mother was recording him. I will presume that he did not know she was.

[10] Generally, the Court discourages surreptitious recordings in family law matters because they only serve to increase the conflict and mistrust that already arises in these fraught situations. Nevertheless, such evidence will be admitted if the probative value of the recordings outweighs the policy reasons for excluding the evidence. There must be

a compelling reason for admitting a surreptitious recording (*FS v TWS*, 2019 YKSC 25 at paras. 6-8).

[11] In this unique situation, I conclude that the audio recording should be admitted but the video recording of the father, mother, and K.D.R.H. should not be admitted. The probative value of the audio recording is strong. The recording is lengthy. It is clear what the situation depicts. It also provides evidence that directly addresses the aunt's allegations that the father has substance abuse issues and that he was abusive to the mother. The video recording of the mother, father, and K.D.R.H., however, is very short. It appears that the father may be giving K.D.R.H. an alcoholic drink but I cannot draw any conclusions about it.

[12] The policy reasons for admitting the recordings are not as significant as they are in other matters. In this case, while the mother recorded the father, it is the aunt that is seeking custody. There is not the same concern that the aunt will use this as a tool against the father in the future.

[13] Moreover, the mother is unable to provide her own testimony. The recordings are the only evidence available directly from the mother from the past couple of years. The lengthy audio recording, in particular, gives insight into the mother's and father's relationship, and the father's behaviours.

[14] I will therefore admit the audio recording but not the video recording of the mother, father, and K.D.R.H. The video recording of the mother and father is admitted, as it was not taken surreptitiously, but its probative value is slight.

[15] The third preliminary matter is about allegations the father made that the aunt has obtained evidence illegally. He did not state what evidence was obtained illegally

but stated that it was from the mother's cell phone. The grandmother continues to have the rights and obligations as the mother's guardian. It seems to me that includes being able to have access to the mother's phone and the contents on the phone. The grandmother did not take the position that the aunt had attained the new evidence illegally. I therefore conclude that the aunt did not obtain evidence from the cell phone illegally.

[16] Now before I get into the merits, I do want to recognize that we are in a very awful place, that the reasons for coming here are terrible and tragic, nobody wants to be here; and nobody wants K.D.R.H. to suffer anymore.

[17] I will now discuss the law applicable in circumstances in which a non-parent seeks an order against a parent. The aunt's lawyer submitted that the Court must be respectful of the parents' right to determine custody and who may have access with the child. It follows that the Court should be reluctant to interfere with the custodial parent's decisions. The central issue, however, is what order would be in the best interests of the child (*GN and YN v DN and E.P.*, 2009 YKSC 75 ("GN")). These legal principles were not discussed in any length in the proceedings so I will simply add that there is also no presumption in favour of a parent in a proceeding between a parent and a non--parent (*SJB v TBS*, 2020 SKCA 93 at para. 56).

[18] The essential question, as stated in *GN*, is what is in the best interests of the child?

[19] I will first address who K.D.R.H. should live with. To do so, I will apply the pertinent principles from the *Children's Law Act*, RSY 2002, c 31, to determine whether it would be in K.D.R.H.'s best interests to live with her aunt or with her father.

[20] I will first address the factor of the bonds, love, and affection the parties have with K.D.R.H. Both parties have strong bonds with and love for K.D.R.H. The father separated from the mother when K.D.R.H. was about six months old. He and the mother then entered into a shared parenting arrangement. The aunt provided evidence that K.D.R.H. was in the mother's care most of the time despite the parenting arrangement. I cannot conclude, on a balance of probabilities, however, that this was the case. In the end, it is not necessary to come to a conclusion about the amount of time the father spent with K.D.R.H. between 2018 and 2023, when he and the mother reconnected. Since then, the father has been a figure in K.D.R.H.'s life.

[21] The aunt has also been an important figure in K.D.R.H.'s life. She was there when the father and mother first separated, providing a home for the mother and K.D.R.H. to live in while the mother adjusted to living separately from the father. She has continued to be involved in K.D.R.H.'s life after that and increasingly so after the mother became ill. The father agrees with some of the evidence the aunt gave about the time she spends with K.D.R.H. Both parties, then, are connected to K.D.R.H.

[22] The other factor I will address is the parties' willingness and ability to meet K.D.R.H.'s needs. The aunt alleges the father abuses alcohol. I find the aunt has substantiated her allegations. The aunt provides different kinds of evidence to support her allegations. While I do not give much weight to some of it, such as her evidence that the mother spoke to her about the father's drinking and about use of drugs, other evidence is persuasive. For instance, the aunt attests that she found many bottles, empty bottles and cans of alcohol when she would stop by the mother's house when the father was staying there with K.D.R.H. after the mother became ill. At times, K.D.R.H.

was with the father and at times he was alone. She also provides photos to corroborate her testimony.

[23] Additionally, the audio recording of the interaction between the father and the mother, which was made on June 20, 2024, clearly shows that the father was extremely intoxicated. Cumulatively, the evidence together is sufficient to prove that the father abuses alcohol, including when K.D.R.H. is in his care.

[24] The audio recording also substantiates that the father was abusive to the mother. The recording is of an interaction between the mother and the father in which they argue about whether the father should drive the mother's car. The father wanted to drive, and the mother was trying to stop him. During the interaction, the father is demeaning and insulting to the mother. She also complains that he closed the door on her leg twice and grabbed her face and leg. It appears that one of the times he closed the door on her was an accident. Otherwise, based on what the mother and father were saying and the tones of voice used, I conclude that these assaults occurred as the mother described in the recording.

[25] The father has been similarly insulting to K.D.R.H.'s extended maternal family from time to time, as can be seen from texts he sent to the grandmother.

[26] K.D.R.H. was not present when the incident between the father and mother occurred. She would also not have read the texts between the father and K.D.R.H.'s extended maternal family. However, a child does not need to be a direct witness to domestic violence to be affected by it. Here, the father was physical with and verbally attacked the mother repeatedly during the incident. His intoxication likely contributed to his behaviour, and he continues to abuse alcohol. He behaved similarly with K.D.R.H.'s

maternal family. I conclude that K.D.R.H. has been or will be exposed directly or indirectly to this behaviour and it is not in her best interests. It is, in fact, harmful for children to be exposed to these kinds of situations.

[27] The father is also not providing a permanent home for K.D.R.H. The aunt and her family permitted the father to stay with K.D.R.H. in the mother's house after the mother became ill. However, the family learned that he stayed there at times without K.D.R.H. and also invited people to the house. So, at the beginning of October, they told him he could only stay over with K.D.R.H. and that they would be monitoring the property. At that point, he stopped staying at the home. He did not, however, find an apartment or other housing for K.D.R.H. and himself. The aunt has stated, with some corroborating evidence, that K.D.R.H. has stayed at the father's friends' homes, a few Airbnbs, and a mechanical shop.

[28] It is difficult to get affordable housing in Whitehorse. Parents who have difficulty finding housing should not be penalized. In this case, however, the father had the opportunity to continue to stay at the mother's house but chose not to when the aunt and her family lay some ground rules. Moreover, the father has been without a permanent home since October. He has not explained what steps he has taken to secure housing or when he may have permanent housing. The aunt also has a bedroom set aside for K.D.R.H. The most sensible course would have been for K.D.R.H. to stay with her aunt for at least some periods of time to give K.D.R.H. some sense of stability.

[29] Given that K.D.R.H. has so recently lost her mother, it would be highly important to give K.D.R.H. a sense of stability and security, including by having permanent

housing. I have concerns that the father has not made finding them a permanent home a priority.

[30] The father has shown questionable judgment in acting in K.D.R.H.'s best interests in other ways. The aunt states that the night that the mother had her medical crisis, she became very ill. The father and K.D.R.H. were there as well. The following morning, the father left K.D.R.H. with her mother, who was still experiencing grave symptoms of illness. It was K.D.R.H. who called emergency services to get help for her mother. The father does not address these allegations directly in his affidavit. However, in texts between the grandmother and the father, the grandmother reminds him that he left K.D.R.H. and her mother alone when her mother was sick, and he does not deny it. This is sufficient corroboration that the aunt has recounted what occurred when K.D.R.H.'s mother became ill. In that case, the father was not acting in K.D.R.H.'s best interests in any way.

[31] The father also cut off contact between K.D.R.H. and the mother's family and involved K.D.R.H. in his conflict with the family. The aunt relates that once the father was served with the court documents for this matter, he stopped contact between K.D.R.H. and the aunt completely. In the affidavit the father did file, he stated that he ceased contact because the mother's family was abusive and toxic. He added that, while the mother was alive, they only permitted the aunt to have supervised access with K.D.R.H. The evidence of the aunt's visits with K.D.R.H., which he addresses directly, however, shows that she had visits with K.D.R.H. at her home, without others present, or with members of the mother's family whom he also alleges were abusive and toxic. I

conclude that the father was agreeable to the aunt having extensive unsupervised contact with K.D.R.H. until he became angry with the family.

[32] He has also spoken negatively to K.D.R.H. about the mother's extended family. The aunt attested that K.D.R.H. asked her if the family had thrown K.D.R.H.'s things out after the mother passed away. This evidence is consistent with the father's own statements that he believes the family threw K.D.R.H.'s belongings away. I believe that the aunt did not do this. More importantly, the father brought K.D.R.H. into his dispute with the mother's family by telling her something that served no purpose other than to cause her distress.

[33] The father cut off K.D.R.H.'s contact with the mother's side of the family and involved her in the dispute at the time when she could have benefitted most from their love, after her mother passed away. The father's actions had the effect of creating additional losses for K.D.R.H.

[34] Turning to the aunt, the father submits that the mother's family, including the aunt, was abusive to the mother and continues to be abusive to K.D.R.H. I have addressed this allegation to a certain extent but will discuss it further here.

[35] Texts between the father and the mother from early 2024 show that, at that point, the mother was angry and disappointed with her family. The aunt does not dispute this. She states that problems arose because she confronted the mother about the impact the father was having on the mother and K.D.R.H. She furthermore states that the mother was angry for a while, but the mother and aunt reconciled to the point that the aunt was able to have contact with K.D.R.H. again.

[36] I cannot come to any conclusions about why the mother and the aunt had a falling out or why the mother was angry at her family. What is uncontroverted is that the mother permitted the aunt and the mother's extended family to have frequent contact with K.D.R.H. in the spring and summer of 2024. The father has also not provided specific evidence about what the aunt does that is abusive. I find that the mother did not have concerns with the aunt's or the family's contact with K.D.R.H. I also have no proof that the aunt is in any way abusive or toxic to K.D.R.H.

[37] The aunt also appears to have knowledge of K.D.R.H.'s needs, including her health and educational needs. She shows that she is interested in ensuring that K.D.R.H.'s needs are met should K.D.R.H. live with her. Furthermore, the aunt can provide stability to K.D.R.H. She has a home in which K.D.R.H. has her own bedroom.

[38] The aunt is also committed to spending time with K.D.R.H. as much as possible. After I made the order that K.D.R.H. have in person access with the aunt, the aunt attempted to arrange visits with her. The father would sometimes promise the visits but then not follow through or bring K.D.R.H. later than expected. On those dates, the aunt would wait, hoping to have a visit with K.D.R.H. The aunt is thus willing to set aside her own interests for K.D.R.H.

[39] Finally, the aunt has stated that she will ensure the father has access with K.D.R.H. and with K.H., who is K.D.R.H.'s half-sibling. This is important. Her communications with the father are measured and respectful even when the father refused or delayed court ordered access. I conclude that the aunt would provide the father with access with K.D.R.H. I have said this is important because, just as K.D.R.H.

needs to be in contact with the maternal side of the family, she needs to continue to be in contact with her father. Her losses are already too big.

[40] Balancing all the factors, I conclude that it is in K.D.R.H.'s best interests to live with her aunt. I therefore order that the aunt have primary residence of K.D.R.H. and that the father have access with K.D.R.H. I will provide my complete order at the end of the decision.

[41] I now turn to the issue of decision-making for K.D.R.H.

[42] The aunt first applied for joint custody of K.D.R.H., but in oral submissions the aunt's lawyer invited me to find that sole custody was in K.D.R.H.'s best interests. There are two competing issues here. First is that the father has not been given notice that counsel would suggest sole custody as a possibility. His ability to respond has thus been impacted. On the other hand, there is a basis for ordering that the aunt have sole custody. Joint custody is ordered where there is mutual trust and respect between the parties. If joint custody is likely to inflame the parties' conflict or to expose the child to the parents' conflict, then it should not be ordered. Here, the father has shown that he can respond aggressively and disrespectfully to the mother's family, thus impacting the ability of the parties to discuss decisions for K.D.R.H.

[43] In the end, because the father did not have notice of the possibility that the aunt would present sole custody as an option and given that he is self--represented, I conclude that it would not be fair to consider whether the aunt should have sole custody.

[44] Nevertheless, I do want to ensure that decisions are made for K.D.R.H. in a way that preserves her best interests. The father has shown that he does not always act in

K.D.R.H.'s best interests. I will therefore order that the parties have joint custody but that, after consultation, if the parties disagree on major decisions, the aunt shall have final decision-making authority.

[45] When I pronounce my order, I will also put in place a structured method of communication to guide the parties in the way they should communicate.

[46] I will now address the aunt's request for guardianship of K.D.R.H.

[47] Under the *Children's Law Act*, the guardian of the child is responsible for the care and management of the child's property. In this case, guardianship is an issue because K.D.R.H. stands to inherit property from her mother. The *Children's Law Act* sets out who, as between parents, is to be guardian. It does not, however, indicate who is to be guardian when the person who has care and custody of the child is a non-parent.

[48] In determining who should be guardian, the Court will consider the following factors:

- the ability of the applicant to manage the property of the child;
- the merits of any plans proposed by the applicant for the care and management of the property of the child; and
- if they can be determined, the views and preferences of the child (ss. 65(4)).

[49] I do not have a great deal of evidence on this issue. Based on what I have determined about the parties' abilities to act in K.D.R.H.'s best interests, it seems to me that the aunt would be a better guardian. Moreover, the father entered a consumer proposal in 2014 to deal with his accumulated debts. The father thus does have some

difficulties in managing money. I therefore conclude that the aunt should be K.D.R.H.'s guardian.

[50] So, my order in totality is as follows:

1. The plaintiff, A.D.M., shall have guardianship and primary residence of the child, K.D.R.H.
2. The parties shall have joint custody of the child and shall attempt to reach agreement on any major decision about the child, but if they are unable to reach agreement, the plaintiff shall have the authority to make the decision.
3. All discussions about major decisions for the child shall be in writing and, absent urgency, the parties shall respond to each other's messages within five days of receipt. In matters of urgency, the party seeking a response shall provide a reasonable timeframe for response. If the plaintiff consults with the defendant about a decision and he does not respond within the timelines as set out in the order, he is deemed to consent to the plaintiff's decision.
4. The defendant, T.J.H., shall have generous access with the child, as can be agreed upon by the parties. All arrangements for access shall be made in writing and shall be arranged at least one week in advance unless otherwise agreed upon by the parties. As a condition of access with the child, T.J.H. shall inform the plaintiff as to where he will be exercising access with the child.

5. The defendant shall not consume alcohol or non-prescription drugs immediately before or while the child is in his care, nor shall the child be in the presence of anyone under the influence of alcohol or non-prescription drugs while in the defendant's care.
6. The parties shall refrain from speaking negatively about each other and the defendant shall refrain from speaking negatively about the maternal side of the family in front of the child or in the presence of the child.
7. The parties shall communicate only by text or email, shall only communicate for the purpose of discussing matters pertinent to the child, and all such communications shall be conducted in a respectful manner.
8. Finally, I will include an RCMP assist clause to intervene if the father does not comply with the order. I am doing this because the father has not abided by the orders I made up until now. It can be traumatic for children when the RCMP needs to be involved, so I hope, and I expect, that this will never be necessary. Additionally, violating an order is extremely serious. What I have put in my order is not a guideline. The parties need to comply with it.

The order is the Royal Canadian Mounted Police may take such reasonable steps as they deem necessary to enforce the terms of this order, including, without limiting the generality of the foregoing, upon it appearing to a police officer having jurisdiction in the Yukon Territory that the defendant is in breach of any of the terms of the within order, then the police officer shall be authorized to arrest the defendant, restrain him, and

bring him at the earliest possible time before a Justice of the Supreme Court of the Yukon Territory to show cause why he should not be cited for civil contempt.

[51] I want to underline that disobeying a court order can have a number of effects. The Court can decrease the time spent with the child or require that it be supervised, it can change custody decisions, it can order costs against a party, and it can even order jail.

[52] My next issue is to talk about how and when you are going to get K.D.R.H.

[DISCUSSIONS]

[53] What I am going to order is that A.D.M. shall pick up K.D.R.H. from school today to take her into her care. It is not going to be my order, but I am going to recommend that there then be some access pretty soon after that.

[54] In terms of discussing this with K.D.R.H., I hope and expect she does not know about what is going on. What both parties should be saying to her is that you have been trying to figure out where she should live so that she can be cared for and everybody can love her in the best way possible, and that they asked a judge to make that decision. The judge decided that it should be A.D.M. but that you both love her very much and you will make sure that she is taken care of. That is basically what the message should be. There should not be any blame either way. I am sure you will both emphasize how much you both love her.

[DISCUSSIONS]