

SUPREME COURT OF YUKON

Citation: *JDWL v SNF*, 2025 YKSC 65

Date: 20250905
S.C. No. 24-B0062
Registry: Whitehorse

BETWEEN

J.D.W.L.

Plaintiff

AND

S.N.F.

Defendant

Before Justice K. Wenckebach

Counsel for the Plaintiff

André Roothman (by videoconference)

Counsel for the Defendant

Erin Linklater

This decision was delivered in the form of Oral Reasons on September 5, 2025. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The parties in this family law matter are J.D.W.L. and S.N.F. They were in a common-law relationship on and off between about 2020 and sometime between August and October 2024. They have one child of the relationship, Z.M.L., born [redacted]. S.N.F. also has a child from another relationship, L.F., born [redacted], who lives with S.N.F. L.F.'s biological father is involved in L.F.'s life.

[2] The parties met in Fort Nelson, British Columbia. They moved back and forth between Fort Nelson and Dawson City, Yukon. S.N.F. would spend summers in Dawson City and most of the rest of the time in Fort Nelson. J.D.W.L. spent somewhat more time in the Yukon.

[3] By all accounts, the parties had a difficult relationship. This reached a crisis when, on October 1, 2024, J.D.W.L. was charged with forcible confinement and assault against S.N.F. He was also put on conditions that he have no contact with S.N.F. or Z.M.L.

[4] Shortly thereafter, S.N.F. left the Yukon with Z.M.L. and L.F. She advised the RCMP and Family and Children Services that she was leaving and told them her plans for travel. She states she also told one of J.D.W.L.'s friends where she was going.

J.D.W.L. states that he did not know where S.N.F. went.

[5] S.N.F. went to stay with her father in Alberta first. Then around Christmas time, she went to Nanaimo, British Columbia, where she stayed at her grandmother's home. Her grandmother was recently deceased, and S.N.F. states she went to clean the house and deal with the estate.

[6] J.D.W.L. filed a statement of claim on December 5, 2024. L.F.'s biological father is not named as a party.

[7] On February 11, 2025, J.D.W.L. obtained a without notice order from the Court that S.N.F. return Z.M.L. and L.F. to him, and which included an RCMP assist clause.

[8] On February 15, 2025, the RCMP attended S.N.F.'s home and apprehended the children from her. The RCMP then gave them to J.D.W.L. J.D.W.L. went soon after to Dawson City with the children.

[9] S.N.F. had the without notice order set aside on March 4, 2025, and was permitted to return to Nanaimo with the children. She then returned to Fort Nelson and on to Dawson City in the summer.

[10] A family law case conference was held on July 18, 2025. J.D.W.L. maintained, as he has all along, that he stands in the place of a parent to L.F. It was agreed that L.F.'s biological father should be added as a party to the proceedings, but J.D.W.L. has not done that yet. Because of this, orders since then and this application have applied only to Z.M.L. J.D.W.L. has had some access with Z.M.L. since March 4, 2025, though he states that it is not sufficient.

[11] Although it is S.N.F. that has an order granting her, essentially, primary residence of Z.M.L., it is S.N.F. who brought the current application. She submits that the Court does not have jurisdiction over the matter. At the same time, she seeks that Z.M.L. be permitted to reside in Fort Nelson, British Columbia, and Dawson City, Yukon, and seeks other orders about communication and contact with J.D.W.L. Effectively, she seeks to have primary care and residence of Z.M.L. in Fort Nelson or Dawson City. In response to S.N.F.'s application, J.D.W.L. seeks that Z.M.L. reside in Dawson City.

[12] The first issue then is whether the Court has jurisdiction over the matter. If the Court does have jurisdiction, the determination of the other issues is a little more complicated. It is unclear whether Z.M.L. resides in Dawson City or Fort Nelson or in both cities. This has an effect on the legal question to be decided. If Z.M.L. resides only in Dawson City, then S.N.F., in seeking to have primary care and residence of Z.M.L. in Fort Nelson, is making a relocation application. If Z.M.L. lives in both Fort Nelson and Dawson City, then the question is simply about which parent should have primary care

and residence. Finally, if Z.M.L. lives in Fort Nelson, then it is J.D.W.L. who must prove that relocation is in her best interests.

[13] The second question is thus whether this is an application for relocation or a simple question of who should have primary care and residence of Z.M.L. Based on that answer, I will determine the issue of Z.M.L.'s primary care and residence.

[14] I will now begin with the question of jurisdiction.

[15] S.N.F.'s counsel has advanced this application in a contradictory fashion. She states that she is raising the question of jurisdiction but at the same time is seeking relief, which means she accepts the Court has jurisdiction over the matter. Counsel states that she raises it because it helps to determine whether this is a question of relocation or not.

[16] The question of Z.M.L.'s residence for the purpose of determining jurisdiction is not, however, the same as the question of Z.M.L.'s residence for the purposes of determining custody. While the two questions share some of the same factual basis, they are different legal questions with different tests. I still have to consider whether I have jurisdiction, however, because if I do not have jurisdiction, I cannot decide the application. Having considered the matter, I conclude that the Supreme Court of Yukon has jurisdiction.

[17] Sections 37 to 39 of the *Children's Law Act*, RSY 2002, c 31, sets out the circumstances in which the Supreme Court of Yukon may have jurisdiction over an application for custody. The Court's interpretation of these provisions is assisted by the Supreme Court of Canada's recent decision in the case *Dunmore v Mehralian*,

2025 SCC 20 (“*Dunmore*”). In *Dunmore*, the Court set out the legal principles for jurisdictional issues in child custody matters.

[18] Although *Dunmore* was concerned with Ontario legislation on the issue of jurisdiction, the Ontario legislation is virtually identical to the *Children’s Law Act* of the Yukon. The legal principles arising out of *Dunmore* are therefore directly applicable to the Yukon.

[19] Under ss. 37(1)(a), the Supreme Court of Yukon may have jurisdiction if the child is habitually resident in the Yukon at the commencement of the application for the order. In *Dunmore*, the Supreme Court of Canada considered the same provision in the legislation from Ontario. It began by noting that the legislation requires that the child’s habitual residence is determined as of the time the application was started (at para. 40).

[20] There is therefore a time element to the determination of the child’s habitual residence. Section 37(2) of the *Children’s Law Act* states the child is habitually resident in the place where the child last resided under one of three conditions: first, with their parents; second, if the parents are separated, with one of the parents under an order or with agreement or acquiescence of the other parent; or third, with a third party on a permanent basis or for a significant period of time, whichever last occurred.

[21] In reviewing Ontario’s legislation, the Supreme Court focused on Ontario’s equivalent to the phrase “whichever last occurred”. It concluded that the period of time that establishes the child’s habitual residence is before the application was started. The analysis is therefore backward looking (at para. 40).

[22] The period of time that establishes the child's habitual residence is further delineated in ss. 37(2) and (3). The time the court is concerned with is established and referenced to two conditions.

[23] Under the first condition, as noted above, it is the place where the child last resided with both parents, if they are together; or if the parents are separated, with the parent as permitted by an order or with the agreement or acquiescence of the other parent; or with a non-parent on a permanent basis or significant period of time.

[24] Under the second condition, which falls under s. 37(3), the child must not have been removed or withheld without consent or acquiescence from the other parent from the jurisdiction.

[25] So, in summary, the first question the Court must answer is which period of time is to be used to determine the child's habitual residence. It arises before the application is brought and is the last time the child lived, broadly speaking, with a parent or other adult with the consent or acquiescence of both parents or as permitted by an order. Once the Court determines the appropriate period of time for determining the child's habitual residence, the Court must then determine where the habitual residence is.

[26] *Dunmore* also establishes the principles about what constitutes a habitual residence. In summary, the principles are:

1. A residence is the place where someone "regularly, normally or customarily lives." It is contrasted with a place where someone "unusually, casually or intermittently visits or stays" (at para. 47).

2. The parent's intentions are not the central concern of the analysis. Rather, the analysis is squarely focused on the child's life and circumstances (at paras. 52-61).
3. Nevertheless, parental intention can be a factor in determining the child's habitual residence. It may be important for very young children because "very young children rely on the adults in their lives to create a home for them" (at para. 66).
4. "[P]hysical presence in a jurisdiction at a point in time is neither necessary nor sufficient to reside in that jurisdiction at that time" (at para. 64).
5. Permanence is also not necessary to establish residence, nor is it simply about determining where the child has spent the most time. It is not determined by a pure mathematical calculation of the number of days they resided in a place (at para. 65).
6. A child may reside in more than one jurisdiction at any given time (at para. 67).
7. The Court must look to "all the relevant links and circumstances" in determining the child's residence (at para. 68).

[27] In this case, I conclude Z.M.L.'s habitual residence is both British Columbia and the Yukon, and specifically Fort Nelson and Dawson City. In coming to this conclusion, I determined that the pertinent period of time for establishing Z.M.L.'s habitual residence is the time before October 1, 2024. J.D.W.L. filed his Statement of Claim on December 5, 2024, and brought his application in February 2025. At the beginning of October 2024, S.N.F. took Z.M.L. out of the jurisdiction without J.D.W.L.'s consent, thus,

in accordance with s. 37(3) of the *Children's Law Act*, Z.M.L.'s residence cannot be established on the basis of the period between October 2024 and December 2024 or February 2025.

[28] The period when the parties were together or there was agreement or acquiescence about Z.M.L.'s residence was the period before October 1, 2024. The evidence from both parties is that after Z.M.L.'s birth in 2022, S.N.F., Z.M.L., and L.F. lived in Fort Nelson while J.D.W.L. travelled back and forth between the Yukon and Fort Nelson. In 2023, the parties both intended to move to Dawson City more permanently. After arriving in Dawson City, however, S.N.F. states the plans for permanent residency in Dawson City fell through. The parties, with Z.M.L. and L.F., spent the summer in Dawson City; however, S.N.F., Z.M.L., and L.F. returned to Fort Nelson for the winter. J.D.W.L. seems to have remained committed to living in Dawson City. Even so, he returned to Fort Nelson, staying there between December 2023 and February 2024. In the summer of 2024, S.N.F., L.F., and Z.M.L. once again returned to Dawson City.

[29] J.D.W.L. submits that S.N.F.'s driver's licence is from the Yukon; she purchased property in the Yukon that she could qualify for only if she were a Yukon resident; and she filed taxes in the Yukon. He states that this is evidence that Z.M.L.'s habitual residence is the Yukon. This evidence is only marginally helpful, however. It is evidence of S.N.F.'s intentions rather than of Z.M.L.'s lived experience. Moreover, S.N.F. does not deny she thought of living in Dawson City permanently. Her evidence is that her intentions changed.

[30] This case demonstrates why parental intention is not always a good barometer for determining a child's habitual residence. S.N.F.'s intentions changed, but J.D.W.L.'s did not. The parties' intentions were, therefore, divergent.

[31] Z.M.L.'s reality was that she had seasonal shifts in her residence, living in Dawson City in the summer and in Fort Nelson the rest of the year. I therefore conclude Z.M.L.'s habitual residence is both Fort Nelson and Dawson City.

[32] That only partially resolves the question on jurisdiction, however. As Z.M.L. is habitually resident in two jurisdictions, both British Columbia and the Yukon could have jurisdiction over the matter. This is called concurrent jurisdiction. The *Children's Law Act* also addresses how to decide between two courts where there is concurrent jurisdiction. Under s. 39, the Supreme Court of Yukon may decline jurisdiction if it is more appropriate for jurisdiction to be exercised outside the Yukon.

[33] The factors used in determining which jurisdiction is more appropriate are set out in the *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c7, at s. 11

(*Shortridge-Tsuchiya v Tsuchiya*, 2010 BCCA 61 at para. 60). Those factors are:

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- (b) the law to be applied to issues in the proceeding;
- (c) the desirability of avoiding multiplicity of legal proceedings;
- (d) the desirability of avoiding conflicting decisions in different courts;
- (e) the enforcement of an eventual judgment; and
- (f) the fair and efficient working of the Canadian legal system as a whole.

[34] The factors applicable here are the convenience and expense to the parties, the desirability of avoiding a multiplicity of legal proceedings, and the fair and efficient working of the Canadian legal system as a whole.

[35] In looking at the comparative convenience and expense of litigation, the court will often examine where the bulk of the evidence will come from. This favours British Columbia as the appropriate forum. Much of the evidence filed in the previous application, in particular, was from witnesses living in Fort Nelson and other parts of British Columbia. There was also a recent child welfare investigation conducted of S.N.F. in British Columbia. Moreover, Z.M.L. has spent most of her time in British Columbia. It is reasonable to conclude that the best evidence about her life would be there.

[36] Ordinarily, given Z.M.L.'s stronger connection to British Columbia, I would decline jurisdiction in favour of British Columbia. However, if I were to decline jurisdiction at this juncture, the parties would be left in limbo without a clear answer about where Z.M.L. should reside. This is hardly helpful to the parties or, more importantly, to Z.M.L. Additionally, the proceedings have been in the system for some time, and this is the third application to be heard, although all the applications are interrelated. The parties would be required to start fresh in British Columbia, requiring the court there to familiarize itself with the issues and decisions that the Court here is already cognizant of and to make new decisions. I therefore conclude that, given the state of the proceedings, British Columbia would not be a more appropriate forum.

[37] The next question is whether this is a relocation application; and I conclude that it is not. The *Children's Law Act* does not include provisions about relocation. I have also

not found case law that addresses what constitutes a relocation under the common law. Legislation in other jurisdictions, including the *Divorce Act*, RSC 1985, c 3 (2nd Supp), do have provisions about relocation. Under the *Divorce Act*, the requirement to follow the provisions about relocation is triggered if a child's change in residence is likely to have a significant impact on the child's relationship with the parent that is not moving. If a move does not have a significant impact on the child's relationship with the non-moving parent, there is no requirement to engage in a relocation analysis.

[38] The Saskatchewan Court of Appeal in *DTD v TAJ*, 2022 SKCA 34, stated that the provisions in the *Divorce Act* reflect the way the courts viewed relocation applications under the common law. Under the common law, courts did not analyze the circumstances in which they should conduct a relocation application, but rather simply applied the significant impact test. This test, in turn, was derived from the Supreme Court of Canada's decision in *Gordon v Goertz*, [1996] 2 SCR 27 ("*Gordon*"). *Gordon* did not address this exact issue; rather, the significant impact test is a natural extension of the legal principles enunciated in *Gordon v Goertz*.

[39] Thus, the question before me is whether S.N.F. is seeking a change of residence for Z.M.L. that would have a significant impact on Z.M.L.'s relationship with J.D.W.L. In my opinion, Z.M.L. is not changing residences. Although S.N.F. lived most recently in Nanaimo, this was a temporary move. Based on the facts of Z.M.L.'s living arrangements thus far, Z.M.L.'s residences are in Dawson City in the summer and Fort Nelson in the winter. In proposing to return to Fort Nelson, S.N.F. is proposing to return to one of Z.M.L.'s residences at the time that, more or less, she normally returns there.

[40] I am also of the view that this proposal will not have a significant impact on the relationship between Z.M.L. and J.D.W.L. When Z.M.L. was an infant, J.D.W.L. spent a great deal of time working away from Fort Nelson. Z.M.L. was born [redacted] [in the spring of 2022]. After her birth, J.D.W.L. was away at times in May 2022 and also spent the summer and beginning of the fall in Whitehorse. He states that he made multiple trips to Fort Nelson and was in Fort Nelson between October 13 and October 29, but between mid-June and the beginning of December 2022, he stayed in Whitehorse, not Fort Nelson. J.D.W.L. went to Fort Nelson around the Christmas holidays in December 2022, then returned to Whitehorse at the beginning of March 2023, staying there until the end of April 2023. Similarly, when S.N.F. returned from Dawson City to Fort Nelson in October 2023, J.D.W.L. stayed on in Dawson City. He went through Fort Nelson every few weeks when trucking and then stayed in Fort Nelson at Christmas. He left for Dawson City again at the end of February 2024.

[41] If S.N.F. returns to Fort Nelson and J.D.W.L. stays in Dawson City, he can continue to have the *status quo*, being with Z.M.L. by making trips between Dawson City and Fort Nelson as he did before. S.N.F.'s proposal does not constitute a change in the place of Z.M.L.'s residence, but even if it did, it would not have a significant impact on Z.M.L.'s relationship with J.D.W.L. It is not necessary to conduct a relocation analysis.

[42] This leads me to the final question, which is whether Z.M.L. should be in the primary care and residence of J.D.W.L. or S.N.F. or if the parties should share care and residence of Z.M.L. My decision about primary care and residence is determined by what is in Z.M.L.'s best interests. The *Children's Law Act* provides a non-exhaustive list

of factors the court may use in determining the best interests of the child (s. 30). As paraphrased, these are:

- (a) the relationship between the child, their parents, and other family members who live with child or others who are involved in the child's care;
- (b) the views and preferences of the child, if they can be ascertained;
- (c) the length of time, taking into consideration the child's sense of time, that the child has lived in a stable environment;
- (d) the ability and willingness of each parent to care for the child and fulfill their needs;
- (e) any plans proposed for the child's care and upbringing;
- (f) the permanence and stability of the family unit in which it is proposed that the child shall live; and
- (g) whether the parents will encourage a relationship between the child and the other parent.

[43] In the case at bar, the factors that are applicable are the relationship Z.M.L. has with other family members, the length of time she has lived in a stable environment, the ability and willingness of each parent to fulfill Z.M.L.'s needs, and whether the parents will encourage a relationship between Z.M.L. and the other parent.

[44] The relationship Z.M.L. has with L.F. is an important factor in this case. L.F. is Z.M.L.'s half-sibling. They have spent their entire lives together. J.D.W.L.'s counsel rightly and reasonably concedes that this factor has weight.

[45] The next factor is really about who has taken care of Z.M.L. As noted above, while the parties were together, J.D.W.L. spent significant periods of time working in a

different city than Z.M.L. Moreover, on his own evidence, even when he was in Fort Nelson, he was often working long hours. For instance, he states that in the winter of 2023, he worked 12-hour days, six days a week. Additionally, in the summer of 2024, he saw the family more but still would be away overnight some of the time. On J.D.W.L.'s evidence, although he spent as much time as he could with Z.M.L., S.N.F. was Z.M.L.'s primary caregiver since her birth.

[46] The third factor is the parties' abilities to fulfill Z.M.L.'s needs. J.D.W.L. has expressed a number of concerns about S.N.F. He claims she is abusive to both L.F. and Z.M.L. and abusive to him. He states that she does not feed the children properly, and they are frequently physically dirty. He also attests she has mental health issues. His mother and his friend have provided affidavits supporting these allegations.

[47] S.N.F. categorically denies these allegations. She, too, has filed affidavits from friends and family attesting that she is a caring, good mother who feeds her children properly.

[48] It is often difficult to make anything of affidavits when they are so contradictory, particularly as here, when they are for the most part either provided by the parties themselves or people who are not disinterested. And most of the affidavits fall into these categories.

[49] Here, however, I am assisted by evidence that is more neutral. First, S.N.F.'s ex-partner, L.F.'s father, has provided an affidavit on behalf of S.N.F. In it, he provides a glowing picture of S.N.F. as a mother to L.F., stating that L.F. is happy and healthy and that S.N.F. provides interactive, positive parenting. While ex-partners will not automatically be oppositional to each other, having a positive affidavit from an ex-

partner with whom the party shares a child may be one more step removed and more neutral than affidavits from friends and family.

[50] Additionally, there is indirect evidence from the RCMP and from Child Protection Services in British Columbia. The RCMP attended S.N.F.'s residence twice because J.D.W.L. asked them to do mental wellness checks on her. The police who apprehended L.F. and Z.M.L. when J.D.W.L. obtained his without notice order also recorded their observations of S.N.F., her home, and the children. S.N.F. has obtained the notes of all these interactions. The notes from the first mental wellness check state:

S.N.F. was very easy to talk to and confirmed the children were safe and sleeping. S.N.F. was respectful. She understood why police had to follow up. S.N.F. indicated she had nothing to say and that the police could tell him whatever he needed to. S.N.F. thanked the members for attending and appreciated the level of concern for her safety.

[51] After the second mental wellness check, notes state: "The home was well-kept, children clean, well-fed, and looked happy."

[52] When the RCMP attended S.N.F.'s home to apprehend the children, they noted the following:

S.N.F. was calm, coherent, and stable. Sgt. Dupuis met both children. No red flags or observations of mistreatment observed. The house was a mess; however, S.N.F. expressed she was there to clean up the home, which was her recently deceased grandmother's home. The home was a hoarder home.

[53] None of these snapshots substantiate J.D.W.L.'s evidence, aside from some of the evidence about the state of S.N.F.'s grandmother's home.

[54] Child Protective Services also provided a letter to S.N.F. after they investigated her because there had been reports of concerns about S.N.F. This occurred on May 13, 2025. They found that no further action was required and closed the file.

[55] On the evidence filed, J.D.W.L. has not shown that S.N.F. is a poor parent.

[56] S.N.F. also has concerns about J.D.W.L. Amongst them, she states that J.D.W.L. was abusive to her and exercised coercive control over her. Abuse and coercion and control can take many forms, including denigration of the other parent and especially in front of the children, unwarranted calls to the authorities such as the police and Children's Aid Society, threats including threats of suicide, surreptitious recordings, surveillance, insults, unwarranted criticism about parenting, and demanding to know the other parent's whereabouts (*KM v JR*, 2024 ONSC 1338 at para. 52; *Dunmore* at para. 57).

[57] Domestic violence against a partner is a factor in determining a child's best interests because it affects the children. It also helps to assess a parent's ability to care for their children's needs.

[58] In considering this factor, I will first address the charges laid against J.D.W.L. J.D.W.L. submits that when he sought to have shared custody with S.N.F., she made up a story to the police that he forcibly confined her and threatened her; she then fled the territory to prevent J.D.W.L. from having access with Z.M.L. S.N.F. maintains that J.D.W.L. was abusive during the relationship and he forcibly confined her and threatened to harm her. She also maintains that she left on the recommendation and permission of Victim Services, Family Children Services, and the RCMP.

[59] If I understand J.D.W.L.'s counsel correctly, his argument is that it is not a coincidence that J.D.W.L. was charged after he discussed shared custody with S.N.F. Rather, it prompted her to lie and to get him charged so she could leave the jurisdiction.

[60] I do not accept, however, that it is more plausible that S.N.F. made up a story about forcible confinement because the parties had spoken about custodial arrangements for Z.M.L. shortly before. The sequence of events could be coincidental. Moreover, it also fits the pattern of an abusive relationship. It is accepted that abusive partners may become more abusive when the relationships break down and after separation, as the abusive partner seeks to reassert control. The pending breakup and notion of not having S.N.F. in his life or Z.M.L. for at least 50 percent of the time could have also spurred J.D.W.L. to take increasingly desperate measures. In saying this, I am not concluding that this is what occurred; rather, I say this to point out that the sequence of events is not helpful on the evidence before me to determine what occurred.

[61] The fact that the Crown dropped the charges in exchange for a peace bond is also not sufficient proof that the incident did not occur.

[62] For S.N.F.'s part, affidavit evidence is not sufficient to prove abuse. Additionally, some of the examples S.N.F.'s counsel provided to support her position that J.D.W.L. was coercive and controlling also do not constitute domestic violence. For instance, gaming incessantly may make someone a very bad partner, but it does not amount to abuse or coercion and control.

[63] Because this is an interim application with affidavit evidence only, I cannot come to any firm conclusion about whether J.D.W.L. engaged in coercion or control of S.N.F. Nevertheless, largely on J.D.W.L.'s own evidence, there are red flags.

[64] This evidence is: J.D.W.L. set up security cameras on the parties' property to surveil S.N.F. Stating he was concerned about S.N.F.'s behaviour, he attests: "I got a security camera set up, facing the yard for the days that I was not able to be around to see if her behaviour persisted." He then did watch S.N.F. with the cameras. On the one night when he was concerned that she was out late with the children and another man, after contacting her by text, he watched the property through the cameras to see when she returned home and whom she was with. He states in his affidavit that he believed S.N.F. was having an affair with the man and the man was violent towards the children. Even if S.N.F. were having an affair, this does not excuse surveilling her; and J.D.W.L.'s evidence that the man was violent towards the children is scanty.

[65] During the second incident, he also called the RCMP to do a wellness check on S.N.F. Again, on his own evidence, he made this call because he had general concerns about the man and S.N.F. was out late with the children at the man's house.

[66] On another occasion, he states he was concerned about the children's safety because he was leaving for a few days for work. He told S.N.F. to not have the man over and to put the children to bed at 9 p.m. In his affidavit, he states: "I reminded her of the security cameras and asked her to leave it on." This could be read as a threat that he would be watching her.

[67] In his second affidavit, J.D.W.L. states he did not set up the security cameras to surveil S.N.F. This statement, however, contradicts his first affidavit, raising questions about his credibility on this issue.

[68] Additionally, J.D.W.L. seems to have threatened suicide if S.N.F. left him. In his second affidavit, he states:

I explained to her that the children are the most important thing to me and that she cannot just run away with them, there would be no point in me living if she would have run away, and that I would probably just kill myself.

[69] S.N.F. also filed a document that she states J.D.W.L. presented to her as a consent agreement for her to sign while she cared for Z.M.L. It states:

I, _____, hereby consent to care for Z.M.L. on September 30, 2024, from 3:30 p.m. until 8 p.m. for the purpose of J.D.W.L. to work. I, _____, will not leave [address redacted] physically. I, _____, will not have anyone else on the premises of [address redacted].

[70] J.D.W.L. does not deny that he gave S.N.F. this document to sign.

[71] Because, as I said before, this is an interim application made with only affidavit evidence, I cannot make the finding that J.D.W.L. was abusive or coercive and controlling. This evidence is, however, concerning.

[72] Finally, I cannot consider this issue without addressing the events that led to the children being apprehended from S.N.F. and being put into J.D.W.L.'s care. I will not examine whether and when a party may leave without consent or notice to the other party when they fear domestic violence. This is a difficult question. Many facts here are unresolved, and I have heard no submissions on this issue.

[73] What is undisputed is that J.D.W.L. did not know what was happening in Z.M.L.'s life for four months. J.D.W.L. was entitled to know that Z.M.L. was safe and cared for.

S.N.F. was also required to ensure that leaving with Z.M.L. and then staying away was legitimate. She could do that by either negotiating a resolution with J.D.W.L. or, if that was not possible, by applying to court. It is no surprise that, having received no information about Z.M.L. for that long period, J.D.W.L. took extraordinary steps to get Z.M.L. back.

[74] For his part, J.D.W.L. brought a without notice application. I want to pause here and note that I do not question J.D.W.L.'s counsel's integrity. The decision to apply for a without notice order is a question of professional judgment made in consultation with the client that I do not quarrel with.

[75] However, a party seeking a without notice order has a heavy burden. They must provide full and frank disclosure of all material facts (*CMS v MRJS*, 2009 YKSC 49 at para. 7). This includes not only the facts that support the party's position, but also those that do not support them.

[76] In this case, on the evidence presented here, there are two areas in which J.D.W.L. did not give full and frank disclosure.

[77] First, J.D.W.L. sought the without notice order not only for Z.M.L. but also for L.F. He sought the order for L.F. on the basis that he stands in the place of a father to L.F. However, he made no reference to L.F.'s biological father either in his affidavit or when questioned by the judge on this issue during the hearing. J.D.W.L. states in his second affidavit that he did not name L.F.'s father because of the father's limited involvement in L.F.'s life, that J.D.W.L. stood in the place of a parent for L.F., and Yukon law permits non-parents to apply for custody of a child.

[78] This fails to address the central point: the court needs to know all the material information to make a good decision. That L.F. had a father that had even limited involvement in L.F.'s life was a material fact that should have been disclosed. Counsel stated that he did not see how providing the information would have changed the outcome. That is not the basis for determining whether a party has provided full and frank disclosure of the material facts.

[79] Moreover, had this been revealed, the proceedings might have been conducted differently. The judge may have ordered that L.F.'s father be added as a party and served. Had he been served, he may have taken part in the application. Based on the evidence he has provided in the proceedings thus far, the judge would have had far more complete evidence before her, and her analysis would have been more nuanced.

[80] The second area in which J.D.W.L. did not provide full and frank information was about S.N.F.'s mother. J.D.W.L.'s counsel states that the application turned on S.N.F.'s mother's opinion, which was that she feared if S.N.F. was given notice of the application, she would run away and may even harm the children. Because J.D.W.L. was relying on S.N.F.'s mother's opinion so heavily, it was incumbent on him to provide as much information as he knew about her in his affidavit. He did provide some information about S.N.F.'s mother in his first affidavit. He states, for instance, that S.N.F.'s father, D.F., told him that the mother was abusive to D.F. and that he left her because of it. He stated that D.F. told him he believed she had mental disorders. J.D.W.L. appears to have accepted this, as he suggests at various times that S.N.F. inherited her alleged mental health issues from her mother. He also states the information he had was limited on this issue.

[81] J.D.W.L.'s mother also provided an affidavit in which she states that S.N.F.'s mother stayed with them when she came for a visit to Fort Nelson and that she understood S.N.F. and her mother did not have a good relationship.

[82] What J.D.W.L. needed to explain, therefore, is how well he knew S.N.F.'s mother; what if anything he knew about S.N.F.'s relationship with her mother; what he himself truly believed about the mother's health issues; and if he believed that the mother had mental health issues, why he still relied on her information.

[83] The Court was faced with a very difficult decision. On the one hand were concerns that S.N.F. may flee or harm the children if provided notice; on the other hand, apprehending the children would be very traumatic to them. It could only come to a well-reasoned decision with full information, which it did not have.

[84] J.D.W.L. and his counsel also complained that J.D.W.L. was not given enough time to respond when S.N.F. brought her application seeking the return of the children. At J.D.W.L.'s counsel's suggestion, the without notice order provided that S.N.F. could apply to set the order aside by giving J.D.W.L. 72 hours' notice. The evidence is that S.N.F. had J.D.W.L. personally served on March 1, 2025, at 9:09 a.m. The application was heard March 4, 2025, after 10 a.m. While it was J.D.W.L. that was served and not counsel, the service, I find, was complied with within the notice period.

[85] Ultimately, though, in dealing with Z.M.L. and the effects on her, both parties made mistakes that had negative consequences for Z.M.L.

[86] The final factor I am to consider is the extent to which the parties will encourage a relationship with the other parent if primary care and residency of Z.M.L. is granted to them or if there is a shared residential schedule. Each party states that the other has

not provided any or adequate access to Z.M.L. S.N.F. states that when J.D.W.L. had custody of Z.M.L., she was unable to have any access with her. J.D.W.L. states that he had insufficient access with Z.M.L. since S.N.F. regained primary care and residence of her. Given the events that have arisen at least since separation, it is unsurprising that the parties have little faith or trust in each other. It is therefore also unsurprising that they would be reluctant to provide each other with generous access. At this point, I put little weight on this factor in my decision.

[87] Considering all the factors together, I conclude that Z.M.L.'s best interests are to live primarily with S.N.F. S.N.F. seeks that she have primary care and residence of Z.M.L. in either Fort Nelson or Dawson City. As I have found that Z.M.L.'s residence is both places, my order is that on an interim basis S.N.F. shall have primary care and residence of Z.M.L. in Dawson City in the summer and for the rest of the year in Fort Nelson.

[88] I now turn to access. J.D.W.L. seeks intermittent access with Z.M.L. until the new year, at which time he seeks an equal residential schedule. S.N.F. seeks that J.D.W.L. have weekend access every second weekend alternating with short access during the week.

[89] My analysis on primary care and residence is also applicable to the question of access. S.N.F. has been Z.M.L.'s primary caregiver since birth. J.D.W.L. has failed to show that S.N.F. does not take good care of Z.M.L. It is also important not to unduly separate Z.M.L. from L.F. I therefore do not grant the access schedule as requested by J.D.W.L., including his request for shared parenting as of January 1, 2026. J.D.W.L. should, however, have a little more access than S.N.F. proposes.

[90] My order is that on an interim basis, both in Fort Nelson and in Dawson City, J.D.W.L. shall have access with Z.M.L. every second weekend from Friday morning to Sunday evening, and on alternating weeks, he will have one overnight access once during the weekdays from the morning on the first day until noon or early afternoon the following day. A third party shall facilitate transportation from J.D.W.L.'s in-parent access.

[91] When the parties live in different cities, J.D.W.L. shall have FaceTime access three times per week. When the parties live in the same city, J.D.W.L. shall have FaceTime access once per week. I am hopeful the parties can work out a schedule, but if there are issues, the parties can set down a family law case conference to resolve the matter.

[92] Now this does not form part of the order, but I will address a question that often comes up, which is whether parties can arrange additional access or change the access that is in the order. The simple answer is that on consent parties can arrange access in any way they choose.

[93] The more complicated answer is that where, as here, there are issues of trust and difficulties communicating, it is often better to begin with a set schedule, and then, when this has become established and the parties are able to communicate better, access can be changed and varied. Once the schedule is in place for a while, moreover, and the parties are better able to communicate, adherence to a strict schedule may be counterproductive. Life does not follow a strict schedule. There will be opportunities for Z.M.L. that do not adhere to the order, so flexibility will hopefully become the norm after a while.

[94] I cannot underline enough, however, that communication is vital to ensuring that access can occur in a manner that is in Z.M.L.'s best interests. And on that note, I will address communication between the parties. Except in emergencies, the parties shall communicate through OurFamilyWizard only. The parties shall have 48 hours to respond to each other's messages. The parties shall speak respectfully to each other and shall only discuss Z.M.L. or division of property if that continues to be an issue. In emergencies, the parties shall contact each other by phone.

[95] This is not part of the order, but it is encouraged that the parties not persistently seek a different answer if the other party has already responded to a request. That forms part of the communications that can help access to Z.M.L. occur more easily and fluidly.

[96] My next order is that the parties shall not speak negatively about each other to Z.M.L. or in her presence.

[97] I also order that J.D.W.L. be enjoined from harassing, molesting, or annoying S.N.F., or attempting to harass, molest, or annoy S.N.F. I order that J.D.W.L. be enjoined from attending within 500 metres of [address redacted] and any place of residence, employment, or education of S.N.F. except in the company of an officer of the RCMP.

[98] Finally, I will not order the RCMP assist clause. These orders should be exceptional and is not necessary in this instance.

WENCKEBACH J.