

SUPREME COURT OF YUKON

Citation: *KAJ v SH*,
2025 YKSC 74

Date: 20250926
S.C. No. 22-B0078
Registry: Whitehorse

BETWEEN

K.A.J.

Plaintiff

AND

S.H.

Defendant

Before Justice K. Wenckebach

Appearing on his own behalf

K.A.J.

Appearing on her own behalf

S.H.

This decision was delivered in the form of Oral Reasons on September 26, 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 proceedings are K.A.J. and S.H. They were in a common-law relationship between April 15, 2016, and February 18, 2023. They have one child of the relationship, L.A.J., born [redacted].

[2] This has been a contentious matter from the beginning. K.A.J. has had primary care of L.A.J. since the party separated. S.H. was charged with assaulting K.A.J. and took part in Domestic Violence Treatment Option in the Yukon Territorial Court. K.A.J.

has also alleged since the start of the proceedings that S.H. has an alcohol and substance abuse problem. S.H. denies problems with alcohol and substance abuse. She has consistently sought to have shared parenting with L.A.J.

[3] I became the judge on the file in the late summer of 2024 when I heard S.H.'s application to have equal shared residential schedule with L.A.J. I denied S.H.'s application at that time. As a part of my analysis, I considered an incident that Family and Children Services ("FCS") was involved with. It was alleged that S.H. had L.A.J. in her care and drove with him while intoxicated. My decision stated:

The information from the FCS file is... a practicum student at L.A.J.'s daycare reported that they observed S.H. swaying, unable to get L.A.J.'s boots on and had difficulty bending down; the RCMP received three calls: one was that S.H.'s vehicle was in a ditch; one was that S.H. was driving erratically by the airport; and one reported S.H. was suspected to be under the influence with L.A.J. in her car. During FCS's interview with L.A.J., L.A.J. played with cars, explaining that the car was stuck like when his mom got the car stuck.

S.H. did take a [drug and alcohol] test the next morning which showed no alcohol through a breath test, but the presence of THC in a blood test. S.H. also denies absolutely that she was intoxicated when she had L.A.J. in her care. I accept S.H.'s contention that it is very possible at least one of the people who phoned the RCMP was K.A.J. However, we are left with the practicum student's report and L.A.J. explaining that the car got stuck. K.A.J. could have instigated others to call the RCMP as S.H. also suggests, and, in fact, individually, all three facts could be explained away. However, it is difficult to explain them all away. It is evidence for why FCS concluded that there was a likelihood of physical harm to L.A.J. (as read)
(KAJ v SH (13 September 2025), Whitehorse (YKSC))

[4] So that was my decision at that point. In my decision, I accepted that S.H. was intoxicated when she picked up L.A.J. from daycare. It is important to note that she drove with L.A.J. while intoxicated.

[5] To protect L.A.J. and to get a better sense of how alcohol and drugs were affecting S.H.'s life, upon S.H.'s agreement, I ordered that S.H. abstain absolutely from alcohol, marijuana, and any other non-prescription drugs. I ordered that she take an alcohol test every day for three months followed by drug tests for three more months. This occurred between November 26, 2024, and May 27, 2025. I also ordered that she continue to take an outpatient treatment program she had enrolled herself in. S.H. took all the alcohol and drug tests ordered and completed the treatment program.

[6] Problems between the parties continued, however. K.A.J. contacted FCS over concerns that S.H.'s common-law spouse, L.G., physically abused L.A.J. FCS investigated and found the allegations unsubstantiated. In early June 2025, K.A.J. also attested that he believed S.H. was drinking again, which S.H. denied. S.H. also expressed concerns about statements L.A.J. made to her about showering with K.A.J.

[7] On June 23, 2025, S.H. went to L.A.J.'s [redacted] class to pick L.A.J. up, as it was her time to have access with L.A.J. During the course of the transfer, K.A.J. states that he smelled alcohol on S.H. He took L.A.J., put him into K.A.J.'s vehicle, and called the RCMP. The RCMP attended and took a breath sample from S.H. She failed the breath test and was charged with driving while impaired.

[8] The parties came to court on short notice to address this issue. I ordered that S.H. have shorter periods of access with L.A.J. with no overnights. I also ordered that she take an alcohol test immediately before and after L.A.J. was in her car. Should she

test positive for alcohol, her access would be suspended immediately with leave to both parties to apply to change the order.

[9] I adjourned to permit the parties to file more evidence and for a fuller consideration of the issue. A fuller hearing was held where both parties gave me their positions.

[10] The question now is: Where do we go from here? S.H. argues that we should begin back where we were at the end of last year. She would take all the alcohol and drug tests she took before to show she is not using drugs or alcohol and that she can have L.A.J. 50 percent of the time. She states that alcohol and drugs are not a problem for her. It is in L.A.J.'s best interest that she have an important role in his life.

[11] K.A.J. seeks that S.H. have limited supervised access with L.A.J. He submits that S.H. has shown that she does have a drug and alcohol problem. Nothing less than supervised access will keep L.A.J. safe.

[12] Before anything else, and although I have said it before, I want to say again that it is clear to me that you both love L.A.J. very much. I can see how much S.H. wants to spend time with L.A.J. and how much it hurts to not spend that time. I can also see how committed K.A.J. is to ensuring his son's safety. And that is what the issue is: L.A.J.'s safety and his best interests.

[13] It has been proven that S.H. has twice put L.A.J.'s safety at risk. The second time happened less than a month after she stopped taking drug and alcohol tests.

[14] Despite her and L.G.'s statements to the contrary, I conclude that S.H. has a substance abuse problem. What is also concerning is that although S.H. recognizes the impact her decision has had on the time she spends with L.A.J., she has not taken full

responsibility for her decision to drink. She blames the dispute, her stress, and K.A.J.'s actions for her drinking. It was S.H., however, who responded to these stressors by drinking. S.H.'s deflection of blame points to a larger issue: she does not yet see that she has a problem with alcohol. She stated during one of the hearings that alcohol is not a problem for her. Her affidavits confirm that she continues with this belief.

[15] That also means S.H.'s proposal that she start taking alcohol and drug tests again is not a solution because it does not get to the root of the problem. S.H. has shown that she can go for some time without drinking. I believe she would be able to provide clean alcohol and drug tests for six months or maybe even more, but I am not convinced she can stay abstinent over the long term.

[16] S.H. also states that L.A.J. is suffering without having her in his life in a more meaningful way. I agree that L.A.J. should be able to have S.H. take a more active role in his life, but she cannot be fully present for L.A.J. if she is exercising access even sometimes while intoxicated. And I am not saying this to shame S.H. It is simply that although S.H. loves L.A.J. so much, it is not in his best interest to spend long periods of time with her at this point with where she is in her life.

[17] Any order I put in place would require either that S.H. take drug and alcohol tests, as she does right now, or that her access be supervised. I can see that this is not without problems. The drug and alcohol tests are costly, and I worry that at some point it will be too costly for S.H. Supervised access is not a much better solution. It can be difficult to organize, especially in the Yukon, where there are no facilities for providing supervision. It can also feel artificial for a parent to be observed while trying to maintain the relationship with their child.

[18] Some courts have stated that supervised access is supposed to be a temporary solution used to resolve a parental impasse over access (*M(BP) v M(BLDE)*, 1992 CanLII 8642 (ON CA) at para 80). Generally, I agree. However, as some other courts have also concluded, it would be an error to take an overly rigid approach to supervised access. If the alternatives are supervised access or no access, supervision may be in the child's best interest (*VSJ v LJG* (2004), 5 R.F.L. (6th) 319 at para. 139 cited in *Armstrong v Coupland*, 2023 ONSC 5451 at para. 675).

[19] S.H. has to make a significant change in her life before unsupervised access or access that is not in a sense supervised by drug and alcohol tests can take place. I nevertheless believe that it is in L.A.J.'s best interest to have access with S.H. The order going forward will therefore require that S.H. either take drug and alcohol tests or have a supervisor.

[20] At the last hearing, I asked S.H. if she wanted any changes to access if it continued to be for short periods of time. S.H. indicated she had two interests: first was that L.A.J. be able to spend time with L.G.'s daughter E.G., and second, that she have the maximum time possible with L.A.J.

[21] I have thought about whether to order that all of L.A.J.'s access occur during one week to permit L.A.J. to spend time with E.G. That would mean adding another day of access. That would be a lot of back-and-forth between houses and can be very tiring for someone L.A.J.'s age. I will therefore keep the schedule the same. However, S.H. can decide which week works best to land on the week L.G. has with his daughter.

[22] So, if this week, S.H. had week one access, but it lines up with E.G.'s schedule and L.G. has E.G. next week, then S.H. can have week one access again next week.

She can speak with K.A.J. over the weekend to let him know if she wants to start on week one or week two.

[23] So, I am just going to explain my order now. What I am going to do after that, because it is complicated, is I am going to hand it out and I am going to go over it again. All right?

[DISCUSSION]

[24] So, whatever she chooses in terms of going with week one or week two, it will then alternate between week one and week two thereafter.

[25] Paragraphs 2 to 5 of the Order of June 30th will remain in place. Those were the provisions about K.A.J. dropping L.A.J. off and picking him up for access, that S.H. not permit L.A.J. to be on the side-by-side, and the details about alcohol testing.

[26] It appears to me that, aside from alcohol, other drugs are not a significant issue for S.H. I am concerned, though, that S.H. will use drugs as a crutch if she is not drinking alcohol, and particularly I am concerned about marijuana. As THC stays in the person's system for a longer period of time, periodic testing for other drugs should be sufficient. I will therefore order that S.H. test for other drugs every second Wednesday starting October 15, 2025.

[27] Paragraph 6 of the Order from June 30th is therefore amended and will be that if at any time the drug or alcohol tests are positive, S.H.'s access will be suspended and either party will be at liberty to bring the matter back before the Court.

[28] In hopes that I can add some flexibility, I will also put in place an order that S.H. can have supervised access instead of taking the test the day of access. If S.H. has supervised access on Saturdays, it can be exercised overnight. In that case, it would be

for 24 hours, the time which shall be agreed upon by the parties. If overnight access can be arranged, it is to be agreed upon by the parties in writing at least one week before access is to occur. S.H. is not required to take alcohol testing before, during, or after visits that are supervised, but she will be required to not consume alcohol, marijuana or THC, or other non-prescription drugs 24 hours before having access with L.A.J. and while she has access with L.A.J.

[29] If S.H. decides to have all her visits supervised, then she will no longer be required to test for drugs or alcohol. Again, however, she will be required to not consume alcohol, marijuana or THC, and non-prescription drugs 24 hours before having access with L.A.J. and while she has access with L.A.J.

[30] The tricky part, if S.H. chooses supervised access, may be finding a supervisor, as that can frequently be an issue. The supervisor must be agreed upon by the parties, but L.G. is not to be the supervisor. Other supervised access with K.A.J. acting as supervisor can also occur as agreed upon by the parties. However, the parties are not to speak to L.A.J. or each other about parenting issues during access visits, and L.G. may not attend such access.

[31] S.H. shall have access with L.A.J. on holidays as follows: for L.A.J.'s birthday [redacted], for three hours, and on all even years thereafter; for Mother's Day from 10:00 a.m. to 3:00 p.m.; for S.H.'s birthday for three hours; for Christmas on December 24, 2025, from 3:00 p.m. to 8:00 p.m., on December 25, 2026, from 10:00 a.m. to 3:00 p.m., and alternating every year thereafter.

[32] Access on holidays may either be supervised or with alcohol testing on the day of access as S.H. would do for other access. If access is three hours, S.H. is to test a half

hour before she has access with L.A.J. and immediately after L.A.J. leaves. If access is five hours, she is to test a half hour before she has access with L.A.J., at the 2.5-hour mark, and immediately after L.A.J. leaves.

[DISCUSSION]

[33] I did not include this in the last order, but all test results shall be provided to K.A.J. I will also include that S.H. shall not drive with L.A.J. in the car.

[34] If K.A.J. plans to travel with L.A.J. during the time that S.H. is scheduled to exercise access with him, K.A.J. shall provide notice to S.H., and S.H. shall be entitled to have makeup access time for any access L.A.J. missed with her.

[35] Should there be an issue about access, the parties can seek a family law case conference and even just to clarify some of these terms.

[36] So now I turn to the other part of custody, which is decision-making and who makes major decisions for L.A.J. In an Order dated April 27, 2023, the parties were granted interim joint custody. K.A.J. believes that joint custody can continue, so that will remain in place.

[37] In one of the appearances several months ago, an issue came up about the payment of S.H.'s child support while she took drug testing. The question was whether I ordered that child support be decreased while she was doing the tests. So I listened to the recording of the December 5, 2024, appearance, and that is where the drug testing was worked out. K.A.J. offered to reduce child support to permit S.H. to better pay for the drug tests along with Soberlink. The amount of the reduction would have covered only one drug test per month, however, and K.A.J. did not consider that was sufficient. I was not prepared to lower child support without K.A.J.'s consent. Instead, to make the

test more affordable, I ordered that S.H. do Soberlink first for three months and then drug tests for three months, and this was despite the fact that it would have been preferable for her to be able to do the drug testing and the alcohol testing all at once. The result is that child support was not decreased during that time.

[38] Now I am going to hand out the order to both of you. This is marked as a draft. I put it as a draft because it is not signed and because there may be some minor grammar issues or typos that need to be changed, but this is the substance of the order:

[DISCUSSION]

WENCKEBACH J.