

SUPREME COURT OF YUKON

Citation: *JDT v JLE*,
2026 YKSC 35

Date: 20260513
S.C. No.: 25-B0044
Registry: Whitehorse

BETWEEN:

J.D.T.

PLAINTIFF

AND

J.L.E.

DEFENDANT

Corrected Decision: The text of the decision, at paras. 14 and 25 were corrected and the changes were made on May 13, 2026.

Before Justice J. McDermot

Counsel for the Plaintiff

Shaunagh Stikeman

Counsel for the Defendant

Brendan Miller (by videoconference)

REASONS FOR DECISION

Overview

[1] This is an application brought by the Defendant for an order that I recuse myself as the case management judge in this matter and that I not conduct the trial of the issues in this proceeding. She claims that my continued involvement would give rise to reasonable apprehension of bias in the conduct of this matter.

[2] This is primarily a parenting matter, although support and property are also issues. These parties have one child, C.J.S.T., born [redacted] (the "Child") who is [redacted]. Originally, when the parties separated, the Child lived with both parties.

However, in 2025 because of his concerns about the Defendant's drug consumption, the Plaintiff used self help to overhold the Child and arbitrarily bring the shared care arrangement to an end. J.L.E. denied that she used drugs to the extent of preventing her from adequately parenting the Child.

[3] There are also property and support issues. The common residence in Whitehorse is owned by the Defendant. It was listed for sale. J.D.T. says that he and the Defendant had an agreement that he would be paid \$25,000 for his interest in the property. The Defendant denies this. J.D.T. has now amended his pleadings to claim more than the \$25,000 by way of unjust enrichment.

[4] The Plaintiff brought an application for care of the Child and for supervised parenting time to the Defendant. Although I was concerned about the Plaintiff's self help which changed the status quo, I determined on the balance of probabilities that the Defendant was consuming drugs and that C.J.S.T. should reside with his father.

[5] The Defendant says that there is a reasonable apprehension of bias for the following reasons:

- i. Mr. Miller says that, without good reason, I determined that the Defendant was dishonest with the court in failing to disclose that the common residence was for sale through foreclosure proceedings brought as a result of her failure to pay the mortgage registered against that home. Mr. Miller says that if I have prejudged the Defendant's credibility, I obviously cannot provide a fair judgment at trial.
- ii. Mr. Miller also submitted that, again without good reason, I ordered an advance to the Plaintiff on his equalization of \$25,000 to be paid from the

net proceeds of the home. This Order was made as a condition of an adjournment sought by the Defendant. Mr. Miller says that the fact that I made this Order without financial disclosure and without a determination of the rights of the parties as to the division of the net proceeds of the home, is evidence of bias which should result in my recusal.

[6] For the reasons set out below, the Defendant's application for recusal is dismissed.

ANALYSIS

[7] The fact that someone personally feels hard done by does not, on its own, prove bias sufficient to remove a judge from presiding over a matter. As stated by Duncan C.J. in *Bachli v Yukon Care and Consent Body/Board*, 2025 YKSC 70 at para. 8, the court must consider the following:

The legal principles are:

- i. a judge's impartiality is presumed;
- ii. a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
- iii. the criterion of disqualification is the reasonable apprehension of bias;
- iv. the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

- v. the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;
- vi. the test requires demonstration of serious grounds on which to base the apprehension;
- vii. each case must be examined contextually and the inquiry is fact-specific [emphasis in original] citing *Wewaykum Indian Band v Canada*, [2003] 2 SCR 29.

[8] In this application, the Defendant only filed three transcripts in support of the application. When I asked about this, Mr. Miller said that the facts were not relevant to the determination of bias and that it would be improper to file an affidavit in support of such an application. That is surprising in light of principle no. vii above, which requires the inquiry to be fact based and examined “contextually”. For example, the Defendant says that I had demonstrated bias for my negative credibility finding concerning the forced sale of the common residence owned by her. She had said in her affidavit filed in response to the Plaintiff’s parenting motion, that she was not losing her home, but was “selling it by choice.”¹ I had interpreted this statement as being dishonest because a forced sale in any mortgage enforcement proceedings is hardly a sale “by choice”; however, J.L.E. said in her Application that she had made this statement because she decided not to object to the sale in the foreclosure proceedings because the sale was at

¹ Affidavit of Defendant sworn September 9, 2025, para. 4.

a fair price. She says she exercised choice in not objecting to the sale. However, she offered no affidavit evidence of that fact.

[9] I will address each alleged incident of bias in turn.

Credibility Finding

[10] In her application, the Defendant says that my finding as to her credibility is a fundamental incident of bias and must serve to disqualify me as a judge in this matter.

Mr. Miller asks how I can fairly conduct a trial, when I have made the credibility findings that I did in this matter.

[11] I acknowledge that I did make a credibility finding. In my written decision of September 16, 2025, I stated [at para. 40] that:

[40] There was no request for the signing of a Certificate of Pending Litigation in the Notice of Application. The Defendant said during argument that this would jeopardize the sale of the home. I agreed and ordered that the Defendant give notice of any accepted offer in the sale of the property so that the Plaintiff can take steps to ensure that the \$25,000 is placed in trust. However, this was based upon the fact that the Defendant deposed in her affidavit that the mortgage was in good standing and that there was no concern that the equity in the common residence was at risk. I am now advised by court staff that there is an outstanding foreclosure action which has been brought before another deputy judge in this jurisdiction. If that is the case and the mortgage remains in default, the Defendant was not telling the truth when she said that the mortgage was in good standing. Certainly, the foreclosure proceedings were not disclosed to the Court or the Plaintiff during argument of the application.

[12] Defendant's counsel is also correct when he said I misspoke when I stated that the Defendant's affidavit had said that the mortgage was in good standing. In fact, the affidavit did not state this; it only stated that J.L.E. was not losing her home but was selling it by choice. She did not depose that the mortgage was in good standing.

[13] However, what she did do in argument as is demonstrated by the transcript from September 11, 2025, was to give everyone in that courtroom the impression that the home was for sale and that there was no signed agreement of purchase and sale. The context of this discussion and the statement in the Defendant's affidavit was the statement in the Plaintiff's affidavit that the Defendant "has defaulted on her mortgage and is facing foreclosure."² The Defendant's answer to this was to say that there was no forced sale of the property and that she was selling it by choice. Her answer and the discussions throughout the argument on this point led me to believe that she was actively selling her home and that there was no sale of the property at this time. I was convinced that she would continue to list the property and she undertook in court to advise of the name of the listing agent and the real estate lawyer so that the funds claimed by the Plaintiff would be held back upon a sale of the property. Based upon this undertaking (and the Plaintiff's failure to request the relief in his application), I did not grant a Certificate of Pending Litigation at the hearing.

[14] What J.L.E. failed to mention was that the property had already been sold by the bank and that there was a hearing in the foreclosure proceedings on September 17, 2025 to confirm that sale. J.L.E. knew the name of the lawyer who was handling the sale who was the bank's lawyer in the foreclosure proceeding. The fact that there were ongoing foreclosure proceedings as a result of J.L.E.'s default in the mortgage were not disclosed to myself or Ms. Stikeman even though specifically addressed in the Plaintiff's affidavit. As Ms. Stikeman pointed out, J.L.E. is a lawyer and knew the duty of full disclosure especially when the subject at hand was whether her

² Affidavit of J.D.T. sworn August 10, 2025, para. 5.

home was in jeopardy. Had it not been disclosed by court staff that there was a foreclosure hearing scheduled for September 17, 2025, J.L.E. would have been in receipt of all of the surplus funds without anything being held back to secure the claims of J.D.T.

[15] Therefore, although I may have misspoke as to the contents of the Defendant's affidavit, the credibility finding that I made was not unreasonable in the context of what was actually deposed to, the in-court discussions and the failure of the Defendant to disclose the foreclosure hearing that was days away from the September 11, 2025 hearing.

[16] However, that is not what is in issue. The issue is whether the credibility finding, rightly or wrongly, gives rise to a reasonable apprehension of bias against J.L.E. which would result in my recusal as the case management and trial judge in this matter.

[17] Justice Wenckebach of this Court commented on this issue in *KS v JF*, 2025 YKSC 68. At para. 25, she stated that negative credibility findings alone do not give rise to a reasonable apprehension of bias:

K.S. also argues that a reasonable apprehension of bias arises because I found her not reliable. A reasonable apprehension of bias does not arise simply because a court has made an adverse credibility finding of a party or witness, however. Even in the same proceeding a judge may find a witness or party credible on one issue but not another. Something more, in addition to a negative finding of credibility, is required to create a reasonable apprehension of bias (*R v Novak*, 1995 CanLII 2024 at para. 7 (BCCA)).

[18] When I asked Mr. Miller as to whether he had reviewed case law that addressed the issue of bias and the statements of Justices Wenckebach and Duncan of this Court, his response in argument was that he “preferred what the Supreme Court of Canada

said.” He did not tell me where or how the Supreme Court of Canada differed with the case law presented by Ms. Stikeman. I choose to follow these cases because they are decisions made by colleagues in this Court considering the exact issue that is before me.

[19] Moreover, Justice Wenckebach speaks to the issues which would necessarily arise from the family case management protocol in place in the Yukon Courts. In this jurisdiction, the Chief Justice appoints a case management judge who is responsible to manage the case, ready it for trial and to address any interim applications which may be necessary in the hearing of that matter. That judge also hears the trial. The only restriction in this jurisdiction, is that the case management judge, assuming he or she is to preside over the trial, cannot conduct the settlement conference which must be addressed by a different judge than the trial judge: see the *Rules of Court* of the Supreme Court of Yukon (the “*Rules of Court*”), Rule 37(8). Under the circumstances, it is entirely foreseeable that the case management judge would be called upon to hear an interim application and to make credibility findings in the hearing of that application. If any judge who made a credibility finding was then disqualified from hearing the trial due to apprehension of bias, many case management justices would be disqualified from hearing the trial as they necessarily hear and adjudicate on interim applications heard in the proceeding. I am certain that was not the intent of the *Rules of Court* and if it was, I would have thought that the *Rules of Court* would specifically address that particular issue.

[20] It is to be noted that in the case that Justice Wenckebach relied upon, *R v Novak*, [1995] BCWLD 1684 (CA), the British Columbia Court of Appeal determined that a

judge hearing an assault trial and who made credibility findings against the accused in that trial, could then hear a subsequent trial involving the same accused. At para. 7, Prowse J.A. stated:

The fact that a trial judge has ruled adversely in a previous case on the credibility of either a defence witness or the accused does not necessarily result in a reasonable apprehension of bias. Something more is required showing a predisposition by the adjudicator with respect to the accused's credibility, such as to amount to pre-judgment of the result of the second hearing.

[21] This addresses the concern expressed by Mr. Miller that I cannot make an adverse credibility finding and then be impartial at the trial. As stated by Justice Wenckebach in *KS v JF* at para. 28,

Judges routinely hear evidence that they must disregard, for any number of reasons. Hearing prejudicial evidence about a party, and then presiding over another matter involving that party, does not give rise to a reasonable apprehension of bias.

[22] That is particularly important in the context of the case management practice in the Yukon Supreme Court where the same judge hears interim applications and then the trial. The case management justice is expected to be impartial at trial after seeing the parties at their best and at their worst as the matter approaches trial.

[23] Therefore, the fact that an adverse credibility finding was made against the Defendant concerning her statements as to the sale of the common residence does not result in my disqualification in this case.

Advance to the Plaintiff of \$25,000

[24] On February 3, 2026, the Plaintiff brought an application to this Court for financial disclosure, child support, including lump sum child support, and for \$50,000 to be payable to the Plaintiff from the Defendant for the Plaintiff's interest in the family home.

He also requested an order permitting him to travel with C.J.S.T. The Defendant requested an adjournment because she did not have counsel and wished representation at the hearing.

[25] I allowed the adjournment and I also ordered the payment of certain amounts from the net proceeds of the common residence that were held in court. Although most of these amounts were on consent, I ordered, not on consent, the sum of \$25,000 to be made to the Plaintiff in respect of his property claims. That decision is under appeal and, because of that appeal, I do not wish to further comment on the decision as it would be improper to do so in light of the pending appeal.

[26] Mr. Miller says that the decision is ill founded and that my reasoning was inconsistent. He says that the decision was made without the Plaintiff having filed a financial statement. He says that the decision to release the funds under those circumstances is evidence of bias which should disqualify me from any further involvement in this matter.

[27] Again, Justice Wenckebach commented on this issue in *KS v JF*, *supra*. She said that the fact that a judge has made errors in making procedural or other decisions does not give rise to an apprehension of bias. At para. 24, she speaks to this issue:

K.S. submits that I made numerous factual findings and procedural decisions that should not have been made. K.S. disagrees with many of my findings of fact. While I do not believe that I made errors in my findings of fact, even if I had, this does not, by itself, raise a reasonable apprehension of bias. Similarly, disagreement about procedural decisions, such as whether to grant an adjournment, does not, without more, raise a reasonable apprehension of bias.

[28] Justice Wenckebach later speaks to the claimant's complaint that she made the decision to set the matter down for a summary trial contrary to the claimant's wishes.

Again, Justice Wenckebach notes that an adverse decision, whether right or wrong, does not automatically give rise to a reasonable apprehension of bias [at para. 53]:

Here, again, K.S. disagrees with my rulings as this matter has progressed. Even if I am wrong in the way I have conducted the proceedings and the rulings I have made, however, this does not raise a reasonable apprehension of bias.

[29] The issue of the correctness of my decision is for the Court of Appeal. Even if the decision was in error, the negative ruling on its own does not result in a reasonable apprehension of bias.

[30] The Defendant's motion is therefore dismissed.

[31] Ms. Stikeman made submissions as to costs during her submissions on May 11, 2026. That was premature as no decision had then been rendered. Generally, costs follow the event; however, there are other factors in determining costs. If the parties cannot agree on costs, the parties may make written submissions on costs, the Plaintiff first and then the Defendant, on a 10 day turnaround. Costs submissions shall be no more than four pages in length not including any offers to settle made on the application or the parties' respective bills of costs.

MCDERMOT D.J.