

SUPREME COURT OF YUKON

Citation: *HHVV v HBP*,
2026 YKSC 77

Date: 20260908
S.C. No. 22-D5486
Registry: Whitehorse

BETWEEN:

H.H.V.V.

PLAINTIFF

AND

H.B.P.

DEFENDANT

Before Chief Justice S.M. Duncan

Appearing on her own behalf

H.H.V.V.

Appearing on his own behalf

H.B.P.

REASONS FOR DECISION

Introduction

[1] This is an application by the defendant father for shared decision-making and equal parenting time for the two children of the marriage, X. age 15, and Y., age five (the Children). The father requests child support be varied in accordance with the Federal *Child Support Guidelines*, SOR/97-175 (the *Guidelines*) to reflect changes in parenting time and financial information. He also requests full financial disclosure from the plaintiff of all marital assets and equal division of those assets. Specifically, he seeks information about, and equal division of, a property located in Vietnam. He

acknowledges the *status quo* is a result of the consent order signed in July 2023 but argues it should not apply. Among other reasons, he says he did not make a fully informed decision because he lacked many of the necessary documents, he did not receive independent legal advice, and he did not understand English well.

[2] The mother opposes any change to the current decision-making responsibilities for the Children or parenting time arrangements. She relies on the July 2023 consent order which she says remains valid. She says the consent order is being followed and there is no reason to change any of its provisions.

[3] The issues are:

- a) can or should the consent order be set aside;
- b) has there been a material change in circumstances that would warrant a revision of the order as it relates to decision-making and primary residence;
- c) how should generous and reasonable access be interpreted in this context;
- d) time for payment of the father's share of orthodontic expenses.

[4] I will first briefly set out the factual background, then I will set out the applicable legal principles, and finally provide an analysis and conclusion on each issue.

[5] The application was heard with the benefit of a Vietnamese/English interpreter who appeared by videoconference.

Factual Background

[6] The parties were married at Ho Chi Minh City, Vietnam on January 26, 2010. They had two children as I noted – X. and Y., currently ages 15 and five. They came to the Yukon in September 2019.

[7] The parties separated in February 2022 but continued living in the same residence until February 2023. They were divorced on August 9, 2023.

[8] They entered into a consent order on July 7, 2023. It provided:

- payment of child support by the father in the amount of \$700 per month beginning May 1, 2023;
- primary decision-making responsibility and primary residence of the Children with the mother;
- reasonable and generous access to the Children by the father as agreed between the parties, including transporting the Children to school;
- transfer of ownership of the 2018 Chevrolet Sonic LT 4DR vehicle registered at that time to the mother, to the father; and
- relinquishing of all interest of the father in the real property located at land lot #87 Nam Ha Hamlet, Xuan Bao Commune, Cam My District, Dong Nai province Vietnam (the Vietnam property).

[9] The father continued to pay child support as agreed in the consent order. On May 8, 2026, another Family Law Case Conference (FLCC) Order was entered into, increasing his child support to \$1,072.46 per month in accordance with the *Guidelines*, based on his 2025 annual income of \$70,166. He was ordered to and did pay

retroactive child support of \$4,465.92 representing the period from June 1, 2025, to May 31, 2026, based on his annual income for 2025 which was \$70,166.

[10] The father was also ordered to pay 62% of the s. 7 expenses for the Children, and the mother 38%. The order provided that the mother consult with the father before incurring a s. 7 expense for the children of \$1,000 per month or more, unless it is for medical or dental reasons. The question of the payment of \$7,142 for X.'s orthodontic work was adjourned to the hearing of this application unless the father's employer provided benefit coverage to assist.

[11] I note that FLCC orders are generally agreed to by both parties at the FLCC before being entered into, and here it is clear from the order that both parties consented to its terms.

[12] There has been much conflict between the parties over the last several years. The conflict has resulted in a number of court orders relating to behaviour of the parties such as, not speaking negatively about each other to or in the presence of the Children or on social media, requiring essential documents for the Children to be shared and returned, and requiring consent and signatures to be provided on documents for the Children. Both parties have new partners, and both share their homes with tenants who also have Children.

[13] The father has had access to the Children every Saturday from 10:00 a.m. to 5:00 p.m. In the early days after separation his access visits were not regular. In recent months his visits have been more consistent.

[14] A Child Lawyer was appointed for X., the older child. Her instructions to her lawyer were clear. They met four times. She wants to continue to live with her mother,

not with her father and his new partner. She told the Child Lawyer her father was not involved with the Children when her parents were together: her mother was the caregiver. The access visits with her father every week on Saturday is a satisfactory arrangement and she wants no change. The Child Lawyer observed she did not believe X. has been influenced by either parent.

[15] Y. is too young to provide instructions to a lawyer or for his views and preferences to be ascertained.

(a) Can the consent order be set aside

[16] The father wants to set aside the July 2023 consent order for a number of reasons: he did not make a fully informed decision about the property because he lacked many of the necessary documents and information, he did not receive independent legal advice and did not know Canadian law, he did not understand English well, he wanted to avoid further conflict and resolve all issues between him and the mother. He says the consent order is unfair. Part of his evidence is that the mother has demanded larger support payments than what he agreed to in the consent order.

Legal principles

[17] A consent order is a formal expression of an agreement between the parties. It is treated in the same way as a final judgment between the parties (*KMH v PSW*, 2018 BCSC 2022 (*KMH*) at para 33). Once made, a consent order is assumed to be valid and correct unless it is overturned on appeal. A consent order may be set aside for the same reasons other court orders may be set aside. The court has inherent jurisdiction to set aside a judgment or order obtained by fraud, undue influence, duress, coercion, collusion, perjury, abuse of process, or on the basis that fresh evidence has been

discovered (*KMH* at para. 34 quoting *Racz v Mission (District)* (1988), 22 BCLR (2d) 70 (C.A.)). Unconscionability is another ground that is related to undue influence or duress.

[18] Lack of independent legal advice is not a ground upon which a consent order can be set aside. “Parties are free to contract with one another without consulting with lawyers. The failure to obtain legal advice is not fatal to the agreement made” (*RP v PRP*, 2024 ONSC (*RP*) at para. 26).

[19] In the same decision, the court held that “the failure to exchange financial disclosure alone also cannot form the basis upon which a consent order can be set aside, failing evidence to demonstrate fraud or mistake as a result” (*RP* at para. 27).

[20] The modern law of unconscionability does not stand for the proposition that persons cannot agree to terms of a contract, and by extension an order, that are unfavourable to them. For unconscionability to exist, there must be an aspect of inequality between the parties and “that inequality must have been utilized by one party to prey upon the other... As the Ontario Court of Appeal set out in *Munding v Munding* [citation omitted in original] it is not the role of the Court to protect a person from their own ‘folly or carelessness’” (*RP* at paras. 29-30), but rather to ensure that no one is taken advantage of by a person in a position to exert pressure or influence over the other by virtue of their position.

Analysis

[21] In this case, the reasons provided by the father to support his request to set aside the consent order are not sufficient. All of his reasons were a result of his choices at the time. He now regrets making those choices, but this is not enough to set aside an

order to which he consented. Further, an examination of the consent order does not reveal unfairness.

[22] The father says he did not have sufficient information or disclosure about the Vietnam property. However, this property was transferred into both their names by the mother's parents as a gift to assist them with their immigration application. Since the parties have separated, according to the mother, her mother has asked for a return of the property. This was apparent from the text messages between the parties and the mother's affidavit.

[23] While this property is a family asset, as it was transferred into both the parties' names, it originated from a gift from the mother's mother for a specific purpose. The father was aware of this when he agreed to relinquish his interest in the property. Before agreeing to the consent order, he could have requested documentation about its value, but he chose not to do so.

[24] Part of his reason for agreeing to relinquish his interest in the property was connected to the mother's agreement that the amount of support payments would be \$700 per month. This amount was close to but still less than the *Guidelines* amount at the time of \$845.55, based on his annual income of \$55,375. The father says he did not understand the principles applicable to child support in Canadian law: that is, child support is calculated on the basis of income and that its payment is a priority.

[25] The text messages between the parties before the consent order was entered into show the father's reference to obtaining legal advice and the mother's discouragement of the need for legal advice. It is not clear from the text messages whether the father did pursue legal advice: he now says he did not. He considered

obtaining legal advice at the time. If he did not, this was his choice. The mother's comment that legal advice was not necessary did not amount to undue influence, coercion, duress or unconscionability. It was her opinion only and did not prevent him from consulting a lawyer.

[26] The text messages between the parties about the terms of the agreement were exchanged in Vietnamese, not English. The father could have requested the consent order be translated into Vietnamese before he signed, to ensure he understood it, but he did not. This again was his choice.

[27] Finally, I appreciate the father was motivated to sign the consent order because he wanted to end the conflict and resolve all matters between them. This is a good reason for entering into a consent order. It shows a reasonable willingness to compromise in order that both parties may move on with their lives with reduced or no conflict. Once again, this was the father's choice. Because he has not shown any of the bases for setting aside a consent order, the July 2023 consent order remains valid.

[28] The order for child support in May 2026 is different from the consent order. Courts have an overriding discretion to vary child support orders. The variation was agreed to by the father. He now accepts that child support payments are calculated on the basis of income and his income has increased since 2023 when he entered into the consent order. This is the only part of the consent order that has changed. It is valid because it was agreed to and it accurately reflects the law.

(b) Material change in circumstances for shared decision-making and residential arrangements

[29] The father's request for shared decision-making and shared residential arrangements for the Children may be considered on a different legal basis than a setting aside of the consent order. The father must show there has been a change in circumstances since entering into the consent order that justifies a change to this part of the order (s. 17(5) of the *Divorce Act*, RSC, 1985, c 3 (2nd Supp)) In this case the father accepts the wishes of his daughter as expressed through the Child Lawyer. At the hearing he abandoned his request for shared decision-making and residential time with her.

Legal Principles

[30] A "material change in circumstances" has been interpreted by the courts as one that (1) amounts to a change in the circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) materially affects the child; and (3) was either not foreseen or could not have been reasonably contemplated by the judge who made the order that is sought to be varied (*DMM v TBM*, 2009 YKSC 50; *Dedes v Dedes*, 2015 BCCA 194; *Burg v Burg* 2021 ABCA 371)

Analysis

[31] The father did not provide any evidence of a material change in circumstances that would affect decision-making and residential time for their son Y. There is no evidence of a change in Y.'s circumstances, the ability of either parent to meet his needs, or a circumstance that materially affects him that was not foreseen. Without that evidence, I have no basis on which to change this term of the consent order.

[32] I also observe that the communication between the parties is not easy. An example is the father's reliance on their daughter rather than the mother for communication about the timing and logistics of the Children's access visits. A further example is the need for a court order to prevent the parties from speaking negatively about each other in the presence of the Children or on social media. Many courts have said that difficulty in parental communication is a good reason not to have shared decision-making. This is another reason in this case to deny the father's request for shared decision-making at this time.

(c) Generous and reasonable access visits with Y.

[33] Based on X.'s wishes, the father abandoned his request for additional access time with her. However, the father wants greater access to his son.

[34] The father says that because Y. and X. visit him together on Saturdays, they are sometimes late because X. likes to sleep in. Y. still needs a nap in the afternoon. As a result, after the father feeds the Children their lunch, and Y. has his nap, there is little time for any activities before he has to return them to the mother at 5:00 p.m. Despite this, the father says he takes Y. to the playground or the Canada Games Centre and plays video games with him. He would like to have overnights with Y. every weekend from Friday night to Sunday night. He has a four-bedroom house, with one empty bedroom available for Y. His current partner has two children, ages eight and 13, who are with their father every weekend so not in the father's house. He has two other tenants in the home – a single mother of a seven-year-old child, who share a bedroom.

[35] The mother objects to additional parenting time with Y. for the father. She says the Children always go to their father's house together, they are very close, and her

daughter looks out for her brother. The mother does not agree with splitting up the Children for access visits. She says Sunday is her only day off of work and she wants to spend time with her Children during her day off. She says the father lacks plans for activities with Y. She notes Y. is having problems with slow speech and has been attending the Child Development Centre for help. The mother says routine is very important for Y. and more access time with the father will disrupt the routine. Finally, she worries about the father's ability to care for Y. because during a recent access visit, the father brought Y. into the store where she worked. When Y. saw her there, he hugged her, cried intensely, and wanted to stay with her. Later X. told her mother that both she and Y. had not eaten during that visit.

[36] In this case, I agree with the father that a visit during the day on Saturdays with his son is not reasonable and generous access. I have considered the best interests of the child as set out in the relevant provisions of the *Divorce Act* at s. 16(3):

- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
- (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings;
- (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
- (d) the history of care of the child;
- ...
- (g) any plans for the child's care;
- (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) any family violence and its impact on, among other things,
 - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
 - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child.

[37] I will say something at this point about the allegations of past family violence that the mother has raised against the father. These allegations are historical. The father denies them. He says during part of the time the mother said the violence occurred they were in Vietnam living with her parents. If there had been such incidents, the father says her parents would have acted to protect their daughter and there is no evidence of this. The photo included by the mother in her affidavit material of her in the hospital with a bruised and injured arm is not evidence that he inflicted the injury on her. He notes there was never any report to the police or other agency by her of domestic violence.

[38] Allegations of domestic violence are extremely serious. There are significant consequences in the family law context where domestic violence is found to have occurred, including impacts on parenting time and access, especially if the children have been exposed to the family violence.

[39] I am unable to conclude on the basis of the conflicting affidavit evidence whether domestic violence did occur and to what extent. The mother did not give oral evidence during the hearing about this, nor did she raise it in her submissions. I am not

concluding violence did not occur; I am saying I do not know whether or not it did occur based on the evidence provided. As a result, I will not consider the mother's allegations of family violence at this time in my determination of Y.'s best interests.

[40] I have considered all of the relevant provisions in s. 16(3) of the *Divorce Act* noted above in my decision to give the father more access. I do not think the concerns about the father's parenting are significant enough to deny him more access. It is not unexpected that a young child like Y. who sees his primary parent in a public place during the other parent's parenting time would show his attachment to that primary parent. It does not follow that the father is a poor parent. Y.'s inadequate eating while at his father's does not seem to be a regular occurrence.

[41] I agree with the mother that routine for any child, and in this case, for Y., is important. But that does not preclude an increase in regular parenting time for the father, as long as it happens on a routine basis.

[42] The splitting up of siblings is a relevant consideration for custody/decision-making responsibility but there are very few decided cases involving splitting up of siblings for access/parenting time purposes. There is no presumption at law that siblings must not be split up. The focus is on the stability, the safety, and the overall best interests of the children. I note in this case the 10-year age difference between the siblings. While I appreciate they are very close, they have different interests, activities, and friends. Splitting them up for a short period of time to allow the father more time with Y. does not detrimentally affect their best interests.

[43] I appreciate the mother only has Sunday off work each week and that naturally she would like to spend time with her Children that day.

[44] A reasonable increase in access for the father with Y. is every Friday night overnight, with a return of both Children on Saturday after dinner, so that the father may have dinner with both Children.

[45] If this new access time is successful, I encourage the parents to discuss the possibility of extending the time Y. spends with his father to Sunday on every second weekend, with a return to the mother on Sunday during the day and before dinner. I leave it to the parties to discuss that option, and if court assistance is required, either party can request a FLCC.

(d) Time to pay orthodontist expenses

[46] Finally, turning to the s. 7 orthodontic expenses of \$7,142, the father confirmed that his employment benefits do not cover them, but he is willing to pay his 62% share. He requests 24 months to pay. The mother says this is too long. She confirmed she had 18 months to complete her payments.

[47] In this case, I will grant the father 15 months to pay what he owes for the orthodontic expenses, in recognition of the mother's time to pay of 18 months and that she had to pay the entire amount on her own, instead of 62% as the father is required to do.

Order

[48] I will therefore order as follows:

1. This order replaces the order of May 8, 2026.
2. Based on his 2025 annual income of \$70,166 the Defendant shall pay child support to the Plaintiff for the Children, in the amount of \$1,072.46 per month, commencing June 1, 2026, and payable on the first of every month.

3. Based on the Defendant's 2025 annual income if \$70,166, and the Plaintiff's 2025 annual income if \$42,299, the Defendant shall pay 62% and the Plaintiff shall pay 38% of the Children's special and extraordinary expenses (s.7 of the Guidelines), starting June 1, 2026.
4. The Plaintiff shall provide her receipts for the Children's s. 7 expenses to the Defendant monthly, on or before the 25th of each month, and the Defendant shall pay the Plaintiff his proportionate share of the Children's s. 7 expenses on the 1st day of each following month, starting June 1, 2026.
5. The Plaintiff shall consult the Defendant prior to incurring a s. 7 expense for the Children if a total amount of \$1,000 or more, unless the expense is required for medical or dental reasons.
6. The consent order remains in place, except for the amount of child support payments, which is replaced by this Order.
7. The father shall have access to X. every Saturday from 10:00 a.m. to 7:00 p.m.
8. The father shall have access to Y. every Friday night after school to Saturday night at 7:00 p.m.
9. The father shall communicate directly with the mother about access visits and any other matter related to the Children, and not with the daughter, X.
10. The parties shall discuss increase in access time with Y. by the father over the next several months.
11. The mother shall share information with the father about the Children's educational achievements and challenges, medical status and extra-curricular activities.
12. The father shall pay his 62% share of the \$7,142 in orthodontic expenses for X. on a monthly basis over the next 15 months.

DUNCAN C.J.