

# SUPREME COURT OF YUKON

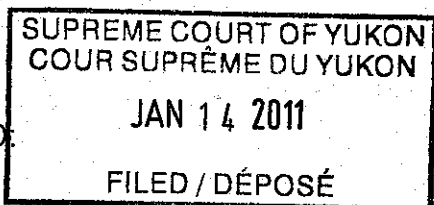
Citation: *B.J.G. v. D.L.G.*, 2010 YKSC 81

Date: 20101201  
Docket S.C. No.: 99-D3183  
Registry: Whitehorse

BETWEEN:

**B.J.G.**

Plaintiff



AND:

**D.L.G.**

Defendant

Before: Madam Justice D. Martinson

Appearances:  
Kathleen Kinchen  
Henning Wiebach

Counsel for the Plaintiff  
Counsel for the Defendant

## RULING ON A CONTEMPT APPLICATION

### I. INTRODUCTION

[1] This is an application by B.J.G. (Ms. R.) to have D.L.G., (Mr. G.) found in contempt of court and punished by the imposition of a fine. She argues that he is in breach of an Order of this Court made June 25, 2010 in which the Court concluded that the parties' son K., who was then 12, and who has since turned 13, shall "reside with each party on alternating weeks": *B.J.G. v. D.L.G.* 2010 YKSC 33.

[2] Mr. G., I want to tell you now what conclusions I have reached. I have been asked by Ms. R. to make a legal ruling as to whether or not you were in contempt of the Court's June 25, 2010 Order. I am required to apply the law relating to contempt. That law says that if I am satisfied beyond a reasonable doubt that the court order required

you to ensure that K resided with Ms. R. from at least September 13, 2010 to September 17, 2010 at 3:30 p.m. and you deliberately did not do that, you are in contempt of the Court Order. In this case, questions relating to the circumstances of what happened between K. and his mother, and what K. was saying and doing are not relevant to whether the order was breached. They are though, important in terms of what the consequences of a finding of the contempt should be.

[3] I am satisfied beyond a reasonable doubt that the Court Order required you to ensure that K. resided with Ms. R. from at least September 13, 2010 to September 17, 2010 at 3:30 p.m. and you deliberately did not do that. In terms of the consequences to you of that conclusion, I have taken into account a number of factors. The first is the difficult circumstances you found yourself in, given the fight between K. and his mother that was did not directly involve you, was quite intense, and according to both you and Ms. R., made K. angry and quite upset. The second is the explanation you have provided for why you did what you did. The third is the evidence of Dr. Posthuma as to what K. told him about his wishes. The fourth is your statement in your affidavit that you are genuinely sorry for the difficulty caused. The fifth is the fact that you made sure that K. was returned on September 17<sup>th</sup> as required by an order of the Court. The sixth is the fact that there has been no repetition of the conduct leading up to Ms. R.'s application.

[4] Because of those factors, I agree with your lawyer, Mr. Wiebach, that a fine is not appropriate. You have purged your contempt and nothing further needs to be done in this respect.

[5] I will explain further my reasons for concluding that you were in contempt of the Order by using several topics. They are these:

1. A review of the relevant facts
2. A review of the reasons why, Ms. R., your lawyer argued that Mr. G. should be found in contempt, and, Mr. G., the reasons your lawyer argued that you should not be found in contempt (the Submissions).
3. The reasons for the decision, using five headings:
  - a. Why I have found that the Order was clear and concise;
  - b. Why I have found that Ms. R.'s Application for contempt does specify precisely the provision of the order alleged to be have been breached;
  - c. Why Mr. G's conduct constitutes contempt;
  - d. The reasons why people must comply with Court Orders; and
  - e. What Mr. G. should have done and not done and why.

## II. RELEVANT FACTS

[6] Some background information is helpful. The June 25, 2010 Order was a final order. At that time both parents applied to vary existing custody and access orders. Ms. R. asked for retroactive and ongoing child support and an order that K. reside with each on alternating weekends. Mr. G. asked for "an order that he shall have custody of K. with generous access to Ms. R., or in the alternative that they have joint legal custody."

[7] The Order of June 25, 2010 says:

-K. shall reside with each party on alternating weeks; and

-Mr. G.'s applications for an order that he shall have custody of K. with generous access to Mr. R. or in the alternative that they have joint legal custody are dismissed.

[8] The Application containing the contempt allegation, filed September 16, 2010, states that it is for an order that:

1. This application be heard on short notice;
2. the child [K. be returned to his mother's care immediately;
3. the date and time for [K.] to change home be Friday at 3:30 p.m. unless otherwise agreed to in writing;
4. the RCMP be directed to assist the petitioner in enforcing the terms of this order and the order of Madam Justice Martinson, made June 25, 2010;
5. the respondent be found to be in contempt of court and shall be punished by the imposition of a fine;
6. the petitioner shall be awarded client and solicitor costs payable forthwith;  
and,
7. such other relief as this Honourable Court deems just.

[9] The Application states that at the hearing of the Application, "the applicant will rely on the Affidavit of [Ms. R.], sworn on September 16, 2010, and the other process filed herein." Mr. G. was served with the Application and Ms. R.'s affidavit on September 16<sup>th</sup> and swore his own affidavit on September 16<sup>th</sup>. In it he says that he has read Ms. R.'s affidavit sworn September 16, 2010 and makes his affidavit in response to it.

[10] Justice Stach, of this Court, heard the Application on September 17, 2010 and made various orders: 2010 YKSC 55. He made an order that K. be returned to his mother's care by 3:30 pm Friday, September 17, 2010. He directed that the time for changing homes in the week on, week off access order that continues in existence be varied to Friday of each week at 3:30 pm unless otherwise agreed by the parties in writing. He included an RCMP assist clause, though he stated he hoped it would not be necessary. He granted Ms. R. special costs on the basis that the application should not have been necessary.

[11] Ms. R. and Mr. G. agree about much in terms of what happened. There disagree on some things and I will indicate where there is such a disagreement about what happened.

[12] The week on week off arrangement had been in place since 2009 by agreement of Ms. R. and Mr. G. At the time of the June 24<sup>th</sup> hearing the exchange was Friday at 3:30 pm. Ms. R.'s claim was that it continue to be the arrangement and that it be incorporated into an Order.

[13] During the course of the June 24<sup>th</sup> hearing the Court raised the question of whether the Court should hear from K. as to his views. Both parents opposed that

application, saying the Court should not hear from K.; I have explained the reasons for that in a decision relating to K.'s legal rights to be heard: *B.J.G. v. D.L.G.*, 2010 YKSC 44.

[14] Mr. G. knew about the June 25, 2010 Order and what it said. As he says in his affidavit dated November 25, 2010, at para. 3, "I was of course aware that an order had been made by the Honourable Madam Justice Martinson on 25 June 2010, stipulating that [K] reside with me or the respondent on alternating weeks."

[15] Ms. R. and K. went to Nova Scotia from July 21st to August 4<sup>th</sup>. Ms. R. sent emails to Mr. G. in this respect. On March 20, 2010 she said it is her mother's 80<sup>th</sup> birthday on July 28<sup>th</sup> and advised of her plans, saying that they would be gone two weeks at the most, and that she would give him the itinerary when she got it. On May 19, 2010 she advised that they would be leaving on July 21<sup>st</sup> and returning on August 4<sup>th</sup> at 10:40 p.m. so "K. could go directly to our place if you want when we get back." On Tuesday, July 13, 2010 she emailed again, saying that K. asked to stay at his place an extra week to make up for the week he was away with her, so she will keep him the one extra day, Thursday, take him to his place on Friday, and "we can continue on with the one week alternating from there. That will be a different weekly rotation that's in place now, so I'll make the changes on the calendar so that we each know what weeks we can plan to do things with K etc. Thoughts?"

[16] Mr. G. did not reply to any of these emails. However, that is what happened. K. spent the week of Friday, August 6<sup>th</sup> to Friday, August 13<sup>th</sup> with his dad.

[17] On Friday, August 13<sup>th</sup> K told Ms. R. that he and his dad have picked out a dog from the pound and must wait 24 hours to pick it up. On August 14, 2010 K. went with his father to pick up his new dog from the pound.

[18] That day, August 14<sup>th</sup>, K. told his mother that he wanted to spend more time with his dad. According to her, he said that his mother had him for 11 years and his dad now has more time to spend with him and he is a boy and probably should be spending more time with his dad. He insisted on an answer and said that if she did not answer now and they start the new arrangement next week, he would get out of the car right now and walk to his dad's. She told him that she believed the alternating schedule that all agreed to and that was in the court order was the best arrangement. If there was something special he and his dad wanted to do when K. was with him, his dad could contact her and let her know and they could work it out as they had always done. K. did not mention a change to the schedule again during the week he was with her.

[19] The next exchange was to be Friday, August 20<sup>th</sup> and K. called his mother and said he had to go to his dad's as they were on a plane early the next morning to go to the PNE for the weekend. She took K. to Mr. G.'s residence at 6:30 p.m. Ms. R. and Mr. G. disagree about notice of the trip. Mr. G. says that K. told her before the date that he would like to go and K. told him it was okay. He booked the tickets. She says that this was the first time that she had heard of any such plan.

[20] In any case, on August 27<sup>th</sup>, K. returned to her care in accordance with the week on week off Friday to Friday schedule. On or about August 28, 2010 Ms. R. sent an email to Mr. G. The email says, in part:

Hi [Mr. G.'s first name]

It would be greatly appreciated that when you require a change to the alternating schedule with regards to K. that you contact me directly. I don't think it is a good idea to have K. relay messages to me that you contacted him and said that he needs to be at your place earlier than planned...

[21] There is a further discussion in this email about how the exchanges should take place, which refers to Friday as the exchange date. Ms. R. received no response from Mr. G.

[22] School this year started on September 1<sup>st</sup> and K. resided with Ms. R. during the week of August 27<sup>th</sup> to Friday September 3, 2010, again according to the week on week off Friday to Friday schedule. During the week of September 3<sup>rd</sup> to Friday 10<sup>th</sup> K resided with his dad, according to the Friday, week on, week off schedule.

[23] I am now going to review the evidence specifically relating to the time frame with respect to the matter now before the Court. Ms. R. and Mr. G. agree that on Thursday evening K. called Ms. R. and asked if he could spend the weekend with his dad as they were going to [a particular location] and he was taking a friend. It was the last weekend before his dad would bring the trailer back to Whitehorse. They came to an agreement that evening about K. taking their quad and a plan was made for K. to pick it up it up on Friday after she returned from work.

[24] She called him on Friday after work. K. and his mother got into an argument about whether he would spend that evening with her, and about the delivery of the quad and he was quite angry with her. According to her he informed her that he decided he was staying at his dad's house longer and would see her next Sunday, meaning



September 19<sup>th</sup>. She told him that they had all agreed that his father would drop him off at around 3:00 p.m. on Sunday September 12<sup>th</sup>. K. said no he wasn't doing that and she told him he was doing that and they both hung up. She called him back and told him she did not appreciate the way he was speaking to her and reminded him that they can always talk about things but he should not be yelling and being disrespectful because that does not get them anywhere. According to her, K. was still angry and told her he wouldn't be over at all anymore.

[25] She says that she called Mr. G.s cell and he answered and confirmed they would be leaving in the morning and he would be back on Sunday because he had a meeting at 2:00 p.m. She told him about her suggestion that K. spend the night at her place and that he pick K. up in the morning. Mr. G. said that she should work that out with K. and handed the phone to K.

[26] She says that K. was still really angry and he had decided that he wanted a change to the schedule and he is just going to do it and she can't do anything about it. He told her to take the "big child support you're getting now", deposit it in his bank account and he can buy his own food and stuff and he'll just see how she likes that. He then said he would stay at his dad's for a month or two and see how she likes it. More was said and he hung up on her.

[27] K. did not return to her home on Sunday, September 12, 2010. Mr. G. says that K. did not want to return. "I suggested K. call and let his mother know what he was doing and tried to encourage him to go home but it was just simply no use, it was very

clear as soon as I mentioned this he was upset and almost into tears. It was virtually impossible for him to force the boy at this stage.”

[28] Ms. R.'s next step, the next day, Monday September 13, 2010, was to call her lawyer and instruct her to send a letter to his lawyer requesting him to return K. to her home. The letter, sent by fax to his lawyer that day said, "Please have your client return K. immediately to our client's home. We ask that your client contact our client's cell phone to advise what time K. will be returning this evening."

[29] Neither of those things happened. The next day, Tuesday, September 14, 2010, her lawyer sent an email to his lawyer saying that neither had occurred and stating that by not returning K to his mother's care, Mr. G. is in contempt of a court order. The email said, "Please advise immediately of your client's plan to return K to his mother's care."

[30] On Wednesday, September 15, 2010, his lawyer wrote to her lawyer saying:

I have spoken to Mr. G. and he has advised that K. does not wish to return to Ms. R's residence. Mr. G. will be contacting Ms. R. by email in order to address the situation directly with her.

[31] There were email exchanges initiated by Mr. G. that evening, Wednesday. He explains that he asked K. to go home and he refused and asked his father to then take him to his (paternal) grandmother's house. Mr. G. describes how the situation was emotional for K. and K. broke down into tears. He says K. seemed to be very upset about the argument he and she had over the weekend. Mr. G. says he "has no idea what engaged this but it is not good seeing K. this way."

[32] Mr. G. then says he is concerned about K.'s emotional status and that maybe a professional person needs to visit what this is all about. He says that K. has expressed for the last year that he wants to be with his dad. He told Ms. R. that he feels this is a problem and needs to be deal with where everyone is happy. He says he hopes they can resolve the matter and "do what's best for the child, he is a growing man now and I am very concerned that he is happy." He concludes by saying that if she cares to discuss the matter so we can make sure K.'s wishes are heard I would be available anytime.

[33] In her response Ms. R. expresses surprise, saying that K.'s welfare has always been and always will be her first priority. She says that if there are issues then she and K. should discuss them between them. She adds that she has never experienced anything like this, and that if she feels a professional needs to be involved she will involve one. She says her partner is away and she and K. would have time to discuss the matters. She concludes by saying, "I want you to bring K. or have him brought home this evening by 7:30 p.m. I will be home waiting for him."

[34] Mr. G.'s response was that he asked K. to call her so that two of them can arrange whatever it is that you would like to do. He said K. has told him he does not want to go home even when he, Mr. G. told him he has to. He said K. would call her that night and he hopes the two of them can sort it out.

[35] The next morning, Thursday September 16, 2010 she emailed to say that "K. did call her last night, and really, I don't think it's appropriate to continue to put him in the middle of this and I am asking you to not do this to him. We are the adults and as I've

requested of you before, please stop having K. call me and make requests. Again, I want you to bring K. home.”

[36] That evening, after the application was filed, K. sent an email his mother. In it he says:

Hi Mom,

Thanks for the call tonight Mom. I just wanted you to understand my feelings about things and I hope you will support me and not cause hard feelings between us. As I told you for quite a while I have wanted to stay with Dad for more than Half the time and I will still spend time with you, but I want my main home to be at Dad's.

This has nothing to do with me not loving you anymore but this is what I want to do and I hope you will support me.

Thanks,

K.

[37] K. did not come to his mother's home until after the Court ordered on September 17, 2010, that he "be returned to his mother's care by 3:30 p.m. Friday, September 17<sup>th</sup>".

[38] That day, after the Court decision, Ms. R. sent an email to Mr. G. asking if he was going to pick up K. after school and bring him over and if so asking that he arrange to have K. bring certain things, and asking if there is anything special going on next week that she should know about. Mr. G. responded promptly, saying, "K. will be returning to your house after school 3:30 PM Friday, this has been the way we have done it in the past and nothing has changed."

### III. SUBMISSIONS

#### a. Reasons Why Ms. R. says Mr. G. was in Contempt

[39] Ms. Kinchen argues that Ms. R. has proven beyond a reasonable doubt that Mr. G. was in contempt of the Court Order. She says that the order is very clear. They are each to have K. residing with them on alternate weeks. That order confirmed what they had previously agreed to in 2009. Originally the exchange date was Wednesday, but then it was changed until Friday at 3:30 p.m., after school.

[40] They continued to follow this schedule after the June 25<sup>th</sup> Order, except that she and K. went to Nova Scotia for the two weeks. She says that she advised Mr. G. of this in March, May and July, but had no response from him.

[41] It was her week to have K. from Friday, September 10<sup>th</sup> to Friday, September 17<sup>th</sup>. She agreed that he could stay with his dad until Sunday. Her counsel says in the Outline supporting the contempt application, that Ms. R., Mr. G. and K. had all agreed that Mr. G. would drop K off at her home at around 3:00 on Sunday. Mr. G. told her he would bring K. back on Sunday before 2:00 pm. This did not occur.

[42] She relies on the events I have already reviewed leading up to the filing of the Court Application on Thursday, September 16, 2010.

[43] Ms. Kinchen argues that the only answer that Mr. G. gives is that K. did not want to return. That, she says, is not a defence to an application for civil contempt. Mr. G need only deliberately disobey the order, and he did that.

[44] Ms. Kinchen emphasizes the importance of the law of contempt in that it emphasizes the rule of law and the importance of abiding by orders of the Court. It is used to demonstrate to a party and members of the public that deliberate disobedience

of an order is not acceptable. She says that a person such as Mr. G. cannot treat a court order as unworthy of notice. If those who disagree with court orders are allowed to ignore them, the orders become meaningless.

[45] She says that the law confirms that it is particularly important in family cases that the parties follow court orders. Disputes should be resolved effectively, efficiently and economically, particularly when there are children involved.

[46] She says that Mr. G. should have called Ms. R. about his concerns he now raises about the state that K. was in and that he said he would ran away. She says he did not call her at all, even to tell her K. would not return.

[47] She submits that Ms. R. was under no obligation to go to his home and try to persuade K. to return. In fact, he had forbidden her from attending at his property. Nor was she required to go see him and confront him at school. That would only make matters worse. The obligation was on him, not her.

[48] An issue arose with respect to the admissibility of the report of a psychologist, Dr. Posthuma. Mr. G. is also involved in a court case involving his second marriage and the custody of his two daughters. In that case, Dr. Posthuma was retained to prepare a custody and access report. Mr. G., through his new counsel, asked Ms. R., through her counsel, if she would agree to participate in a custody and access report prepared by Dr. Posthuma in which K. would participate. She agreed. Ms. R., Mr. G. and K. did fully participate and Dr. Posthuma completed that report on November 10, 2010.

[49] Ms. Kinchen argues that the report, prepared after the date of the alleged contempt, and not in the course of these proceedings, is not relevant to these proceedings. The issue is whether Mr. G. intentionally disobeyed an order of the Court. What K may think about custody is not relevant to that point. In any event, Ms. R. says that K told her, during the course of events leading up to the contempt allegation, that he wished to live with his father. Ms. Kinchen also argues that the report has not yet been tested for reliability. That is usually done by cross-examination, and other evidence, including, sometimes, other expert evidence.

b. Reasons Why Mr. G says he was not in Contempt

[50] There are a number of reasons why Mr. G., through his lawyer, Mr. Wiebach, says he should not be found in contempt.

[51] Mr. Wiebach says that the June 25<sup>th</sup> Order was not clear and concise and lacks the precision and certainty needed to found a contempt order. He says that it is not clear and precise in its direction to Mr. G and lacks the precision and certainty needed to found a contempt order. He says it did not say how the order was to be carried out. It did not: state when the weekly exchange was to begin; or identify how the exchange was to be implemented; state where and when the exchange was to take place. He says that with respect to the exchanges there were a number of questions left open. For example, did one party have a duty to deliver K. to the home of the other? Did both have a duty to retrieve him?

[52] Mr. Wiebach also argues that the Application does not state, though it can be inferred, the order of which he is in contempt, the terms of the order, or the conduct on Mr. G.'s part that breaches the order.

[53] He submits that while counsel for Ms. R. says that Mr. G. refused to return K, the order imposes no obligation to return him or obligation to retrieve him. She therefore, he says, is seeking to have Mr. G. found in contempt of an order that was never made. He says that while Ms. R. asserts that all agreed that Mr. G. would drop K. off at Ms. R.'s home, that conclusion is not supported by the evidence.

[54] Mr. Wiebach argues that both Ms. R. and Mr. G. treated the order for an alternating week access schedule as a matter of discretion. He says that they, by their own conduct, chose to obey or disobey the order as they saw fit. He refers to the trip to Nova Scotia, which he says was done without Mr. G.'s prior agreement. He says one could argue that Ms. R. herself was in breach of the order by taking K. to Nova Scotia and by agreeing to extend Mr. G.'s "access" to 9 days.

[55] Mr. Wiebach also relies upon the evidence as to what actually happened in the time frame leading up to Justice Stach's order on September 17, 2010, emphasizing that what happened was a matter between K. and his mother and did not involve Mr. G. He also points to the fact that K. was adamant that he did not want to return and that he is a mature 13 year old who is frustrated that his views are being ignored.

[56] Mr. Wiebach argues that the report of Dr. Posthuma is relevant, in essence because it can assist the Court in assessing the reliability of the evidence about K.'s



reaction and his true wishes. It addresses, he says, some poisonous suggestions about Mr. G.'s conduct.

[57] Mr. Wiebach refers to Mr. G.'s evidence about that happened. I have already referred to some of that evidence. In addition, Mr. G. says he really feels the situation is nothing to do with him and is something that Ms. R. has to deal with. He states, "I feel the situation has to defuse for the best interest of both parties before it's safe for K. to try and work things out with his mother." He also says that there is a dispute between Ms. R. and her son; he, Mr. G., is simply caught in the middle of her situation. He should not be held accountable for something that was initiated by objects or her son's own wishes. He repeats that he has done everything he could to assist in the return of his son to her home.

[58] Mr. G. also says that K. is a mature, respectful, intelligent and generally well behaved teenager. He has expressed a desire to reside with his dad on a full time basis and his mother having reasonable access, and in the week leading up to the court application dug in his heels. He refused to return to his mother and told Mr. G. that he would not go. K. told him that if his dad took him to his mother's house he would run away and go to his paternal grandmother's home. He says that K. had been agitating for some time to spend more time with him and notes that, based on her affidavit, K. had been putting pressure on her for several weeks to be allowed to spend more time with him.

[59] Mr. G. then says that if K. had been willing to go to his mother's house he would have dropped him off on the way back on Sunday, September 12, 2010. Because K.

was so adamant and so emotional in his refusal, he was concerned what he might do if he forced him to return to his mother's house. He said he took him to his home instead and asked him to call his mother to try and work things out "and I know that they spoke". He says he hoped that the matter would be resolved and he continued to hope that they would be resolved during the week.

[60] He also suggests that Ms. R never drove to his home to pick K. up or went to his school. He says that had she come to his house he would have encouraged K. to go with her.

[61] Mr. G. also spoke about the implications of the Order of Justice Stach, ordering him to return K. to his mother. He said he told K. that the court ordered him to return him to his mother and that a contempt application was pending. Mr. G. said that K. realized that his refusal to return to his mother had very serious repercussions for his father and therefore returned to his mother without incident.

[62] Mr. G. told the Court that, with the benefit of hindsight, he realized that he should have told K., before Ms. R. was required to make an application, that if K. did not return, he, Mr. G., could be in trouble with the courts. Mr. G. added that he had assured K. that he would be bringing an application to change the access arrangements. He says that, unfortunately K. was very upset that his wishes were not being considered. He refused to return to his mother's houses and "I was concerned that he would run away from his mothers if I returned him against his will. I was more concerned for his safety if I forced him to return and less concern than I should have been about the legal consequences to me."

[63] Mr. G. says that he is genuinely sorry for the difficulty this has caused and there has been no repetition of the conduct leading up to Mr. R.'s Application.

[64] He says that it is his intention to make application for an order varying the access arrangements to bring them into line with the recommendations of Dr. Posthuma.

#### IV. REASONS FOR THE DECISION

[65] There is no dispute in this case about the relevant legal principles. Justice Veale, of this Court adopted the law in this respect summarized by the British Columbia Supreme Court: *Gwich'in Development Corp. V. Alliance Sonic Drilling Inc.*, 2009 YKSC 19.

[66] Civil contempt proceedings are quasi-criminal in nature. Ms. R. has the onus of proving the elements of civil contempt beyond a reasonable doubt. The strict rules of evidence, those that would apply at a trial, apply. A reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense; it is logically connected to the evidence or absence of evidence. It does not involve proof to an absolute certainty; it is not proof beyond any doubt nor it is an imaginary or frivolous doubt; and more is required than that the person is probably guilty: *R. v. Lifchus*, [1997] 3 S.C.R. 320. Proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities: *R. v. Star*, (2000), 147 C.C.C. (3d) 449 at 545 [242] (S.C.C.)

[67] I will now consider the legal principles relating to the specific issues raised in this case and apply them.

a. Why I have found that the Order was clear and concise

[68] The order must be clear and precise in its directions to Mr. G. If the order is ambiguous Mr. G. is entitled to the most favourable interpretation of the Order. A lack of precision is fatal because the conduct to be condemned cannot be ascertained: *Hama v. Werbes*, 2000 BCCA 367 at 16.

[69] In my opinion the order is clear and precise. It says K. shall reside with each party on alternating weeks. Mr. G. had no trouble understanding the order. In his November 25, 2010 affidavit, he acknowledged, at para. 3, that: "I was of course aware that an order had been made by the Honourable Madam Justice Martinson on 25 June 2010, stipulating that K. reside with me or the respondent on alternating weeks." He also says that during July and August, with the exception of a two week period when Ms. R took K. to Nova Scotia, he "generally picked K. up at the plaintiff's residence when it was time for him to stay with me she typically picked K. up at my residence when it was time for K to return to his mother's house." In saying this he acknowledges that they were following the schedule.

[70] He takes no issue with the fact that since the Order was made, when K. was in school, the exchange date was Friday at 3:30 p.m.

[71] Once school started again, that is what they did. K. resided with Mr. G., based on the Order, from Friday September 3, 2010 to Friday September 10, 2010 and Ms. R.'s next week was from Friday, September 10<sup>th</sup> at 3:30 pm to Friday September 17<sup>th</sup>. While she agreed to let K stay with his father until Sunday, September 12<sup>th</sup>, 2010, at request K

made on Thursday, September 9<sup>th</sup>, her agreement did not extend beyond September 12<sup>th</sup>.

[72] This Order did not have to give specific directions to Mr. G. as to when or how the exchanges were to be implemented. It was confirming a schedule already in place that both agreed to. They both complied with the schedule after the Order was made. It was not necessary for the Order to say that Mr. G. must retrieve K. or return K. The obligation was to ensure that K. resided with his mother on the alternate week.

b. Why I have found that Ms. R.'s Application for contempt does specify precisely the provision of the order alleged to have been breached.

[73] Ms. R.'s Application for contempt must specify precisely the provision of the order alleged to be have been breached. That is because Mr. G. cannot be found in contempt of something for which he has not been specifically cited.

[74] Ms. R.'s affidavit sworn September 16, 2010 forms part of the Application. As I noted at the start, the Application states that at the hearing of the Application, "the applicant will rely on the Affidavit of [Ms. R.], sworn on September 16, 2010, and the other process filed herein."

[75] In it she says that the court order at issue is the one granted by this Court on June 25, 2010 in which K. was to reside with his parents on alternative weeks. Her allegation is that the Order required that K. reside with her for the week starting on Friday, September 10, 2010, at 3:30 p.m. to Friday, September 17, 2010 at 3:30 p.m., that she agreed to let K. stay with his father until Sunday, September 12, 2010 but no

longer, that Mr. G. was required to ensure that K did reside with her after that, until September 17, 2010 at 3:30 p.m. and he failed to do that.

[76] Mr. G. knew what the allegation was and, in his own affidavit, responded to it in detail. He has never said that he did not know what the allegation was, or that he did not think that the exchange date and time was Friday, September 10th at 3:30 p.m. Rather, he has provided an explanation as to why he did not comply with the Order based on K's wishes and conduct. Mr. G.'s evidence is that if K. had been willing to go to his mother's house he would have dropped him off on the way home on Sunday, September 12, 2010. His explanation through his lawyer and in his email is not that he did not think the order required him to return K. to his mother's care. Rather, he provides an explanation as to why he did not comply.

c. Why Mr. G.'s conduct constitutes contempt

[77] To constitute deliberate contempt, Mr. G.'s conduct must be intentional, as opposed to accidental or unintentional. There is no requirement that the conduct be wilful; it is not necessary that Ms. R. prove that Mr. G. intended to disobey or flout the order of the Court. Rather, the offence consists of the intentional doing of an act that is in fact prohibited by the order. All that is necessary to establish the contempt is proof of deliberate conduct that has the effect of contravening the order; an intent to bring the Court into disrepute or to interfere with the due course of justice or with the lawful process of the Court is not an essential element of civil contempt.

[78] I have considered Dr. Posthuma's report. It is not relevant to the question of whether Mr. G. intentionally did an act that is in fact prohibited by the order. Aspects of it

are relevant to the question of the consequences of the contempt. It would likely be relevant to any future application to vary the June 25, 2010 Order.

[79] Ms. R. and Mr. G. did not treat the Order for an alternating access schedule as a matter of discretion. Rather, they followed the Order unless they both agreed otherwise. The only logical inference to be drawn from the evidence before the Court is that Mr. G. implicitly agreed to K. going to Halifax for two weeks because K.s grandmother was celebrating her 80<sup>th</sup> birthday.

[80] Mr. G.'s legal obligation under the Order was that he was required to ensure that K. did reside with his mother from at least September 13, 2010 until September 17, 2010 at 3:30 p.m. and he failed to do that. That conduct was deliberate, and had the effect of contravening the order.

[81] I agree with Mr. Wiebach when he says that while Ms. R. asserts that all agreed that Mr. G would drop K off at Ms. R's home on September 12th, that conclusion is not supported by the evidence. However, it is clear that Ms. R. only agreed that K. could stay with his father until Sunday, September 12<sup>th</sup>.

d. The reasons why people must comply with Court Orders

[82] I agree with what Ms. Kinchen has said about the importance of following court orders. Mr. G. cannot treat a court order as unworthy of notice. If those who disagree with court orders are allowed to ignore them, the orders become meaningless.

[83] In a family law case involving custody, a Judge is only asked to decide what is in a child's best interests when the child's parents cannot agree. In this case, the Court

was asked to decide what was in K.s best interests and did so, resulting in the order in question.

[84] It is not unusual for one parent to disagree with what the Court says. That parent can appeal the Order. However, if the order is not appealed, or if it is not changed as a result of an appeal, that Order stands, and determines what is in, in this case, K.'s best interests. This Court Order, like all other court orders, was not a polite request by the Court asking Ms. R. and Mr. G. to do certain things. It placed formal legal obligations upon both Ms. R. and Mr. G. that must be met; formal legal sanctions can be imposed if they do not comply.

[85] This treatment of court orders is not an arbitrary rule, made without reasons. There is of course the obvious reason that the rule of law forms the basis of a civilized society. But, in a case involving custody, like this one, the reasons go far beyond that.

[86] Kids, especially when their parents are in conflict about them - and before the courts in a case to do with them - need to have a workable solution as soon as is reasonable possible, so that the conflict in which they are caught can stop and so that they can have some certainty about their future. Study after study has shown that conflict between parents relating to their custody can be very harmful to children's physical and mental well-being, not just when it is happening, but also later in their lives. Ongoing court litigation can make the situation even worse.

[87] Obtaining a workable resolution and certainty are provided by final orders made in a timely way, which are only subject to change if there has been a material change in the circumstances that existed at the time the Order was made. When a parent ignores



a court it order, doing so often prolongs and escalates the conflict, causes lack of certainty, and contributes to the harm that can be caused to children.

e. What Mr. G. should have done and not done, and why

[88] Mr. G., you are the parent, and K. is a child. It is your responsibility, both legally, and as a good parent, not to place K. in the middle of issues that are between you and Ms. R. It is your responsibility, not K.'s, to deal directly with Ms. R if changes to the schedule need to be made, or if problems arise. She made that request of you on August 28<sup>th</sup> and you did not respond to her.

[89] It should not have been K. who spoke to Ms. R. about changing the schedule so that K. could spend an extra two days with you. You should have phoned, got her agreement, and made arrangements as to when K. would be returned. While I agree that the fight was between K. and his mother – fights happen between parents and kids his age – it does not mean that the problems that arose had nothing to do with you. As a responsible parent you had an obligation to deal with them.

[90] You have said you had a number of concerns about K. and I have accepted that. You should have called Ms. R. to tell her about the concerns you had so that the two of you, as the parents, could try to reach a solution that you both felt was in K.'s best interests. You could not, and you cannot, make a unilateral decision about what the best solution is. It is very difficult to understand why you did not even phone her to say that K would not be returning to her home.

[91] If you could not reach an agreement with her, then your obligation was to comply with the Order, or immediately come to court to ask the court to change it.

[92] It was not and is not appropriate to take the view that K. has the right to decide, on his own, what is in his best interests. I agree with Justice Stach when he says that this at para 3:

In his submission made personally to the court today, D.G say that he is merely abiding by the wishes of his son, who does not want to return to the home of his mother. D.G. appears content to permit K. to make that decision. It is fundamentally wrong for D.G. to take that position. By simply allowing his son to decide in respect of a serious matter is in my view, not responsible parenting. To permit that in the face of a court order, deliberately and recently made, is simply not on.

[93] I have made it clear in my earlier decision that children have a voice, but not the choice. That is why I raised the question of his participation.

#### IV. CASE MANAGEMENT

[94] I confirm the statement I made at the start of this proceeding that I am now seized of any further applications that may be made in this case, including any application to vary my June 25, 2010 Order, so that there can be a timely resolution that is in K.'s best interests. He, like other children, needs to have the ongoing conflict between his parents, in which he is caught, end; he needs some certainty about his future: paras. 82 - 87, above. Having one judge, and in this case the judge who heard the custody application, deal with any further applications to enforce the order, and any applications to change it, helps to achieve those objectives. As that judge, I have relevant information about the parents and the child, I know what orders were made and

why they were made, and I know the evidence upon which they were based. As such I am well placed to both enforce the orders, and to consider any application to vary them. See: *A.A. v. S.N.S.*, 2009 BCSC 372, at paras. 74 – 87, and *One Case - One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and other High Conflict Cases*, *Family Court Review*, 48(1), 180 to 189.

#### V. COSTS

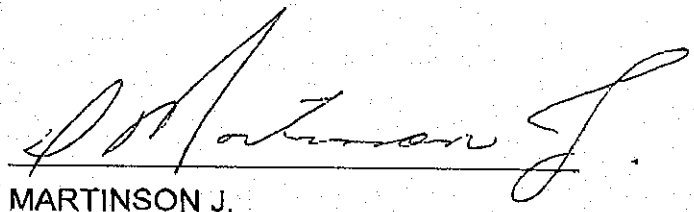
[95] The remaining issue, which is unrelated to the question of the consequences of contempt, relates to the court costs. On the question of costs, as Justice Veale said in the *Gwich'in* case, there is a considerable amount of authority saying that there should be or can be an award of court costs on a special costs basis in contempt cases. Like Justice Stach, I conclude that Ms. R. is entitled to special costs equal to the legal fees that she has incurred since the appearance before him on September 17. Those costs are to be paid by December 31, 2010, unless otherwise agreed between the parties.

[96] I direct that a transcript of these oral reasons be prepared and filed.

#### [DISCUSSION WITH COUNSEL ABOUT COSTS]

[97] The costs are subject to taxation.

[98] Thank you. Court will then adjourn.

  
MARTINSON J.