SUPREME COURT OF YUKON

Citation: *S.L.F v. T.L.C.*, 2017 YKSC 40

Date: 20170616
S.C. No.: 16–B0102
Registry: Whitehorse

BETWEEN:

S.L.F.

PLAINTIFF

AND

T.L.C.

DEFENDANT

Before Mr. Justice L.F. Gower

Appearances:
H. Shayne Fairman — Counsel for the Plaintiff
No one — Appearing for the Defendant

REASONS FOR JUDGMENT

[1] GOWER J. (Oral): This is a trial where the paternal grandmother (the "grandmother") seeks an order of joint custody and shared residency for the two children: A.L.F., born November 5, 2008, who is now eight-and-a-half years old; and L.K. F., born October 6, 2010, who is now six-and-a-half years old.

[2] The grandmother also seeks other ancillary relief, which I will come to later in these reasons.

[3] Because there is an aspect of child abduction in this case by the mother, I view this as a case where time is of the essence. We have the new school year starting in about two-and-a-half months from now and in view of the fact that this Court has a very

busy calendar at the moment and the summer break and summer vacation times are quickly approaching, it is my view that it is appropriate to provide oral reasons as soon as possible, rather than reserve to produce a written judgment, which would be more polished and perhaps elegant, but not nearly as useful for the parties. Certainly, the additional time it would take to produce a written judgment would not be in the best interests of the children, for reasons which will become evident as I go forward.

[4] I am in substantial agreement with the submissions of Mr. Fairman, who is counsel for the grandmother. He is an experienced and capable lawyer with many years at the bar, practising almost exclusively in the area of family law. I have found his submissions to be thorough and fair.

[5] I am going to direct, Madam Clerk, that a transcript of Mr. Fairman's submissions be obtained and appended as an appendix to any published version of these reasons. The transcript will be redacted to protect the identity of the parties and the children. Further, I would ask that any other court or other tribunal dealing with an appeal of these reasons, or an application to vary these reasons, has due regard to Mr. Fairman's submissions, with which I am in substantial agreement and upon which my eventual decision is largely based.

[6] I also want to make brief reference to the fact that the mother has not appeared for this trial, despite the fact that she had notice of the date and time of its commencement. The mother was in contact with the Court Registry and, in fact, attempted to send a letter directly to myself, which was intercepted by the trial coordinator, trying to explain her current situation and to provide what she referred to as a "statement of defence".

[7] There have been other emails from the maternal grandmother and others who I believe to be friends of the mother. None of those are in evidence before me, *per se*. I note that the mother was originally represented by legal counsel and that her legal counsel, in fact, had filed a statement of defence, so the document that the mother purported to file was largely redundant and, in any event, was not in the proper form.

[8] I want to observe further that our registry staff replied to some of these communications by the mother, informing her that if she wanted to make an application before this Court to obtain any form of relief, then she would have to go through the procedures under the *Rules of Court* and file a notice of application with an affidavit in support. She was provided with phone numbers for various legal resources that she could contact, such as the Law Line, the Family Law Information Centre, and so on. It appears that the mother has not availed herself of any of those resources, and the upshot of the communications that have been sent to the Court suggest that the mother is presently residing in London, England with the children, where the maternal grandmother also resides.

[9] What impressed me most about the evidence of the grandmother was her lack of *animus* towards the mother in these circumstances. She spoke very evenly and calmly about the factual background in this case; how she spent her time with the two children; and her relationship with her son, J.F., who very tragically passed away on March 12, 2017, just recently. And this is all in the context of the children apparently having been taken by the mother as recently as April 13, 2017, away from Whitehorse, out of the Yukon, and now apparently overseas in England.

[10] In my experience as a judge for over 13 years, it would have been very understandable if the grandmother had come to court effectively wanting to attack the character of the mother and to seek sole custody of the children for herself. She has not done that. She has restrained herself to seeking essentially a continuation of what was the *status quo* before: joint custody and shared residence. She even expresses the hope, in spite of everything that has happened, that she can resume her relationship with the mother, because they used to be really good friends in the past before everything started to go sideways as of about November of last year.

[11] That speaks volumes to me, in terms of the grandmother having the ability to put the children's best interests first over her no doubt anger, frustration, worry, concern for the children over everything that has happened. That is one of the main reasons why I am persuaded, in addition to what Mr. Fairman has said, that it is entirely appropriate that the grandmother be granted joint custody of the children with the mother.

[12] Furthermore, the grandmother's attitude in that regard, her even-handedness and her calmness, has been corroborated by her friends when they describe the brief and few conversations that the grandmother has had with each of them. I am now speaking of T.B. and C.L., the two witnesses who testified. She was not speaking ill of the mother because of what the mother had done, she was simply calmly expressing her concerns and her worry for the children.

[13] Again, it would have been entirely understandable and not uncommon, in my experience, if the grandmother had been more vitriolic in the way that she spoke of the mother, but she has not done so.

[14] That is very similar to the manner in which the grandmother spoke about the death of her son, which she is still grieving for. It has impressed her friends about how calmly and quietly, but responsibly, she has been dealing with her grief in that regard. There is evidence that she has been taking grief counselling; there is evidence that she cries to herself when she is alone; but then when she is with others, she is able to speak about the death calmly and in a constructive and healthy fashion. That, again, is a positive testament to her character.

[15] Largely for those reasons, this case has not evolved to become an attack on the mother's ability as a parent, but it is more so about the grandmother being a central pillar of stability in the children's lives. Relative to the mother, the grandmother has been primarily providing the optimum stability in the children's lives; whereas the mother has had a relatively unstable lifestyle over the last six years especially.

[16] Firstly, I refer here to the grandmother's evidence that the mother has held many jobs over the last 10 years. The longest job that she has ever held in that period was over a two-year period, approximately, but the rest have all been a matter of months. The mother has also at times been a recipient of social assistance and Employment Insurance. The grandmother has helped her financially to pay bills, to provide food and clothing for the children, as well as other supplies.

[17] Secondly, in relation to the mother's relative instability, there is evidence that she moved a significant and surprising number of times over the last 10 years. The grandmother said she lost count at 15 moves. That evidence is corroborated by the school enrolment forms, which were filed as an exhibit in this trial, particularly for the child A.L.F. It shows that over the period from 2014 to 2016, there were five different

residences listed by the mother as her physical home address, which is a surprising number of moves in such a short time.

[18] Thirdly, with respect to the mother's relative instability is the evidence that the mother, particularly since she and her husband, J.F., separated after 2011, their relationship has been on again/off again. The grandmother testified that there have been quite a few other relationships over that period, but that they were all short-lived as well.

[19] The most recent of those relationships is what has given rise to the current state of affairs. The grandmother testified that one day a computer was left on in her residence and her son, J.F., determined that the mother had been in communication over the computer with a man in Alaska, who was later determined to be A.G. That caused J.F. to move out of the grandmother's home where he and the mother and the children had been residing. That led also to the mother making plans to move to Alaska to start up a long-term relationship with A.G.

[20] To make a long story shorter, that is what eventually prompted the grandmother to commence the action that has been tried before me in the last day, in an attempt to prevent that move, because it would not have been in the children's best interests, especially to uproot them before the end of the school year.

[21] Given that the mother is now believed to be in London, England, it appears that even that most recent relationship may also be over, which is further evidence of the mother's relatively unstable lifestyle.

[22] Fourthly, there is the issue of the number of schools that the children have been moved to and enrolled in because of this relative instability in the mother's lifestyle. In

A.L.F.'s case, since she started kindergarten until this spring, she had attended six different schools from September 2013 to January 2017. For L.K.F., who is six years old, he has been in three different schools from September 2015 to January 2017. That kind of instability cannot be in the best interests of the children.

[23] What is also immediately apparent, as being contrary to the best interests of the children, is the mother feeling the need to have to uproot the children from Whitehorse and from the Yukon, where they were born and have been living all their lives, to either go to Alaska and now off to England. She apparently had a conversation with the grandmother on March 21, 2017, where she tried to justify her plan by stating that the children needed a new beginning.

[24] However, I agree with Mr. Fairman that this is evidence that the mother was putting her own agenda for some kind of a new beginning, if not with A.G., with reconnecting with her mother and going England, ahead of the best interests of her children.

[25] Further, it is evidence of a clear disregard that the mother had for the emotional needs of her children, particularly on the heels of the death of their father. The last thing these children need at this time in their lives is further uncertainty, further instability, and further inconsistency. This is in addition to the fact that the children have also been removed, not only from their grandmother and from their friends and other family in Whitehorse, but also from their half-siblings, D. and S., whom they have been close to all their lives.

[26] Now, you take all of that instability and that disregard for the children's best interests and you compare it with the number of days that the grandmother has had the

children either in her care or days when she has been responsible for picking the children up from school or from daycare or dropping them off to either school or daycare, or taking them on activities — she has methodically kept records of her time with the children since January 2014, right up until May of 2017. I have taken the trouble to go through and count each of those days. It would not necessarily have been overnight stays on each occasion, but there would have been times when the grandmother was responsible for caring for the children, the children would have been over at her residence, or she would be involved with them in some other way, and some of them would have been overnights. In 2014, I counted 132 days; in 2015, 141 days; in 2016, 157 days; and in 2017, up until May — and this is allowing for the fact that the mother apparently absconded as of April 13 — 30 days.

[27] This is corroborated by Ms. B., who testified that she knew when the mother was off work from her shiftwork at the Thomson Centre, where Ms. B. also works from time to time, because the children would always be over at the grandmother's residence where they would be playing in the yard. That is consistent with the grandmother's evidence that, by and large, her shift would be two days on, two nights on, and then she would have five days off. She would note that in her calendar that I have just referred to. In almost all of the days off, she would have the children with her or she would be caring for them in some way or other. That is an unusual and exceptional level of involvement for a grandparent in the lives of grandchildren.

[28] I have had regard to the case law that has been provided to me, in particular, the case of *Boutilier-Robar v. Robar*, 2012 NSSC 279. I am going to borrow from the language of Justice Theresa Forgeron at para. 63 of that decision. I agree with

Mr. Fairman and I think the case is entirely appropriate and reflects the situation here. I would say, borrowing that language, that the relationship between A.L.F. and L.K.F. and the grandmother is "strong because it is founded on love, emotional availability, structure, routine, and stability." The children's relationship with the grandmother is also "characterized by love, affection, genuine interest, and respect." It is a relationship where the children have and will continue to thrive, which is another reason for granting the grandmother joint custody and shared residency.

[29] I have also had regard to my previous decision, cited as *G.N. v. D.N.*, 2009 YKSC 75. I am not going to repeat the legal principles. Mr. Fairman has referred to them and I adopt his submissions in that regard, but I will make particular reference to one of the cases I cited there at para. 12 of my reasons. It is from the Ontario Court of Appeal in *Chapman* v. *Chapman*, [2001] O.J. No. 705. There, Abella J.A., as she then was, delivered the judgment of the Court and made the following comments at para. 19 — and, again, I repeat them because I think they are applicable here:

> A relationship with a grandparent can - and ideally should - enhance the emotional well-being of a child. Loving and nurturing relationships with members of the extended family can be important for children. <u>When those positive relationships are imperiled arbitrarily</u>, as can happen, for example, in the reorganization of a family following the separation of the parents...

[30] — and I would add, parenthetically, "or the abduction of children from the community in which they have lived all their lives" —

> ...<u>the court may intervene</u> to protect the continuation of the benefit of the relationship [citations omitted]. (my emphasis).

[31] And that is what I am intending to do by my decision today.

[32] In my view, the grandmother has met her onus in establishing that the best interests of the children would be best served by the order sought for joint custody.

[33] Secondly, by the order sought for shared residential arrangements — and I think it is probably wise to specifically include in that aspect of the order that the children will reside with the grandmother on her days off, unless otherwise agreed in writing by the parties.

[34] Thirdly, that there will be a continuation of the order that I made on May 5, 2017, specifically para. 4, that neither the grandmother nor the mother shall remove the children from Whitehorse, Yukon Territory, without the written consent of the other party or an order of the Court.

[35] There will also be a continuation of para. 5, that the mother shall return the children immediately to Whitehorse, Yukon Territory.

[36] There will be a continuation of para. 6, that, in the alternative, the mother shall return the children to the care of the grandmother immediately so that she can make arrangements for the return of the children to Whitehorse, Yukon Territory.

[37] There will be a continuation of para 7, which states: "A sheriff or police officer, having jurisdiction in any area where the children may be, shall be authorized until" — a date needs to be inserted here — "which will be not later than 30 days after the date this order is filed or such further date as ordered by this Court to locate, apprehend, and deliver the children to the grandmother, or her appointed designate, to facilitate the return of the children to Whitehorse, Yukon Territory.

[38] There will also be a continuation of para. 8 of the May 5, 2017 order, but with a slight amendment, "Upon the mother's return to Whitehorse, she shall deliver and leave

the children's passports with the grandmother, who shall hold them until further order of the Court or written agreement between the parties."

[39] Finally, there will be a continuation of para. 9 of the May 5, 2017 order, which is the RCMP assist clause. I need not read that into the record because it is available to counsel.

[40] The last aspect of this case is the issue of costs.

[41] Mr. Fairman has asked for an order for specific costs in the amount of $3,000 in order to avoid having to go through the filing of a bill of costs and having that taxed, and perhaps having to give further notice to the mother, who is essentially absent without leave and we do not know her current whereabouts for certain.

[42] In those circumstances, I agree that it is appropriate to order costs in favour of the grandmother in a fixed sum of $3,000. Obviously, the mother's signature approving any form of order arising from these reasons is dispensed with.

[43] Mr. Fairman, have I omitted anything else?

[44] MR. FAIRMAN: My Lord, I wonder if there could be a term of the order that service of the order would be effected by email delivery or electronic delivery of the filed copy of the order to the email addresses, which we have for the defendant mother: [two email addresses given].

[45] THE COURT: So ordered.

GOWER J.

APPENDIX

S.C. No. 16-B0102
Registry: Whitehorse
June 16, 2017

SUPREME COURT OF YUKON

(THE HONOURABLE MR. JUSTICE L.F. GOWER)

BETWEEN:

S.L.F.

PLAINTIFF

AND

T.L.C.

DEFENDANT

PROCEEDINGS AT TRIAL

APPEARANCES:

H. Shayne Fairman — Counsel for the Plaintiff
No one — Appearing for the Defendant

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Whitehorse, YT
June 16, 2017

(COMMENCED AT 10:16 A.M.)

THE CLERK: In the Supreme Court of Yukon, this Friday, the 10th day -- 15th day of June, 2017.

The matter before Your Honour is F. versus C.

THE COURT: Good morning.

MR. FAIRMAN: Good morning, My Lord.

THE COURT: Just give me a second.

Yes, whenever you're ready.

MR. FAIRMAN: Thank you, My Lord. Prior to the commencement of the proceedings this morning, I provided to the court registry two cases which I will be making reference to during the course of my submissions. Has Your Lordship had an opportunity to review those?

THE COURT: I have, yes.

MR. FAIRMAN: All right. Thank you.

THE COURT: Briefly.

SUBMISSIONS FOR PLAINTIFF:

MR. FAIRMAN: My Lord, we have before us a rather unfortunate situation, an unfortunate situation that I submit has been largely created by the impulsive, rash and ill-conceived actions of the defendant T.C. We're asked today to deal with custodial issues and other related issues with respect to two children: A., born November 5th, 2008, who is currently 8 years of age; L., who was born October 6, 2010, is currently 6 years of age. Both children were born in Whitehorse. They have resided their entire lives in Whitehorse, and they have a half brother and sister in Whitehorse, who are the older children of the defendant, those two individuals being S., who is currently 18 years of age, and D., who is 24 years of age. D. himself has had a child with his partner, who is now several months old. So all of the extended -- or immediate extended family of the children are here in Whitehorse. A. and L. are the outcome of a relationship between T. and their father, J.F. The evidence supports the fact that that relationship began in 2007 and continued for all accounts until October 2011, when a separation between the parents of A. and L. occurred. The parties were married in 2009, after A.'s birth in 2008, and remained married until J.F.'s untimely death on March 12th, 2017.

In the early part of the relationship between J. and the mother T., they resided with S. for several months, and it is in evidence that everyone was very excited and looking forward to the first pregnancy and the birth of A. From early in A.'s life, the evidence is that there was substantial time spend by S. and her granddaughter A. That residential time with S. and A. was important and was encouraged and facilitated on, say, in those period -- in that period of time by both J. and T. There is evidence before

you about the number of family events which were organized and posted by S., and when L. was born in October 2010 this arrangement continued. The family unit for the most part, up until the first separation between J. and T., was J., T., S., D., S. and A. and L.

The evidence before you is that during the period of the relationship between J. and T., S. has resided in only three locations: The [redacted] residence in the early days of their relationship, the [redacted] residence from December 2009 to October 2011, and her property in [redacted] from October 2011 until present.

Between October 2011 and October 2016, which the evidence says is the final separation between J. and T., the relationship was stormy, to say the least. Frequent periods of reconciliation, followed by frequent periods of separation, marked the sort of relationship history between J. and T. in that five-year period. The constant throughout, in my submission, whether J. and T. were together or not together, was that S. would consistently and frequently have responsibility for the care of both A. and L. The evidence before you is that for the last several years when she has worked the shiftwork that she does at the Thomson Centre, she would have two dayshifts, two nightshifts, followed by five consecutive days off, and we've produced in evidence the calendars that S. kept over those periods of time which show that, for the most part, she would have the children in her care during her days off from work, and that evidence and those observations have been corroborated by third party witnesses to the amount of time the children were in S.'s care. That evidence has been given to you by C.L., who was the landlord and also lived in a four-plex on [redacted], of the amount of time that she saw the children at S.'s home, in S.'s care, or S. hosting events involving the children. And in the period 2011 to present, S.'s next door neighbour and good friend T.B. has also confirmed the way she knew that S. wasn't working was if she saw the children at S.'s. I thought that that evidence was quite compelling, and Ms. B. also made reference to the fact that, in her own mind, she was thinking that S. is doing an awful lot and hoped that T. and J. both appreciated how involved and significantly connected to A. and L. S. was and how important she obviously was to their day-to-day care.

The last period of reconciliation between J. and T. appears to have occurred from September 2016 until October 2016. This is a period of time where they were both residing in S.'s condo complex. She had actually sacrificed her own bedroom to allow J. and T. to share that room themselves. And the children, who have always had their own bedrooms at S.'s residence, either sharing a bedroom or having their own bedrooms, S. abandoned her own room to give it up to J., T. in that time, and moved in with one of the children temporarily. That was a temporary arrangement until J. -- sorry, what happened then is the evidence is that in late October, some point in October, J. discovered that T. was being unfaithful, that she was pursuing a relationship with an online boyfriend who lived in Alaska, and that resulted in what I'll characterize as the final separation between J. and T.

J. moved out. Interestingly, S.'s own son moved out, while her daughter-in-law, T. and the children continued to reside with her, and remained there until mid-November 2016. They had obtained a condominium unit very close to S.'s, in the same complex, but it wasn't available until mid-November 2016. That evidence was given by S. and corroborated by Ms. B.

T.'s relationship with her new boyfriend from Alaska appears to have continued and, in January of 2017, he came to the Yukon for a visit. By S.'s evidence, this is the first time that she believes the two of them met in person, that at that point T. had never been to Alaska, had never been to Alaska to visit the boyfriend, and the evidence is that the only period of time that she spent in Alaska with the boyfriend was a three-day period -- supposed to be four days, but cut short by J.'s passing -- was a three-day period. T. apparently was quite smitten by the new online boyfriend and had proposed to J. and S. that she wanted to relocate the residence of the children from their lifelong home of Whitehorse, Yukon to Alaska. T. was never able to provide any particular details to S. or J. about what the residential arrangements would be, other than she'd be living with the boyfriend, never provided any information about schooling, was uncertain about her employment prospects, other than she suggested that she would be working for her boyfriend. There is no indication that he looked into immigration requirements, whether she would be allowed to go to Alaska with two children and remain there for more than just a visitor's visa. Some of the degree of lack of preparedness for this move is reflected by the fact that even the first time that T. tried to go to Alaska to be with the boyfriend to visit him, they couldn't get across the border because it hadn't occurred to her that she needed a passport to do so, so they were turned back on the first occasion they tried to go and she had to go to Vancouver and secure a passport -- sorry, they would have had to go to Edmonton to secure a passport for T.

In the early days of the proposed move to Alaska, T. was providing assurances that the children would remain in school until the end of the school year. J. and S. had both made known to T. their opposition to the proposed relocation, particularly given the lack of detail that was being offered up. T. was, in efforts to secure their consent, offering substantial periods of residential time here in the Yukon. S.'s evidence was that T. initially offered the entire summer or Christmas, spring break, other times, to allow for continued contact.

T. was aware of J.'s opposition to the relocation. She commenced -- she retained a lawyer and commenced divorce proceedings, but those divorce proceedings were discontinued prior to them even being served on J. as a result of J.'s untimely passing on March 12th, 2017. At that point, T.'s intent on relocating the children immediately to Alaska became clearer. She obtained a death certificate for J., which is a document that she'd require in order to pass over the border with the children. In the absence of a consent from him, she would

have needed to prove that he was unable to provide that consent. The evidence is that she quit her employment here in Whitehorse, that the boyfriend's truck was within sight of S.'s home; she could see that it was packed and ready to go, and when S. tried on March 21st to communicate with T. to even get her to offer the assurances she'd offered before that the children would remain in the Yukon and not be taken out of school until at least the end of the school year, T. was unable and unwilling to even offer those assurances.

And that's when the conversation occurred, which I think is telling, where, in T.'s -- from T.'s point of view, following the death of their father, what these children needed was a new beginning, they needed to start over, they needed everything to be new, they needed to have nothing from the past, which, very conveniently for T., played into her plans to relocate to Alaska, but I think speaks volumes to the clear disregard T. has for the emotional needs and the best interests of her own children. I don't think any expert or any person in terms of child development would suggest that uncertainty, new beginnings and instability are what children need, and quite the opposite, particularly when dealing with traumatic events like the death of a parent, they probably need stability, certainty, some consistency.

In light of her refusal to offer those assurances to S., court proceedings were commenced, these court proceedings were commenced, Ms. F. versus Ms. C.

There was some deliberateness in terms of the plans around the service of the documents on T.C. There was a very real concern on S.'s part that if she had the children and she was served, even on short notice and even a return date of a couple days, that by the time the couple days rolled around the fear was that she would have left the jurisdiction already with the children as it was clear that they were already ready to go. S. ensured that the children would be with her on the evening the documents were served. She confirmed that they could stay with her for the night by text with T. and the documents were, in fact, served at about 8 p.m. on March the 21st. You have had evidence from both T.B. and S. about T.'s reaction to being served, and I won't suggest that it would be unusual or unheard of that she would be upset by having been served, but I would submit that her emotional outburst, her reaction that night, was certainly out of -- out of proportion for what was, in fact, happening. She came to the door, banged on the door, issued a number of vulgar statements directed at S., called her a number of names, in the full knowledge that the children were within earshot, but eventually she did leave and, with police intervention, she did not return that night. S. spent the evening comforting particularly L., who was somewhat upset by this exchange, and the next morning she returned the children to T.'s care, as had been originally planned.

The matter was before Your Lordship first on March 23rd and at that time an order with respect to the non-removal of the children from the Yukon, with the exception of a period of up to five days of missing school,

was ordered. Ms. C. filed an affidavit at that time which offered up assurances to the court that it was never her intention to take the children out of school before the end of the school year, that this notion that she was going to be leaving imminently with the children was just nonsense, and that was the order that was made at the time.

As we know, the other thing that happened after being served with the court documents is that T.C. immediately almost entirely restricted S.'s contact with the children. Only with the assist and the intervention of counsel -- and keeping in mind that T.C. did have legal counsel at this time -- only with the intervention of counsel were we able to negotiate a one-hour visit on what would have been J.'s birthday on March 28th with A., and then two other visits, on April 4th, from 5 to 7 p.m., with both children, and April 5th, from 5 to 7 p.m., with both children. So four hours with both children in total since March 21st, and one additional hour with only A. on March 28th. That is the extent of the contact that was allowed by T. after March 21st, and that's the only contact S.'s had with the children since March 21st.

On April 13th, our understanding is that T., the new boyfriend and the children left for Alaska to visit with the boyfriend and his family over the Easter weekend. A week later, when they had not returned as expected, obviously S. and I were becoming alarmed and began communicating with Ms. Chan with regard to the likelihood or the location of the children and her client and when would they be returning. This is in the affidavit number 2 that we filed as an exhibit in this proceeding, that we contacted the school and they advised that the children had not returned to school since they were taken out on April 13th. The children have not been seen since.

On May 5th, Your Lordship made an order in this court granting interim joint custody of the children to the plaintiff and the defendant, and granting a number of other terms of relief with respect to the return of the children to Whitehorse. The evidence is that Ms. C. is aware of that order, that she is deliberately disregarding -- well, she deliberately disregarded the first order from March 23rd, and that she is further disregarding the order of this court from May 5th. I provided at the email address that we were given for service a copy of the May 5th order shortly after it was made and when Ms. C. contacted the trial coordinator, the trial coordinator also emailed -- at an address provided by the defendant, emailed a copy of the court order to her, so there's clear evidence that she has notice of the order. In the email from the trial coordinator, she was told that the matter would be proceeding to trial today, that orders could, in fact, be made in her absence if she didn't attend for trial, and, as we know, she has not, in fact, appeared and this matter has, in fact, proceeded.

So, as I said at the outset, we're faced with a very unfortunate situation created, in my submission, by the impulsive, rash and ill-conceived actions of the mother. What we're asking for today is orders as set out in the statement of claim, as I noted yesterday, and also additional terms to assist in the enforcement of the order of this court.

The law with respect to these matters is expressed in the Yukon Territory in the *Children's Law Act*. I think it is important, My Lord, that we keep in mind s. 1 of that Act. Do you have it there? States as follows:

> This Act shall be construed and applied so that in matters arising under it the interests of the child affected by the proceeding shall be the paramount consideration, and if the rights or wishes of a parent or other person and the child conflict the best interests of the child shall prevail.

Our Act was amended in 2002. It was a minor amendment, but one that was viewed as quite significant by the group affected by it. Section 33 of our legislation sets out who can make application to this court for custody. Previously, s. 33, or its equivalent section then stated:

> A parent of the child or any other person...

-- et cetera, et cetera.

The amendment made in 2002 added the words "including the grandparents," and obviously the grandparents who have sought custodial rights or access rights with regard to their grandchildren were celebrating that amendment as a significant accomplishment. And I do think that it's significant to the extent that grandparents was specifically added by the legislative assembly as an enumerated group who could seek custody of or access to a child.

I should also note that s. 29 of the *Children's Law Act* describes generally the purposes of Part 2, Part 2 being the custody, access and guardianship provisions of the Act. It says, among other things, that:

> The purposes of this Part are to
>
> (a) ensure that applications to the courts dealing with
>
> (i) custody,
> (ii) incidents of custody, or
> (iii) access to children will be determined in accordance with the best interests of the child...

-- repeating the paramount consideration, and also:

> (b) the purposes of the Part are to discourage the abduction of children as an alternative to the determination of custody rights by due process.

And, in fact, I don't think it's too harsh for me to describe what we have here as an abduction of the children by the defendant mother.

In determining the best interests of the child, the specific factors

that a court should consider are set out in s. 30, particularly sections 30(1) of the *Children's Law Act*. I think that the subparagraphs of that section that are particularly pertinent to this proceeding are subparagraph (a):

> (c) the bonding, love, affection and emotional ties between the child and
>
> (i) each person entitled to or claiming custody of or access to the child,
> (ii) other members of the child's family who reside with the child, and
> (iii) persons, including grandparents involved in the care and upbringing of the child.

I also think that subparagraph (c):

> (d) the length of time, having regard to the child's sense of time, that the child has lived in a stable home environment...

-- is a pertinent consideration here, as is subparagraph (d):

> (e) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessities of life and any special needs of the child;
> (f) any plans proposed for the care and upbringing of the child, and;
> (g) the permanence and stability of the family unit with which it is proposed that the child will live, and;
> (h) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child.

Those, I think, are all pertinent aspects for this particular case and with regard to the evidence that's before the court.

I provided before the outset of court today two cases to the court. The first one I'll speak to, Judge, is a -- or, My Lord, is a decision of yourself from 2009, *G.N. and Y.N. v. D.N. and E.P.*, 2009, YKSC, 75. This was a case that was, in broad terms, an application by grandparents for specified access to grandchild. In the course of the reasons for judgment, My Lord, if I could put words in Your Lordship's mouth, I think what the essential outcome of the decision was that parents, biological parents of children, have a right of custody; grandparents do not necessarily have a right of custody, although our legislation, as amended, does clearly allow them the opportunity to apply for custody. And I would submit that one of the propositions this case stands for is that the right of a parent to determine custody or determine incidence of custody is something that

needs to be given high regard, it needs to be respected for the most part, but Your Lordship quite properly also indicated, as the Act states, that the paramount consideration remains what is in the best interest of the child or the children, and I think that's important that we keep coming back to that.

In the case that I have provided to you, Your Lordship did not find it necessary to make an order for specific access, although, to be fair when reading the case there was a fairly strong warning or indication to the custodial mother that she should be reasonable with regard to the access that she allowed. The case stands for the proposition that the onus rests on S., as the applicant, to demonstrate that what's proposed is in the child's best interest. It states -- and this is -- it's quoting from the -- and I need to differentiate between the two *Chapman* decisions here, but the *Chapman,* 1993, B.C.J. decision, it quotes that:

> 2. The custodial parent has a significant role. The courts should be reluctant to interfere with a custodial parent's decision and should do so only if satisfied that it is in the child's best interests.

It also goes on to make the statement that:

> ...the court must be vigilant to prevent custodial parents from alleging imagined or hypothetical conflicts as a basis for denying access...

-- or, in our case, for denying custody, and I speak to that because it's in the evidence before you that Ms. C. does not think much of Ms. F.'s efforts to retain the children in the Yukon. There have been scurrilous accusations made about Ms. F. and her motivations and her intent. But that is, I would -- I would submit it's a made-up conflict, to the extent that Ms. F. has been very clear in her evidence that prior to -- essentially prior to T. being told she can't have her way and she can't simply move to Alaska with the new guy and take the children with her, there was a relationship of trust between S.[F.] and T., a relationship, given the amount of time T. allowed the children to be in S.'s care, the amount of time -- the things that she allowed S. to do with the children, take the child -- one child to dental appointments, on one occasion take the child to a doctor's appointment. S. would be obviously involved in the day-to-day care of the children. She certainly didn't have any problem with S. providing for the day-to-day needs of the children. So there was, in my evidence, a relationship of trust and a relationship of respect that has ended largely because of T.C.'s decision to end it and her conduct thereafter

The evidence of Ms. F., and this goes to the point of we are not here today seeking sole custody of these children. Ms. F.'s evidence is that in spite of everything that's happened, in spite of all the difficulties that T.C. has caused, she still believes in her heart of hearts that the best arrangement for her grandchildren is joint custodial arrangement, where

the children spend substantial amounts of time with two loving and capable -- or two caregivers, herself and their mother.

Your Lordship's decision in the *G.N. and Y.N. v. D.N. and E.P.* also quotes from the Ontario Court of Appeal case, also interestingly named *Chapman*. I don't know if they're the same Chapmans, but, in any event, there's two cases with the same name. Quoting from Justice Abella, as she then was, at the bottom of page 6, paragraph 12:

> A relationship with a grandparent can - and ideally should - enhance the emotional well-being of a child. Loving and nurturing relationships with members of the extended family can be important for children. When those positive relationships are imperiled arbitrarily, as can happen, for example, in the reorganization of a family following the separation of the parents, the court may intervene to protect the continuation of the benefit of the relationship.

In my submission, Justice Abella is expressing there exactly what the circumstance is here. We have had for a number of years a very positive relationship between A. and L. and their grandmother S., and that positive relationship has been imperilled by the actions of T.C., the arbitrary actions, I would submit. There is nothing in evidence before the court to suggest that S. isn't other than a loving and caring caregiver for these children and has been for some time, and the children's sudden removal -- you have to think about this, I think, My Lord, from the perspective of the children. In the last several months, they have had to deal with the death of their father in early March, the sudden deprivation of any contact whatsoever with their grandmother, with whom they've obviously had a substantial contact relationship in the past, they've been removed from the school that they've been attending unexpectedly, and at this point we simply don't know even what's going on in their lives. We don't know where they are, we don't know where they're living, we don't know what their circumstances are. We know that T.C. has limited financial resources, we know that she wasn't working, she didn't have a large financial reserve when she left here, so, understandably, S. is very concerned for the wellbeing of the children, but if we were to stop and just think about this from the perspective of the children, it must have been -- it must be a particularly bewildering point in their lives right now. Everything that they have known has been turned on its head. I guess T.C. was true to her word. Everything is going to be new for these kids. They're not going to have contact or connection with the past.

But, in doing so, she has also removed the children from contact with her own other older children. As far as we know, there is nothing to indicate that there has been contact between S., 18 years old, and D., 23 years old, or contact with his newborn child, and our proposal that the children return to Whitehorse would also facilitate ongoing contact with those other extended family members. I think it's important, and S. would

agree, that contact between S. and D. and A. and L. is probably important to them as well, obviously, contact -- restored contact with her is critical, but our proposal that Ms. C. be obliged to return to Whitehorse and obliged to remain in Whitehorse with the children I don't think is unreasonable and it would certainly accord with, in our submissions, the best interest of the child -- children, which should and must be the paramount consideration.

In the course of reviewing circumstances, my colleague, Ms. Tohn (phonetic), has been absolutely instrumental in terms of looking at other circumstances where grandparents in this country have sought full custody of children, which, again, is not the case here, we're seeking joint custody. The case which I provided to the court this morning is a Supreme Court of Nova Scotia Family Division case cited as *Boutilier-Robar v. Robar*, 2012, NSSC, 279. Of the cases that I reviewed, I found this one to be particularly compelling because of the manner in which Madam Justice Theresa Forgeron presented her consideration of the factors to be considered in awarding custody of this grandchild to the grandparents. She cites -- I particularly liked her opening paragraph, paragraph 2:

> [2] Children grow and develop within a family structure. Usually, parents, as head of the family unit, will play a pivotal role in their child's development. On occasion, however, other adults, such as grandparents, will assume this responsibility.

She goes on in this particular case to consider the facts with regard to the wellbeing of a young lady, and the grandparents' application for full custody. It cites in paragraph 30 revisions of their *Maintenance and Custody Act* and it says in there, s. 18(2), this is in paragraph 30 of the decision:

> ...the *Maintenance and Custody Act*. Section 18(2) of the Act, provides the court with the authority to make a parenting order on the application of a parent, or other person with leave of the court. The parties consented to leave being granted...

-- in this case to the grandparents. Interestingly, their legislation isn't even as open as our legislation with respect to it requires grandparents to actually seek and obtain leave or other persons to have leave. Our legislation does not require that

It goes on in the decision, I think, to have a very useful discussion with respect to the development of the law over many, many years and the movement from the parents' rights vis-à-vis their children to the shift in focus which we now have across the country of the focus should be in the best interests of the children. It talks about that being the dominant consideration over all other factors and cites the *King v. Low* decision from 1985 in the Supreme Court of Canada.

It also -- paragraph 36, My Lord, makes reference to a decision of the Nova Scotia Supreme Court called *Foley*, and it appears, and I've been told by my colleague in her research that this *Foley* case has been cited hundreds of times in Nova Scotia cases largely because -- and you can tell why when you begin to read the factors -- it appears to set out a very, very good series of factors for courts to consider with regard to balancing and determining a child's best interests, factors all of which, I think, fall within the best interest of the child factors that I enumerated from our s. 30, but expressed perhaps slightly differently, and those factors are set out -- the *Foley*-type factors, as I refer to them, are set out in this decision at paragraph 51. You can see at the bottom of the latter part of paragraph 51, the *Foley*-type factors that they identify include "an examination of the following factors," and I won't be exploring all of the factors listed here, but I would say this, I think that I'm going to make submissions with respect to each of the following points:

a. Physical Needs;
b. Emotional Availability;
c. Relationship Between Child and Caregivers;
d. Primary Care History;
e. Educational Needs;
h. Maximum Contact Principle;
i. Family Connections and Supports.

When we look at each of those factors and contrast S. with T., in most instances, or all of those instances, I would submit that S., on the evidence before you, is the preferred caregiver with regard to meeting those items. There are some items clearly which T. has been able to meet to a certain degree, but even on those items I would submit S. is the better of the two caregivers when it comes to the needs of the children.

Physical needs, you have the evidence before you that for a number of years now, in the homes that S. has had, she has had separate bedrooms available to her grandchildren, that she has fed them, has provided nutritious meals to them, that she has provided clothing for them and done their laundry. In my submission, S. has always had a high regard for the needs of the children.

By contrast, T. has had frequent residential changes. I believe S.'s evidence was that she lost count after 15. She's had sporadic -- or she's had a number of employment -- she's had unstable employment, she's had unstable residential arrangements, she's had unstable relationship situations. After ending the relationship with J. in 2011, the evidence is that she's had a number of other relationships and partners, including a number of reconciliations with J. himself.

One term that S. uses stands out in my mind when I was asking about the provision of food for the children, was that T. and J. would often come "shopping" at her house, and by that what I take it to mean that that

they always knew there would be good food for the children at her home and that they could go there and help themselves to the food that S. had already performed.

In terms of the heading of "Emotional Availability," I would submit that it's not an unfair statement that T. puts her own needs first, that she has demonstrated limited regard for the wellbeing of her children by the action and the conduct that she's taken particularly in the last few months, and, by contrast, S. has always put the needs of her grandchildren often ahead of her own, often ahead of her own. If you look at the pattern of residential time, S.'s either working or she's looking after or caring to some degree or another her grandchildren. She has had the opportunity to vacation, but even then it would appear that the vacation time that she prefers is time with A. on a bus trip for three weeks, A. and grandma's excellent adventure, if you will, or lengthy family vacations in British Columbia, or camping or partaking of other activities with the grandchildren in and around the Yukon.

In the decision at paragraph 63, and this is the Nova Scotia decision which I have provided, paragraph 63, under the heading of "Relationship Between Child and Caregivers," the description here is obviously pertinent to that case and is describing -- this at the beginning, at the third line -- describing the relationship between the child in this case and the paternal grandparents, but what I found in reading this is that it's just as easy to substitute the names S. and the children's names here. So the relationship -- if you do that, it reads this way, and I think it's -- it's accurate:

> The relationship between [L. and A. and S.] is strong because it is founded on love, emotional availability, structure, routine and stability. [A. and L.'s] relationship with [S.] is characterized by love, affection, genuine interest, and respect. It is a relationship where [L. and A.] have and will thrive. [L. and A.] will continue to develop a sense of family while maintaining a healthy sense of self, because of the nature of their relationship with [S.].

I think that those words apply in this circumstance as much as they did in the Nova Scotia case.

One of the bullet points or considerations, the *Foley* factors, if you will, are a primary care history. The evidence is clear before you that S. has spent substantial residential time with these children and, as noted before, that has been corroborated by neighbours who have lived either right next door to her over the last several years or even shared the four-plex place.

Educational needs I think is an important bullet point here. I was able to produce a schedule of where the children have attended school over the various dates. We've submitted into evidence through Mrs. L. the student enrolment forms. The dates on those forms don't necessarily coincide with when the students were actually in attendance, to the extent

that sometimes they're signed in advance of when they actually attended, so I've summarized in this document, which I would like to produce to the court, the schools attended by the children, both A. and L.

I don't know if you'll recall, My Lord, but there was a moment in Mrs. L.'s evidence where she hesitated. When she was looking through the student enrolment forms, she hesitated and she stopped and she looked up, and particularly in regard to A., and she said, "Oh, my, that's an awful lot of change for a young person." This a kindergarten teacher whose specialization is teaching young people. And she had taught A. in kindergarten at [redacted], was able this year, since January, to reconnect with the children of [redacted], but wasn't, obviously, that familiar with what had happened in the intervening time, and what you've got graphically represented here is the fact that A. had a full year of kindergarten at [redacted] and then Grade 1 at [redacted], but Grade 2 she spent part of the year at [redacted], the latter part of the year at [redacted], the beginning of Grade 3 at [redacted], and then since January 2017 at [redacted]. L., who only entered the school system in September 2015, in his two years of school has already experienced three different elementary schools here in Whitehorse. I am going to suggest that that's not the very healthy pattern for school attendance for young children.

There was also some evidence from Mrs. L. that, having dealt with L., there is concern -- or she expressed that there was some concern with regard to his sort of emotional regulation and his ability to cope. It wouldn't be a surprise if he is having some challenges or difficulties. The good needs seems to be that all accounts and all reports are that A. is a strong student, she has been reading since age 3. Mrs. L. spoke glowingly about remembering her as a very good student even in kindergarten, but there is some evidence, I would submit from Mrs. L., that L. is struggling. He's had issues -- physical issues with regard to his bowel, which was identified -- or is not necessarily identified, but S. has offered advice to T. about how to deal with that over the years. I think there's a real worry here that these children need to be somewhere stable and consistent. If S. is given joint custody, my understanding is that they can be enrolled at [redacted]. Regardless of where T. may be living in the catchment area of Whitehorse, they can continue on at [redacted]. It's a school they've -- that A. has attended before and I understand from S.'s evidence that it was actually the preferred school, that T. wanted to re-enrol them there, but was unable to because it was full and they had to go to [redacted] School. But my understanding of the way the educational system works is that if a custodial parent is residing in the catchment area, which would be [redacted] or [redacted], then the student can be enrolled in that school. And, again, this presumes that we're going to be able to track down the children and have them returned to the Yukon before school starts next year. They've missed the last half -- or they've missed the last two and a half months of school by the mother's actions. Something she deposed in an affidavit that she wouldn't do, she went ahead and did.

And, again, without -- without being too uncharitable, she did so with the full knowledge that the court ordered her not to do that, that she had offered assurances to the court, if for nothing better, in my submission, than she didn't want to face the possibility that S. and the court might -- well, S. certainly, and the court might stop her from pursuing her, in my submission, ill-thought-out plan of running off to Alaska with the Internet boyfriend.

One of the other factors, the *Foley* factors, set out in the Nova Scotia decision talked about the Maximum Contact Principle. The case actually talks about the willingness to follow court-ordered access and custody arrangements. I think we have before us, by her own actions, T.'s low regard for respecting orders of this court and low regard for abiding by what she's instructed to do by the court. You have the evidence of S. that, in spite of everything that's happened, her best estimate of moving forward for these children is that there be joint custody and some shared residential arrangement between her and T., and her hopefully well placed confidence that they can return to the trust relationship they used to have. Interestingly, when I asked her about the cellphones, these are cellphones that S. purchased in 2008 for J. and for T. and for herself that she's paid for for years so that contact can be maximized, and she hasn't even cut off the cellphone. She hasn't cut off J.'s cellphone because I'm sure doing that will be a difficult moment for her and she's expressed the hope that eventually that phone could be used by one of the children, but she hasn't cut off T.'s cellphone either because, as she said in her evidence, she's hoping she'll call. She's hoping that she'll reach out again, in spite of everything that's happened, and call her and get -- ideally the parties can get back on track.

Some of the other factors that are cited in the Nova Scotia case are also the willingness to seek out the assistance of experts and providing a role model, providing a consistent, stable, nurturing environment for children. It's my submission the evidence supports the fact that S. is certainly able and willing to do that, has done that and will continue to do that. There's obviously some question marks unanswered yet about T.'s ability to do that, and we remain hopeful that once she returns to the Yukon with the children, well, firstly, we remain hopeful that that will happen and that will be able to be done without -the intervention of the authorities, but when she returns with the children we're hopeful that we can return to an arrangement very similar to what it was before her proposed relocation to Alaska.

Another factor with respect to the orders that we're seeking, My Lord, is this: In the communications that I've had with the RCMP thus far with regard to the existing orders of the court, I can advise, as an officer of the court, that one of the factors that -- the initial order made by the court that did not contain any custodial rights to S. was an order that the RCMP felt -- it did not specifically contain an RCMP enforcement clause, but it was my sense in my discussions with them that they are going to be much more inclined to enforce and assist in the enforcement of an order that

provides rights of custody to an individual than simply rights of access. I can say for the record that to this point the efforts of the RCMP to recover T. and the children have been modest. I am hopeful that with a final order in hand we can ask them to be a little more engaged and we can also begin to pursue options that might exist with respect to the *Hague Convention on International Child Abduction*, and what we're here today, at the end of a trial, an abbreviated trial given that Ms. C. did not participate, but I think you have before you, My Lord, a very picture of what's happened over the lifetime of A. and L. and I would submit that their best interest, which remains the paramount consideration of this court, would be met by an order of joint custody of the children between the plaintiff S.F. and the defendant T.C.; that the plaintiff and defendant have a shared residence arrangement, and if there needs to be any particularity to that, I think it should be best described as the children would reside with the plaintiff during her days off, and you could add the words "unless otherwise agreed in writing by the plaintiff and the defendant." That does allow the possibility, somewhat hopeful, that upon return to the Yukon with the children, that T. and S. could work out some satisfactory residential arrangement for the children.

I would also be seeking the continuation of the previous order that neither party remove the children from Whitehorse without the written consent of the other party or order of the court; that the defendant return the children immediately to Whitehorse, Yukon Territory; that, in the alternative, the defendant return the children to the care of the plaintiff immediately so that she can make arrangements for the return of the children to Whitehorse, Yukon Territory. I would ask for the clause that we previously had about a sheriff or police officer having jurisdiction in any area where the defendant or the children may be, he's authorized -- and you'll recall, My Lord, that our Act only allows this for one month, so would be authorized until one month after the date of Your Lordship's order or such further date as ordered by the court to locate, apprehend and deliver the children to the plaintiff or her appointed designate to facilitate the return of the children to Whitehorse.

THE COURT: What's that section number again?

MR. FAIRMAN: It is s. 46 generally, My Lord, entitled "Order for Apprehension of Child." Section 46(2).

THE COURT: Of the *Children's Law Act*?

MR. FAIRMAN: Of the *Children's Law Act*. And the restriction under -- only being for a month is actually s. 46(7). It does allow for extensions of time to be given by the court longer than a month.

We'd be asking a continuation of the May 5th order with a slight variation with regard to paragraph 8, that "upon the defendant's return to Whitehorse, she shall deliver and leave the children's passports," the order said with the Supreme Court registry, where it would be held until further order of the court. I would propose that the passports be held by S.F.. We would be asking for the RCMP enforcement clause.

And with respect to costs, previously costs of $1,000 had been

awarded with respect to our application on May 5th, 2017. I would submit that, in the circumstances, that costs of this proceeding be payable by T.C. to S.F. in a fixed amount of $3,000. Clearly that is an amount well below the actual legal fees that have been incurred by Ms. F., but I think it's a figure that sends a reasonable message to Ms. C. that her refusal to participate in these proceedings in any way, and her obvious deliberate refusal to participate can come with a consequence. It would be in accord with the usual rules of costs, which would suggest that a successful party should be entitled to the costs. I'd rather it be a fixed amount so that we don't end up having to go through the trouble of a taxation and appearance before a clerk, et cetera.

So, subject to any questions Your Lordship may have, those are my submissions.

THE COURT: Thank you. In the circumstances, I am going to endeavour to give you an oral decision this morning. I have had a chance to consider the matter overnight and to review my notes from yesterday and other materials, but there are a few things that I want to check and I'll take the morning break to do that. So I'm going to propose that we come back at about 11:30. It might be a few minutes after that.

MR. FAIRMAN: Fair enough.

THE COURT: Okay?

MR. FAIRMAN: Thank you, My Lord.

THE CLERK: Order. All rise.

Court is stood down for a brief recess.

(RECESSED AT 11:11 A.M.)
(RECONVENED AT 11:44 A.M.)

THE CLERK: Order in court. Call rise.

The Supreme Court of Yukon is now reconvened.

THE COURT: I am just going to preface my remarks by reserving the right to edit any published version of these reasons for things such as technical errors and grammatical errors, style, legal errors, slips or omissions and that sort of thing.

[Reasons for Judgment]

MR. FAIRMAN: Other than that, I don't know, My Lord, if you want, just for the completeness of the record, to make note of or have entered into as an exhibit the schedule which I provided to you with respect to the schools attended by the children. That would be the only other technical matter.

THE COURT: Probably out of an abundance of caution, Madam Clerk, if you could make that the next exhibit.

THE CLERK: Exhibit 6, Your Honour.

THE COURT: Oh, I found the original.

THE CLERK: Thank you.

EXHIBIT 6: School schedule for children (Plaintiff)

THE COURT: Anything else?
MR. FAIRMAN: No, My Lord. We appreciate your time.
THE COURT: Best of luck.
THE CLERK: Order in court. All rise.
The Supreme Court of Yukon is now closed in the name of Her Majesty the Queen.
(CONCLUDED AT 12:46 P.M.)

CERTIFICATION

I hereby certify the foregoing to be a true and faithful transcript of the proceedings transcribed to the best of my skill and ability.

_____
Sandra Lotz
Transcriptionist

StenoTran