

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

L. (P.)

Respondent

-and-

L. (A.)

Applicant

MEMORANDUM OF JUDGMENT

[1] This is an application to vary custody and access. For simplicity, I will refer to the Applicant as the Father and the Respondent as the Mother.

FACTS AND BACKGROUND

[2] Oral evidence came from the parties themselves and from other witnesses on their behalf. The Father called his cousin, J.L., and a family friend, N.K. The Mother called her mother, E.L., and her grandmother, M.K.

[3] The parties have a daughter, P., who is eight years old. She was represented at the hearing by Ms. Rattan through the Office of the Children’s Lawyer. P. did not give evidence; however, Ms. Rattan called Ann Schreuders, who has provided counselling services to P. since April of 2016.

[4] Not all of the evidence is referred to in these reasons; however, it has all been taken into account.

[5] At present, both parties live in Hay River. Their homes are in close proximity to each other. P. is able to walk from one to the other.

[6] The Mother has four other children. The youngest two are from a relationship she had with G.J., which started in 2011. The Father has no other children.

[7] A number of interim orders were granted early on in the proceedings, including one granted in October of 2011. It provided for joint custody and specified access to coincide with the Father's work rotation at a mine camp.

[8] Sometime later, the Father brought a variation application in which he sought sole custody and day-to-day care. The Father's primary concern was that the Mother's relationship with G.J. was plagued by violence and substance abuse, such that it was no longer in P.'s best interest for the parents to share day-to-day care. G.J. was most often the perpetrator of violence and on some occasions it took place in front of P. and her half-siblings.

[9] Schuler, J. heard that application. The written reasons indicate there was evidence from the Mother that she and G.J. each had addiction issues; however, the Mother had completed some addiction programming and was maintaining a sober lifestyle. Further, the Mother and G.J. were attending counselling together to help them with the violence in the relationship. Schuler, J. stated it was significant that the Mother had taken steps to address the domestic violence and the substance abuse and that she had been sober for a relatively lengthy period of time prior to the hearing. The Father's application was dismissed.

[10] In March of 2013 parties agreed to a consent order which provided, among other things, that they would have joint and shared custody of P. This arrangement worked with the Father's shift rotations, which took him out of Hay River to a mining camp for two weeks at a time. The parties followed the arrangements set out in the consent order until the Father moved to Inuvik in early 2016. The Father said he felt he had to move because he had been laid off from his job at the mine. He could not make a sufficient income in Hay River at the time to support himself and meet his obligations to P. While living in Inuvik he kept in contact with P. and he was able to see her in person for about two weeks over the spring break.

[11] Unfortunately, G.J. continued to subject the Mother to violence after the consent order was entered. He assaulted her on a number of occasions while the Mother had P. in her care, at times seriously injuring the Mother. The Mother and

G.J. separated and reconciled a number of times. G.J. attended a treatment program in 2015.

[12] There was a particularly serious incident in April of 2016. G.J. assaulted the Mother and in the process, punched their infant son while she was holding him in her arms and trying to protect him. All five children of her children, including P., were in the home at the time. Ultimately, G.J. stabbed himself. The police were called and the incident ended. The Mother testified that she permanently separated from G.J. following this. She has not reconciled with him.

[13] The Father said he received calls in Inuvik from people in Hay River who told him what happened. He went immediately to Hay River. The Mother confirmed the events and by agreement, the Father took P. to live with him in Inuvik. The Mother remained in Hay River and started taking counselling for drug and alcohol addiction. She also took counselling for trauma she experienced as an adolescent (in the form of alcoholism in her home and sexual abuse by her friend's father) and during her relationship with G.J.

[14] The Mother contacted the Father in late May of 2016 and asked that P. be returned to Hay River by June 1 to finish the school year. The Father did not return her at that time. It was his view that it would be in P.'s best interest to finish the school year in Inuvik. He returned to Hay River with P. in early July and obtained employment there.

[15] At the end of September, 2016 the Mother went to a residential treatment program in Calgary. She returned to Hay River in November of 2016 and remained for approximately two months. She relapsed, but she returned to Calgary and completed the program on May 23, 2017.

[16] The Mother described two occasions when she spent time with G.J. while she was in treatment in Calgary. She said G.J. was attending treatment in Calgary at the same time. They met once at a restaurant to discuss child support and about a month later they went shopping together to buy things for their two children.

[17] The Mother did not return to Hay River immediately after she finished the program. She spent some time with a friend in Calgary and then stayed with her brother in Edmonton. She got back to Hay River in early June, 2017. She was concerned about returning to Hay River and having insufficient support to abstain from drugs and alcohol.

[18] Despite the change to P.'s living arrangements, the parenting provisions in the consent order were not immediately varied. It was varied by way of an interim consent order granted August 4, 2017 and again on September 28, 2017. The terms of these orders are discussed below.

[19] P. stayed with the Father while the Mother was in treatment. From time to time, the Father made arrangements for members of his and the Mother's extended families to look after P. He also made arrangements for P. to see her half-siblings regularly.

[20] Shortly after her return to Hay River in June of 2017, the Mother was hospitalized for five days because she relapsed and used both alcohol and drugs for about a week. She attributed the relapse to feeling badly about herself and not taking medication prescribed to treat her anxiety. She also said that in treatment she was surrounded by a large community of sober people who provide support. By contrast, when she returned to Hay River she was reminded of the abuse and trauma she had endured and she felt others were judging her. She stated that one day it was just too overwhelming and she turned to drugs and alcohol. P. remained in the Father's care during this time.

[21] The Mother continues to use alcohol and she testified that she does not intend to stop. She admitted she drank to the point of inebriation with the Father's cousin, J.L., and another individual in September of 2017. J.L. gave evidence about this event which the Mother did not dispute. Various individuals were drinking at the Mother's home over a two day period. He said there were children in the home at the time. They were in bed at night and awake during the day.

[22] The Mother testified she drank alcohol the night before she gave evidence in the hearing.

[23] The Mother testified she feels can now drink in moderation. She has a new partner. The two of them drink socially and she does not think her drinking upsets P. Nevertheless, she believes she would have the strength to abstain from alcohol while P. is in her care.

[24] As noted, the parenting schedule set out in the consent order made in March of 2013 was varied on an interim basis by orders dated August 4, 2017 and September 28, 2017. At present the arrangements are that P. resides primarily in the Father's care. She is to be in the Mother's care as follows:

- a. Saturdays at 4:00 p.m. until Monday morning, when the Mother is to take her to school; and
- b. Mondays, Tuesdays, Wednesdays and Thursdays from after school until 5:30 p.m.

[25] The Mother testified that when P. is in her care they engage in a number of activities, such as going to the pool, doing traditional crafts and baking together. P. also gets to spend time with her half siblings.

[26] The Father harbours concerns about the Mother's ability to properly attend to P.'s emotional and physical needs. He also recounted a number of occasions where P. did not want to go to the Mother's or where P. contacted him because she wanted to leave the Mother's care early. Specifically, he indicated the following:

- a. P. told him she did not have breakfast before school on the Monday morning following the September 30, 2017 weekend and she said she did not have breakfast before school on Monday following the October 14, 2017 weekend.
- b. She asked to go back to the Father's one day early (on the Sunday) during the October 28, 2017 weekend.
- c. On the weekend of November 4, 2017 P. said she wanted to stay at the Father's over the weekend. He took her to the Mother at her new partner's home. P. returned to her Father's home the following day, rather than staying with the Mother until Monday.
- d. The Mother took P. to Fort Resolution the weekend of November 11, 2017. P. contacted the Father and requested he travel to Fort Resolution and pick her up because the Mother was drinking alcohol. He did so. He said P. was upset and crying when he picked her up. She told him it was because of the Mother's drinking.
- e. P. stayed at the Father's on Saturday, November 18, 2017, rather than going to the Mother's. The Father testified she expressed fear that the Mother would drink. She went to the Mother's on the Sunday.

- f. On the weekend of November 25, 2017 P. spent the entire weekend with the Father. She expressed concern about going to the Mother's. The Father said he was unwilling to force her to go.
- g. On the weekend of December 2, 2017, P. went to the Mother's for the whole weekend. The Father arrived to pick her up for school on Monday morning at 8:15 and she was still in her pajamas. She was late for school.

[27] Neither party raised any issues about the after-school access during the week.

[28] Communication between the parties has been difficult at times. It appears to have improved, however and, to their credit, it appears they have been able to engage in discussions about certain issues. For example, the Mother told the Father about her violent relationship with G.J. In response, the Father offered support to her and encouraged her to leave the relationship.

[29] The parties also recognized the need for P. to take counselling following the April 2016 incident and they jointly arranged for this. As noted, Ann Schreuders provided that counselling, with the exception of the period between the end of April and June of 2016, when P. was living in Inuvik with the Father. The Father had P. in counselling in Inuvik during that time, however.

[30] Ms. Schreuders gave evidence about the therapy she provided to P., particularly with respect to trauma. She also provided her observations and opinions on P.'s mental health. In her view, the therapeutic work has been completed. She does not foresee a need for ongoing, long term counselling for P. arising out of the events she witnessed during the time the Mother lived with G.J. What is left is to ensure P. has sufficient coping skills to deal with what she witnessed. Notably, however, Ms. Schreuders indicated that seeing alcohol being consumed is something that upsets and causes anxiety in P.

THE LEGAL FRAMEWORK

[31] This application comes within the *Children's Law Act*, SNWT 1997, c 14 (the "CLA"). Section 22(1) of the *CLA* requires that there be a material change in circumstances that affects, or is likely to affect, a child's best interests for an order to be varied.

[32] A “material” change is one which was unforeseen at the time the order was made and which has changed fundamentally either the child’s needs or the parent’s capacity to meet those needs: *Gordon v Goertz*, [1996] 2 SCR 27 at 43-44. Assuming the material change threshold is satisfied, the Court must determine what is in the children’s best interests going forward.

THE PARTIES’ POSITIONS

[33] It is apparent from the parties’ evidence that they recognize P. must be able to have a meaningful relationship with both of them, as well as with her half-siblings and her extended family members. Unfortunately, they do not agree on how that should happen.

[34] The Father is concerned about how the Mother’s lifestyle choices affect P. In particular, he says that the Mother stayed in a relationship with G.J. for an extended period and exposed all of her children to violence and substance abuse. He also points out that the Mother remains unwilling to abstain from alcohol, despite how that behavior affects P. The Father argues that there has been a material change in circumstances which justifies varying the 2013 consent order.

[35] The Father proposes that he should have sole custody and day-to-day care; that the Mother have generous and unspecified access; and that all overnight access be supervised. He does not feel that a term requiring the Mother to abstain from using alcohol while P. is in her care would be sufficient to protect P., given the Mother’s stated intention to continue to drink and her difficulties in drinking in moderation in the recent past.

[36] The Mother proposes a staged transition towards shared custody. For the first four months following judgment the parties would continue to have joint custody of P.; P.’s primary residence will be with the Father; and the Mother would have access from Saturday at 4:00 p.m. until the following Tuesday morning. This would add in an extra day/overnight. Next, the parties would move to a week-to-week schedule of shared custody. It would be a term of the order that no alcohol would be consumed in her home while P. is in her care.

[37] The Children’s Lawyer submitted that any order this Court makes should include a term requiring both parents to meet with Ms. Schreuders to discuss

parenting. She also suggested the parents give P. a mobile device so that she can contact either parent or child protection authorities if she feels she is in danger.

ANALYSIS

[38] There have been significant changes in the Mother's circumstances and consequently, those of the child, since the consent order was issued in March of 2013.

[39] Although there were no changes to the terms of the consent order until relatively recently, the parties have not shared day-to-day care of P. since 2016. Her primary residence has been with the Father since April of that year, when he took her to Inuvik. She remained in his primary care thereafter while the Mother attended treatment and after her return to Hay River. This is a material change in and of itself which was clearly not within the parties' contemplation when they agreed to the consent order in 2013.

[40] Some of the changes in the Mother's life are positive. The Mother is no longer living in an abusive relationship with G.J. She is in a new relationship which appears to be a healthy one and about which the Father has expressed no concerns. The Mother has made efforts to deal with her addictions and she seems to have insight into how past events have led her to use drugs and alcohol. She seems to recognize that she must learn to cope with both past and present events in a healthier way.

[41] That the Mother had been dealing with addiction and domestic violence was known to the parties when they agreed to the consent order in 2013. Further, the Mother is no longer with G.J., so it is no longer a pressing consideration. Substance abuse remains a concern, however, and in my view, the extent of the disruption to P.'s life that would later result from the Mother's substance dependence was not something which could reasonably have been foreseen at the time.

[42] When the parties agreed to the 2013 consent order, the Mother was making efforts to address the domestic violence and addiction problems that figured so prominently in her life. The reasonable conclusion is that both parties thought the issues of Mother's substance dependence and the domestic violence in her relationship were being addressed and would not have a negative effect on P. Unfortunately, as the evidence bears out, these two issues escalated to the point

that the shared custody arrangement was no longer tenable or safe for P. and they have had a lasting effect on her.

[43] The evidence demonstrates that the Mother is in a relatively early stage of recovery. Consequently, her circumstances are unstable and unpredictable at this point. She had a serious relapse, which resulted in her hospitalization in July of 2017. This left her incapable of caring for P. and her other children and necessarily led to significant disruption for them. In September, she permitted the Father's cousin and others to drink to the point of intoxication in her home for an extended period of time while P. and the other children were present. She, too, drank to excess on this occasion, no doubt impairing her ability to care for the children or, if the need arose, to protect them.

[44] Given this, I am not satisfied that the Mother is as yet able to provide a safe and stable environment to P. for long periods of time and so shared custody is simply not reasonable. This term of the consent order must be varied.

[45] Turning to what would be appropriate for access, it is concerning that the Mother does not seem to appreciate how her alcohol use affects P. It is clear from the evidence of both Ms. Schreuders and the Father that seeing her mother use alcohol is an emotional trigger for P. It makes her feel unsafe. It upsets her. This is not surprising, given that P. has witnessed significant domestic violence in which alcohol was a factor.

[46] Nevertheless, P. must be able to spend time with her mother. They have an established relationship. The Mother loves P. very much. The Mother appears to be a capable, resourceful parent. She and P. do many things together and, no doubt, she has much to offer. Thus, the custody and access must be varied in a way that preserves their relationship and provides maximum contact, while keeping P. safe and feeling secure.

[47] The combination of the Mother's past substance abuse, her lack of appreciation for how her alcohol consumption affects P., her relatively recent relapses and her stated intention to continue using alcohol in the future leads me to conclude that she may not always abide by a requirement that she abstain from alcohol if P. was in her care. Accordingly, this condition, by itself, would be insufficient to ensure an environment where P. feels safe and secure. Combined with other safeguards, however, it would be useful.

[48] I have considered the solutions proposed by the parties. The staged approach proposed by the Mother is untenable. Given the events following the Mother's return from her treatment program, it is impossible to predict where she will be in her recovery in a given period of time. It would result in an order with arbitrary timelines, placing financial and emotional burdens on the parties who would very likely have to return to the Court for a further order.

[49] Providing P. with a mobile device so she can contact her Father or others if in danger or feeling scared is not a viable option either. It would place P. in the position of having to "tell on" the Mother if there was a problem. That is an unfair and unreasonable burden to place on her.

[50] The Father's proposal for sole custody, instead of joint custody, is not justified. The evidence supports the conclusion that it is in P.'s best interests that her primary residence be with the Father, but the Mother has played an active role in P.'s upbringing. She should continue to have a voice and play a role in substantive decisions.

[51] As noted, the after school/early evening access that P. has with the Mother during the week has not been problematic and there is no reason it should not continue. The problems appear to arise during the extended access times on the weekends. These are the times when P. has resisted going to or remaining at the Mother's home and when she has expressed concerns to the Father about the Mother's alcohol use.

[52] In my view these issues can be addressed through a more flexible weekend access regime, rather than one that is strictly specified, and by requiring that a responsible adult, agreed upon by the Father and the Mother, supervise any overnight access. The parties can make arrangements for weekend access that better suits P.'s needs. Requiring that P. will be in the Mother's care for several hours on at least one weekend day, which is the minimum, will ensure the Mother gets a meaningful amount of weekend time, unencumbered by the routines of the weeknights. There will also be a requirement that the Mother abstain from using alcohol or other intoxicating substances, or allowing others to do so, when P. is in her care.

[53] Hopefully, this will create an atmosphere where P. will feel safe and secure in the Mother's care, while causing as little disruption as possible to the current routines.

CONCLUSION

[54] In all of the circumstances, it is in P.'s best interests that the consent order dated March 26, 2013 be varied. The terms shall be as follows:

- a. Paragraphs 1 through 4 shall be struck out and the following substituted:
 1. The parties shall have joint custody of the child. Without limiting the meaning of the term "joint custody", both parties shall be entitled to access the child's school and health records and they shall jointly participate in major decisions respecting the child, including health care, education and extracurricular activities.
 2. The child shall reside in the day-to-day care of the Respondent/Father.
 3. The Applicant/Mother shall have access to the child as follows:
 - a. During the school year, other than during school breaks, on Mondays, Tuesdays, Wednesdays and Thursdays from after school until 5:30 p.m.;
 - b. Reasonable and generous weekend access to be arranged by agreement of the parties, which shall include a minimum of at least one full weekend day (Saturday or Sunday) from 10:00 a.m. until 6:00 p.m. or such other times as the parties may agree;
 - c. Reasonable and generous access during school breaks and holidays, to be arranged by agreement of the parties.

4. The Applicant/Mother shall not consume alcohol or other intoxicating substances while the child is in her care, nor shall she permit any other person to do so.
 5. The Respondent/Father shall encourage the child to spend time with the Applicant/Mother, the child's half-siblings and her extended family.
 6. Unless otherwise agreed by the parties in advance, any overnight access shall be supervised by a responsible adult agreed upon by the parties.
- b. Existing paragraphs 5, 6 and 7 shall be renumbered as paragraphs 7, 8 and 9, respectively;
 - c. Existing paragraph 8 shall be struck out; and
 - d. Existing paragraphs 9 and 10 shall be renumbered as paragraphs 10 and 11, respectively.

[55] The matter of the ongoing and past child support obligations of both parties was not addressed in this hearing. If the parties are unable to agree they may bring an application to have that issue resolved. If they are able to resolve child support, they may include those provisions in the new order. In the meantime, the order staying enforcement against the Father granted by Mahar, J. on September 22, 2016 shall remain in place.

Order accordingly.

Dated at Yellowknife, NT, this
3th day of April, 2018.

K. M. Shaner
J.S.C.

Counsel for the Respondent/Father:

Andre J. Duchene

Counsel for the Applicant/Mother:

Paul G. Parker

Counsel for the Child:

Baljindar K. Rattan

Docket: S-1-FM-2011-000088

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L. (P.)

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-and-

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MEMORANDUM OF JUDGMENT OF
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