Citation: *T.W. (Re),* 2020 YKTC 24

Date: 20200820
Docket: 19-T0001
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**
Before His Honour Judge Cozens

IN THE MATTER OF THE *CHILD AND FAMILY SERVICES ACT*,
R.S.Y. 2008, C. 1, and T.W., S.W. and R.W.

**Publication of the name of a child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Law Act* or section 162(2) of the *Child and Family Services Act*.**

Appearances:

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|---|---|
| Kimberly Sova | Counsel for the Director of Family & Children's Services |
| H. Shayne Fairman | Counsel for Parents |
| Allyssa Tone | Co-Counsel for Parents |
| Kathleen Kinchen | Counsel for Children |

**RULING ON APPLICATION**

[1] COZENS T.C.J. (Oral): This is an application by the Director of Family and Children's Services (the "Director"), filed August 10, 2020, seeking an order pursuant to s. 57(3)(c) of the *Child and Family Services Act,* R.S.Y. 2008, c. 1, (the "*Act*"), placing T.W., S.W., and R.W. (the "Children") in the temporary custody of the Director, for a period of six months.

[2] The presentation hearing commenced, in a manner of speaking, on Thursday, August 13, 2020, but due to the need for additional time to fully address the materials filed by the Director, the matter was adjourned for the submissions on the presentation hearing to be heard today, August 20, 2020.

[3] In support of the Director's application are the affidavits of Adam Wicke, Social Worker, and Cpl. Dustin Grant, both filed on August 12, 2020.

[4] The Children were brought into custody, pursuant to a warrant that was issued, based upon an Information to Obtain a telewarrant. The warrant was issued on August 6, 2020.

[5] In response to the affidavits that were filed by the Director on August 19, 2020, I received affidavits from the Children's mother, E.B.; from J.B.; and from T.W. T.W. is 17 years old and will be turning 18 in a matter of a few days; S.W. is 15; and R.W. is 11.

[6] This is a presentation hearing and my job today is to determine whether I am satisfied that there is a *prima facie* case that the Children are in need of protective intervention. If not, they are to be returned to the parents, who are entitled to custody; if so, I have options under s. 57(2) of the *Act*, with respect to the placement of the Children in the interim.

[7] The Director's plan, if they are successful and the Children are placed into the care of the Director, is to make further inquiries into a suitable residence with extended family in British Columbia. The first stage of assessing the suitability of that residence has taken place, and the second stage would occur if the Director receives the order that they are seeking today.

[8] In brief, on July 18, 2019, Chief Judge Chisholm made an order pursuant to s. 57(3)(a), based upon a finding that the Children were in need of protective

intervention that placed them in the care of J.B. and E.B., under the supervision of the Director, for a period of six months on conditions set out in (a) through (l) of the Order.

[9] The matter came before me pursuant to a Director's application in December 2019. I made an Order, noting the Order of Chief Judge Chisholm, that denied part of the Director's application under s. 32(3)(a) and (b). I did, however, grant an Order under s. 68(3) on terms set out in (a) through (p). I note that many of these terms were agreed to by parties.

[10] The matter came before Judge Snell on January 16, 2020. Again, the Court found that T.W., S.W., and R.W. were Children in need of protective intervention, and they were placed under the supervision of J.B. and E.B. for a period of six months.

[11] Agreement was reached between the parties on the terms of the Order of Snell J. I note that at all times J.B. and E.B. have not agreed that the Children are in need of protective intervention, but entered into these Orders, as the Director did, in an attempt to have matters move forward in a way that was reached by agreement.

[12] On July 16, 2020, the matter was before Judge Ruddy. Again, her Order noted that the Children did not feel that they were in need of protective intervention, that they did not wish to speak with social workers, and that J.B. and E.B. did not agree that the Children were in need of protective intervention. However, based upon Judge Ruddy's finding that the Children were in need of protective intervention, again, a supervision order under s. 57(3)(a) was imposed for a period of six months on terms set out in (a) through (p) of the Order, again by agreement.

[13] Within a few weeks of that Order, new concerns were raised by the Director that resulted in this application. These are set out in the affidavit of Adam Wicke., which includes the Information to Obtain by which the telewarrant was granted for the apprehension of the Children. I will say that the apprehension of the Children occurred in Dawson City. They were taken from Dawson City by a car driven by a social worker followed by a car driven by the police, who handed off to another police car. The Children have been in Whitehorse ever since.

[14] Both counsel for J.B. and E.B. and the Children's lawyer take the position that there is not even a *prima facie* case here and that the Children should be returned to Dawson City — where two of them have school, two of them have work — under the terms of the supervision order.

[15] The concerns raised in the affidavit of A.W. include information from sources like L.F., whose connection to the family can be said to be somewhat questionable, in both firsthand knowledge, and in the actual involvement in the family. I am not saying that to denigrate these concerns, I simply note that. Also, from E.B.'s sister, there are some concerns raised.

[16] Of most concern to the Director are really two separate things.

[17] One is how a visit to British Columbia with all the family transpired, and the other is communications between a cousin of the girls and, in particular, S.W., the 15-year-old, in which S.W. talks about things that have taken place in the home in a general way that are concerning to her.

[18] There is no question that, in the communications between E.B. and the Director about how this visit was to take place, there was at least one piece of misinformation where E.B. said that the Children would at all times be staying at the one location of her sister, but, in fact, E.B. and the Children — without letting the Director know otherwise — went to other places overnight. I raise that because, in a situation like this, it is always best to make sure that communications are clear and direct, and the information provided is complied with, or otherwise other information be provided, so that no one finds out later that something happened differently than there was an expectation of. I think E.B. understands that now.

[19] There was an issue raised with respect to an argument between E.B. and T.W., in the affidavits of E.B. and T.W., that relate to an incident where T.W. was with some friends and drank a little more than she should have. I do not make a lot out of this; it is a family dynamic and these things happen. I am not unaware that this is happening in a different context because of the history of this case and some of the concerns that have been raised.

[20] There are allegations of drinking by J.B. and E.B. that would be contrary to the terms of the supervision order, other than one incident where E.B. says she had three drinks over six hours. They deny these allegations otherwise.

[21] There are allegations of emotional abuse and possibly physical abuse. These allegations are denied.

[22] Underlying all of these concerns and all of, really, everything that we are dealing with today, from the Director's point of view, in regard to the Children's need of

protective intervention, are concerns that the Children are at risk of sexual abuse at the hands of J.B. The Director relies quite strongly on the fact that J.B. was convicted of a sexual abuse of an older daughter not directly related to these Children. This matter is under appeal. As I understand it, the appeal is to be heard on September 8, 2020 by the Yukon Court of Appeal.

[23] The concerns of the Director with respect to both, or either of E.B and J.B. speaking to the Children comes back to the concern about the Children being at risk of sexual abuse at the hands of J.B. I am not making any findings or determination about that issue here today. There is nothing explicit in the affidavit evidence that I have read with respect to these Children, but I will say there has been some information which I would perhaps put a question mark above. This is not a matter I can resolve today.

[24] However, I believe that the terms of the orders that have been in place, again, primarily by agreement, take into account that this is an issue that is out there, and it will perhaps merit deeper consideration at a future date and in a different context than we are here on today.

[25] As I said, this is a presentation hearing only, and the issue before me is whether there is a *prima facie* case that the Children are in need of protective intervention and, if so, what should happen until the protective intervention hearing itself takes place — which, subject to a judge's ability on application to extend it up to 90 days, needs to start within 45 days of today, this decision on the presentation hearing.

[26] The nature of a presentation hearing has been summed up quite succinctly under the British Columbia child protection legislation in the case of *J.P. v. British Columbia*

*(Director, Child, Family and Community Services)*, 2015 BCSC 1216, by Walker J. This case was overturned on appeal to the Court of Appeal but not on this issue. There were three proceedings. There was a civil proceeding, a family proceeding, and a child protection proceeding. The child protection proceeding was, in fact, abandoned part way through, and it was in the other proceedings that the Court of Appeal ruled. But the comments, which I will just mention briefly here, on the overview of the discussion of a presentation hearing in provincial court at para. 382, which was dealing at that point in time with the notion of an apprehension without prior judicial authorization, notes that it:

> 382 … survives constitutional scrutiny where the authorizing statute provides for a prompt and fair post-apprehension hearing…

which is, of course, different here where there was judicial authorization for the apprehension. These comments are still appropriate, however.

[27] Looking at the case of *Child and Family Services of Western Manitoba v. K.B.,* 2006 MBQB 94, affirmed *Child and Family Services of Western Manitoba v. K.B.*, 2006 MBCA 82, the Court, in *J.P.,* identified some reasons for the conclusion it reached, and stated that the removal of a child from parental care by apprehension:

> 9 …
>
> > [para. 87] . . . may give rise to great emotional and psychological distress for parents and constitutes a serious intrusion into the family sphere. Since s. 21(1) of the Act provides for the apprehension of a child from parental care, it contemplates an infringement of the right to security of the person which can only be carried out in accordance with the principles of fundamental justice.

> 10 …
>
> …
>
> [Para. 124] The child's need for continuity in relationships provides the most compelling basis for requiring a prompt post-apprehension hearing…
>
> . . . and
>
> [Para. 122] . . . the seriousness of the interests at stake demands that the resulting disruption of the parent-child relationship be minimized as much as possible by a fair and prompt post-apprehension hearing.
>
> …

[28] I would say the same applies to our Yukon legislation. I would add that the apprehension of children, whether by warrant or not, may give rise to great emotional and psychological duress for not only the parents, but also for the children that are apprehended, in particular when they are of age to appreciate what is taking place, which the Children in this case all clearly are, at 11, 15, and 17 years of age.

[29] The Court stated at para. 384 that on a presentation hearing:

> 384 …The Director need only demonstrate a *prima facie* case that the child is at risk of harm. The test is lower than a balance of probabilities.

[30] And then at para. 388, the Court stated that:

> 388 Presentation hearings are summary in nature and are designed to ensure that children are not arbitrarily taken into custody. Credibility assessments are not made at presentation hearings conducted under the *CFCSA*; they are left for the protection hearing. The practice before the Provincial Court at a presentation hearing is to resolve conflicts in the evidence in favour of the Director. Resolution of the conflict is left to the protection

> hearing unless the facts are manifestly wrong or untrue or unlikely to have occurred. …The Court must be satisfied that there continues to be objectively reasonable grounds to believe that the child is at risk of harm at the time of the presentation hearing…,

again, noting that the *prima facie* case is determined on a standard of less than a balance of probabilities.

[31] Under the *Act*, it is critical for me to keep in mind portions of the preamble that say:

> . . . every child is entitled to personal safety, health and well-being;
>
> children are dependent on families for their safety and guidance and as a result, the well-being of children is promoted by supporting the integrity of families;
>
> every child's family is unique and has value, integrity and dignity; …

[32] Again, that is only a portion of the preamble.

[33] Under s. 2:

> 2 This Act shall be interpreted and administered in accordance with the following principles
>
> (a) the best interests of the child shall be given paramount consideration in making decisions or taking any action under this Act;
>
> (b) a child has a right to be protected from harm or threat of harm;
>
> . . .
>
> (e) family has the primary responsibility for the safety, health and well-being of a child;
>
> (f) a child flourishes in stable, caring and long-term family environments;

> (g) the family is the primary influence on the growth and development of a child and as such should be supported to provide for the care, nurturance and well-being of a child;
>
> . . .
>
> (i) a child, a parent and members of their extended family should be involved in decision-making processes regarding their circumstances;
>
> . . . and
>
> (l) prevention activities are integral to the promotion of the safety, health and well-being of a child. …

[34] Under s. 3:

> 3 The following principles apply to the provision of services under this Act
>
> (a) in making decisions, providing services and taking any other actions under this Act, a child's sense of time and developmental capacity should be respected;
>
> (b) families and children should receive the most effective but least disruptive form of support, assistance and protection that is appropriate in the circumstances;
>
> . . .

[35] And then, finally, under s. 4(1):

> 4(1) In determining the best interests of the child all relevant factors shall be considered, including
>
> (a) the child's safety, health and well-being;
>
> (b) the attachment and emotional ties between the child and significant individuals in the child's life;
>
> (c) the views and preferences of the child;
>
> (d) the child's physical, cognitive and emotional needs and level of development;

> (e) the importance of continuity and the resulting stability to the child, and the effect of any disruption in that continuity;
>
> . . . and
>
> (g) the importance to the child of an on-going, positive relationship with their parents and with members of their extended family;
>
> . . .

[36] Again, those are only some of the considerations that are mentioned there, but the ones that I find most appropriate here.

[37] There is no doubt that the apprehension of the Children — which I am not questioning on the basis of the information in the ITO that was provided to the issuing justice of the peace — caused disruption in the Children's lives. I am not undervaluing the disruption to J.B. and E.B. However, these Children are of such an age that I consider their views and the impact upon them with their ability, differential for each of them, of course, to appreciate their circumstances, to be really an issue of great concern for me. The Children are represented by a very experienced counsel who has had considerable communication with the Children.

[38] Of some relevance is that I made the Order last week allowing the Children unsupervised access visits with their mother, following an initial visit in Whitehorse with their mother in the presence of counsel, after which, if the Children wished, they could spend the night with their mother without any safety checks. The Children did so, and then, with the consent of the Director, had a second night with their mother.

[39] I think Ms. Kinchen stated that, when she spoke to the Children after the first visit, it was the happiest she has seen these Children since she has been involved with

them. That means something. It, of course, does not mean everything, but it is a relevant factor for consideration.

[40] I am quite concerned about the impact of these proceedings and the family disruption on these Children. I say that without in any way trying to invalidate any concerns the Director may have about the underlying safety issues that the Director feels are critical here. The Director has a job to do and, from the Director's point of view, based upon what they believe, they are acting in accordance with what they think needs to be done.

[41] Part of the terms of some of the agreements or orders that have been made based on agreements, is the fact that a parenting capacity assessment is to be conducted — I understand that Ms. Wotherspoon is in town in September, and the hope would be that she would be able to conduct such a parenting capacity assessment while she is here. That, of course, would require the Children to be with E.B. That in and of itself is certainly not a reason to send the Children back to Dawson City; it is just one more factor that I take into account with all of the other factors.

[42] I am not going to go through the affidavit evidence. I have read all the affidavits and I have considered them carefully. I have read the attachments to the affidavits. I have read the messages that have been exchanged with the cousin. I have acquainted myself well with what is said in the affidavit material. Based upon everything that I have seen and given the test at the presentation hearing — the fact that credibility is not really an issue for me unless something outrageous jumps out — I am satisfied there is a *prima facie* case that the Children are in need of protective intervention. This is far

from finding that they are in need of protective intervention as would be the requirement once a protective intervention hearing takes place, and the evidence that is before the Court is scrutinized in much more detail by the Court and by counsel.

[43] That said, and without reservation, I am satisfied that the Children need to be returned to Dawson City — where they want to go, which they have expressed unreservedly to their lawyer. These are Children whose opinions matter to me. I do not think that they are naïve. I do not think that they are simply saying this because they think that is what their mother and/or J.B. want. I think they are saying this because this is what they want.

[44] I note that school has started. The Director was not able to provide me any information about any plans for the Children to attend school in any particular location. I believe that it is not in the best interests of those of the Children who are enrolled in school to put them in a situation where there is uncertainty about school. I understand that these Children have already missed one day of school in Dawson, and that if they are returned to reside in Dawson they will only miss that one day. In addition, if returned to reside in Dawson, T.W. will be able to continue to work.

[45] While I am not in any way dismissing or undervaluing the concerns raised in the affidavit of A.W., including, in particular, the communications that S.W. has made, I simply believe that this is where the Children need to be right now, and I am satisfied that, if they are in Dawson City, under the terms of a slightly varied supervision order, it will give the Children the best chance to find some form of stability in this very difficult situation.

[46] Pursuant to s. 52(2), I am satisfied there is a *prima facie* case that the Children are in need of protection. The order shall state that they shall be returned to the care of E.B. and J.B., under the supervision of the Director, until the conclusion of the protective intervention hearing or such other time as may be ordered.

[47] The terms, pursuant to s. 52(3), shall be very close to the terms under the order of Judge Ruddy, with some variations. I will, if counsel wishes to address any variation I make, deal with accordingly.

[48] The order will, of course, say:

> UPON THE HEARING coming before me, and hearing Kimberly Sova, Counsel for the Director; and Kathleen Kinchen, Children's Lawyer for T.W., S.W., and R.W.; and Shayne Fairman, Counsel for J.B. and E.B.

[49] I am aware of what it says in the preamble to the Order of Judge Ruddy. I am not sure that is essential in this Order because now we are at the conclusion of the presentation hearing and this is not an order by agreement, so it is different. What Judge Ruddy found, obviously, that Order is vacated, but what she put in the preamble is still, I am very aware, out there.

[50] I find that there is a *prima facie* case that T.W., S.W., and R.W. are children in need of protective intervention, which, candidly, is a lesser threshold of finding that has been made in the previous orders.

[51] I will order that T.W., S.W., and R.W. shall remain in the care of J.B. and E.B. (the "Parents") under the supervision of the Director pursuant to s. 52(2)(a) of the *Act* until the conclusion of the protective intervention hearing or such other time as a judge may order, on the following conditions:

- The Director shall be permitted by the parents the opportunity to speak privately with the Children in their residence, their school, or any other place where any or all of the Children may be. The Director shall, however, make arrangements to speak with the Children through the Children's lawyer prior to speaking to the Children privately. The frequency of these meetings will be at the discretion of the Director; will be within reason, both as to frequency and duration of these meetings; will take into consideration the views and best interests of the Children; and, in particular, if counsel for the Children advises the Director that the Children do not wish to speak to them at any such time that the Director wishes, in the absence of a particular urgency to speak with the Children, the Director shall make best efforts to wait until such time as the Children have indicated through counsel they are willing to speak with the Director.

[DISCUSSIONS]

- Absent a particular urgency, the Director shall not speak to the Children at that time unless subject to a further order of the Court.

[52] If the Director wants to talk to the Children, and the Children's lawyer advises the Director that the Children say: "We don't want to talk to the Director", and the Director does not have something that the Director has heard that makes it urgent to speak to the Children, the Children do not have to talk to the Director.

[53] If the situation is considered urgent, such as the Director receives information that so-and-so just told me this, and they want to talk and they mention this to Ms. Kinchen and the Children do not want to talk to the Director, the Director can still say: "Well, I need to talk to them anyways", and then they can explain to a Court that it was urgent enough to do so if the issue gets raised.

[54] I want the Children to feel that they are not going to be approached in private. This does not prevent, if the Director checks at the door for safety checks, talking to the Children in the presence of others. It is the private discussions I am concerned about.

[55] I think the Children need to know that the Director is going to be working through their lawyer to talk to them. Ms. Kinchen has enough experience. Ms. Kinchen will be giving these Children advice as to what they should be doing; so they are not children who cannot give instructions based on receiving advice.

- The Director shall be permitted to conduct safety checks on the home where the Children are residing, to ensure the children are not alone with J.B.;

- In the absence of a designate of the Director to conduct home checks, J.B. or E.B. shall present the Children at the door of the home to allow the RCMP to confirm the safety of the Children;

- J.B. shall have no unsupervised contact with the Children at any location or at any time;

- The parents shall ensure that the Children are not exposed to physical or verbal violence;

- During the periods that E.B. is supervising contact between J.B. and the Children, E.B. shall provide continuous visual observation and supervision of any contact;

- J.B. is prohibited from entering or being in any residence where the Children reside between 12 a.m. and 7 a.m., and is prohibited from being in the family residence if E.B. is sleeping;

- J.B. shall abstain from using any alcohol and/or non-prescription drugs;

- E.B. shall abstain from using alcohol and/or non-prescription drugs while caring for the Children;

- E.B. shall provide reasonable notice to the Director if she plans to sleep overnight outside of the family residence and/or leave the community of Dawson City, Yukon, and of the arrangements that she has made for the care of the Children;

- E.B. shall provide her consent to release information in regard to any counselling services the Children are attending. These consents will be with respect only to the sharing of information as to the location, frequency, and duration of these attendances;

- E.B. shall not unreasonably withhold her consent to the Children being referred by the Director for counselling and support services;

- E.B. shall complete a parenting capacity assessment. The assessment, or its equivalent, which will be prepared in order to assess her ability to protect the Children. The assessment, or its equivalent, shall be delivered by a party mutually agreed to by E.B. and the Director, or as otherwise ordered by the Court;

- E.B. shall meet once a month with social worker Savannah McKenzie to discuss issues regarding the Children or, if Ms. McKenzie is not available, another Family and Children's Services worker;

[DISCUSSIONS]

[56] With regard to the issue raised of the family being assigned a new social worker, I am not going to make it part of the Order, but I will just say that I think, as much as possible — and, again, without intending this to cast negative aspersions on A.W. — the relationship is severely fractured there, therefore it would be best if it were someone else working with the family than A.W..

[57] Again, I am not laying all the blame on A.W., I am saying this is just the reality. It is a fractured relationship. Let us try to work with someone else. I note that that is what this clause is doing, but the involvement of another Family and Children's Services worker, if possible, would be better. It would be someone with whom there is not already this wall built up. This is just a comment and not to be included in the order.

- The parents shall not discuss or share any information or documents disclosed by Family and Children's Services with the Children; and

- The parents shall not speak of these child protection proceedings with the Children.

[58] I appreciate with this last part of the order, as I said earlier when we adjourned submissions, the Children are going to have questions, but it is, in particular, E.B.'s job to deflect these questions to Ms. Kinchen in a way that does not invalidate the Children raising these concerns. I appreciate that can be difficult to do in real life, in emotional moments, but it is critically important that the Children, as much as possible, not have to deal with this issue in their home lives. I think that is really important for the Children.

[59] That is one of the reasons, when I made the order I made last week, that what I said is: "Kids just need to try to be kids. Even 17-year-olds are still kids." I think that E.B. and J.B. have a very important role to play in trying to create a bubble — a very popular word these days — of safety around their Children where they can just go to school, go to work, be children, and trust that things will unfold how they should. That puts a lot of responsibility, in particular, on E.B., but it is a responsibility that she has to take on. It is her job, in particular, to protect her Children.

[DISCUSSIONS]

[60] We are on the terms of the supervision order except that, really, I have added the one caveat to it, that I really want the Children contacted, and private meetings to be arranged, through Ms. Kinchen, who I am completely satisfied will give them good advice in that regard.

[DISCUSSIONS]

[61] Adjourned to September 3, 2020 at 9:30 a.m., simply for the purpose of setting a case management date. Frankly, I expect that counsel will be in contact with the trial coordinator before that so that we have dates.

[62] I will advise the trial coordinator to simply put a hold on the afternoon of October 6 and the entire day of October 7, 2020, in the event that we need to start this within the 45 days.

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COZENS T.C.J.