

Citation: *D.E. (Re)*, 2020 YKTC 33

Date: 20201113
Docket: 18-T0011
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 D.E. and T.E.

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:

Kim Sova

Counsel for the Director of Family
and Children’s Services

Gregory Johannson

C.E.

Counsel for F.B.
Appearing on his own behalf

RULING ON APPLICATION

[1] Counsel for the Director of Family and Children’s Services (the “Director”), counsel for F.B., and C.E. representing himself, were before me on an application to seek a determination of a preliminary jurisdictional issue.

[2] The Director has applied for a Continuing Custody Order (“CCO”) for D.E. and T.E., (the “Children”), pursuant to s. 57(3)(d) of the *Child and Family Services Act*, SY 2008, c.1 (the “Act”). As the matters between the parties presently stand, the Children are subject to a s. 79(3)(b) interim order that places them in the care of the Director.

[3] The specific jurisdictional issue before me can be stated as follows:

- Can the Court, in granting a CCO impose, as a term or condition of the CCO, a restriction that the Director not place the Children outside of the City of Whitehorse.

[4] This issue also raises, in the broader sense, a question as to whether a judge can, where considered appropriate, impose terms and conditions that require future judicial oversight of the Director's exercise of its decision-making authority, in the event that at the conclusion of a s. 57 hearing a s. 57(3)(d) order is made.

[5] This is not a question of whether there is jurisdiction to order under s. 57(4) where the child is to be placed following the issuance of a CCO under s. 57(3)(d). Lilles J. said that was not possible in **C.K.W. (Re)**, 2002 YKTC 3, at para. 9, although I note that s. 128 of the *Children's Act*, R.S.Y. 2002 c. 31, did not contain provisions equivalent to s. 57(4) and (5) of the *Act*.

[6] In general, it is not up to the Court to determine where a child or children are to be placed upon the granting of s. 57(3)(d) order. That remains within the decision-making jurisdiction of the Director.

[7] Counsel for the Director submits that a judge cannot, in granting a s. 57(3)(d) order, impose a term or condition under s. 57(4), that places a limitation on where the Director may decide to place the Children. In the broader sense, the Director submits that s. 57(4) does not authorize a judge to impose any term or condition that limits the decision-making jurisdiction granted the Director under the *Act*.

[8] Counsel for F.B. disagrees. He submits that s. 57(4) does provide a judge jurisdiction to place such a limitation or limitations on the Director. C.E. states that he agrees with the position and submissions of F.B.'s counsel.

Statutory Scheme

[9] The relevant portions of s. 57 of the *Act* read as follows:

57(1) At the conclusion of a protective intervention hearing, a judge shall determine whether a child is in need of protective intervention.

...

(3) If the judge determines that the child is in need of protective intervention, the judge shall so declare and make one of the following orders

...

(d) that the child be placed in the continuing custody of the director.

(4) The judge may attach terms or conditions to the order that the judge considers appropriate.

(5) If a judge makes an order under paragraphs 3(b), (c) or (d), the judge may grant a parent of a person significant to the child, access to the child.

[10] Section 65(1) of the *Act* states:

65(1) If a child is placed in the continuing custody of a director under paragraph 57(3)(d), the director has the custody of the child.

[11] Section 89 of the *Act* reads as follows:

89(1) A child in the care or custody of a director may only be placed by the director with a caregiver in a residential facility established by, or operated on behalf of the Minister under section 165.

(2) In determining the placement for the child as part of the case plan developed under section 44, priority shall be given to placing the child with a member of the child's extended family, or if that is not consistent with the best interests of the child, priority shall be given to placing the child as follows

(a) in a location where the child can maintain contact with friends and members of the child's extended family; and

(b) in a location that will allow the child to continue in the same school.

(3) If a child is a member of a First Nation, in determining the placement for the child as part of the case plan developed under section 44, priority shall be given to placing the child as follows

(a) with a member of the child's extended family;

(b) with a family that includes a person who is a member of the child's First Nation; or

(c) with a family that includes a person who is a member of another First Nation.

(4) If placement of the child who is a member of a First Nation in accordance with paragraphs 3(a), (b) or (c) is not consistent with the best interests of the child, priority shall be given to placing the child in accordance with paragraphs 2(a) and (b).

[12] "Parent" is defined in the definition section of the *Act* as follows:

"parent" means

(a) a mother or father of a child who has custody of the child,

(b) a mother or father who does not have custody of the child but who regularly exercises or attempts to exercise rights of access,

(c) a mother or father providing financial support for the child,

(d) a person to whom custody of a child has been granted by a court of competent jurisdiction or by an agreement, or

(e) a person with whom the child resides and who stands in place of the child's mother or father,

but does not include a caregiver or a director;

[13] Section 68(1) and (3) read:

68(1) If a judge has attached terms or conditions to an order under subsections 52(3), 57(4) or 79(4) or has made an access order in respect of a child under subsections 52(4), 57(5), 79(5) or section 67, any of the parties to the proceeding at which the order was made may apply to a judge to vary or terminate the terms or conditions or the access order.

...

(3) A judge may vary or terminate the terms or conditions attached to an order or may vary or terminate an access order if there has been a material change in the circumstances since the order was made that affects or is likely to affect the best interests of the child.

[14] Section 2 of the *Act* states, in part:

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;

...

(i) a child, parent and members of their extended family should be involved in decision-making processes regarding their circumstances;

Analysis

[15] Logically, it would seem that the terms and conditions a judge may impose on an order made under s. 57(3)(d) may be sufficiently restrictive or directional that at some point in the future, a party can seek to have that term or condition changed or removed, as per s. 68(1). I note that "Party" includes the Director.

[16] If, as the Director submits, a judge cannot impose a term or condition that restricts the Director's decision to any extent with respect to placement of a child, it is difficult to understand why the legislation reads as it does.

[17] If the intent of the legislation in enacting s. 57(4) was to restrict a judge in the terms and conditions he or she is able to impose on a s. 57(3)(d) order, in particular with respect to placing a geographical limitation on the placement of a child, the legislation could have been worded to make that clear. It was not. As a matter of statutory interpretation, I would be loathe to read in such a limitation, unless it was necessary to do so in light of a consideration of the whole of the *Act*.

[18] By applying the principles of statutory interpretation, the interaction of ss. 57(4) and 68(1) logically means that a judge has the power to impose terms or conditions on a s. 57(3)(d) order that are directional or restrictive on any party to the proceedings, which can be altered or terminated on further application. The Director has not been excluded by these statutory references.

[19] This case differs from ***F.F. (Re)***, 2014 SKQB 226, in that in that case, unlike here, the specific statutory scheme excluded a permanent custody order from those circumstances where a judge could impose terms and conditions or order access.

[20] The fact that a judge can place a restrictive term as to placement of a child on a s. 57(3)(d) order does not mean that the Director is unable to fulfill its duties under s. 89. It simply provides judicial oversight to the process in those circumstances where, at the conclusion of a protective intervention hearing, a judge has decided that such oversight is required.

[21] A judge, having heard the evidence at a s. 57 hearing, and having the power under subsection (5) to order access in circumstances where the judge considers access to be in the best interests of the child, should not have this access potentially frustrated because the Director chooses to place the child in a location where access becomes extremely difficult or virtually impossible to facilitate, at least access to the extent and in the manner that the judge felt was important enough for the child, and was in the child's best interests, to order in the first place.

[22] It appears to me that it is necessarily incidental to the jurisdiction granted to me in s. 57(5), to be able to place some restriction through a term or condition imposed under s. 57(4), as to the location where the child is to be placed, in order to make the s. 57(5) ability to order access meaningful.

[23] A judge should be able to place some terms and conditions on the s. 57(3)(d) order that would ensure that the access the judge granted could be exercised. To order access under s. 57(5), a judge would need to have some sense of where a child is to be placed in order to do that in a meaningful way.

[24] I am not presuming that the Director would choose to place the Children, or any particular child or children in another proceeding under s. 57, in a location where, if access was ordered, access could not be facilitated in the manner that a judge making a s. 57(5) order would have expected it to be facilitated.

[25] However, as I am deciding an issue of jurisdiction, reasonable hypotheticals must be considered. For example, a parent or parents of limited means residing in Whitehorse, who have regularly exercised access to a child, to the benefit of the child,

to the extent that a judge orders under s. 57(5) the access to continue, could find this access frustrated if the Director decides, even if acting in good faith and in accordance with their mandate under s. 89(3)(a) or (b), to place the child in the community of Old Crow.

[26] That placement decision may ultimately be what is required in the best interests of the child. However, if a judge has ordered that regular access between the parents and the child is important in the best interests of the child, it would seem inconsistent with the purpose and principles of the *Act* that the Director could then effectively make decisions that circumvent what the judge intended, without any judicial oversight.

[27] I wish to make it clear that I do not suspect or believe that the Director would move a child from Whitehorse, for example, to a distant community that interferes with the child's right of access to a parent or parents unless the Director, acting in accordance with its obligations as set out in the *Act*, honestly believed that such a move would be in the best interests of the child.

[28] That is not the point, however. There is judicial oversight throughout child protection proceedings that restrict the ability of the Director to make unilateral decisions. An order under s. 57(3)(d) is not a complete handing over of the child to the Director and a "washing of the judge's hands" of the matter. This can be seen by the existence of ss. 57(4) and 68(1). As a result, there is no reason that judicial oversight of the Director's decision-making jurisdiction be ended at the conclusion of the s. 57 hearing.

[29] In order to place a child in a different community than the one the child is presently in, and that access is being facilitated in pursuant to s. 57(5), the Director simply needs to bring before the judge the evidence as to any change in circumstances and satisfy the judge that this change warrants the placement that is proposed.

[30] In this way, the judge can weigh the factors that led to the term, condition, or access order being imposed in the first place, against the factors that the Director states require the placement that it now believes is in the best interests of the child.

[31] This is not an usurping of the Director's statutory decision-making ability; it is simply providing the necessary judicial oversight to this ability in circumstances where a judge has felt it important enough at the conclusion of the s. 57 hearing to impose a term, condition, or access order.

[32] If the best interests of the child are to be the paramount consideration, then any decision by the Director that would alter the structure that is imposed by a judge as a term or condition under s. 57(4), and/or access pursuant to s. 57(5), should be made on application with judicial oversight as contemplated in s. 68(1).

[33] As such, I find that a judge has the jurisdiction under s. 57(4) to order a term and/or condition that limits the Director's decision-making ability as to where a child is to be placed. In this case, the particular question before me is whether a judge can, at the conclusion of this particular s. 57 application, order that the Children not be placed outside of the community of Whitehorse.

[34] I find that a judge has jurisdiction to order any term and condition under s. 57(4) that the judge considers appropriate, based on the evidence that has been placed before the judge, so long as such a term or condition does not wholly interfere with, and thus usurp, the jurisdiction and considerations the Director has been statutorily prescribed to exercise and comply with in making decisions following a s. 57(3)(d) order being made.

[35] I have made findings here only with respect to the jurisdiction of a judge to impose a geographical limitation on the placement of the Children at the conclusion of the protective intervention hearing that has yet to be held. It will only be at the conclusion of the hearing, in the event that the Director's application for a CCO is granted, that a judge will decide on the evidence adduced and submissions of the parties whether such a term or condition should be imposed in this case.

COZENS T.C.J.