SUPREME COURT OF YUKON

Citation: *D.A.K.* v. *J.M.K.*, 2013 YKSC 60 Date: 20130611
Docket: S.C. No. 08-D4104
Registry: Whitehorse

BETWEEN:

D.A.K.

Plaintiff

AND

J.M.K.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
Shayne Fairman Counsel for the Plaintiff
André Roothman Counsel for the Defendant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is a difficult situation. I suppose in an ideal world I would like to reserve on it, but I do not think that the decision or the essence of what I want to say would improve much with the addition of some time. I think the proposal that is made by Mr. Fairman is a reasonable one, at least as an interim stage, in allowing contact to resume between Mr. M. and these girls.

[2] While I am aware that the burden here is on a balance of probabilities as opposed to the criminal standard, given that Mr. M. was acquitted by me of the charge that gave rise to the Order of February 14, 2012, there is not much left in terms of

evidence that is clear and substantive as to what the specific reasons are that the Director of Family and Children's Services has for being concerned that Mr. M. may cause some harm to the children.

[3] They talk about, in the Lea Bayliss letter of January 28, 2013:

> "At this time the Director is not supporting any indirect or direct contact between [Mr. M.] and the children. The reason for this decision is based on the Director substantiating sexual abuse by [Mr. M.] on his son as a result of investigations that were conducted by the RCMP in late 2011."

There is no explanation or justification for why they feel that the complaint was substantiated and it leaves me to question whether it was simply a case of having believed the complainant. Perhaps that is not surprising, given the comments that I made about the complainant's credibility in my reasons for judgment on the criminal matter, but the complainant's credibility is not the only thing that needs to be taken into account in this case. I made a number of comments regarding the reliability of the complainant's evidence and I would hope that the Director's department would take those concerns into account as well.

[4] Now, with the acquittal, I have Ms. McPhee's letter of June 6th, 2013, and again, there is a reference in the letter and I quote:

> "However, the child protection concerns have been substantiated pursuant to the standards of Family and Children's Services."

There is no justification or explanation for what that means, what the standards are, or what kind of evidence the Director is taking into account in coming to that conclusion.

[4] There is a reference to J.K. being a “non-protective parent” and placing the girls at risk because she apparently believes in Mr. M. and does not see him as a risk to the children. Yet, it is not particularly surprising that Ms. K. would take that position. There is also some reference to Ms. K. isolating herself from Family and Children Services in the fall of 2012, moving out of town, not providing her address and so on. I suspect that Ms. K. may well have something to say to that, but that affidavit was only filed today and so it is not surprising that there is no response from her yet on that point.

[5] At the end of the day, there is little in terms of evidence from the Director or from Mr. K., and he acknowledges quite candidly that he does not have a lot to say on this matter in response. He is obviously not taking a particularly partisan role here; he just wants to ensure that his children are safe when they are in the presence of Mr. M. To repeat myself, there is little in the way of evidence on the record from the Director which would support the continuation of the no contact order of February 14, 2012. And, as I say, there is no additional evidence form Mr. K. in that regard either.

[5] What is proposed is that, for the interim period, access be allowed by Mr. M., but that the access be supervised by Ms. K. or another third party adult who is agreeable to both the Plaintiff and the Defendant here. That seems to me to be an eminently reasonable compromise and it will give Mr. M. an opportunity to hopefully establish some kind of a track record of appropriate behaviour with the children to alleviate, one hopes, the concerns of the Director over time. I am prepared to make that order.

[6] The Order of February 14, 2012 will be amended in that regard. I will leave the wording to counsel. So, that will be with respect to the first two paragraphs which

should probably simply be vacated, subject to a further, new order in the terms that I have suggested.

[7] I am not going to make any order with respect to Mr. M. undertaking any sort of independent risk assessment, but I have made it very clear in my discussion with his counsel here today that he should seriously consider doing such a thing. I am not sure how much something like that would likely cost, but I would expect that by using a local psychologist - and these are usually standardized tests - that something like that could be done in a matter of a few hours. At the rates that I am aware of that are charged by registered psychologists in Whitehorse, it is not something that would necessarily break the bank and, at the end of the day, might be a very good investment in Mr. M.'s future. If the results are positive, then it also is something that might go a considerable distance to allaying any concerns that are still outstanding with the Director's department.

[8] I am prepared to make that order. Is there is anything else that needs to be addressed?

[9] MR. FAIRMAN: Costs. Each party bear their own?

[10] MR. ROOTHMAN: Each party bear their own costs. It's a divided result and --

[11] THE COURT: So ordered. Thank you both.

[12] MR. FAIRMAN: Thank you, My Lord.

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GOWER J.