Citation: *R.F.* v. *T.T.,* 2006 YKTC 57 Date: 20060605
Docket No.: T.C. No. 01-T0118
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Mr. Justice R.S. Veale

R.F.

Plaintiff

And

T.T.

Defendant

And

THE DIRECTOR OF FAMILY AND CHILDREN'S SERVICES

Defendant

Appearances:

David Christie and Fia Jampolsky	Counsel for the Plaintiff
T.T.	On his own behalf
Kathleen Kinchen	Child Advocate
Lana Wickstrom	Counsel for the Defendant Director of Family and Children's Services

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the father, in a child protection proceeding, for the appointment of a state-funded lawyer. The application was made at the opening of the trial on May 25, 2006. The balance of the trial was to be completed during a 3-week period from June 5 through June 23, 2006, now reduced to the week of June 19 - 23 because the mother has consented to a permanent care and custody order based upon

an access arrangement with the Director of Family and Children's Services (the Director). The following are my reasons for refusing the application of the father for the appointment of state-funded counsel.

The Facts

[2] The father and mother were in a relationship from 1999 to 2003. A child of their relationship was born in 2000. The child has been in the care of the Director since approximately March 2002. The father did not participate in the child protection proceeding until the Director advised in June 2004 that she would be applying for a permanent care and custody order. About that time, the mother applied to have the father found to not be a concerned parent for the purposes of the permanent care and custody order application. If granted, this would have resulted in the father not receiving notice of the hearing. The father retained counsel and was found to be a concerned parent. Various adjournments occurred in the Territorial Court and a hearing date for a permanent care and custody order was set for May 24, 2005. Counsel for the father applied to be removed as counsel on May 5, 2005, and the court ordered the removal of the father's counsel.

[3] On October 18, 2005, the mother applied in the Supreme Court of Yukon for a custody order, anticipating that the Director would not succeed in obtaining a permanent care and custody order for the child. According to the practice in this jurisdiction, I ordered that the Territorial Court child protection proceeding be joined with the custody proceeding in this Court. It is not a joinder in the classic sense of two actions in this court being joined, but rather it involves a judge of the Supreme Court hearing the custody application and the same judge sitting as a judge of the Territorial Court to hear

the child protection trial. I will give further reasons in due course explaining this procedure.

[4] A January 2006 trial date was set and a pre-trial conference proceeded on December 1, 2005, without the presence of the father. The January trial date could not proceed because of the unavailability of the judge. A new date was set for June 5 - 23, 2006. The father appeared at a pre-trial conference held on March 24, 2006, as represented by his spouse. She indicated that a lawyer from Lethbridge, Alberta, was acting for the father.

[5] At a further pre-trial conference held on March 31, 2006, counsel reported that they contacted the lawyer from Lethbridge, Alberta, and he indicated that he was not retained in the matter. There was no further contact with the father and he was subsequently served with a notice of the hearing commencing on the afternoon of May 19, 2006, and the disclosure of the Director. The hearing date of May 19, 2006 was to determine among other things, whether the father would be participating in the trial.

[6] At the commencement of the hearing on May 19, 2006, the father indicated that he wished to be present personally at the trial. He wanted to be represented by counsel, but was unable to retain counsel for financial reasons. At the invitation of the Court, the father made an application for the appointment of state-funded counsel.

[7] The application for state-funded counsel was set over to May 25, 2006, on the understanding that the father would provide, by noon on May 24, 2006, the required financial information. I ordered the father to provide his income tax returns for the years 2003, 2004 and 2005. I also ordered him to provide the Court with pay stubs indicating his year-to-date earnings for 2006 as well as his family income for 2006. The father

indicated that he was injured and unable to work from January until May 2006. He was ordered to provide information regarding workers' compensation or social assistance received between January and May 2006. He was also ordered to provide information on assets that may assist him in retaining counsel on his own behalf.

[8] The financial information provided by the father, who did not have the benefit of counsel, was incomplete. The father indicated that he was employed by his father's oil services company in 2003 and earned a gross income of $46,850. He provided a T4 for 2004 indicating that year he earned $43,154. He was unable to provide a T4 for 2005 but he indicated that he had requested it from Revenue Canada. He also filed a financial statement indicating a projected family income of $5,000 a month from May 2006 onwards. He indicated that he did not earn any money between January and May 2006, as he had been working for his father at the time of his injury and did not wish to incur a workers' compensation claim, which would affect his father's business.

[9] The father's previous counsel indicated that a week of trial would cost between $15,000 to $20,000. The father indicated that he had spoken to other counsel in Whitehorse but they all had conflicts relating to the mother.

[10] The father indicated that he telephoned the Yukon Legal Services Society (Yukon Legal Aid) and was informed that he was not eligible for Yukon Legal Aid since he did not reside in the Yukon. Counsel provided documentation confirming that an applicant with a spouse and two children would not be eligible for legal aid if their annual family income exceeded $25,140.

[11] The father also indicated that he contacted Alberta Legal Aid in Lethbridge, Alberta, and was informed that they did not handle child welfare cases out of the

province. He did not provide any confirmation of this advice in writing. The court was also informed by counsel that reciprocal agreements are in place in each province so that the father, if he is eligible for legal aid in Alberta, would receive Yukon Legal Aid.

[12] For the purposes of this application for state-funded counsel, I concluded that the father was not eligible for legal aid in Alberta and consequently Yukon Legal Aid would not provide state-funded counsel. I also find that the father is capable of earning an income of $60,000 for 2006 and that he has no significant assets or debts.

The Law

[13] The seminal case for applications for state-funded counsel in child protection cases is *New Brunswick (Minister of Health and Community Services)* v. *G.(J.)* [*J.G.*], [1999] 3 S.C.R. 46. In that case, the Supreme Court of Canada found that it would be a violation of s. 7 of the *Charter* to fail to provide state-funded legal counsel to an indigent mother whose child was the subject of a child protection application by the state. The indigent status of the mother was not in dispute. The Supreme Court, in paragraphs 103 and 104, provided the following guidance for future cases where an unrepresented parent wants a lawyer but is unable to afford one:

> 1. The judge should first inquire whether the parent has applied for legal aid or any other form of state-funded legal assistance.
>
> 2. If the parent has not exhausted all possible avenues for obtaining state-funded legal assistance, the proceedings should be adjourned to give the parent a reasonable time to make the appropriate applications, provided the best interests of the children are not compromised.
>
> 3. The judge should next consider whether the parent can receive a fair hearing if unrepresented by considering the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, assuming the power of the judge to provide limited assistance during the proceeding.

> 4. If the judge is not satisfied that the parent can receive a fair hearing and there is no other way to provide the parent with a lawyer, the judge should order the government to provide the parent with state-funded counsel under s. 24(1) of the *Charter*.

[14] The Supreme Court was very specific that the power to directly order the government to provide the state-funded counsel only applies to child protection proceedings. In criminal cases, the well-established procedure in *R.* v. *Rowbotham* (1998), 41 C.C.C. (3d) 1 (Ont.C.A.), is to stay a criminal proceeding until the necessary funding of counsel is provided. The stay of proceedings can still be applied in child protection proceedings, so long as it is consistent with the best interests of the child or children.

[15] The most difficult issue in these cases arises where the parent earns a sufficient income so as not to qualify for legal aid, yet claims to be unable to afford the legal fees of private counsel. It is not an unusual situation for many families today.This issue was not addressed in *New Brunswick* as J.G. was clearly indigent. However, in *Rowbotham*, at page 69, the Ontario Court of Appeal found that there may be “rare circumstances" in which legal aid is denied and the accused person cannot afford to retain counsel to the extent necessary to ensure a fair trial. In these circumstances, the trial judge has the power to stay the proceedings until counsel is provided for the accused.

[16] In *R*. v. *Malik*, 2003 BCSC 1439, at paragraph 23, the *Rowbotham* jurisprudence was held to require the applicant to present detailed financial evidence to demonstrate:

> a) extraordinary financial circumstances;
>
> b) attempts to obtain funds to retain counsel;
>
> c) prudence with expenses and prioritization of payment of his legal fees;

d) efforts to save for the cost of counsel and to raise funds by earning additional income;

e) he has made all the reasonable effort to use his assets to raise funds, for example by obtaining loans;

f) whether he is in a position to pay some of the costs of counsel;

g) the income and assets of his spouse and family.

[17] In the case of *Family and Children's Services of Guelph and Wellington County* v. *K.F.*, [2001] O.J. No. 4548, the parents applied for an order staying a child protection hearing until they received state-funded legal counsel. The judge found that the parents had a combined gross income of $54,000 and as a result did not qualify for legal aid. They also had substantial debts which they failed to explain and they did not exhaust their avenues of appeal for legal aid. Caspers J. found, at paragraph 42, that the parents were not indigent as in *New Brunswick*, but rather “are parents with a reasonable income who, with a reworking of their priorities, should be able to retain counsel”.

[18] In the case of *Bingo City Games Inc*. v. *British Columbia Lottery Corp*., 2004 BCSC1472, a case concerning indigent status for the purpose of permitting a litigant not to pay filing fees, the trial judge granted indigent status where the family income was $3,300 per month. That case was very unusual in that the plaintiff had a debt in the order of $740,000. He had already budgeted $70,000 for the court action, assuming that it would take 30 days. At the time of the application, the trial had taken 38 days and had another four weeks to go. Rogers J. pointed out that the Attorney General had steadily increased court access fees in significant amounts, and as a result more people earning higher incomes would be entitled to indigent status. At the end of the

day, Rogers J. granted the plaintiff indigent status which relieved the plaintiff from paying court fees for the balance of the trial.

Analysis

[19] I am satisfied that this is a case that is of a serious nature and of similar complexity to the *New Brunswick* case. However, the onus on the applicant father is a heavy one and, in my view, he has not satisfied that onus.

[20] Firstly, the father has not provided any documentation to support his applications to Yukon Legal Aid or Alberta Legal Aid. While it would be appropriate in some circumstances to adjourn the proceedings to permit the father to make the appropriate applications and obtain written documentation of those applications and decisions, this is not such a case. The father has been without legal counsel in excess of a year and his legal aid applications appear to be telephone inquiries only without follow-up. While I have some sympathy that the father was not aware of the heavy onus required for this application, the timing of his application does not permit this Court to grant a further adjournment which would not be in the best interests of the child. This child has been in care for 4 years and a decision about her future must be made in a timely way. In any event, the father's present and past family income would appear to make the appointment of a legal aid lawyer out of the question.

[21] Secondly, the father has been unable to provide any indication of his 2005 income. I find that this kind of application requires full and complete disclosure of income and assets. The father's failure to disclose his 2005 income does not meet the onus to fully disclose his financial situation.

[22] Thirdly, the father's failure to earn income from January to May 2006 is a matter of his choice and thus should have no impact on his potential to earn a family income of $60,000 for 2006. In addition, he has no significant debts.

[23] I conclude that the father has had the opportunity to earn a decent, if not considerable, income for his family in the past years. In my view, he is quite capable of managing his financial affairs to make provision to retain counsel for this one-week trial. His situation simply does not fit into the category of extraordinary or rare circumstances that would compel this court to appoint state-funded counsel. I should add that it is also my view that the father is a highly intelligent young man who will be adequately able to represent himself with the assistance of the Court. The application for state-funded counsel is dismissed.

VEALE J.