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Re: *D.I.*, 2003 YKTC 21

Date: 20030207
Docket: T.C. No. 02-T0032
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Judge Faulkner)

IN THE MATTER OF THE *CHILDREN'S ACT*,
R.S.Y. 1986, C. 22 AS AMENDED, AND
IN PARTICULAR S. 121;

AND IN THE MATTER OF *D.I.*
A CHILD
WITHIN THE MEANING OF THE SAID ACT

Zeb Brown

For the Crown

Malcolm Campbell

For the Defence

REASONS FOR JUDGMENT

[1] FAULKNER T.C.J. (Oral): The Director of Family and Children's Services seeks a six-month temporary care and custody order in respect to the child *D.I.*, who is presently one year of age.

[2] The child was apprehended from her mother's care on the 17th of January, this year.

[3] The hearing before me was to determine whether interim care and custody should be granted to the Director pending the determination of the application for temporary care.

[4] The child had been residing with her mother, E. I., pursuant to an order granted October 25th of 2002, which granted the Director temporary care and custody of the child while returning her to the day-to-day care of her mother.

[5] Normally, I would not have expected to hear *viva voce* evidence on an application for interim care. In the normal course of events, such applications would be decided in chambers on the affidavit material filed. In this case, however, there was considerable confusion. There was a sufficient difference between each party's understanding as to the nature of the hearing that I decided to allow witnesses to be called.

[6] It seems to me that this confusion was entirely avoidable had counsel had any communication whatsoever before the hearing.

[7] The hearing commenced last week and could not be completed in time set aside and was adjourned until today. To my dismay, it developed that counsel still had not communicated in the interim, with the result that further difficulties arose respecting additional evidence that the Director wanted to lead.

[8] At the initial hearing, the Director had proceeded on the basis that it might have to demonstrate reasonable and probable grounds for the apprehension. However, Mr. Campbell, on the behalf of the mother, conceded that since the Director already had temporary care and custody of the child, then so long as the Director did not act arbitrarily, she could lawfully take possession of the child. He did, however, oppose the Director's application for interim care.

[9] The *Children's Act*, R.S.Y. 1986, C. 22, is inscrutable in many respects and, in particular, is silent on the question of who bears the onus or burden of proof on an application for interim care.

[10] It seems to me that logically the Director bears the burden of showing that there were reasonable grounds for the apprehension. Once that onus has been met, the parent bears the burden to show cause why the child should be returned pending hearing, notwithstanding that the apprehension was on reasonable and probable grounds.

[11] In this case, as has already been indicated, the Director did not need reasonable grounds to apprehend the child since the Director already had care and custody of the child. However, the order on which the Director acted on the 17th of January is, as I understand it, now spent and the Director's authority to detain the child rests upon her new application for temporary care and custody. Therefore, in my view, while the Director need not show grounds for the apprehension, she must, nevertheless, show that there is a reasonable basis for her present application. Should she succeed in this respect, the onus would then shift to the parent to persuade the Court to alter the child's existing interim custody status.

[12] The reasons for my holding in this regard are as follows: Except in a case where the apprehension was shown to be groundless, the Court would naturally be reluctant to return an apprehended child to the parent prior to hearing, because it is only at the hearing where a proper determination can be made as to whether or not the child is in need of protection. Therefore, if there appear to be reasonable

grounds for the Director's application in the first place, prudence would dictate granting interim care to the Director.

[13] In the hearing before me, Mr. Campbell mounted a vigorous attack upon the Director's grounds and motivation for the temporary care and custody application. He alleged that the real reason for the apprehension and the application was the Director's wish to rectify the error that she felt she had made in agreeing to the October order which returned custody of the child to Ms. I.

[14] Mr. Campbell charged that Ms. Pare's affidavit, which provides the basis for the temporary care and custody application, and the interim care application, contains, at best, inflated innuendo and, at worst, outright lies.

[15] There are certainly some contradictions between Ms. Pare's affidavit, on the one hand, and the pharmacy records and the affidavit of Mr. Banks, on the other hand, respecting the amount of prescription drugs as supplied to Ms. I. in December of 2002. The preponderance of evidence in regards to that particular matter must be toward the version contended for by Ms. I.

[16] There were also some other fraying around the edges of Ms. Pare's affidavit, probably illustrative of the difficulties with second-hand information. Nevertheless, and without reviewing the Director's allegations in detail, there remains in my view a rational and reasonable basis for the Director's concerns respecting Ms. I.'s drug and alcohol abuse, her relationship with Mr. G. and other matters.

[17] It also appears that the child is in a suitable foster home. It is the same home that the child resided in before her return to Ms. I., and the child continues to attend the same daycare that she has been enrolled in throughout. There is therefore some degree of continuity afforded by the present placement.

[18] Keeping in mind, as always, the best interest of the child, a test which governs all proceedings under the *Act*, I find that I have not been persuaded that the normal practice of granting interim care to the Director should be departed from in this case.

[19] Accordingly, interim care and custody should be granted to the Director for a period of 60 days or until the hearing of the matter, which should be conducted on an expedited basis.

[20] The order I presently make is also premised on the understanding that the Director will continue to provide generous access to Ms. I. in the interim.

[21] The matter should now go to child protection docket day to fix a date for the hearing.

FAULKNER T.C.J.