

Publication of identifying information
is prohibited by s. 172 of the Children's Act.

Date: 20030422
Docket No.: T.C. 01-T0063
Registry: Whitehorse

*Re: Matter of K.M. and C.M.
AND an Application
for a six-month supervision order, 2003 YKTC 33*

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. 118;

AND IN THE MATTER OF AN APPLICATION FOR A SIX-MONTH SUPERVISION
ORDER CONCERNING C.M., MADE PURSUANT TO S. 126(1)(A)
AND S. 127 OF THE *ACT*;

AND IN THE MATTER OF K.M. AND C.M.

Zeb Brown

Appearing for the Director
of Family and Children's Services

Elaine Cairns

Appearing for the mother

DECISION

[1] FAULKNER T.C.J. (Oral): I would like to begin by thanking counsel for their excellent and very helpful written briefs in argument with respect to this matter.

I should also say at the outset that it would have been my preference to provide a reserved and considered judgment with respect to this matter, but in my view, it is neither desirable nor possible in the present circumstances to delay the decision.

[2] At issue here is the power of the Territorial Court to make an interim order where the Director of Family and Children's Services applies for a supervision order in an application brought by the Director under s. 118 of the *Children's Act*.

[3] The formal hearing of the Director's application is now set for the 26th of May of this year and the Director seeks an interim supervision order, which would be in effect until that time.

[4] As with many other matters, the *Children's Act* is silent with respect to the court's power to make an interim supervision order. If there is such a power it must be inferred from the overall scheme of the *Act*. There is an express power in s. 118(2) to make an interim care and custody order.

[5] It should also be noted that there is no express power to make the order sought even if the proceedings had been commenced under s. 119 by the apprehension of the child.

[6] It could, therefore, be argued with some force, on the basis of the *expressio unius* rule, that the express inclusion of the power to make an interim care and custody order necessarily excludes the power to make an interim supervision order. However, in my view, this would be completely contrary to the clear policy of the *Act*, and, indeed, would frustrate the *Act's* purposes if an interim supervision order could not be made.

[7] Why, for example, would the *Act* permit an interim custody order but not permit the court to make a less intrusive order for supervision? To hold that an interim supervision order cannot be granted could work real mischief, because it might encourage the overzealous or the overcautious to apprehend the child, who would

otherwise be left with his parents, and to seek an interim care and custody order.

[8] It also makes no sense, in my view, to argue that no interim order can be made until the hearing of the Director's application commences if, by a hearing, one means the trial of the action, which in this case will occur on the 26th of May. Interim orders, by their very nature, are meant to be in effect until the matter is finally resolved.

[9] For the purposes of the *Children's Act*, the hearing of an application by the Director commences when the matter is first put before the court. It is true that the case is often adjourned but it is not inevitable that this would occur; for example, the parents might agree to the order sought at the initial hearing.

[10] As well, it is sometimes the case that certain matters, as, for example, identity of the children or the existence of reasonable and probable grounds, could be dealt with at the initial application rather than being adjourned to some later date.

[11] I am, therefore, of the view that it is available to the court, by necessary implication, to grant an interim supervision order in appropriate circumstances.

[12] There is another question that could arise in these proceedings that I would leave for determination at another time: whether there was, in fact, a power to issue an interim supervision order on the 6th of March since the action had only been commenced on the 4th of March, which is less than the required five days notice

which the *Act* calls for. No order abridging the time was sought or given.

[13] For present purposes it will be sufficient to note that the five days defect of time has now been effectively remedied by the passage of considerably more than the required five days. Therefore, there is, in my view, a power to grant an interim order at this time.

FAULKNER T.C.J.