Citation: *Re: M.N.*, 2007 YKTC 85

Date: 20071122
Docket: 03–T0078
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

IN THE MATTER OF THE *CHILDREN'S ACT*, R.S.Y. 2002, C. 31, AS AMENDED, AND IN PARTICULAR S. 130;

AND IN THE MATTER OF AN APPLICATION FOR A CONVERSION OF THE EXISTING TEMPORARY CARE AND CUSTODY ORDER TO A PERMANENT CARE AND CUSTODY ORDER, PURSUANT TO S. 130(1)(C) OF THE *ACT*;

AND IN THE MATTER OF M.N.

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

Appearances:

Lee Kirkpatrick	Counsel for the Director of Family and Children's Services
Christina Brobby	Child Advocate
James Van Wart	Counsel for the mother

REASONS FOR DECISION

[1] This is the application of K.N., seeking increased access to her biological daughter, M.N. M.N. is the subject of a permanent care and custody order granted on May 8, 2006. The permanent care and custody order includes a provision that K.N. and C.N., K.N.'s teenaged daughter and M.N.'s sister, "be granted such reasonable access as, in the discretion of the Director, is in M.N.'s best interests".

[2] Currently, the Director has approved one two-hour supervised visit per week. K.N. takes the position that this access schedule is insufficient to meet the

terms of the order. She seeks an additional access visit each week, and further seeks that the visits be unsupervised.

[3] In support of her application, K.N. has filed two affidavits, which focus on the efforts she has made in relation to the child protection concerns identified in my decision of May 8, 2006.

[4] It is K.N.'s position that, given her efforts to address the concerns noted, the Director's position with respect to access is both unreasonable and contrary to M.N.'s best interests. Counsel for K.N. further suggests that the situation is analogous to a sole custody/access parent situation, arguing that if K.N.'s access to M.N. is not contrary to M.N.'s best interests access should be maximized.

[5] The Director opposes K.N.'s application on two grounds. Firstly, the Director argues that I do not have jurisdiction to entertain the application, and secondly, even if I do have jurisdiction, increased access would be contrary to M.N.'s best interests. In support of this latter position, the Director has filed two affidavits of the assigned social worker, Ed McLean, one of which includes an attached assessment and letter from Psychologist, Dawn Oiffer.

[6] The Child Advocate supports the position of the Director with respect to both grounds of opposition.

Jurisdiction:

[7] I will deal first with the issue of jurisdiction. As noted, the Director and the Child Advocate take the position that I have no jurisdiction to hear K.N.'s application. The Director submits that the principle of *res judicata* applies, arguing that K.N. is, in effect, seeking to reargue the issue of specified access, which was fully addressed at the hearing on the Director's application for a permanent care and custody order. The order made at that hearing was a final order and I have no jurisdiction now to change it.

[8] In considering all of the materials filed and the submissions of counsel, I am of the view that the principle of *res judicata* does not apply in these circumstances. While counsel for K.N. has made a suggestion as to his views on how much access would be reasonable, he has not asked for a supervised access order per se. He is asking that I find that the Director is essentially not complying with the access order made on May 8, 2006, and that I take steps to enforce the order. Accordingly, I do not view the application as an attempt to reargue the issue of specified access.

[9] Similarly, counsel for K.N. has not sought to vary the access order made on May 8, 2006. Again, I am being asked to enforce the order, not to change it.

[10] The Child Advocate argues that my jurisdiction must be found within the confines of the applicable statute and, as the child protection provisions of the *Children's Act* do not include a provision with respect to revisiting an access order attached to a permanent care and custody order, I do not have jurisdiction to decide the application.

[11] While there is no explicit jurisdiction in the *Act* to entertain an application to enforce an access order made in conjunction with a permanent care and custody order, neither does the *Act* contemplate the making of an access order in conjunction with a permanent care and custody order in the first place. However, at the hearing on the permanent order, the Director conceded my jurisdiction to make an access order, presumably based on the line of reasoning in Stuart C.J.'s decision in *In the Matter of R.A.,* 2002 YKTC 28. I am of the view that implicit in the jurisdiction to make the original access order, as conceded by the Director, is the jurisdiction to enforce that order.

Standard of Review:

[12] Having determined that I have the jurisdiction to hear the application, the next question for me is the appropriate standard of review.

[13] While the *Children's Act* does not explicitly provide for a mechanism to address access post-permanent order such that one could look to the relevant sections to ascertain the appropriate standard of review, it does explicitly provide for an application to address access in circumstances where there is a temporary care and custody order. Section 139(5) provides that:

> (5) A person who, under paragraph (2)(b) or (4)(a) is entitled to have reasonable access to the child and who alleges that the director has unreasonably withheld consent to access may apply to the judge for an order and the judge may make an order settling the terms and conditions of reasonable access by that person to the child.

[14] In such applications, the law in this jurisdiction is clear that the standard of review is one of reasonableness. In *K.B. (Re)* [1998] Y.J. No. 187, Faulkner J. clearly stated the test as follows:

> I cannot make an order changing access even if I am simply persuaded that other arrangements might have been made, nor can I make an order simply upon the parents showing that some other arrangements are possible. Rather, I think it must be shown that the decision was an unreasonable one. That is a decision either that was made for an illegitimate purpose and not bona fide or a decision which was irrational in the sense that no prudent, caring or cautious parent or guardian would make such a decision. (paragraph 2)

[15] Counsel for K.N. argues that the appropriate standard of review in this case ought to be somewhat broader than that contemplated by section 139(5), because of the way the access order is framed. The access order reads "such **reasonable** access as, in the discretion of the Director, is in M.N.'s **best interests**" (emphasis added). Accordingly, counsel for K.N. submits that the test ought to be not just reasonableness, but also whether the discretion of the Director has been exercised in a manner consistent with M.N.'s best interests.

[16] With respect, I fail to see how this would amount to a broader standard of review when one considers that section 1 of the *Children's Act* ensures that the best interests of the child are to be the paramount consideration in all

proceedings under the *Act,* including proceedings under section 139(5). Thus, a consideration of the best interests of the child is implicit in the test set out with respect to section 139(5).

[17] I am satisfied that, based on the wording of my original order, the enforcement application before me is analogous to an application under section 139(5), and am equally satisfied that the appropriate standard of review is one of reasonableness. I would further adopt the words of Faulkner J. in *K.B.* as being equally applicable in this instance.

Application of the Test:

[18] The foundation of K.N.'s argument rests on the work she has done over the past 18 months to address the child protection concerns identified in my decision of May 8, 2006. Her counsel argues that M.N. is entitled to benefit from her mother's efforts by having increased access with her.

[19] To her credit, it must be acknowledged that K.N. has taken considerable steps to address the identified child protection concerns. These include abstaining from alcohol and illicit drugs, attending AA meetings and counseling sessions with ADS and Detox Services, maintaining consistency in access visits, making efforts to improve her relationship with the Director, and attending the recommended Dialectical Behavioural Therapy sessions with Mental Health Services. K.N. must be commended for her efforts to date and strongly encouraged to continue those efforts both in her own interests and in the interests of her children.

[20] Based on the information provided, I fully accept that K.N. has worked hard on her issues and it would certainly be in her best interests to have increased access to M.N.; however, that is not the test to be applied with respect to this application.

[21] To be successful in her application, the onus is on K.N. to satisfy me that the Director's decision to limit access to one visit per week is unreasonable and contrary to M.N.'s best interests.

[22] In support of her position, the Director points to the psychological assessment conducted by Dawn Oiffer. In a follow up letter dated September 27, 2007, Ms. Oiffer states the following:

> With regard to the question of access, it is important to separate the mother's wishes and the child's best interests. The report dated September 14, 2007 summarizes the findings regarding assessment of the nature and impact of the relationship between (M.N.) and (K.N.). Those findings suggest that current access places high demands on (M.N.'s) capacity to accommodate her mother's needs for a relationship. (M.N.) directs the majority of her own needs for nurture into relationship with her foster family and that is a desirable outcome for a child in Permanent Care, one that indicates that the child is accessible in relationship and that the potential for better outcomes is afforded. Analysis of the interaction observed between (M.N.) and (K.N.) indicates problems in communication familiar to the mother's previous diagnosis of Borderline personality and analysis of her attachment narrative. Such patterns of communication and relationship are seen to have disorienting impact on children and are associated with Disorganized attachment relationships (Lyons-Ruth et al 2003). At this point, increased access has the potential to reinforce manifestations of attachment Disorganization which appear to have (fortunately) receded over time. Rather than increasing (M.N.'s) exposure to the same, it would be advisable to address those difficulties with the interventions proposed and with (K.N.'s) continued therapeutic efforts toward acquiring more consistent internal regulation.

[23] Again, it must be stressed that my role in hearing this application is to assess the reasonableness of the Director's decision with respect to access, not to substitute my own views as to what I might consider reasonable access in all of the circumstances. Ms. Oiffer is clearly of the opinion that it is not in M.N.'s best interests to increase access at this time, and indeed that it may be contrary to M.N.'s best interests to do so. I would note that Ms. Oiffer's opinion was not challenged in any way by the applicant. Absent a challenge calling into question

the validity and/or reliability of the proffered opinion, I simply cannot find that the Director has acted in any way unreasonably or in a manner contrary to M.N.'s best interests in limiting access to one visit per week.

[24] The onus has simply not been met. As a result, I have no option but to dismiss the application. In so ruling, it is my sincere hope that this decision not impact adversely on K.N.'s commitment to continue her efforts to address her issues. It was clear to me that her efforts have already had a positive impact on her own life and that of her children, and she should be both congratulated for her efforts and encouraged to continue them.

RUDDY T.C.J.