

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.M.H. v. C.L.F.*, 2006 YKSC 60

Date: 20061121
Docket No.: S.C. No. 04-B0002
Registry: Whitehorse

Between:

R.M.H.

Plaintiff

And

C.L.F.

Defendant

Publication of the name of a child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act*.

Before: Mr. Justice R.S. Veale

Appearances:

Peter Morawsky
Lynn MacDiarmid
Kathleen Kinchen

Counsel for the plaintiff
Counsel for the defendant
Child advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the mother for reasonable and generous access to her daughter and for a recommendation that a child sexual abuse investigation be completed on the father.

[2] This is a difficult case that became very complicated when the mother was charged with what is commonly known as kidnapping her daughter on March 23, 2004.

The parents were sharing custody of their daughter when the mother surreptitiously took

the child to Quebec. No custody order had been made by a court. The charge was dismissed on November 16, 2005. On June 15, 2006, I made the following order:

1. a recommendation that the director of Family and Children's Services cause a child sexual abuse investigation to be completed by Dr. Louise McKay;
2. the mother shall have access to her daughter:
 - (a) from 5:00 p.m. on June 15, 2006, to 5:00 p.m. on July 11, 2006;
 - (b) from 5:00 p.m. on July 17, 2006, to 5:00 p.m. on July 28, 2006; and
 - (c) from 5:00 p.m. on August 4, 2006, to 5:00 p.m. on August 18, 2006;
3. the mother shall pick up and drop off her daughter for the purpose of exercising her access; and
4. the mother shall be responsible for making all arrangements relating to, and paying the expenses of, transportation for her daughter.

[3] These are my reasons.

BACKGROUND

[4] This case first came to this court by way of a without notice application by the father on April 6, 2004. The father applied for interim custody of his child based on the fact that the mother had left the Yukon with the child.

[5] The father and the mother lived together in a common-law relationship from 1993 until they separated permanently in 2002. They had previously separated for less than a year during 1996 - 1997.

[6] The father stated that after some initial difficulties in getting access to his daughter, he and the mother worked out a one-week on, one-week off arrangement in

October 2002. The arrangement was apparently made with two RCMP officers present, which gives some indication of the deteriorating relationship between the father and the mother.

[7] In the spring of 2003, the mother made an allegation to a social worker that the father was sexually abusing the child. The social worker did an investigation which included a child development assessment, medical assessment, the RCMP, and joint counselling sessions. He concluded there was no need of protective services for the child. The mother was not satisfied and was advised to see a lawyer to seek custody. Some time around March 23, 2004, the mother left town with the child without a custody order or an agreement.

[8] On April 8, 2004, this court granted the father an interim custody order and the usual RCMP assist order to locate the child and return her to her home. It included a term that the mother could bring an application to set aside the order on two days' notice.

[9] The child was returned to the Yukon from Quebec on October 23, 2004, the day after a hearing was held in the Superior Court of Quebec. The mother returned to the Yukon in November 2004. On May 18, 2005, the mother applied for reasonable and generous access to the child, for an assessment of the child by a psychiatrist or a psychologist specializing in child sexual abuse, and for the appointment of a child advocate.

[10] The father did not file a response affidavit at the May 18 application and counsel agreed to adjourn the access and sexual abuse issues. This court recommended the

preparation of a custody and access report, that a child advocate be appointed and granted the mother reasonable telephone access twice a week at reasonable times.

[11] The access and sexual abuse issues were heard on October 4, 2005. The mother filed a second affidavit attaching the Superior Court of Quebec decision rendered orally on October 22, 2004. That decision did not support the mother's allegation of sexual abuse by the father but, nevertheless, indicated that her original complaint was not fully investigated because there was no assessment by a child development specialist with expertise in child sexual abuse. The Superior Court of Quebec ordered the return of the child to the father on the express condition that the father arrange, without further delay, for a competent specialist to assess whether the complaints of sexual assault by the father had any foundation. The Superior Court of Quebec recognized that its authority did not extend to the Yukon and called upon this court to ensure that the express condition for the return of the child was satisfied.

[12] In the meantime, the mother was permitted to have only sporadic supervised access to the child. The father insisted on supervised access as he was very concerned that the mother will abscond with the child again. The criminal charge against the mother was to proceed promptly in November 2005.

[13] The father states that his expenses to date to locate and return the child to the Yukon are in excess of \$24,000. He states he cannot afford to pay for an expert report on the sexual abuse allegation. He has had a counsellor at the Child Abuse Treatment Service see the child three times but no report was prepared. It is widely known that the Child Abuse Treatment Service does not investigate sexual abuse of a child but rather focusses on identifying problems and counselling the child.

[14] There was one area of major dispute. The mother alleged a further incident of the child touching herself in a sexual way in front of a social worker. The father said he spoke to the social worker who said it looked like the child was adjusting her clothing. No evidence from the social worker was filed.

[15] In the circumstances, on October 4, 2005, I adjourned both issues to await the expected custody and access report and the outcome of the criminal charge against the mother.

THE CRIMINAL TRIAL

[16] Justice Foisy dismissed the criminal charge against the mother on November 16, 2005. His written decision was not filed in this court action until May 29, 2006. He found the father's evidence to be argumentative and wanting, particularly with respect to a fondling allegation. Justice Foisy considered the social worker's investigation of alleged sexual abuse in 2003 to be inadequate, as there was no expert assessment done. He also found "the father's undertaking" to the Superior Court of Quebec to have an expert assessment unfulfilled.

[17] Justice Foisy found that there was sufficient independent support for the allegation of sexual abuse which he described as "almost unbelievable episodes". He accepted the mother's evidence that no one was properly addressing the issue of sexual abuse so that she had to save her daughter. He concluded that her belief was honest, even if mistaken, and reasonable in the circumstances.

THE CUSTODY AND ACCESS REPORT

[18] The Custody and Access Report of Dr. Joanne Tessier, Registered Psychologist, was not filed until April 13, 2006. It is 53 pages in length and very comprehensive. She

had the benefit of Justice Foisy's written decision. Her report cannot be fully appreciated without a complete reading but I will attempt to cover the salient points. Dr. Tessier is not an expert in assessing or treating child sexual abuse. However, she has prepared numerous custody and access reports for this court and is a well qualified expert on the subject of children and families. She has done an extensive review of the literature on child sexual abuse in the course of preparing her report.

[19] Dr. Tessier concluded that the mother, father and the father's new common-law partner were all psychologically healthy with adequate parenting abilities and child-parent relationships with the child. However, she was of the view that the child sexual abuse allegation and the abduction concerns are intertwined. Until the sexual abuse allegations are laid to rest or confirmed, the abduction issue persists.

[20] In that regard, Dr. Tessier concluded that a medical examination should be conducted by a medical examiner trained in the investigation of child sexual abuse. She also considers it in the child's best interests that "a thorough child sexual abuse investigation is conducted". She identified Dr. Louise McKay of Alberta as an appropriate expert who would accept a referral from the Yukon.

[21] Dr. Tessier also recommended that the child sexual abuse investigation include both the potential risk for child sexual abuse and the risk for child abduction. In the event that the allegations of child sexual abuse are substantiated, she recommended supervised visits between the child and her father until he is deemed safe for the child. In the event that the allegations are not substantiated, she recommends that the mother seek therapeutic support and education to understand normal child sexualized behaviour.

[22] While Dr. Tessier candidly stated that she is not an expert in assessing or treating child sexual abuse, she has done a considerable review of the literature and assessed the issues and the father in light of that research. She concluded that the father “did not at this point present as a risk especially in light of the presence of another adult in his home”.

[23] Her assessment of the risk of child abduction by the mother was somewhat guarded. She felt that the child’s relationship and attachment to her mother was of greater concern than the risk of the mother abducting the child. She hoped that the mother would be less a risk for child abduction, once the child sexual abuse investigation is completed “especially if allegations are unsubstantiated and potential mental health concerns are managed with the assistance of therapist and/or physician”.

DECISION

[24] Counsel for the mother requested that the court recommend that the government pay for the child sexual abuse investigation rather than the parties, who appear to be unable to pay. Counsel for the father agreed that the court recommend that a sexual abuse investigation be completed although he interpreted Dr. Tessier’s report as recommending it more for the purpose of persuading the mother that things are okay.

[25] Counsel are now in agreement that the mother have summer access to the child without supervision. The child advocate supported the access for both parents over the summer period. Counsel for the mother did not want the access order to go beyond the child’s return to school.

[26] The statutory authority for recommending a child sexual abuse investigation is found in s. 43 of the *Children’s Act*, R.S.Y. 2002, c. 31. It states:

Request for investigation

43(1) In an application under this Part in respect of a child, the court may request the director of family and children's services appointed under section 111 to cause an investigation to be made and to report to the court on all matters relating to the custody, support and education of the child.

(2) The director shall have no obligation to prepare a report or to prepare a report within a stipulated period unless the director consents to or has given a prior written report.

[27] In my view, the wording of s. 43(1) is sufficiently broad to make this recommendation. It permits the court to request the director "to cause an investigation to be made and to report to the court on all matters relating to the custody, support and education of the child". That wording clearly includes a child sexual abuse investigation as part of a custody assessment.

[28] The difficulty for the director is that a custody and access report has already been recommended and completed. However, it is significant that this report concludes that a further investigation is warranted. In my view, it is appropriate to conduct the child sexual abuse investigation as the consequences of failing to do so may be disastrous for the child.

[29] I am also of the view that when a report has been prepared for the court, it does not necessarily conclude the matter. Updated reports are a common occurrence. In this report, a significant recommendation has been made after a thorough and professional assessment of the child and the family.

[30] I strongly recommend that a child sexual abuse investigation be completed. It is very clear that the first investigation by the social worker was incomplete which has resulted in this issue hanging over everyone's head. A child sexual abuse investigation

is particularly important for the safety of the child and the resolution of a longstanding dispute between the parents which has no doubt had a serious negative impact on the child.

VEALE J.