

Citation: *T.W. (Re)*, 2020 YKTC 6

Date: 20200214
Docket: 19-T0001
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

IN THE MATTER OF THE *CHILD AND FAMILY SERVICES ACT*,
R.S.Y. 2008, c. 1, and T.W., S.W. and R.W.

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 Law Act* or section 162(2) of the *Child and Family Services Act*.

Appearances:

Rachel Gutman and
Karen Wenckebach
Shayne Fairman
Kathleen Kinchen

Counsel for the Director
Counsel for J.B. and E.B.
Children's Lawyer

RULING ON APPLICATION

[1] The Director of Family and Children's Services has applied for the following Orders, as set out in the Amended Notice of Application filed December 11, 2019 (the "Application"):

1. If necessary, an order abridging time for service or dispensing with the requirement to serve any notice or document pursuant to s. 80(1)(a) and (b) of the *Child and Family Services Act* ("CFSA");
2. A six-month no contact order pursuant to Section 32(3)(a) of the CFSA prohibiting J.B. from contacting or interfering with T.W., S.W. and R.W. (the "Children") or trying to contact or interfere with the Children or from entering any place where the Children are located, unless supervised by Family and Children's Services or a third party approved, in writing, by Family and Children's Services;

3. A six-month no contact order pursuant to Section 32(3)(b) of the *CFSA* prohibiting J.B. from residing with the Children or from entering premises where the Children reside, including premises that J.B. owns or has a right to occupy, unless supervised by Family and Children's Services or a third party approved, in writing, by Family and Children's Services;
4. Pursuant to s. 68(3) of the *CFSA*, an order to vary the terms of the July 18, 2019 supervision order, made pursuant to s. 57(3)(a) of the *CFSA*; ~~A six-month supervision order pursuant to section 57(3)(a) of the *CFSA*, in respect of the Children;~~
5. An order that J.B. and E.B. not disclose any affidavit filed by the Director with respect to this matter to anyone except as required by law, and particularly, that they not speak to the Children about information contained in the affidavit(s) or provide the affidavit(s) to them; AND
6. An order that J.B. and E.B. not speak of these proceedings with the Children.

[2] Filed December 11, 2019 in support of the Application was the affidavit of social worker Adam Wicke (the "2nd Affidavit"). (I note that the 2nd Affidavit is deficient in that the jurat fails to note the date that it was sworn).

[3] The matter came before me for hearing of the Application on December 12, 2019. The Application was adjourned until December 18, 2019 for further submissions. After hearing submissions, I reserved my decision and, with the agreement of the parties, I issued an Order on December 20, 2019, (the "Order") with my reasons to follow. The terms of the Order were as follows:

1. The Director's application for an order under ss. 32(3)(a) and (b) of the *Act* is denied.
2. The Director's application for an order pursuant to s. 68(3) of the *Act* is granted and terms 1(a) through (l) of the Order are replaced by the following terms:

- (a) The Director shall be permitted by the Parents the opportunity to speak privately with the Children in their residence, their school or any other place where any or all of the Children may be. The frequency of these meetings will be at the discretion of the Director, will be within reason, both as to frequency and duration of these meetings, and will take into consideration the views and best interests of the Children;
- (b) The Director shall be permitted to conduct safety checks on the home where the Children are residing, to ensure the Children are not alone with J.B.;
- (c) In the absence of a designate of the Director to conduct home checks, J.B. or E.B. shall present the Children at the door of the home to allow the RCMP to confirm the safety of the Children;
- (d) J.B. shall have no unsupervised contact with the Children at any location or at any time;
- (e) The Parents shall ensure that the Children are not exposed to physical or verbal violence;
- (f) During the periods that E.B. is supervising contact between J.B. and the Children, E.B. shall provide continuous visual observation and supervision of any contact;
- (g) J.B. is prohibited from entering or being in any residence where the children reside, from 12:00 a.m. to 7:00 a.m., and is prohibited from being in the family residence if E.B. is sleeping;
- (h) J.B. shall abstain from using any alcohol and/or non-prescription drugs;
- (i) E.B. shall abstain from using alcohol and/or non-prescription drugs while caring for the Children;
- (j) E.B. shall provide reasonable notice to the Director if she plans to sleep overnight outside of the family residence, and/or leave the community of Dawson City, Yukon, and of the arrangements that she has made for the care of the Children;
- (k) E.B. shall provide her consent to release information in regard to any counselling services the Children are attending. These consents shall be with respect only to the

sharing of information as to the location, frequency and duration of these attendances;

- (l) E.B. shall not unreasonably withhold her consent to the Children being referred by the Director for counselling and support services;
- (m) E.B. shall complete a “Parenting Capacity Assessment” (the “Assessment”), or its equivalent, that will be prepared in order to assess her ability to protect the Children. The Assessment, or its equivalent, shall be delivered by a party mutually agreed to by E.B. and the Director, or as otherwise ordered by the Court;
- (n) E.B. shall meet once a month with social worker S.M. to discuss issues regarding the Children, or, if S.M. is not available, another Family and Children’s Services worker;
- (o) The Parents shall not discuss or share any information or documents disclosed by Family and Children’s Services with the Children; and
- (p) The Parents shall not speak of these Child Protection Proceedings with the Children.

[4] These are my reasons for making the Order.

Background

[5] On July 18, 2019 an Interim Order pursuant to s. 57(3)(a) of the *Act* was issued by Chisholm C.J. (the “Interim Order”). The terms of the Interim Order are as follows:

- (a) The Director shall be permitted, within reason, the opportunity to speak privately to the Children in their family home or any other place where the Children may be.
- (b) The Director shall be permitted to conduct “safety checks” on the home where the Children are residing to ensure the Children are not alone with J.B.;
- (c) In the absence of a designate of the Director to conduct home checks, J.B. or E.B. shall present the Children at the door of the home to allow RCMP to confirm the safety of the Children.

- (d) J.B. shall have no unsupervised contact with the Children at any location or at any time.
- (e) During the periods that E.B. is supervising contact between J.B. and the Children, E.B. shall provide continuous visual observation and supervision of any contact.
- (f) J.B. is prohibited from entering any residence where the Children reside from 12:00 a.m. to 7:00 a.m. and is prohibited from being in the family residence if E.B. is sleeping.
- (g) J.B. shall abstain from using alcohol and/or drugs.
- (h) E.B. shall abstain from using alcohol and/or non-prescription drugs while caring for the Children.
- (i) J.B. and E.B. shall ensure that the Children are not exposed to physical or verbal violence.
- (j) E.B. shall notify the Director if she plans to sleep outside of the family residence.
- (k) J.B. and E.B. shall meet with the Director once in August 2019 to discuss issues regarding the Children.
- (l) E.B. shall meet once a month with social worker S.M. to discuss issues regarding the Children.

[6] The Interim Order expired January 18, 2020.

[7] The Interim Order followed an application made by the Director with a first appearance in Court on June 13, 2019. In support of this application was the affidavit of Adam Wicke, sworn June 6, 2019 (the "1st Affidavit").

[8] The 1st Affidavit outlined allegations that J.B., the step-father of the Children, had been charged with sexually assaulting T.S., (E.B.'s oldest daughter), who was 19 years old at the time of this alleged sexual assault. E.B. is J.B.'s intimate partner. It was further noted that J.B. was convicted of this sexual assault on January 25, 2019. I note

that J.B. has appealed this conviction and this appeal is to be heard at a date in the future.

[9] The 1st Affidavit also noted that J.B. had also been charged with sexual interference in respect of T.W. S.W. also disclosed instances where she alleged that J.B. had sexually abused her. It was unclear from the 1st Affidavit whether J.B. had been charged with sexual interference in respect of S.W., although, given the dates of the disclosures by S.W. and the preliminary inquiry date, it would appear likely that he had been charged.

[10] On the July 17, 2018 date of the preliminary inquiry for the sexual interference charges, E.B., the Children's mother, stated that T.W. and S.W. did not wish to proceed with the complaints underlying the sexual interference charges. The charges were stayed on that date. As a result of these charges being stayed, J.B. was allowed to reside in the family home. He had previously been prohibited from doing so due to these charges.

[11] Subsequent to J.B.'s conviction of sexual assault in relation to T.S., it was agreed between the Director, J.B. and E.B., that J.B. would not reside in the home unsupervised, or stay there overnight. On May 16, 2019, the Director notified J.B. and E.B. that the requisite supervision was required to be by a third party.

[12] On May 31, 2019, J.B. and E.B. advised the Director that they no longer would be involved in working with the Director. This resulted in the Director proceeding with the application for a six-month supervision order. This application was filed June 3, 2019. As stated, the Interim Order was made pursuant to this application.

Positions of Counsel

Counsel for the Director

[13] Counsel for the Director states that the Director has received and/or learned new information that alter the circumstances that existed at the time of the Interim Order.

[14] In particular, as set out in the 2nd Affidavit, the Director notes the apparent increasing hostility in the relationship between the Director, J.B. and E.B. (paras. 23-26, 31, 39, 40, 55, 57-59, 61, 73, 74, 76 as well as between the Director and the Children (paras. 21, 58, 64, 77, 104-106).

[15] The Director also had concerns that the terms of the Order of Chisholm C.J., in particular the requirement that J.B. not be in the family home unsupervised and that there be no alcohol in the home, were not being complied with (the 2nd Affidavit at paras. 19, 20, 48-50, 54, 98).

[16] Also noted in the 2nd Affidavit were concerns that S.W. was engaged in self-harm (paras. 47, 52, 84, 85), and that R.W. had written a note in which she threatened to commit suicide (paras. 32(d), 70-72).

[17] The Director is concerned that E.B. is reacting to any disclosures that any of the Children make in a way that is limiting the Children's willingness to talk with the Director's assigned representatives (the 2nd Affidavit at paras. 68, 69, 78-85, 90-97, 103).

[18] A further concern for the Director is that S.W. has alluded to the prior alleged instances of sexual interference as having, in fact, occurred (the 2nd Affidavit at paras. 87-89, 99-102).

[19] The Director's concerns are in relation to a present risk of harm to the Children, being physical harm through sexual abuse, and emotional harm, both from sexual abuse and other issues arising from the present circumstances.

[20] The Director does not believe that E.B. is prepared to cooperate with the Director in acting to protect the Children from physical and emotional harm caused by their contact with J.B.

Counsel for J.B. and E.B.

[21] Counsel for J.B. and E.B. consents to portions of the Application, but opposes any terms that would further restrict J.B.'s ability to be present in the family home or to have contact with the Children, in particular orders under ss. 32(3)(a) and (b).

[22] J.B. and E.B. maintain their position, as noted in the Interim Order, that the Children are not in need of protective intervention.

Children's Lawyer

[23] The Children's lawyer also consents to portions of the Application but concurs with counsel for J.B. and E.B. in opposing any terms that would further restrict J.B.'s ability to be present in the family home or to have contact with the Children.

Analysis

[24] The parties have consented to some specified changes being made to the existing Interim Order, or otherwise did not oppose these changes being made. I accept that some of these changes were agreed to simply to expedite the process and, while J.B. and E.B. denied acting as alleged by the Director, the terms were not otherwise contentious.

[25] At the time I heard this matter, it was expected that the Director would be filing a new Application for an Order prior to the expiration of the Interim Order, and that the matter would proceed to a hearing early in 2020.

[26] The application under s. 32(3)(a) and (b) was not without any basis, on the information contained in the 2nd Affidavit. If true, this information pointed to possible violations of certain terms of the Interim Order, and to there being some validity to the prior allegations of sexual interference by J.B. against S.W. and T.W.

[27] The Director had a right to be concerned that the Children were in need of protective intervention to the extent that the decision to seek s. 32(3)(a) and (b) orders was with a reasonable foundation. I would hardly think that the Director could have ignored this information.

[28] The Child's lawyer was able to speak with S.W. Ms. Kinchen relayed that S.W. was shocked and visibly upset that a no-contact order was being sought. S.W. stated that she felt safe in the current situation, and she was adamant that she did not want a no-contact order to be imposed.

[29] S.W. is 14 years old. She appears on the material filed and the submissions of counsel that she is capable of speaking for herself. I appreciate that there are legitimate reasons to be concerned about S.W.'s current situation, considering the apparent emotional difficulties she is struggling with, and the additional underlying concerns about possible sexual abuse in the past. This context gives rise to a concern as to a risk of possible sexual abuse at present and in the future, not only in respect of her but of her siblings as well.

[30] These concerns need to be balanced against the impact that imposing the no-contact order would have on the Children, in particular S.W. Imposing the s. 32(3)(a) and (b) orders sought by the Director would be a drastic change in the current circumstances.

[31] I am concerned that such a change, in particular when it is primarily (albeit not exclusively), based upon the recent disclosures made by S.W. in regard to the past allegations of sexual abuse, would have a significant negative impact upon the Children, and upon S.W. This potential negative impact outweighs the risk of potential harm that exists in not imposing the s. 32(3)(a) and (b) orders. There is nothing in the Affidavit evidence that indicates there is such an immediate significant risk of harm to the Children that a drastic change in the circumstances as they currently exist should be made.

[32] I am concerned that S.W., in particular, would take it upon herself to bear responsibility for this change taking place, and the impact upon her could potentially be harmful. I believe that this negative impact would also be felt by the other Children.

[33] In this regard, I believe that the concerns outlined by the Child Lawyer arising from her conversation with S.W., given S.W.'s position opposing the no-contact orders being sought, are legitimate and militate in favour of not significantly changing the status quo.

[34] In my opinion, such a drastic change to the relative stability would be contrary to the best interests of the Children, which is, of course, the overriding consideration. As such, I decline to make an Order under s. 32(3)(a) and (b).

[35] I note that S.W. has expressed a desire to receive counselling. She should certainly be provided that opportunity.

[36] After hearing from the parties and discussing certain of the terms being sought by the Director pursuant to s. 68(3), and noting that the parties either consented to or were not opposed to some of the proposed changes, I made the Order, as set out in paragraph 3 above with respect to clauses (a) – (p).

COZENS T.C.J.