IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *J.N.B* v. *P.W.S. et al.*, 2006 YKSC 11

Date: 20060125
Docket: S.C. No. 05-B0048
Registry: Whitehorse

BETWEEN:

J.N.B.

Plaintiff

AND:

P.W.S. and
V.M. and L.M.S.

Defendants

Before: Mr. Justice L.F. Gower

Appearances:

Fia Jampolsky	For the Plaintiff
Debbie Hoffman	As Child Advocate
Lana Wickstrom	For the Director of Family and Children Services
Christina Sutherland and Sheri Hogeboom	For the Defendants

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): V.M. is the paternal grandmother of K.N., age ten, and R.T.T., age eight. Those children and two others, J.H., age 13, and S.S., age four, have been previously and are currently the subject of child protection proceedings in the Territorial Court as a result of being taken into the care of the Director of Family and Children Services on January 6, 2006. The Director has since applied for permanent care and custody of these children.

[2] Previously, J.N.B. commenced an action in this court seeking primary custody of all four children. V.M. sought and obtained standing in that action and was added as a party defendant.

[3] This past Monday, January 23, 2006, V.M. also sought and obtained standing in the Territorial Court proceeding regarding her two paternal grandchildren and also obtained intervenor status regarding the other two children. V.M. now applies for an order that the Territorial Court proceedings either be joined with the current proceedings in this Court, which is the action by J.N.B. to which V.M. has been added as a defendant. In the alternative, V.M. asks that the Territorial Court proceedings and the Supreme Court proceedings be heard together with a judge of this court sitting as a judge of the Territorial Court when adjudicating the child protection proceedings under the *Children's Act*, R.S.Y. 2002, c. 31, which is allowed by s. 5 of the *Territorial Court Act*, R.S.Y. 2002, c. 217.

[4] V.M. also applies for an order that the Supreme Court and the Territorial Court proceedings should be given priority over other outstanding matters on the court's calendar.

[5] Separate counsel appeared on this application representing J.N.B., who is, in effect, the stepfather of the children (I will refer to him later) and also P.W.S., who is the biological mother of the children. The Director of Family and Children's Services was also represented and a child advocate appeared for all four children.

[6] For the most part, the parties agree that the Territorial and Supreme Court actions should be heard together because there is a significant overlap of issues

between them and that doing so will avoid an unnecessary repetition of evidence. It will be the best use of court resources and will avoid potentially inconsistent findings between the two levels of court.

[7] A side issue was raised by counsel for V.M. regarding the relative benefits of a joinder or a consolidation of the Territorial and Supreme Court proceedings versus simply hearing them together, where a judge of this Court would sit as a judge of the Territorial Court to adjudicate the child protection proceedings, and where the evidence in those proceedings could subsequently be applied to the Supreme Court proceedings, which would follow immediately or as soon after as possible. I find as a point of law that there is no jurisdiction to order a joinder or a consolidation of these two different proceedings, as those terms are referred to in Rule 5 of the Supreme Court Rules. The child protection proceedings in the Territorial Court are to be before a judge of the Territorial Court, pursuant to the provisions of the *Children's Act*. They are therefore not capable of being defined as an action or a proceeding in the Supreme Court, which they would need to be in order to be consolidated with the action commenced by J.N.B. on September 2, 2005.

[8] Apart from that, the only remaining issue is that contested by J.N.B, which is what is called "the reasonable and probable grounds hearing" in the child protection proceedings. J.N.B. says this hearing should take place as soon as possible and in the Territorial Court as a separate proceeding and, depending on the outcome of that hearing, J.N.B. is then content that any future proceedings in the child protection action could be heard together with the Supreme Court application. There was talk about this coming January 27th, two days from now, being available for the reasonable and

probable grounds hearing, under s. 123 of the *Children's Act*. However, I since heard from other counsel this morning that the date is problematic for a number of reasons. One is that it would be difficult for the Director to marshal all of her evidence in support of that hearing, because one of their witnesses, a social worker by the name of Mr. Cardy, is currently unavailable due to medical complications; in fact, he is in hospital, as I understand it, suffering form pneumonia and clearly would not be available to either prepare an affidavit or to testify on January 27th. I am also told that Mr. Cardy is a key witness in many respects and may impact significantly on the credibility of the parties.

[9] The second main problem with January 27th is that counsel for V.M. would simply be unable to properly prepare for the hearing on that date. She has only just received notice that her client has been joined as a party to the Territorial Court proceedings, as I mentioned, this past Monday. As of this morning, she had only received one of a number of affidavits involved in the child protection proceedings. I have had a quick look at some of those affidavits. They are extensive and will require a significant amount of time to properly prepare and respond to.

[10] In comparison, J.N.B. has filed just today, a responsive affidavit which he anticipates will be used at the reasonable and probable grounds hearing. That affidavit is several pages long with dozens of paragraphs and is an indicator of the extent to which the facts are expected to be at issue at that hearing.

[11] It may be helpful to just briefly give a bit of an historical overview here. Because of the time constraints, I am quoting and paraphrasing quite liberally from the decision

of Lilles T.C.J. in the Territorial Court, which was his decision to grant V.M. standing, an intervenor status, as I have mentioned. It is cited as *Re Matter of J.H., K.N., R.T.T., and S.S.*, 2006 YKTC 11.

[12] The mother of the four children, P.W.S., has a longstanding problem with drug addiction and child protection concerns date back to 1998. The children were first taken into care in 2003. They were returned to P.W.S. and J.N.B, the then partner of P.W.S., under a supervision order, which lapsed on February 8, 2005. Shortly thereafter, P.W.S. relapsed into drug use. In June 2005, she went to Alberta to take treatment, and prior to departing, she made arrangements with J.N.B. to provide care for the children.

[13] In early September 2005, P.W.S. returned to the Yukon to resume care of the children. She and J.N.B. separated and J.N.B. applied for and received an interim interim order for the care and custody of the children on September 6, 2005. P.W.S. is now back in Alberta and is not in a position to be a parent to her children. M.T., the father of K.N. and R.T.T., is not in a position to parent his children. Similarly, D.S., the father of. S.S., is unable to parent. The whereabouts of S.H., who is the father of J.H., is unknown. J.N.B.'s involvement with the children is relatively short-lived in that he became involved with P.W.S. in April 2004.

[14] The children are described as having special needs and to varying degrees are in need of special programming and therapeutic interventions. Because of their special needs, they demand a lot of attention from anyone parenting them.

[15] As early as October 2, 2005, Judge Lilles noted that J.N.B. was beginning to feel overwhelmed with the task. A month later he was considering placing one of the children, R.T.T. with the Director. Discussions with V.M., who had previously been approved by the Director as a foster parent, resulted in a proposal to place R.T.T. with her. J.N.B. later declined to proceed with the plan.

[16] In November 2005, concerns were raised about J.N.B.'s ability to parent these four special needs children. J.N.B. himself was feeling stressed out. On December 21, 2005, he turned all four children over to V.M. and her husband. That placement, which was intended to be for a few days, turned into a few weeks.

[17] Now, it is the position of J.N.B. in his most recent affidavit that he intended to turn the children over to V.M. and her husband for a period of approximately one month, providing that could be confirmed in writing by a temporary care and custody agreement. He says he needed that amount of time to attend to some recuperation and special health needs; claiming that he had a condition of arrhythmia and needed to be hospitalized and undergo some intensive medical treatment.

[18] However, it turns out, according to J.N.B, that such an agreement could not be reduced to writing and the children continued to remain in the actual care and custody of V.M. She and her husband became uncertain that they could manage the financial responsibilities of caring for all of the children. They were, however, prepared to take them under fostering arrangements with the Director. In any event, they brought the children into Whitehorse on January 6, 2006, and turned them over to the Director.

[19] Since then, V.M. and her husband have decided that they could manage to look after the two paternal grandchildren. Consequently, they have applied for and received full standing in this Court in J.N.B.'s application for custody. They have also now cross-applied for interim custody for those two children.

[20] The *Children's Act*, s. 123, requires that in this context, where the children have been taken into care without a warrant, the hearing on the issue of whether there were reasonable and probable grounds for taking the children into care must take place as soon as is reasonably practicable, and, in any event, at a time not later than seven days after the children are taken into care. There is a "rebuttable presumption" in s. 123(10):

> "...that a failure to comply with the time limits specified in this section is prejudicial to the interests of the child[ren], and it is therefore the duty of the director, the concerned parents and the judge to comply with those time limits."

However, s. 123(11) provides that lack of compliance with the time limits does not deprive a judge of the Territorial Court of jurisdiction, providing that he or she is requested to act either by the Director or a concerned parent, after the expiration of that time.

[21] Counsel have noted that time is clearly intended to be of the essence in child protection proceedings. In the Supreme Court of Canada decision of *Winnipeg Child and Family Services* v. *K.L.W*, [2000] 2 S.C.R. 519, a five to two majority spoke about the nature of the priority to be given to child protection proceedings and I am quoting here from the headnote:

> "The interests at stake in cases of apprehension are of the highest order, given the impact that state action involving the separation of parents and children may have on all of their lives. From the child's perspective, state action in the form of apprehension seeks to ensure the protection, and indeed the very survival, of another interest of fundamental importance: the child's life and health. Given that children are highly vulnerable members of our society, and given society's interest in protecting them from harm, fair process in the child protection context must reflect the fact that children's lives and heath may need to be given priority where the protection of these interests diverges from the protection of parents' rights to freedom from state intervention."
>
> (emphasis added)

And later on in that same headnote:

> "While the infringement of a parent's right to security of the person caused by the interim removal of his or her child through apprehension in situations of harm or risk of serious harm to the child does not require prior judicial authorization, the seriousness of the interests at stake demands that the resulting disruption of the parent-child relationship be minimized as much as possible by a fair and prompt post-apprehension hearing. This is the minimum procedural protection mandated by the principles of fundamental justice in the child protection context."
>
> (emphasis added)

[22] Therefore, the issue really before me is what would constitute a fair and prompt post-apprehension hearing, as we are attempting to set down when and where the hearing for the issue of reasonable and probable grounds should be heard. In my view, it must be fair to all the parties and that includes, now, V.M. A proceeding on January 27th would not be fair to either V.M. or the Director, for the reasons which I have already stated. Indeed, I anticipate that, even if the matter was tentatively set for that date, an application by either V.M. or the Director for an adjournment, for the same reasons, would likely be favourably received.

[23] Further, it is clear that under s. 123(7) of the *Children's Act* there is a live issue about what will happen with the children in the event that the court finds there were no reasonable and probable grounds for taking the children into care. That subsection provides that in that event:

> "…the director shall return the child to the concerned parent, or other person entitled to the child's care, in whose care and custody the child was when taken into care."

[24] Lilles T.C.J. noted at page 6 of his decision, cited above, on the issue of standing, that this was expected to be an issue:

> "The children were in the physical care and custody of V.M. and F.M. [who is V.M.'s husband] when they were taken into care by the director. At that time, J.B., the stepfather of the children, had indicated orally that he did not want or was unable to care for the children and indeed had left them in V.M. and F.M's care and custody. Without deciding, there is an argument to be made that should the director fail to satisfy the Court that it had reasonable grounds to apprehend the children, the children may have to be returned to F.M. and V.M."

[25] So while that may not have been an issue at the time of the apprehension, it clearly is now, and that is a matter which the child advocate says will require legal interpretation of s. 123(7) and which the Director says is not likely to be a simple or short argument.

[26] Further, even if the decision on s. 123(7) is not resolved in favour of V.M., she has stated her intention to make her application for interim custody immediately at the completion of the reasonable and probable grounds hearing. That application clearly can only be heard by a judge of this Court. Therefore, I am persuaded that it makes sense to have the Territorial Court and Supreme Court matters heard one after another

by the same judge, with a judge of this Court firstly sitting as a Territorial Court judge for the purpose of adjudicating the child protection proceedings.

[27] I simply note, for the sake of completeness, that if it is determined that there were reasonable and probable grounds for taking the children into care, then the children will remain where they are, which is in foster care. They have been divided so that two of them are with foster parents in Marsh Lake and two are in Whitehorse with foster parents.

[28] Further, if the grounds are established, the Director will likely proceed with her application for permanent care and custody of the children. It is expected that application will take a significant amount of time to prepare for, as there will be extensive disclosure and potentially even a custody and access report, or something like it, prepared in anticipation of that hearing. Counsel informed me that they expect something in the neighbourhood of two to three months delay while they prepare for the permanent care hearing. V.M. and J.N.B., of course, will be parties to that hearing and even if the Director fails on that application, V.M. and J.N.B. will still want to proceed with their respective applications for custody or interim custody.

[29] The concern of the child advocate is that the children have been bounced around, so to speak, already on a number of occasions and that this is having an adverse impact on their well-being. Despite the fact that the *Children's Act* does make it clear that time is to be of the essence in these proceedings, she says the paramount concern of the court always must be the best interests of the child. Further, that the best interests of the children, at the moment, would be to keep them in the most stable

situation in their existing foster parent arrangements and to avoid, if at all possible, the situation where they are taken out of the foster care, put back into the care of either V.M. or J.N.B., only to have that situation reversed in a matter of weeks or months when V.M. and J.N.B. make their further applications. For that reason, the child advocate was opposed to J.N.B.'s application to have the reasonable and probable grounds hearing proceed as soon as possible in the Territorial Court and separately from any further matters before this Court.

[30] I am persuaded that the best interests of the children will be served by proceeding as soon as possible in this Court, giving every possible priority to having all of these matters heard together at the same time. Therefore, I order that the hearing under s. 123 of the *Children's Act* will take place before a judge of this Court, and, in particular, before Mr. Justice Veale of this Court, sitting as a Territorial Court judge. Justice Veale previously adjudicated the interim interim order that was obtained by J.N.B., on or about September 6, 2005, and in that order he specifically declared himself to be seized of this matter. So it is appropriate that Mr. Justice Veale should also hear the child protection proceedings.

[31] I have canvassed the week of February 6th as a possibility for that hearing, but that is not possible because of an extensive and complex corporate commercial matter which involves numerous counsel, many of which are from out of town, and it would be simply unworkable to try and reschedule that at this late date. The following week, which is the week of February 13th, theoretically could be available in the Court calendar, but it is not available to a number of counsel. So the first potential dates

appear to be Monday, February 20th and Tuesday, February 21, 2006, at 10:00 a.m. and I order that this hearing will take place at that time.

[32] As I mentioned earlier, if the determination of Justice Veale is that there were no reasonable and probable grounds for taking the children into care, then I expect the parties will make argument immediately following on the interpretation of s. 123(7), and potentially, also to be followed immediately by V.M.'s application for interim custody. All the remaining matters on the notice of motion filed by V.M. on January 24, 2006, can be spoken to at that time. Counsel, have I overlooked anything?

[33] MS. SUTHERLAND: Just one question, My Lord. As I understand it then, the decision is that the hearing under s. 123 of the *Children's Act* will proceed. It would be my preference that there will be an order that also V.M.'s application would proceed at that time, rather than following, because I am just concerned in terms of Justice Veale -- I want to be clear that the evidence that's heard as a Territorial Court judge can be applied to that interim custody application at the same time. So my preference would be to have them both ordered to be heard on February 20th.

[34] THE COURT: All right. The order can state that and certainly that is my expectation, that the evidence called in the child protection proceedings will be applicable to your client's application. So there is no need to repeat the evidence.

[35] MS. SUTHERLAND: Thank you.

[36] MS. WICKSTROM: So just out of the abundance of caution of clarity, when I pass this to Ms. Kirkpatrick, it would be that Mr. Justice Veale would make, first,

a ruling about reasonable and probable grounds. Then, counsel would argue, should there be no reasonable and probable grounds, Ms. Sutherland's application about the interpretation of s. 123(7), and then after a ruling of that, he could also make any ruling in regards to the custody application, having heard all of the evidence at the same time.

[37] THE COURT: Well, that seems to make sense to me. I do not want to tie Judge Veale's hands, but I am sure that he would agree with that. I do not see anything objectionable to proceeding in that fashion.

[38] MS. JAMPOLSKY: My Lord, I would just state that the first two are likely to flow from each other immediately, but there may be submissions with respect to further evidence regarding custody, should we reach that third stage.

[39] THE COURT: Oh, yes, yes. There would be -- no one would be precluded from calling further evidence once the reasonable and probable grounds hearing is completely disposed of. Are counsel content that that can be worked out or do we need to go into excruciating detail in terms of the order?

[40] MS. SUTHERLAND: My Lord, I think if we do have difficulties, perhaps we could try and find some time before Justice Veale to just sort out pre-trial matters of that nature. That might be easier than going into the excruciating --

[41] THE COURT: Yes. As I say, I prefer to leave the nuts and bolts to him if he is going to be the presiding judge.

[42] MS. WICKSTROM: The only final matter in regards to the Director's response that was filed is that there be acknowledged that the consent to the joining of the applications that the Director put on record doesn't prejudice their ability to appeal the decision of Judge Lilles that was given orally on Monday's date.

[43] THE COURT: Does that need to be in the order? I mean that is certainly --

[44] MS. WICKSTROM: It could be an acknowledgment in the order.

[45] THE COURT: It is certainly recognized that you are not waiving any of your appeal rights with respect to that, and you have stated that in your response. I do not know that anything more needs to be said on it, but if you feel it needs to be in the order then I will leave it to counsel to draft the terms of the order.

[46] MS. WICKSTROM: Thank you.

[47] THE COURT: So, going once, going twice; is that it?

[48] MS. SUTHERLAND: Yes.

[49] THE COURT: All right. Thank you.

[50] MS. WICKSTROM: Thank you, My Lord.

[51] MS. SUTHERLAND: Thank you.

[52] MS. JAMPOLSKY: Thank you.

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GOWER J.