

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Nukon v. Nukon et al*, 2005 YKSC 55

Date: 20050916
Docket No.: S.C. No. 99-B0051
Registry: Whitehorse

Between:

GLORIA JEAN NUKON

Plaintiff

And

CHRISTINE SARAH NUKON,
CINDY LOU SCHEFFEN and
DOROTHY FROST and RONALD FROST

Defendants

Before: Mr. Justice W. M. Darichuk

Appearances:

Kathleen Kinchen

J. Robert Dick

Jamie VanWart

Debbie Hoffman

No appearance by anyone

For the defendants Frost

For the plaintiff

For the defendant Scheffen

Child Advocate

For the defendant Nukon

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

INTRODUCTION

[1] These proceedings concern the custody of Clifton, born May 2, 1995.

BACKGROUND

[2] Immediately after his birth in Whitehorse, Yukon, Clifton returned with his biological mother, Christine Sarah Nukon, to Old Crow, Yukon. As his mother was unable to care for him due to severe alcohol and drug abuse problems, his maternal

aunt, the plaintiff, Gloria Jean Nukon, a resident of the community of Old Crow, assumed parental responsibilities. She received the benefit and support of the child's maternal grandparents, as well as other family and members of the community of Old Crow.

[3] Christine Sarah Nukon was neither represented by counsel nor participated in person in these proceedings. Her involvement in Clifton's life has been minimal.

[4] Old Crow is an isolated small community of some 300 aboriginal people known as the Vuntut Gwitchin First Nation. According to their culture and traditions, "... it is tradition that many people will raise a child. A child has always been reared by extended family, which includes the whole community": See the letter of the Director of Vuntut Gwitchin First Nation dated December 6, 2002, to the Law Courts, Exhibit "K" to the affidavit of Kim-Marie Rumley filed December 18, 2002.

[5] The child's biological father, who died in September 1999 never assumed parental responsibilities or any significant role in his life.

[6] On September 20, 1999, the child's biological mother signed a custody agreement giving guardianship to his paternal aunt, Cindy Lou Scheffen. In passing, it should be noted that the law no longer treats children as the property of those who gave birth, but focuses on what is in their best interests: See *Racine v. Woods*, [1983] 2 S.C.R. 173 (S.C.C.) and section 1 of *The Children's Act*, R.S.Y. 2002, c. 31 which reads in part:

1. ... if the rights or wishes of a parent or other person and the child conflict the best interests of the child shall prevail.

[7] There have been numerous contested custody and access applications before this Court since the first court proceeding in 1999. The effect of these proceedings on the child is embodied in the first remark Clifton made to the clinical psychologist in Old

Crow. With tears in his eyes, he stated, "I just want this to stop. Why can't I just go one place and stay there." The custody of the child has oscillated between the plaintiff, Gloria Nukon, residing at the community of Old Crow and his paternal aunt, Ms. Scheffen, who resides in Whitehorse, Yukon.

[8] On April 7, 2005, custody of Clifton was awarded to Ms. Scheffen and Clifton has resided with her since that date.

[9] As of June 13, 2005, Ronald and Dorothy Frost, the godparents of the child, residing in the community of Old Crow were added as parties to these proceedings and they also seek interim custody of the child. They appear to have the complete support of all the Nukon family and other members of the community of Old Crow.

[10] Several court orders have been made respecting custody of the child. The aunts have been the primary litigants. Most significantly, following receipt of a comprehensive custody and access report dated November 1, 2003, prepared by a clinical psychologist for the court, the child was placed with his maternal aunt, the plaintiff Gloria Nukon, residing in Old Crow "... in the hopes of providing a stable long-term supportive environment for the boy, ...". The moves between homes of the two aunts has adversely impacted on the desired stable long-term environment. As noted by the author at paragraph 4 of his report dated September 1, 2005 (Exhibit 4):

In 2003, Clifton expressed considerable frustration and confusion about where he should be living, and clearly had divided and confused loyalties to all the parties who were interested in caring for him. In 2003, the adults involved were also frustrated and angry, and had been involved in several unpleasant disputes over custody of the boy, with all sides claiming that the others did not have Clifton's interests at heart. They also stated that Clifton had told each of them that their home was where he wanted to reside.

[11] According to Ms. Scheffen, she encountered difficulties in contacting the child and arranging for his visits. There have been reciprocal accusations of access blocking by others when residence or custody changed.

[12] Ms. Scheffen's secured an order of interim custody of the child on April 12, 2005, after the plaintiff, Ms. Nukon, failed to return for the child at the end of his visit to Whitehorse in March of this year. As noted by the clinical psychologist in his Custody and Access Report, Exhibit 4, by her own admission "... she turned to drugs and alcohol during her stay in Whitehorse" and "simply walked away from her parental responsibilities. ..." She acknowledged that she did "... not feel she was ready to have custody of Clifton again" and that ... she still "needs to work on things. ..." Clifton was very traumatized by this event. As of this date, the child remains in the custody of Ms. Scheffen.

[13] As further noted by the clinical psychologist, since his first report, there "... have been a number of significant changes in the material and emotional situations of all parties."

[14] The most significant changes happened in Ms. Scheffen's presentation. Amongst other matters, he noted that her conversations were more child-centered, which were signature marks of effective parenting; she expressed belief that better resources for the child existed in Whitehorse; better school programs existed; there were fewer negative resources and with a longer-term placement, Clifton would be able to stay with her through high school. No such school existed not in Old Crow. He noted, as well, that she and Clifton were "much more bonded that they had been in the past" and that the child "... seemed to have a more fully formed and engaged relationships with the other boys

in the home.” The physical environment seemed more organized and she had no plans to return to work, supporting her commitment to act as a mother to the children and always be available for each of them.

[15] Custody and access decisions are inherently exercises of discretion involving a case by case consideration of the unique circumstances of each case. See *Van de Perre v. Edwards* (2001), 2004 D.L.R. 4th 257 (S.C.C.).

[16] Bearing in mind that the paramount consideration in these proceedings is the best interests of the child, the central issue is, which of the two competing applications should be granted – that of the paternal aunt, Ms. Scheffen or his godparents, Ronald and Dorothy Frost?

THE LAW

[17] In resolving custody and access issues, all relevant factors must be considered. In these proceedings, such factors would include the subject of stability, recognition of the importance of Clifton’s cultural heritage, the custodial parents’ willingness to facilitate access and as well, all his needs and circumstances, as stipulated in the provisions of section 30 of *The Children’s Act*, supra. It reads:

30(1) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including

(a) the bonding, love, affection and emotional ties between the child and

(i) each person entitled to or claiming custody of or access to the child,

(ii) other members of the child’s family who reside with the child, and

(iii) persons, including grandparents involved in the care and upbringing of the child;

(b) the views and preferences of the child, if those views and preferences can be reasonably determined;

(c) the length of time, having regard to the child's sense of time, that the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessities of life and any special needs of the child;

(e) any plans proposed for the care and upbringing of the child;

(f) the permanence and stability of the family unit with which it is proposed that the child will live; and

(g) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child.

(2) The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the conduct is relevant to the ability of the person to have the care or custody of a child.

(3) There is no presumption of law or fact that the best interests of a child are, solely because of the age or the sex of the child, best served by placing the child in the care or custody of a female person rather than a male person or of a male person rather than a female person.

...

ANALYSIS

[18] Despite the history of animosity and misunderstanding between the parties, everyone agrees that the existing contacts and relationships which Clifton enjoys should be maintained. The clinical psychologist testified that the child "for his own well being

needs one place”; “it is hugely important that he maintains connection to all” and that “the person who gets custody must allow him to contact other people”. The existing bonding, love, affection and emotional ties that Clifton enjoys would greatly enhance his life if there is continued access and contact by all members of his immediate and extended family in both communities.

[19] Although Ms. Scheffen confirmed she had virtually no contact with Clifton until 6 months ago, As between Ms. Scheffen and the godparents, the strongest emotional bond is with the former.

[20] Ms. Scheffen has demonstrated improvement in her care-giving ability in the last six months and, with the help of others, has greatly improved her parental skills. As noted by the witness Shirley McKay, Ms. Scheffen has “... come a long way in the last couple of years.” All children are treated firmly, fairly and equally. There is no evidence of any physical abuse of any children in her care; she is no longer stressed; “she is always there for them” and “knows where to find support.”

[21] The witness, Kim Marie Rumley, who has maintained a close connection with Clifton, neither expressed concern respecting care-giving by Ms. Scheffen nor by the godparents. The godparents, who are well known to her, were described as “wonderful people” who were “very honest, giving and friendly.” They follow a traditional life-style in the community of Old Crow. Clifton was considered to be part of their family and always appeared to enjoy his time with them. She noted a “very, very special bond” existed between Clifton and his grandfather, Richard Nukon. During the time that Clifton resided in the community of Old Crow, his grandfather performed a central role in preserving and nurturing his cultural identity. He was a major part of his life, he was “always with him”

and went “everywhere with him.” In her affidavit of June 6, 2005, this witness noted at page 10:

Clifton has a very special relationship with his grandfather. They are very close and Richard Nukon has played a major role in ensuring Clifton’s needs are met and he is raised in a traditional way. I believe a long period of separation between Clifton and Richard Nukon could be detrimental to both of them.

Considering the evidence given by the grandfather during these proceedings, there is merit in her observations. Undoubtedly he, as well as his brother Lance and/or his godfather could enhance his connection to his culture, identity and emotional well-being by being role models in his life.

[22] Clifton was described by the clinical psychologist as being a “remarkably solid child; strong and bright”, “very sensitive”, “aware of what is going on” and “tries to please everyone one around him.”

[23] Given his traits, his ambivalence respecting residential preference is understandable. His response depended on the person seeking an expression of his preference and in what community he was residing at the time.

[24] While the subject of education will attract further comment in these reasons, it is suffice to note at this point that Clifton has done well in school, wherever situated. A review of the respective proposed plans for his care and upbringing indicates that while a move to the community of Old Crow would be disruptive, he is not a stranger to the community and its education programs. The community of Old Crow has been his home since birth (with the exception of the last six months) and youth counselling services are available to him on his return.

[25] Given the complexity of the issues and the competing custodial applications, the most recent report of the clinical psychologist is of particular significance. While his recommendations are not binding, nonetheless, his neutrality, training, expertise and experience, as well as prior contact with Clifton and members of his immediate and extended family attract considerable weight.

[26] For more than one reason, his recommendations, which offer “the best of two worlds” to Clifton should be favourably endorsed. As he notes at paragraph 110, and following:

110. In my opinion, a solution that might best address Clifton’s needs for some security now, and some foundation in the future, would be to have him placed in the care of the Frosts in Old Crow, then move to Ms. Scheffen’s home in Whitehorse when he reaches high school age.
111. There are several reasons for the proposal. It is my opinion that the Frosts can likely offer Clifton the most stable, most structured home at this point. Ms. Scheffen’s home is clearly better than it was in the past, but taking on an additional child will be a serious thing, and I’m not entirely convinced the extra burden on Ms. Scheffen serves Clifton or the other children, no matter how well intended.
112. The premise of recommending medium term placement with the Frosts when the principle of permanence has already been discussed might seem inconsistent, but there are two factors that weigh into the suggestion.
113. First, I think the Frosts offer the most *immediately* stable home (though Ms. Scheffen’s home is significantly more stable than in the past) and I think this is key.
114. Second, I continue to believe that Clifton gains something that will be a valuable resource in his future by remaining in Old Crow. He has strong family ties there and will perhaps gain a better sense of his cultural self there than he would in Whitehorse.

115. To dismiss Old Crow as a placement simply because he will have to leave in four years time (as Ms. Scheffen does) suggest that *all* the children there are disadvantaged – as they all have to leave. The success of Clifton's brother Lance is just one example of how the combinations of the offerings from both communities can serve a child well.
116. Ideally, the two arms of the family would be able to work together to offer Clifton the strongest formative experience he can have for the next years in Old Crow while also working on proactively building his relationship with Ms. Scheffen, so that he could move there when he reaches high school age. Having two sequential placement options could be seen as a blessing by a family committed to the child's best interests.

[27] I concur with the observations of Scott C.J.M. in the case of *T.(E.J.) v. V.(P.M.)*(1996), 110 Man. R. (2d) 219 (Man.C.A.) at 223:

[N]o authority is required to make a convincing argument that culture and heritage are significant factors in the development of a human being's most fundamental and enduring attributes. For anyone, aboriginal or otherwise, they are the stuff from which a young person's identity and sense of self are developed. This being so, to suggest that concerns about a child's early upbringing and cultural environment can be addressed as if they were school courses to be taken at some later date totally misses the point.

[28] Ms. Scheffen is a member of the Tr'ondek Hwech'in First Nation. By splitting his education between the two communities, the recommendations of the clinical psychologist will enhance the preservation and nurturing of Clifton's cultural identity: - firstly, as a member of the Vuntut Gwitchin First Nation and secondly, when in the custody of Ms. Scheffen, he will be exposed to and receive the benefit of the culture of the Tr'ondek Hwech'in First Nation.

[29] The importance of education in preserving and nurturing cultural identity was noted by Croteau J. in *Cree School Board v. Canada (Attorney General)*, [1998] 3

C.N.L.R. 24. At page 49, he states:

Education is the instrument through which cultures perpetuate themselves. It is the process through which the members of a society assure themselves that the behaviour necessary to continue their culture is learned. ...

The school is concerned with the transmission, conservation and extension of culture. Cultural transmission and personality formation are perhaps the two most important functions of the school ...

CONCLUSION

[30] On balance, after considering all factors which impact the best interests of the child, especially the special relationship with his grandfather, his connection to the community of Old Crow and the importance of continuity with his identity and aboriginal heritage and culture, the parenting and family environment of his godparents, at this stage of his life, is superior and better serves his best interests. When Clifton attends high school, the parenting and family environment of Ms. Scheffen would be superior and better serve his best interests. In the result, until the commencement of his high school education in Whitehorse, Yukon, the godparents are awarded interim custody of Clifton. Thereafter, Ms. Scheffen will be granted custody. The access regime proposed by learned counsel during the spring and summer breaks is adopted. The non-custodial party(s) will have custody of Clifton for one week during spring break, and one month during the summer vacations. The non-custodial party will provide the other(s) with reasonable notice by e-mail or letter of the day the access is to commence.

[31] Telephone access is limited to Sunday of each week at 7 p.m. The party seeking the child to place telephone calls shall provide Clifton with a prepaid calling card. There is no restriction regarding mail or internet access. Air transportation costs shall be split, with the party receiving the child being responsible for the cost of that portion of the flight. Should Clifton attend Whitehorse, Ms. Scheffen is to receive timely notice to visit with him.

[32] Under the provisions of section 35 of *The Children's Act*, supra, the Court shall not make an order varying an order in respect of custody or access unless there has been a material change in circumstances that affects, or is likely to affect the best interests of the child. Despite most persuasive reasons, to the contrary, I have not been persuaded to make any order respecting any future application(s).

[33] I will hear counsel regarding costs.

DARICHUK J.