Date: 20030509
Docket No.: T.C. 93-0734
Registry: Whitehorse

Re: Matter of S.C. and D.C.
AND in the matter of an application
pursuant to s. 137(5) of the Children's Act,
2003 YKTC 40

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Judge Faulkner)

IN THE MATTER OF THE CHILDREN'S ACT, R.S.Y.,
1986, C. 22, AS AMENDED, AND IN PARTICULAR S. 128;

AND IN THE MATTER OF S.C. AND D.C;

Sheri Hogeboom	Appearing for the Director of Family and Children's Services
David Christie	Appearing for the Father
Nils Clarke, as agent for Malcolm Campbell	Appearing for the Mother
Lynn MacDiarmid	Appearing as Child Advocate

DECISION

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[1] FAULKNER T.C.J. (Oral) S.C. and D.C. are presently in the care and custody of the Director of Family and Children's Services and reside in a foster home. The Director's application for a permanent care and custody order is set for trial in the fall.

[2] This application is by the father of the children for review of the access arrangements that have been made by the Director in respect of both children.

[3] Essentially, the father wants access increased so that the children can attend a three-week-long healing program camp organized by the Kwanlin Dun First Nation. The camp in question will be held at Jackson Lake near Whitehorse.

[4] The father's application is supported by the children's mother, who is separately represented in the proceedings, and as well by the child advocate.

[5] It should be mentioned with respect to the father's application, that the material that I was provided with, with respect to the proposed Jackson Lake program, is that it is both intended for and designed to accommodate whole families and the father's application should be understood in that context.

[6] The Director's position is that she is unsure whether or not the children wish to go to the camp. There have also been some difficulties with past access, although these have not been of a dramatic nature.

[7] The Director, therefore, proposes that the children initially go to the camp for two hours after school, on two days during the first week of the camp, and then all day on the first Saturday of the camp. After that, the Director would reassess the situation. If things have gone well she might then decide that the children could attend the remaining two weeks of the camp on a full-time basis.

[8] Before moving ahead to deal with the merits of the application, I should mention one additional matter. The Director raised a jurisdictional issue at the outset. Ms. Hogeboom, who is counsel for the Director, argued that ordering the children to attend the camp effectively ordered the Director to give up care and custody of the

children to a third party for a period of three weeks. Such an order, she said, would be outside the jurisdiction conferred on the court by the *Children's Act*. It seems to me, however, that, properly characterized, this is an application for access. Although the applicant seeks access for a period of three weeks, the application is not different in principle from an application for an overnight visit.

[9] The court has jurisdiction to deal with access issues in two separate situations. The first is where it is alleged that access is being unreasonably withheld and an application is brought under s. 137(5) of the *Children's Act* to review the matter. The second situation is where a care and custody order has been granted on conditions specifying access and there is a disagreement respecting the interpretation of the order or, alternatively, if there is an allegation that the order is being breached.

[10] This application is a s. 137(5) application. As such, as I made clear in *K.B. (Re),* [1998] Y.J. No. 187, the court's power to intervene is seriously proscribed by the provisions of the *Act*. To succeed, it must be shown that the Director is unreasonably withholding or restricting access. In this case, it appears that the children, who are ten and eleven at this point in time, have been under the Director's care since last summer, their apprehension being as the result of alcohol abuse by both parents. Following the initial apprehension, the parents did not even see the children for the remainder of 2002 and contact between the parents and the children was only re-established in late February of this year. So far, this access has been supervised and of limited duration.

[11] In the Director's view, as indicated in the affidavit of Ms. Blysak, there have been some problems with the visits, although, as I indicated earlier, these were not of

a dramatic nature but amounted to the social worker's concerns about inappropriate comments and actions by the mother during the course of the visits.

[12] When the possibility of attending the Jackson Lake camp was first presented to the children they apparently did not want to go. Later, as the matter was discussed further, they became non-committal. As recently as May 5th, the Director had no indication that the children were particularly interested in attending the camp. However, according to the child advocate, Ms. MacDiarmid, she has spoken to the children very recently and both now want to attend. Without going into the various affidavits and representations in court in detail, the best I can say is that, at the end of the day, it appears that the children are somewhat ambivalent about the camp and that their motivations for variously deciding not to go or to go are unclear.

[13] With this background, the Director is saying that she is willing to send the children to the camp, but wants to begin with day visits to see how things go. If everything is fine, the children will be permitted to attend the remainder of the camp on a full-time basis.

[14] As the *K.B.(Re), supra,* decision makes clear, it is not open to the court to simply substitute its judgment as to the children's best interests for the decision of the Director. The test is not whether some other arrangement could be made, or that another parent might have made a different decision. Even if I was personally of the view that letting the children attend the camp full-time from the outset was the preferable course, the *Act* does not permit the substitution of my views for those of the Director unless she has acted unreasonably.

[15] In this case, it appears that the Director's decision does have a rational and reasonable basis. The children's wishes in the matter are unclear, and the history of access to date counsels some caution in moving immediately to unsupervised access for a full period of three weeks.

[16] There is no suggestion here, as in *D.I.(Re),* (6 May 2003), Whitehorse T.C. 02-T0032 (Y.Terr.Ct.) decided by me, that the Director has acted with an improper or oblique motive. Rather, this case is more similar to the situation in *K.B.(Re),* supra, or in *C.W. (Re),* 2001 YKTC 44 (Y.Terr.Ct.).

[17] Accordingly, the application will stand dismissed.

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FAULKNER T.C.J.