SUPREME COURT OF YUKON

Citation: *RKK v BMM*, 2016 YKSC 59

Date: 20161121
S.C. No. 08-B0053
Registry: Whitehorse

BETWEEN:

RKK

PLAINTIFF

AND

BMM and RS

DEFENDANTS

Before Mr. Justice L.F. Gower

Appearances:

Debbie P. Hoffman	Counsel for the plaintiff
André W.L. Roothman	Counsel for the defendant, BMM

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the mother for an order recommending the appointment of a child lawyer, pursuant to s. 168 of the *Children's Law Act*, R.S.Y. 2002, c. 31, (the "*Act*") for the child, M, who is almost 14 years old and was diagnosed with autism when he was four years old. The purpose of the child lawyer will be to present M's views and preferences at a subsequent hearing when the parents will be making cross-applications for sole custody of M. The father opposes the application because he says the risk of harm to M, by involving a child lawyer, outweighs any potential benefit in having his views and preferences considered by the court on the custody issue. In particular, the father submits: (1) M may not be capable of expressing his views and

preferences; (2) M's views and preferences change depending upon which parent is acting negatively towards him, i.e. he protects himself by aligning with the parent from whom he fears negative repercussions; and (3) should M favour residing with his father, there is a significant risk that he will be punished by the mother.

[2] Pursuant to a consent order dated January 11, 2010, which I will discuss further below, this application came on before me as a binding judicial arbitration on the basis of affidavit evidence and written submissions. Reference was also made to other materials on the court file. Because I did not have a written binding arbitration agreement from the parties, I confirmed on the record at the outset of the hearing that the parties have agreed that they will not appeal this ruling unless there is a breach of the rules of natural justice or an error of law.

LAW

[3] Section 30(1)(b) of the *Act* requires the court to consider the views and preferences of the child in determining the best interests of the child regarding custody or access, providing those views and preferences can be reasonably determined:

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

[4] This provision was considered briefly by Deputy Justice Martinson of this Court in *BJG v DLG*, 2010 YKSC 44. In that decision, Martinson J stressed that, as a result of Canada's ratification of the *United Nations Convention on the Rights of the Child*, all

children in Canada have legal rights to be heard in all matters affecting them, including custody cases. In particular, the *Convention* provides that: (1) children who are capable of forming their own views have the legal right to express those views; and (2) they also have the legal right to have those views given due weight in accordance with their age and maturity.[1] Martinson J noted that the *Convention* does not make an exception for high conflict cases, nor does it give decision-makers the discretion to disregard these legal rights because of the particular circumstances of the case or the view the decision-maker may hold about children's participation.[2]

[5] A key premise of these legal rights, continues Martinson J, is that hearing from children is in their best interests.[3] She opined that many children want to be heard and understand the difference between having a say and making the decision.[4] This gives them a voice, but does not require them to make the choice.[5] Martinson J goes on to state that hearing from children can beneficially "lead to better decisions that have a greater chance of success".[6] Thus, an inquiry should be made in each case to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate.[7] That said, there is no requirement that children participate, there being "no doubt that children's safety must be a paramount consideration".[8]

[6] In determining whether a child is capable of forming his or her own views, Martinson J says the inquiry focuses on whether they have the "cognitive capacity" to do

[1] At para 3.
[2] Ibid.
[3] At para 4.
[4] Ibid.
[5] At para 28.
[6] At para 4.
[7] At para 6.
[8] At para 25.

so and to communicate those views.[9] This capacity assessment should also be considered in determining the weight to be given to the child's views in accordance with their age and maturity.[10]

[7] This issue of capacity was also addressed by Veale J of this Court in *Baxter v Benoit*, 2004 YKSC 60, which is a decision about the role of lawyers representing children in custody proceedings (then referred to as child advocates) and the methods employed in presenting the evidence of those children. In that case, Veale J made a distinction between the child lawyer informing the Court of the instructions or position of the child, where capable, and the evidence of the child's views and preferences explaining or supporting those instructions or that position.[11] While it is acceptable for the lawyer to relay the former, it is unacceptable for the lawyer to put him or herself in the position of a witness giving evidence about the latter.[12] Veale J referred with approval to *Re W* (1980), 13 RFL (2d) 381, a decision of Abella J, as she then was, sitting as an Ontario Provincial Court Judge. There, Abella J stressed that the role of a lawyer representing a child is no different than the role of a lawyer acting for any other party - he or she must carry out the client's instructions and protect the client's interests.[13]

[8] Veale J noted[14] that the entire judgment in *Re W* was well summarized by Stuart J of the Territorial Court in Re *Christophe Chartier* (1981-2), 3 YLR, at 731. Veale J quoted Stuart J as follows, and then continued as below:

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[9] At para 27.
[10] Ibid.
[11] At para 33.
[12] At para 25.
[13] At para 26.
[14] At para 27.

> 1. Where the child is sufficiently competent and mature to provide clear instructions, the child advocate's task is similar to the task of representing an adult. In such circumstances the child advocate should not take any separate position than the child's instructions.
>
> 2. Where the child is not sufficiently mature to provide instructions but has some preferences, the child advocate must present evidence in support of the child's preferences and must as well present to the court all evidence the child advocate considers germaine (*sic*) to determine the best interests of the child.
>
> 3. Where the child is unfit, or simply incapable of giving instructions, or stating a preference, the child advocate must lead all evidence relevant to determine the best interests of the child and should submit to the court the child advocate's perception of the best interests of the child.

> 28 Stuart T.C.J. went on to say that a court must allow a child advocate latitude to represent the child's instructions and the child advocate's perceptions. The child advocate must be "resourceful, imaginative and sensitively attuned to the nature of the proceedings".
>
> 29 However, Abella J. warns the child advocate not to express or substitute their opinion for that of the child. It is then that the child advocate risks assuming the role of the judge…

[9] Veale J further stated that while a parent can object to a child lawyer expressing the instructions or position of the child on the ground that the child is not capable of giving instructions, or that the child has been improperly influenced by a parent, such an objection does not necessarily determine whether the court will allow the instructions or position to be stated by the child lawyer.[15]

[15] At para 34.

[10] In *Baxter*, Veale J also addressed[16] the requirements of the capacity of the child to instruct legal counsel by quoting from an article entitled *Counsel for Christopher: Representing an Infant's Best Interests in the Supreme Court of Canada*, (1983) 33 RFL (2d) 16. The article was written by Mr. David C. Day, who had represented a five year old child, in a case before the Supreme Court entitled *Re Beson et al and the Director of Child Welfare for Newfoundland* , (1982) 142 DLR (3d) 20 (SCC). As for the capacity to instruct counsel, Mr. Day wrote as follows:

> Counsel would not act as an advocate pursuant to Christopher's instructions (as he would on an adult's behalf) unless satisfied Christopher was capable, inter alia, of:
>
> > (1) Communicating, voluntarily, to counsel, instructions which were rational and reasonable;
> >
> > (2) Clearly and fully understanding counsel's advice; and
> >
> > (3) Appreciating the nature and legal significance for him, or judicial proceedings (including adjudications) in which Christopher had an interest.

[11] Veale J also confirmed in *Baxter* that a child in family litigation has all the rights of a party. At para 39 of his reasons, he set out a non-exhaustive list of the various rights, this gives rise to in proceeding with the litigation, including receiving copies of all professional reports, records and documents relating to the child, whether in the possession of a parent or a third party. Finally, Veale J commented that when a lawyer is dealing with a child of "diminished capacity", this does not relieve the lawyer of the

[16] At para 36.

legal obligation to represent the client, but may result in greater efforts to interview other people in the child's life.[17]

ANALYSIS

[12] This clearly is a high conflict family dispute. The litigation has been ongoing since 2008 and I have been seized of the matter since then. My reasons cited as *RKK v BMM et al*, 2009 YKSC 33 provide background to this application.

[13] On January 11, 2010, the parties effectively entered into a consent order to share joint custody of M and his sister C, who is currently 17 years old. By way of a subsequent consent order on April 14, 2015, the mother transferred custody of C to the father, however the parties continue to have joint custody of M and he resides with each parent on a week-on, week-off basis. The 2010 consent order also required the parents to have M assessed, because of his autism, by a private mutually agreeable assessor, with agreement on the assessor's appointment to be made no later than February 28, 2010. That did not happen, and has not yet happened, and pursuant to another clause in the 2010 consent order, the parties agreed to go to binding judicial arbitration if they were unable to agree upon an assessor "or any other joint decision" that must be made by the parents for the children. That arbitration is scheduled to take place before me on February 9, 2017, and will also include the cross-applications for custody of M.

[14] One of the father's principal concerns about a child lawyer representing M, is that the mother may be able to manipulate, to her advantage, the views and preferences M expresses to his counsel.

[15] Here, the father points to various passages in a psychological report prepared by Dr. Allan Posthuma, dated December 14, 2010, pursuant to an earlier order I made at

[17] At para 38.

the request of the parties. The parties shared the cost of that report. The assessment involved: interviews of both parents and their partners; observations in their respective homes of them interacting with their children; separate interviews with both children; interviews with teachers, counsellors, and relatives; and psychological testing of the children and the parties. In the report, Dr. Posthuma expressed concern that M was prone to "parroting" his mother's words and sentiments. He also felt that C had been "coached directly and/or indirectly by her mother". Dr. Posthuma further commented on the "problematic relationship" that the mother has with the children. He did not express much hope that the mother was either willing or able to change her position on the children having a significant and viable relationship with the father. Dr. Posthuma further found that the mother was continuing to sabotage C's relationship with her father and that she appears to have "great difficulty appreciating the importance of healthy, supportive relationships for the children".

[16] The mother's counsel dismisses the probative value of Dr. Posthuma's report because it is now almost six years old and because there have been subsequent professional complaints against Dr. Posthuma, which go to his credibility. I note there is no evidence of the latter before me on this application.

[17] As for the datedness of the information regarding the mother, the father's counsel points to a relatively recent email from the mother to the father, dated October 16, 2016, involving a dispute about whether the mother was continuing to contribute to a registered educational savings plan for C. Although there has not yet been cross-examination about that email, or any of the affidavits or other matters, and without

prejudging how I may rule on the custody issue regarding M, I take the email to be evidence of the mother's continuing and rather vitriolic anger towards the father.

[18] In summary, the father submits that the risk of harm to M by the intervention of a child lawyer far outweighs any potential benefit from obtaining his views and preferences. Accordingly, M's best interests should be paramount and I should decline my jurisdiction to make a recommendation for such an appointment. More particularly, the father's arguments are as follows.

[19] The first concern is that M may not be capable of expressing his views and preferences. If that is the case, then the child lawyer will have to make a greater effort to interview others about M's life, in order to discharge the legal obligation of representing him, as suggested by Veale J in *Baxter*. Further, as suggested by Stuart J in *Chartier*, even though a child may be incapable of giving instructions or stating a preference, that does not mean that they are not entitled to the benefit of a child lawyer who can nevertheless lead relevant evidence relating to the child's best interests, including the counsel's "perception" of those best interests. The child lawyer will also have access to the entire court file and any other relevant documents. Finally, the child lawyer will be independent of the parties and will be professionally obliged to act in M's best interests. For this last reason, I do not agree with the suggestion by the father's counsel that it is sufficient to rely upon counsel for the parties to produce whatever collateral information may be of assistance to the Court, since counsel will naturally be looking to produce information which favours their respective clients.

[20] The second particular concern expressed by the father is that M's views and preferences change depending upon which parent is acting negatively towards him.

More specifically, if M feels that he will suffer negative repercussions from his mother for saying things against her, this will impact the truth of his statements about his views and preferences. Here, I tend to agree with the mother's counsel that this risk cuts both ways, in the sense that M may also fear saying negative things against his father for the same reason. Further, an experienced child lawyer, who has familiarity with the history of this file, including the two reports of Dr. Posthuma, will be alive to this risk.

[21] The third and final reason the father does not want the child lawyer to get involved with M, is that if M should favour residing with the father, there is a significant risk that he will be punished by the mother. Here, the father's counsel points to the unpleasant history of what has happened between the mother and C, since the mother turned over custody of C to the father. Apparently C and the mother have not spoken for about a year and a half and C is currently under the care of a psychiatrist. While it would be an extremely unfortunate outcome if the mother turned against M for preferring to reside with the father, that is a bridge that is yet to be crossed in terms of what is in M's best interests. At the moment, the fear is speculative and, if problems arise, it may be that appropriate conditions will have to be imposed to protect M from such negative repercussions. In any event, hearing from M, either directly or through the child lawyer, will assist this Court in determining his best interests. In that sense, the probative value of that evidence outweighs a hypothetical negative outcome.

[22] At the end of the day, what tips the balance of probabilities in the mother's favour regarding the recommendation that a child lawyer be appointed, are the affidavits she filed from two caregivers who have been extensively involved with M. The first is from AS, who is now retired but used to be an educational assistant for M from August 2008

to January 2015. Her affidavit was sworn on January 5, 2016, and does not specifically address the issue of whether M should be assisted by a child lawyer. Nevertheless, it does indicate that AS, as an objective professional closely involved with M, was able to learn certain things about M's views and preferences about his two households, especially during the last term she spent with him until January 2015. AS was also able to discern that over the past seven school years that she has observed M, he has exhibited a love for each of his parents, although the way he has interacted and behaved in their presence and talked about them during the course of the day has been quite different. The father's counsel expressed some concerns about AS's objectivity, because of her friendship with the mother. However, subject to cross-examination on her affidavit, I was favourably impressed with how AS dealt with this issue:

> I would like to make it clear that over the past seven years that I have had a friendship with each of the parents outside of school though significantly more so with [M's] mother. This has also afforded me the opportunity to have a friendship with [M] outside of my professional role. To the best of my ability, I have not used any experiences, observations, or thoughts arising from these friendships to impact what I say in respect to my observations in my professional role at school.

On this basis, I am satisfied that her evidence, to the extent it touches on M's capacity to give his views and preferences, is objective.

[23] The second caregiver is SR. She is a support worker who has known M since birth. SR has known the mother for many years and came to know the father through her relationship with the mother. She has deposed that she respects both parents and is well aware that they have different approaches in raising M. SR further deposed that she has had regular contact with M since he was little and, over the years as he has

grown older, she and M. have been spending more time together. For example, every summer she and M go on a three-night camping and/or kayaking trip. More importantly, SR deposed that, although sometimes M lives in a make-believe world:

> …he can be very serious when I tell him that I want to have a serious discussion about something. He has a good memory and the ability to follow through with things…
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> …
>
> [M] speaks a lot to me and expresses his feelings towards his mother, father, stepmother, stepfather and sister to me…
>
> …
>
> Based on my interaction with [M] over the years, I am of the belief that [M] is in full and capable mind to make a choice about his residential arrangements and express those to a child lawyer.

[24] This latter affidavit is one of the very few pieces of objective evidence in this high conflict case in recent years, and I give it significant weight. Although the father's counsel similarly hinted at the lack of objectivity of this witness because of her friendship with the mother, the father did not challenge this lack of objectivity in his subsequent responsive affidavit. He did say that he thought what M tells SR may be aligned with what M might say to his mother, because M knows that she is a close friend of his mother's. However, this concern does not address the more significant point about whether M has the capacity to provide his views and preferences to a child lawyer. SR knows M. very well and she thinks that he does have sufficient capacity.

CONCLUSION

[25] I am persuaded on balance that it is in M's best interests that I recommend the appointment of a child lawyer to represent him in the upcoming custody arbitration.

[26] Counsel and I discussed briefly during the hearing of this application the sensitive nature of M's condition as a result of his autism and the need for equally sensitive, as well as experienced and creative, counsel to be appointed as his representative. While that decision is clearly within the discretion of the Official Guardian, who in this case is the Public Guardian and Trustee, I would add to my recommendation that serious consideration be given to approaching either Kathleen Kinchen or Shayne Fairman for this role. I say this because both are experienced family lawyers in the Whitehorse bar and both have had extensive experience serving in the role of child's lawyer.

[27] If the Official Guardian agrees to appoint a child lawyer for M, because of the particularly sensitive and somewhat unusual circumstances of this case, and out of an abundance of caution, I would add the following non-exhaustive list of suggestions for the child lawyer:

1) Counsel should consider involving SR in any interviews of M;
2) M should be told that he is not being made responsible for making the custody decision and he will not be asked to do so;
3) M should be told that the court will not make a decision based only on his wishes;
4) M should be told that the child lawyer will keep the discussion private and will only report what M agrees that he or she may report;
5) M may be asked whether the parent bringing him to any interview with the child lawyer had wanted him to say something in particular to the lawyer;
6) M should be asked if there is anything he specifically wants to convey to the judge or to his parents; and

7) M's statements should be reviewed at the end of each interview with the child lawyer and M should be asked to confirm that the lawyer may disclose those statements to his parents and the judge.

[28] In closing, I want to remind counsel of another point I raised at the hearing. That is whether the upcoming arbitration on February 9, 2017 should deal firstly with the issue of the reassessment of M's autism (i.e. whether that should occur at all, and if so by whom) or whether the issue of which of the parents should have sole custody of M should go first. It strikes me that the latter may be a more logical starting point, because the parent who has sole custody will also presumably have the authority to determine if an assessment should take place and by whom. I encourage counsel to discuss this further between themselves and return to case management if necessary.

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GOWER J.