

IN THE SUPREME COURT OF YUKON

Citation: *C.L.F.S. v. M.S. et al.*,
2008 YKSC 20

Date: 20080229
S.C. No. 07-B0030
Registry: Whitehorse

Between:

C.L.F.S.

Plaintiff

And

**M.S., C.G.
and W.G.**

Defendants

Publication of the name of the children, the children's parent or identifying information about the children is prohibited by section 173(2) of the *Children's Act*.

Before: Mr. Justice R.S. Veale

Appearances:

Elaine Cairns
Jennifer Cunningham
J. Robert Dick

Counsel for the plaintiff
Counsel for M.S
Counsel for W.G.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for the interim custody of two children, ages five and four. The biological mother and father have both participated in the proceeding but neither are capable of raising the children at this time. The custody dispute is between a mother who has looked after the children at the request of the biological mother for approximately 11 months in Whitehorse (the Whitehorse mother) and the paternal grandmother who

resides in a Northwest Territories community and makes her application for custody with the support of the biological mother and father. The paternal grandmother resides in a small northern community with road access to and a great distance from Whitehorse. The biological mother and father also reside in the same community as the paternal grandmother.

[2] There is a cultural component to the applications. The mother, father and paternal grandmother are Gwitchin and the northern community they reside in is also Gwitchin. The mother in Whitehorse is also of Gwitchin ancestry and is distantly related to the paternal grandmother.

BACKGROUND

[3] The biological mother and father have been raising the children with some difficulty. They both appear to have addiction and abuse issues which came to a head in March 2007. The biological mother, who comes from a small northern Yukon community, was no longer able to parent her two children. The maternal grandmother arranged for the children to be brought to the home of the Whitehorse mother who immediately took the children in. The children have resided with the Whitehorse mother since March 28, 2007. The biological mother has had very little contact with the children during this time. The biological father was incarcerated at the Whitehorse Correctional Centre from April to July 2007. When he was released, he and the paternal grandmother wanted to pick the children up from the Whitehorse mother and return them to the Northwest Territories community that they reside in.

[4] The mother in Whitehorse clearly did not want the biological father and the paternal grandmother to have custody of the children. While there is no evidence that the

children were left in the custody of the Whitehorse mother by the biological mother on a permanent basis, the Whitehorse mother was clearly reluctant to place the children in the custody of the biological father and paternal grandmother who had had little if any contact with the children for the previous three months.

[5] The Whitehorse mother commenced a custody application on July 25, 2007. There was a great deal of difficulty in serving the biological mother and father. A substitutional service order was made on August 7, 2007, and the application of the Whitehorse mother was adjourned to October 23, 2007, and subsequently to November 6, 2007. On the latter date, the biological mother and father were represented by counsel but were not ready to proceed on the merits of the application. Because of the delays in the matter, I felt it appropriate to grant interim interim custody of the children to the Whitehorse mother on November 6, 2007, with reasonable access to the biological parents in Whitehorse.

[6] In November 2007, the biological father filed an application for custody of the children in the Northwest Territories community that he resided in with his mother. This application was clearly dependent upon the paternal grandmother and shortly after, she filed her own application for custody of the children with the support of the biological father and mother who were both residing in the same Northwest Territories community as well. Thus the custody dispute is essentially between the paternal grandmother in the Northwest Territories community and the mother in Whitehorse

The Whitehorse Mother

[7] The Whitehorse mother comes forward on the basis that the children have essentially been abandoned into her care and she is prepared to continue to care for them. She has a five-bedroom home and six children, one of whom is her biological

child, two of whom are relations and the two children who are the subject of this application. The sixth child is presently in her care but not related to her. There is no question that she has provided a stable home for the children and now wants to make what was a temporary arrangement, a more permanent one. She has raised the two children without financial assistance from the biological parents. She is presently attending college to become a home support worker and nursing aide attendant. She has also enrolled the children at the Child Development Centre in Whitehorse to assist them with their below average speech.

[8] Unfortunately, the relationship between the Whitehorse mother and the biological parents and paternal grandmother is somewhat hostile. Although access to the children has been ordered by the court, it has been difficult to arrange, particularly when the paternal grandmother and the biological parents are traveling to Whitehorse from the distant Northwest Territories community. The Whitehorse mother has also alleged that the biological parents sexually touched the children during one of the access visits. The Whitehorse mother informed a local social worker who advised her to ensure that the access was supervised. She also visited a doctor with the children to have them examined. Neither the doctor nor the social worker have provided any evidence in this matter.

[9] The biological mother was shocked by the allegations made by the Whitehorse mother. When informed of the allegation, she immediately contacted a social worker at the Family and Children's Services branch in Whitehorse as well as the RCMP. The intake social worker investigated the allegations with an RCMP officer in attendance and reported as follows:

"Neither child disclosed any concerns regarding any sexual abuse by any person, nor did they disclose any concern regarding how they are/were being cared for by any caregiver.

At this time Family and Children's Services has no information that suggests that the children are being harmed by any caregiver and as such, is not verifying any alleged abuse or neglect by any caregiver."

[10] I am satisfied that the allegations of sexual touching are without merit.

The Paternal Grandmother

[11] The paternal grandmother resides in a three-bedroom home in her Northwest Territories community. She indicates that she brings her application for custody with the support of the maternal grandparents who reside in a northern Yukon community. She comes well recommended from her community. She is the coroner and is permanently employed with the government of Northwest Territories as a community health representative. She will enrol the children in the Head Start Program in that community. She is thankful that the Whitehorse mother intervened to support the children when her son and daughter-in-law were not capable of looking after the children. However, she indicates that access to her grandchildren has been difficult.

[12] The paternal grandmother has the support of the biological mother and father in her application for custody. This has turned out to be somewhat of a mixed blessing. The biological mother and father are still struggling with alcohol and abuse issues. They originally indicated that they would reside together in the Northwest Territories community but after an incident between them, they will be residing separately in that community. To the credit of the paternal grandmother, her home is alcohol and drug free and she demonstrated this by having the RCMP remove her daughter-in-law from her home when

she was consuming alcohol. This action on the part of the paternal grandmother against her daughter-in-law resulted in the biological mother temporarily withdrawing her support from the paternal grandmother in her custody application. This evidence came to light from the Whitehorse mother who taped a somewhat incoherent conversation with the biological mother apparently after the incident with the paternal grandmother. The biological mother, who was not aware that she was being taped and clearly has continuing substance abuse issues, once again supports the paternal grandmother's custody application. She does so on the basis that she will have better access to her children and the possibility that she may once again assume her role as mother of the children when she has successfully completed a treatment program.

The Best Interests of the Children

[13] These custody applications are brought under the *Children's Act*, R.S.Y. 2002, c. 31. Section 33 states that in addition to the parents of a child, any other person including the grandparents, may apply to the court for an order respecting custody or access to a child. There is no question that the best interests of the children is the test to be applied. The *Children's Act* also gives some guidance in section 30(1) as follows:

“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 necessaries (sic) 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.

[14] I have concluded that the Whitehorse mother and the paternal grandmother are both capable and suitable to have the interim custody of the children. They both have suitable homes and a sincere interest in the well-being of the children. Both appear to be capable of financially supporting the children without depending upon the biological mother and father. Counsel for the Whitehorse mother submits that it is really a question of stability versus the biological family. There is some merit to this submission in the sense that the Whitehorse mother has provided the children with a window of stability that their biological parents have not. On the other hand, there is clearly a hostile relationship between the Whitehorse mother and the paternal grandmother and the biological father. The biological mother has also expressed her access difficulties as well. I am concerned that if interim custody is granted to the Whitehorse mother, the

connection of the children to their biological parents and grandparents will not be well served. This is not to say that the ability to have reasonable access by the biological family is the single most important factor in the determination of the best interests of the children. However, the children are both still very young with the eldest about to enter school. I have concluded that it is in their best interests to reside with their paternal grandmother in the Northwest Territories community with its strong Gwitchin cultural focus and proximity to their biological parents. I am satisfied that the paternal grandmother will provide a stable home for the children and monitor their parental access to occasions when the biological parents are sober and substance free. I am therefore granting interim custody to the paternal grandmother on the following basis:

- 1) that the children reside in her residence which shall be alcohol and drug free at all times;
- 2) that neither biological parent shall reside at the paternal grandmother's residence unless they are not consuming or in possession of alcohol or drugs;
- 3) that the paternal grandmother may provide reasonable access to the children to both biological parents who must not consume alcohol or drugs at all times during that access;
- 4) that the paternal grandmother's interim custody of the children shall not be relinquished to a biological parent except upon application by the biological parent to this Court;

- 5) the Whitehorse mother shall have reasonable access to the children as agreed upon with the paternal grandmother;
- 6) the biological parents shall pay child support for the children to the paternal grandmother according to the Child Support Guidelines;
- 7) the biological father shall pay child support according to the Child Support Guidelines to the Whitehorse mother from April 1, 2007, to and including February 1, 2008;
- 8) the biological father shall produce his financial information being his last three years income tax summaries or information and present pay stubs to the Whitehorse mother and the paternal grandmother within 30 days of this order.

[15] There will be no order as to costs and I ask that counsel advise if any directions need be given regarding the transfer of the children to the paternal grandmother.

VEALE J.