Re: Matter of D.I.
AND an application for
a permanent care and custody order,
2003 YKTC 39

Date: 20030502
Docket No.: T.C. 02-T0032
Registry: Whitehorse

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 D.I.

Zeb Brown — Appearing for the Director of Family and Children's Services

Malcolm Campbell — Appearing for the mother

REASONS FOR JUDGMENT

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[1] FAULKNER T.C.J. (Oral): This is an application by the mother of D.I. for increased access to her child, who is presently in the care of the Director.

[2] Her allegation, with which I agree, is that access is being unreasonably withheld. In my view, it is unreasonable to withhold access as a means of coercing the parent into complying with the Director's wishes.

[3] It is clear to me, from Ms. Pare's comments last Monday, taken together with the affidavit that she has filed, that access was in fact cut back for this reason. There were two additional reasons advanced, the first being that it was appropriate to reduce access as the Director was now seeking permanent custody of the child. The third reason advanced was essentially that of lack of resources.

[4] Now it appears that the positions of the parties are as follows: The Director is prepared to countenance access Monday through Friday, between the hours of 12:45 p.m. and 5:30 p.m. The applicant seeks to have access Monday to Friday between the hours of 10:00 a.m. and 5:00 p.m. If you do the math, it will at once be observed that the difference we are arguing over here is some two hours and 15 minutes per day.

[5] It is regrettable, in my view, that the parties have not been able to bridge this gap through discussion. Since they cannot do so, it is up to the court to settle the matter.

[6] It seems to me that the most compelling feature of this particular case is the now impending permanent care application. Obviously, the amount of access that is in the best interests of this child may vary depending on whether or not the child is going to be going into permanent care or is going to back to her mother.

[7] In my view, the Director has not shown that the success of their application, which is now to be heard in October, is inevitable. Accordingly, it seems to me that access reasonably should be set on the basis that the future long term care of the child is in doubt. It may be with the Director. It may be with the mother.

[8] That being the case, the Court is faced with somewhat of a balancing act and it seems to me the best way to approach the matter is to say the status quo is the safest course to follow at this point in time.

[9] Now, the Director would say that the status quo is that there should be access

from 12:45 p.m. to 5:30 p.m. and that was always their policy. However, it is clear from Ms. Pare's affidavit that, in fact, many of the visits started before that time. At the same time, it does not appear that there was any clear pattern of visits beginning at 10:00 a.m., as the mother contends. Most of them, indeed, all but three, started after 11:00 a.m.

[10] I should also say, with respect to what is in the best interests of the child, that there was some argument about whether or not the child was better off in daycare, where she could be socialized, or with her mother. I do not find any evidence that would suggest that being in the daycare is superior to having the child with her mother. There is no evidence that she has acted inappropriately during the visits, or that visits with the mother are harming the child.

[11] So as I said earlier, what should happen is that status quo ante should be reinstated. The actual pattern, as revealed by the affidavits, is that many of the visits did start before the time contended for by the Director. But equally, many, if not all of them, started after the time contended for by for Ms. I. If I had to pick a time, I would suggest that the most appropriate time would be something around 11:30 a.m. or 11:45 a.m., which is the time after the child has had her lunch, and would probably be the most appropriate and least disruptive time for her to leave the daycare.

[12] So given that the parties seem to be unable to deal with anything other than specifics, I will specifically direct that access be allowed between the hours of 11:45 a.m. and 5:30 p.m., Monday through Friday. That, of course, does not preclude other visits being arranged on the weekends or otherwise, as has occurred on occasion in the past.

[13] Given the history of this matter, I will remain seized of this particular application in the interim between now and the proceedings on the permanent care application, should there be any additional difficulties in sorting out the matter of access.

[14] MR. BROWN: Thank you, Your Honour. Just a point of clarification so that we don't run into any silly little problems. The times that Ms. Pare refers to in her affidavit, the 12:45 p.m. and the 11 a.m., 12 noon and all that, are the times when the family support workers arrives at Ms. I.'s house to pick her up and go to the daycare. Is that what you mean by 11:45 a.m., that the family support worker would arrive at Ms. I.'s home at 11:45 a.m.? Or that they would arrive at the daycare at 11:45 a.m.? Just so that we're all clear on that.

[15] THE COURT: Mr. Campbell?

[16] MR. CAMPBELL: I believe I'm clear on your order, access starts at 11:45 a.m. and goes to 5:30 p.m.. That's when Ms. I. is with the child, I assume. I mean, it's from downtown to Riverdale.

[17] THE COURT: That was my intention, that she would be picked up, she - meaning the child - would be picked up around 11:45 a.m..

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FAULKNER T.C.J.