

Citation: *In the matter of H.T.*, 2006 YKTC 74

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Docket: 01-T0118  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: Mr. Justice R.S. Veale

IN THE MATTER OF the *Children's Act*, RSYT 2002, c. 31, as amended

AND IN THE MATTER OF an application for a permanent care and custody order made Pursuant to s. 130 (1)(c) of the Act;

AND IN THE MATTER OF H.T.

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

Appearances:

David Christie  
T.T.  
Lana Wickstrom

Kathy Kinchen

Counsel for R.F.  
Appearing on his own behalf  
Counsel for the Director of  
Family and Children's Services  
Child Advocate

**REASONS FOR JUDGMENT**

(Child Protection Proceeding)

**INTRODUCTION**

[1] This is an application by the Director of Family and Children's Services (the director) for a permanent care and custody order of a six-year-old child. The mother has consented to the application and entered into an agreement with the director permitting access to the child if the order is granted. The father opposes the application. There is a custody case between the mother and father in the Supreme Court of the Yukon Territory which has been adjourned generally pending this decision.

[2] The mother and father met and established a relationship in Whitehorse in 1999. The mother had a previous child who was in the director's care. In November 1999, the

mother and father moved to Alberta. The mother was pregnant with the child of this application, who was born in Alberta in the spring of 2000.

[3] The relationship between the parents was a violent one. The father has been convicted of three separate spousal assaults on the mother. The second of these assaults, occurring against the mother in Alberta, resulted in her returning to the Yukon with the child in February 2001. The significance of these assaults will be addressed below.

[4] In March 2002, the director apprehended the child from the mother. The father, who had made no efforts to visit the child since February 2001, travelled to Whitehorse at the request of the mother to help care for the child. The father briefly stayed with the mother and assaulted her again. He was not present at the court hearing in March 2002 and was declared not a concerned parent. The father was convicted and sentenced to a period of incarceration followed by a year of probation during which time he was ordered to have no contact with the mother or child.

[5] On August 22, 2002, the child was found to be in need on protection and the director was granted a temporary care and custody order. As a result of being declared not a concerned parent, the father was not formally notified of any court proceedings with respect to the child until July 24, 2004. At that time, the director notified the father that an application was being made for a permanent care and custody order of the child. The father retained counsel, although at this hearing the father represented himself.

[6] This judgment will address the declaration not to be a concerned parent, the conduct of the father, the conduct of the director and the social workers, the conduct of the foster parents and whether it is in the best interests of this child to be committed to the permanent care and custody of the director.

[7] I will use the word "director" to mean the director and the Family and Children's Services Branch generally. The mandate of the director is carried out by social workers and other support workers who form a family service team which makes short-term and long-term planning recommendations to the director. The key social workers in this case are the child protection worker and the child care worker. The child protection worker works with the parents of children in care in assessing risks with a view to returning

children to their parents. The child care worker focusses on the placement of children and their medical, educational, and emotional needs. A team of social workers work under a supervisor who reports to the director.

## **THE MOTHER**

[8] The mother is a young woman of mixed European and First Nation background. She has lived in the Yukon most of her life except for the brief period when she resided in Alberta with the father before and after the child was born. She is in her early 20's while the father is in his 30's.

[9] She has had three children. Her first child has been adopted by the same foster parents with whom the child of this application resides. Her second child is the subject of this permanent care and custody order application. Her third child resides with her and her partner, a young man with whom she has had an on-and-off relationship since she was 13 years old. She describes herself as having partial fetal alcohol syndrome, which was diagnosed after the child of this application was apprehended. She receives life skills support from a local organization.

[10] The mother was very candid in her evidence. She indicated that she has drug and alcohol problems that started at the age of 12 or 13. She stated that she has not consumed drugs or alcohol during her pregnancies. She receives counselling once a week for her drug and alcohol problems. She has participated in several residential treatment programs, not always successfully.

[11] She described herself as a victim who chooses inappropriate partners. The father was a prime example. Their brief relationship from 1999 to 2001 was marked by spousal violence, excessive alcohol consumption, marijuana smoking and when they reunited in March 2002, a night of heavy cocaine use.

[12] There were a number of conflicts in the evidence of the mother and father. Although the father admitted the assault convictions against the mother, he tended to downplay them or blame them on the mother. I accept the mother's evidence when it conflicts with a father's evidence on all aspects of their relationship and the child. She was more candid and, unlike the father, accepted responsibility for her conduct.

[13] The mother stated that the assaults by the father always occurred when he was drunk. He first assaulted her in 1999, in a local hotel in Whitehorse. She bled from this assault. He was not convicted of the 1999 assault until he returned to Whitehorse in 2002.

[14] The mother had difficulty describing their family life in Alberta in a chronological way. It was a very chaotic time with a transient lifestyle. The father had difficulty holding a job because of his drinking. On occasion, she held two jobs to pay the rent and provide the food. Their longest period of residence in any one place was four months around the time the child was born in the spring of 2000. She describes their family life after that as a series of bus trips in Alberta and British Columbia. Money was always a problem and she at times resided in a woman's shelter in order to provide food and clothing for the baby while the father resided in a homeless shelter. She described sporadic contact with the paternal grandfather, who had remarried. The grandfather and the father had a difficult relationship because the father was drinking excessively and could not hold a job. The father was also fearful of the grandfather taking their child away from them. There was a better relationship with the child's paternal grandmother as she actually looked after the child on occasions when they were unable to.

[15] This sad saga came to an end when the father was convicted on February 16, 2001, for an assault on the mother in 2000. He received a sentence of six months for this offence. A social worker with Alberta Social Services advised the mother that if she did not separate from her assaultive spouse, the child would be apprehended. She received financial support and returned to the Yukon in February 2001 without notifying the father. However, she later talked to the father while he was in jail, so he was well aware that she was in the Yukon with the child. She also had contact with the paternal grandmother.

[16] Back in Whitehorse, the mother reunited with her old boyfriend in another unstable relationship. As a result of her conduct, the director apprehended the child in early March 2002. On March 6, 2002, the director obtained a six-month supervision order and returned the child to the mother in an attempt to support her in caring for the child. The mother immediately contacted the father in Alberta and he quickly returned to

the Yukon to assist her in looking after the child. While the father may have had good intentions, his actions were entirely the opposite. During the brief period before the child was re-apprehended in late March, the father continued his excessive drinking and drug use. The mother and father participated in an all-night consumption of cocaine. The father assaulted the mother and was sentenced to 90 days in jail followed by 12 months probation with the condition that he have no contact with the mother or child. He was also convicted of theft under \$5,000 and for the 1999 assault of the mother for which he received 45 days. Shortly after he was confined in the Whitehorse Correctional Centre, he escaped and was convicted of being unlawfully at large and in possession of property obtained by crime. The mother's conduct was not above reproach as she assaulted the father during a court hearing. Because of the no-contact provision in the probation order, there was little contact between the mother and the father while he was in jail. There has been no in-person contact between the father and the child until this trial in June and July 2006.

[17] It is significant, and to the credit of the director and the social workers, that the mother has maintained consistent contact with the child since March 2002 to the present time. She retains a strong bond with the child and is an important person in the child's life. Her father, the maternal grandfather of the child, has also maintained contact with the child and occasionally has separate visits with the child at the home of the foster family.

[18] The director made one last attempt at reuniting the mother and the child in the late summer and fall of 2005. It was not successful and the child's unstable behaviour worsened.

[19] As indicated earlier, the mother has consented to the application of the director for a permanent care and custody order. The mother acknowledges that the placement of the child with the foster family is in the best interests of the child. She has entered into an agreement with the director providing for her continued contact with the child should a permanent care and custody order be granted.

## THE CHILD

[20] The impact of these events on the child has been profound. She suffers from a complex mix of disorganized attachment and exposure to trauma. The most independent evidence comes from the child's kindergarten teacher and the counsellor at the Child Abuse Treatment Services (CATS) of the Government of Yukon.

[21] The child's kindergarten teacher has a Bachelor of Education degree and 13 years experience teaching younger grades in both urban and rural settings in the Yukon. I was very impressed with her attitude and patience with this child. She described the child as intelligent and loving but found that teaching her was like being on a roller coaster. Her most difficult task was to gain the trust of the child. She explained that once trust has been established, and this is a long-term task, the child has the potential to be stable. Until that trust relationship is developed, the child is unstable, angry, lacking in self-confidence, yelling, running and hiding, and very aggressive with her peers. She found that the key to dealing with the child's behavioural problems was to be patient, consistent and to spend more time with the child than any other child in the classroom. However, even when the teacher established a trust relationship with the child, something as innocuous as a seating change, a new friendship, preparing a school play or a school field trip could bring on the unstable behaviour again. It was often a case of one step forward, one step back. The teacher stated that on some occasions she called for the assistance of the foster mother, who was very supportive and offered advice and assistance in helping settle the child down.

[22] The kindergarten teacher advised that this child presented the most extreme behaviours in her experience. I find this to be significant, as she has seen a wide range of children in her job. She stressed that the child required guidance and assistance to stay focussed even when she was settled down and not exhibiting extreme behaviours. While the teacher considered this child to have "special needs", she said the child had no intellectual problems and would do well academically, so long as the child had a secure home life and the teacher could establish a trust relationship. It is worth noting that the public school she attends has a First Nation cultural focus that is appropriate for this child.

[23] The CATS counsellor who works with the child has a Bachelor of Science degree majoring in psychology and nine years of experience. She has also received training in child development and suicide prevention. The primary mandate of CATS is to provide counselling for children who have experienced some form of abuse, whether it is physical, sexual, emotional, neglect or the witnessing of family violence. She specializes in preparing and implementing treatment plans for children from five to nine years old. She does not make a diagnosis, but rather identifies normal and abnormal behaviour and provides treatment for the latter.

[24] She began to see the child for an hour a week in 2003 when the child began to live with the foster parents. She described the child's behaviour as abnormal. At first, she was unable to understand the child's speech and found the child very difficult to manage. The child could not keep focussed on a task, repeatedly used the washroom and was always moving about. In her experience, a child of three-and-a-half years should be capable of focussing for a few minutes. The child was unable to do so. She described the child as anxious, highly stressed, and very sensitive to change, as well as being cautious and guarded. She stated that the child finds it difficult to transition from one activity to the next and small upsets result in physical complaints. She advised that it has taken three years to get her trust and actually engage in treatment.

[25] The CATS worker advised that stability and routine are the keys to settling the child down for appropriate treatment. For example, if she is unable to meet the child in the following week, this must be carefully explained in advance.

[26] Nevertheless, the child has made great progress in the last six months in the following ways:

- 1) she is more able to focus and stay on task;
- 2) she has decreased her requests for the use of the washroom;
- 3) she plays more appropriately; and
- 4) she is easier to understand and more inquisitive.

[27] The CATS worker bases the child's improvement on consistent visits, the routine of going to school and a consistent home life. However, she advises that it is abnormal to take so long to settle down to receive treatment.

[28] The CATS worker stated that the child talks about her foster family most often. She refers to her foster parents as Mommy and Daddy and their daughter, who is close in age, as her sister. She also talks about her mother but less so than her foster family.

[29] The CATS worker described the child as challenging and having "special needs". She advised that a change in the placement of the child would result in an increase in all her difficult behaviours and physical complaints. It would disrupt her sleeping routine, increase her toilet accidents, and increase her aggressiveness with her peers. She stressed that the most important factor in the child's life is staying in her current placement.

[30] She advised that the key to treatment is allowing the child to talk about her feelings of abuse and neglect in the past so that they do not preoccupy her thoughts and actions today. The CATS worker stated that the treatment would be continuous as the child progresses from one grade to the next. The treatment assists her to develop her coping skills in a supportive environment.

### **THE FOSTER FAMILY**

[31] The foster family consists of a mother and father and six children, including the child of this application. The children have ages ranging from one year to 13 years. The three youngest children are foster children and the three eldest children are their own. One of the eldest children is adopted and is a sibling of the child of this application. The foster mother works full-time caring for the children. The foster father does shift work. The foster father states that he and his spouse work as a team to meet the needs of their large family.

[32] Based upon the evidence of all the support workers who testified in this case, I find as a fact that these foster parents have provided the child with consistent love, care, affection, and stability since she was placed in their care in January 2003. This does not mean that there have been no bumps along the road. The child's father has

very skilfully addressed all of the bumps in his cross-examination. I will address the most serious of these issues. However, both the foster mother and foster father conducted themselves with dignity and frankness when cross-examined by the father. The foster parents are well aware of the father and vice versa because of the father's former relationship with the mother. It is an additional complication which has both positive and negative aspects. From a positive point of view, it enhances the ability of the foster parents to care for the child as both the mother and father have regular access visits with the child. From a negative point of view, the father has a difficult time accepting the close, healthy relationship that has developed between his child and the foster parents.

[33] A further negative aspect of the relationship between the foster parents and the father and mother occurred in the fall of 1999 when the foster parents were caring for the first child of the mother, who they eventually adopted. Both the mother and father engaged in some very unfortunate and hurtful racial remarks about the foster mother. I have no doubt that these slurs were made. Significantly, the mother was very embarrassed and when she testified, she apologized for having made the statements. The father, on the other hand, tried to place all the blame on the mother and took no responsibility for his role in the racial slurs. The foster mother commenced a peace bond proceeding against the father in 1999. It did not proceed as the father and mother left for Alberta. Although the foster mother was deeply hurt upon hearing about the racial slurs from the social worker, she has not held it against either of the parents and continues to cooperate in arranging access for the parents.

[34] The foster parents treat the child as a full member of their family. She is treated no differently than her brother who has been adopted by the foster parents. She has a very close relationship with the daughter of the foster parents. The child calls the foster parents Mommy and Daddy. The foster parents permit the child to do so, motivated by real affection for the child but, at the same time, they explain to the child who her biological parents are. This is a particular sore point for the father who does not reside in the Yukon and consequently spends much less time with the child than the mother and the foster parents. I do not find that the foster parents have allowed this close

relationship to develop with the child out of any malevolence for the parents or a misplaced desire to substitute themselves as the only mother and father of this child.

[35] On the whole of the evidence, I find that the foster parents have enormous patience with this child whose behaviour can fluctuate from a rambunctious and affectionate child to a deeply troubled child who exhibits very bizarre behaviour when she feels insecure or has to face unexpected changes, whether at home or school. The foster father put it succinctly when he testified that while most children may require two or three reminders, this child requires a dozen reminders. For example, going to bed at night and getting up in the morning are lengthy procedures with this child. This relates to her inability to stay focussed which was identified by both her teacher and the CATS worker.

[36] The foster mother testified that there is an increase in the bizarre behaviours of the child after visits with the father and mother. This leads the father to allege that the foster parents are building a case for their attachment to the child at his expense. While I fully understand that the father could have this perception, I find as a fact that the bizarre behaviours of the child arise from unexpected changes whether at home, at school or before and after the access visits of the natural parents. I do not consider it unusual for behavioural issues to arise before or after access visits. I specifically do not find that these behaviours are the result of the care of the foster parents but rather from the lack of care, affection and stability suffered by this child before she came into the care of the foster parents. I find as a fact that the care of the foster parents and the child becoming part of their large family, has contributed to the stability of the child. I also find as a fact from the evidence of the foster parents, the kindergarten teacher and the CATS worker that this child will require a team of support workers for many years to come to assist her in coping with the challenges that life brings.

[37] There is a note from a social worker dated November 22, 2002. It describes a case conference meeting of all the workers involved with this child, including the foster mother. The meeting was to discuss “permanency planning” for the child. It was held at the time of transition from the child's first foster placement to the present foster parents. The social worker's notes contain a reference to the fact that the foster parents “are

open to adoption.” The father alleges that this notation indicates that the foster parents have been building their attachment to the child for the purpose of adoption. The father also alleges that the director has been part of this plan from the outset as well. I will deal with the relationship between the father and the director below.

[38] The foster mother had an inappropriate conversation with the mother in October 2004. The foster mother telephoned the mother and encouraged her to agree to a permanent care and custody order which would permit the foster mother to proceed with adoption of the child. There is some dispute about whether the foster mother actually said those words. However, there is no doubt that the mother was left with this perception and had concerns about her future relationship with the child. All involved considered this to be an inappropriate conversation and mediation was arranged between the foster mother and the mother to rebuild the trust in their relationship. The mediation was successful and their relationship was repaired. While the conduct of the foster mother was clearly inappropriate, the director has dealt with the matter quickly and appropriately. The conduct has not been repeated.

[39] I should advise that many of the issues raised in this proceeding arise out of the disclosure of the director to the natural parents. These issues have not been suppressed in any way by the director or the social workers. One of these is the issue of the child’s possible lactose intolerance. The father is convinced that this is the reason for the child’s behavioural problems based on his own experience as a child. This issue has been thoroughly investigated by medical practitioners and I accept the opinion that it is not a factor in her present behaviour.

[40] The father raised the issue that the foster parents were encouraging the child to use the family name of the foster parents rather than her own. In fact, it was the child who was scratching out her family name on her clothing labels and inserting the family name of the foster parents. I am satisfied that this was motivated by the child's desire to be part of the foster family like her brother rather than an attempt by the foster parents to supplant the parents. I note in passing that foster parents are often in a catch-22 situation. If they do their job well, the foster child benefits by having a stable family

home and the bond that flows from that. The downside is that they may be criticized as diminishing the role of the parents.

[41] The disclosure documents indicated that the child had wrapped a belt around her neck. The father alleged that this was an example of risky behaviour that was caused by the care of the foster parents. I am satisfied with the foster mother's explanation of this event. The foster mother responded to a cry on the baby monitor in the child's room and discovered the child had placed a belt around her neck when she was pretending to be a cat. The foster mother told the child that this was not a safe way to play and the incident has not occurred again.

[42] Another issue raised by the father is that the foster family is too large and the foster mother does not have time to care for this child. This issue is raised in the context of the foster family having two foster children even younger than this child. This was also an issue that the director was concerned about as well. It came to a head in the fall of 2005 when the foster mother sustained a severe burn from a bursting hot-water bottle. It resulted in the child missing some of her weekly appointments, and in particular, some medical appointments. When the matter was brought to the attention of the director, additional help was provided to the foster mother and no further appointments were missed. While there is no doubt that these foster parents have an enormous challenge with this child and the other five children they care for, I do not find the size or age of their family to be a negative factor in their care for this child. In this regard, I was very impressed with the evidence of the child care worker who said that, in her experience, this child was extremely fortunate to have such a patient and loving foster family. A more common experience for such a challenging child is to have multiple foster parents without ever having the opportunity to form a meaningful attachment.

[43] Finally, the foster parents have a number of benefits to offer the child. I have already mentioned that her brother has been adopted by them. This allows the child to continue to have a sibling relationship of some significance. The child also has a close relationship with the daughter of the foster parents, with whom she shares a bedroom. It also affords the child an opportunity to learn how to interact with other children of all

ages. The foster parents also offer very good parental modelling for the child. Further, they provide an opportunity for supervised meetings between the child and her maternal grandfather, a person that she is very fond of.

## **THE FATHER**

[44] The father is a young man who represented himself ably during this proceeding. He resides in Alberta with his spouse and a teenage daughter, both of whom attended the proceeding and supported him throughout. To a certain degree, he has turned his life around. His criminal record shows no further entries after 2002. He abided by the terms of his probation in 2002 and had his probation officer contact the department to indicate the treatment he received and when the probation order terminated. He has steady employment as an oilfield worker in his father's oilfield business.

[45] He has a good relationship with both his mother and father who support him wholeheartedly in his effort to regain custody of his child. There is no doubt that the father and his extended family genuinely wish that the child be returned to his custody in Alberta. The father has a large house on an acreage which can easily accommodate the return of the child. He is convinced that it is in the best interests of the child to be in the permanent care of a biological parent. He has a good school for the child to attend. There are more than adequate social services available to support a special needs child in his community. He also has professionals in his own extended family who can assist in getting the proper care for the child. In addition to the support of the child's grandparents, there is a large network of family relatives in Alberta. It is a consistent theme in the father's evidence that the director and social workers involved in the care of the child have, in a corrupt manner, stripped him of his rights as a parent. I will now examine some of the salient points of that history.

### **The Father's Criminal Record**

[46] I am going to set out the father's criminal record. It is relevant both to the present behaviour of this child and why the father has not played a significant role in the child's life since February 2001, when the mother left the father in Alberta on the advice of Alberta Social Services. The father is ambivalent about his criminal record. On the one hand, he admits the record because it is there in black and white. He admits that he has

made mistakes, but states that he is now changed and the department does not want to acknowledge that and continues to treat him as a villain. On the other hand, when he is asked about his understanding as to why he was abusive, he responds angrily that he is not abusive and he simply pled out to “crap charges”. He says that he has learned how to deal with his anger in a healthy manner.

[47] He admits that he had difficult years as a teenager. He was in a youth assessment and independent living program for several months before he reconciled with his father and returned home. He claimed to Social Services that his father had struck him but he now says that he made that story up as a teenager.

[48] In 1996, as an adult, he was convicted of uttering a forged document in Lethbridge and sentenced to 90 days followed by probation for 18 months. In the same year, he was convicted on two counts of possession of property obtained by crime and sentenced to 45 days on each charge concurrent.

[49] In 1996, he was convicted of assaulting his present spouse. In the same year, he was convicted of uttering threats to his mother-in-law. He was sentenced to 45 days on each charge to be served concurrently.

[50] He was also convicted of three assaults against the mother of this child. The first assault took place in 1999 in Whitehorse. He was not convicted of that assault until May 2002 when he was sentenced to 45 days in custody.

[51] The second assault on the mother of this child took place in Alberta after the child was born in April, 2000. In February 2001, he was sentenced to six months for the assault of the mother and 30 days concurrent on a charge of causing a disturbance and failing to comply with a recognizance. The father recalls that he was in remand custody prior to his conviction. He is somewhat sketchy about the dates he was in custody, but it is safe to say that he missed several months with his child in her first year.

[52] The third assault on the mother occurred in March 2002 in Whitehorse when he returned to assist her in looking after the child after the department had apprehended the child. He was again in custody from April 29 to October 23, 2002, when he was released on probation for a period of 12 months and prohibited from contacting the

mother or the child until he successfully completed the Spousal Assault Program of the Family Violence Prevention Unit. His contact with the child did not resume until he contacted the child protection worker and the director arranged for telephone contact from Alberta in December 2004.

[53] I accept the mother's evidence that the violence and abusive behaviour of the father against the mother occurred in the presence of the child. This is no doubt that the mother was violent towards the father but that does not excuse the father's violent behaviour.

[54] The assault convictions only tell part of the story. I will recount one story that undoubtedly had a great impact on the child. The father enjoyed rap songs. In one of the songs, a well-known rap singer describes to his child how he killed the child's mother as he drove the child in a car with the mother in the trunk. The child in this case is apparently named after the child in the song. The mother described how the father held a knife at her throat in the presence of the child.

[55] The father had contact with the child between her birth in the spring of 2000 and February 2001 but no contact between April 2002 and December 2004. What contact he did have during those formative years with the child was marked by violence to the mother and what the mother described as a chaotic and transient lifestyle. I conclude, sadly, as this father desperately wants to parent this child, that his conduct prior to December 2004, was, along with the mother's conduct, a very negative to non-existent factor in the child's life.

[56] I conclude as well, from the evidence of the father in this proceeding, that he has no appreciation of the impact of his spousal violence on the child despite the fact that he has taken anger management and spousal abuse courses. Finally, it is clear that the absence of the father from the child's life for the majority of the child's first four years can be attributed to the conduct of the father himself and not the director or the social workers. There was no conspiracy to deprive him of his parental rights.

**The Declaration Not to be a Concerned Parent**

[57] The father made the March 2002 declaration, that he was not a concerned parent, a major theme in his presentation. He contended that this declaration was a major factor in his lack of contact with the child since March 2002. He also blames the director for this continued state of affairs until he was notified of the application for a permanent care and custody order in July 2004. Until that time, the father was not formally notified and did not participate in the child protection proceedings, although he was well aware of the child protection proceeding.

[58] On March 6, 2002, the director filed a notice of application for a six-month supervision order for the child. The notice of application was served on the mother on March 6, 2002. It was not served upon the father although he was known to be the parent of the child. It must be remembered that the father had not been in the child's life since early 2001, and he was living in Alberta. Therefore, at the time of the notice of application, the child was in the care of the mother alone.

[59] On March 7, 2002, there was a hearing before a justice of the peace to determine whether there were reasonable and probable grounds to take the child into care. The mother took the position at this hearing that the father was not a concerned parent and the justice of the peace declared that the father was not a concerned parent. As a result, there was no requirement on the director to serve notice of the proceedings on the father. The justice of the peace ordered six months supervision by the director.

[60] The department advised the mother that the child could be returned to her under the supervision order. The mother then contacted the father indicating that she needed help to continue parenting the child. The father returned to Whitehorse from Alberta on March 8, 2002, but he was of no assistance to the mother in caring for the child.

[61] On March 28, 2002, the director apprehended the child again. The father received no notice of this application for a three-month temporary care and custody order. Counsel for the mother requested adjournments of the hearing date which was finally held on August 22, 2002, when a Territorial Court judge made a three-month temporary care and custody order with the consent of the mother.

[62] On October 30, 2002, the director filed a notice of application for a conversion of the existing temporary care and custody order to a permanent care and custody order to be heard on November 21, 2002. The notice of application was addressed only to the mother and was not served on the father. The clerks' notes for the November 21, 2002, court appearance state that there was no change in the status of the father as not a concerned party. The child protection proceedings continued to be adjourned for various settlement conference discussions. Finally, on January 27, 2004, the director filed an application for a temporary care and custody order of six months duration. On January 29, 2004, the court ordered a six-month temporary care and custody order with the consent of the mother.

[63] In the meantime, the father's probation officer called from Alberta on November 25, 2002, advising the social worker that the father was on probation until October 23, 2003. The probation officer reiterated the condition of the probation order that the father could not have any contact directly or indirectly with the child until he proved that he had satisfactorily completed the Spousal Assault Program offered by the Family Violence Prevention Unit. This is a Yukon program which would not be available in Alberta. No evidence was presented about the suitability of similar programs in Alberta to satisfy this condition. The father indicated that he would call his probation officer as a witness but did not.

[64] On June 17, 2003, the father called from Alberta wanting to know the whereabouts of his daughter. He was very upset and irate, according to the contact note, and stated that he had completed the required program and was now allowed access to his daughter. On June 30, 2003, the social worker was unable to contact the father but was able to speak with his probation officer. The probation officer advised that the father had attended a two-day workshop on anger management and spousal abuse and was seeing a counsellor. The probation officer described the father as still being quite irrational, abusive and racist. A further phone call was received from his probation officer on September 3, 2003, confirming that the father had completed a two-day workshop and one-to-one counselling was recommended. The probation order terminated on October 23, 2003.

[65] The father was aware of the court proceeding by the director immediately following the first apprehension because the mother told him when she asked for his assistance in March 2002. He also had at least seven telephone calls with the social worker requesting photographs of his child while he was in custody at the Whitehorse Correctional Centre between April 27 and October 23, 2002. When he was released on October 23, 2002, he left for Alberta the following day. From a practical point of view, his lack of contact with his child between March 2002 and December 2004 was caused by his incarceration and probation, followed by his own delay in seeking access.

### **The Father's Access**

[66] The father did not contact a Yukon social worker until July 12, 2004, when he left a message on the department's answering machine. It appears that the phone call was not returned. On July 14, 2004, the father called the department again inquiring about his access to the child. The social worker informed him that the director was applying for a permanent care and custody order on July 22, 2004. The father indicated that he wanted to be represented by a lawyer. The social worker advised him how to obtain legal aid. The father provided the social worker with his address for service of the permanent care and custody application. The department was unsuccessful in serving him at the first address given. The father gave the department a second address on July 19, 2004. The father, appearing by speakerphone in court on July 22, 2004, was granted an adjournment in order to retain a lawyer. In the meantime, the mother applied once again to have the father declared to be not a concerned parent. The mother's application, as well as the notice of application for a permanent care and custody order of the child were served on the father on August 18, 2004. The hearing date was set for October 18, 2004. The father retained a Whitehorse lawyer in September 2004. The application of the mother to have the father declared to be not a concerned parent was not granted. From July 22, 2004 onwards, the father has represented himself, except for the period from September 2004 to May 2005 when he was represented by Whitehorse counsel. The father indicated that he could not afford legal counsel and his counsel applied to be removed from the record in May 2005. The father's application for state-funded counsel in May 2006 was dismissed.

[67] The director responded to the father's request for visits with the child. On October 18, 2004, the director requested Alberta Social Services to prepare a home study on the father and his family. In December 2004, the father commenced phone access with the child. While these may be seen as positive developments between the father and the child, they did not herald a new relationship between the father and the social workers. The father continues to blame the department for the declaration that he was not a concerned parent which he considers to be the root of his problems in gaining access to his child. However, I find that the most significant fact is that the father never made a visit to Whitehorse to have an in-person visit with his child until the date of this trial in June 2006. The father has a number of explanations for his failure to visit his child. He blames the department for not giving him a timetable with his child in order to make the trip worthwhile. At one point, he indicated that he was considering moving to Whitehorse, but he dropped that idea because he could not obtain suitable housing. On another occasion, he was injured on the job and because it was his father's company, he did not obtain unemployment insurance benefits. As a result, he could not afford to make the visit to Whitehorse for the period of his injury.

[68] In January 2006, the department was exploring the idea of facilitating the child visiting the father in Alberta. Unfortunately, that idea raised the father's hopes, which were dashed when the director decided against the visit. The department also failed to respond to a letter from the paternal grandmother and a telephone call from the paternal grandfather wishing to speak to a supervisor. All of this was compounded by the supervisor disclosing to the mother the location and timing of the father's in-person visit with the child in Whitehorse. This regrettable disclosure resulted in the mother attending the location of the visit, which understandably upset the father. Nevertheless, the fact is that the father, who had not seen his child since March 2002, did not make an in-person visit with his child until June 2006 when this hearing commenced. I do not find this to be the fault of the director or the social workers, given the father's criminal record and lengthy period of incarceration and probation with the no-contact condition.

### **The Home Study Report**

[69] The home study report was completed on March 16, 2005. Unfortunately, the caseworker that prepared the report was unable to make a recommendation about the suitability of the father and his spouse. The primary reason for this was that neither the father nor his spouse provided a copy of their criminal records to the caseworker. At trial, the father was particularly incensed about this because they did disclose certain criminal offences. However, I find that this failure to provide the criminal records is quite significant. The father only disclosed a small amount of his actual criminal record (which was made an exhibit in this trial) and we are left to speculate about the criminal record of his spouse who did not testify. The second reason for no recommendation from the caseworker was based upon a hotly disputed allegation about child abuse by the spouse. I simply state this as a proffered reason for no recommendation. No evidence was presented on this issue. The third reason for no recommendation from the caseworker was that she had no knowledge of the needs of the child in order to assess whether the father and his spouse could meet those needs.

[70] It is unfortunate that this home study was so inconclusive. The caseworker was apparently away on leave since March 21, 2005, and no follow-up was presented in evidence. The father blames the director for her failure to obtain a conclusive report. However, the father must also take responsibility for his failure and the failure of his spouse to provide their criminal records.

[71] Based upon this home study report and the evidence I have heard about the father's history of abuse, I cannot find any fault with the director's decision not to have the child visit Alberta. It was always open to the father and grandparents to arrange for visits with the child in Whitehorse.

[72] In spite of the negative relationship between the father and the department, the father is to be commended for turning his life around and beginning to build a new relationship with his child. That is not an easy task over the telephone and both the social workers and the father have had frustrations with it. The in-person visits that took place between the father and his child in June and July 2006 were on balance a positive

experience for the father and his child. It is not unexpected that the child would exhibit some behavioural difficulties after those visits.

[73] I will now turn to my analysis of the legal issues and my decision in this matter.

## **THE LAW**

### **Declaration Not To Be a Concerned Parent**

[74] When a child is taken into care with or without a warrant, the director shall under s. 123(1)(a) of the *Children's Act*, "as soon as practicable, give a reasonable notice in writing to the concerned parent...". Under s. 107 of the *Children's Act*, "concerned" in relation to parent means:

- a. a parent with the lawful care or lawful care and custody of the child,
- b. a parent exercising rights of custody or of access in relation to the child, or attempting to exercise those rights,
- c. a parent providing financial support for the child, or
- d. a parent whose application respecting care, custody or access in relation to the child is before a court and awaiting adjudication;

[75] In order that a hearing may be held to determine the identity of the child and concerned parents and to determine whether reasonable and probable grounds exist for taking the child into care under s. 123(5), s. 123(1)(b) of the *Children's Act* requires the director to appear before a judge and make any application the director thinks there are grounds to make.

[76] Section 123(6)(c) contemplates that the reasonable and probable grounds hearing may take place with a concerned parent not present at the hearing. Directions must then be given for the manner of service of a notice of a subsequent hearing to determine whether the child is in need of protection. Thus, the director bears a considerable burden to assist the court in determining who is, or may be, a concerned parent and how they should be served.

[77] It should be noted that s. 126(1)(b) of the *Children's Act* permits a judge to hear any application of the director on its merits, whether or not a person entitled to be served has been served with notice of the hearing or application. Further, pursuant to

s. 126(2), the person entitled to be served but not served and who is not present at the hearing may apply to set aside any order so made subject to s. 147(3). For this provision to have any practical effect, the person not served must be served with the order made at the hearing.

[78] The *Children's Act* does not give any specific direction on the procedure to be followed in declaring a parent not to be a concerned parent. However, the consequence of declaring a parent not to be a concerned parent is that the parent does not receive any further notice of the proceedings. Without formal notice, a parent could be unaware that their child was the subject of a child protection proceeding. That is not the case in the current proceeding, as the father was fully aware of the fact that a child protection proceeding was taking place. Nevertheless, when the application for a "concerned parent" declaration is made by one parent against another parent, or even by the director against a parent, the declaration should be made on the basis of affidavit evidence and, where reasonably possible, with notice to the parent against whom the declaration is sought.

[79] Fortunately, in this case, the director served notice in writing on the father when the director's application changed from a temporary care and custody order to a permanent care and custody order. That notice is required under s. 130(2) of the *Children's Act*. When the mother again made an application for a declaration that the father was not a concerned parent, the application was served upon the father. The father wisely retained a lawyer and the application did not succeed.

[80] In my view, the father was not prejudiced by the declaration that he was not a concerned parent. He was fully aware of the child protection proceeding and took no steps to participate until his expression of interest in July 2004. Because of his incarceration and probation conditions, he was not in any position to play a role in the child's life. When his probation ended in October 2003, he was ultimately granted access to the child.

[81] The following guidelines, which are not exhaustive, should be considered when an application is made to declare a person not to be a concerned parent:

- 1) the onus is on the director to give reasonable notice in writing to the concerned parents;
- 2) generally speaking, an application to declare a parent not to be a concerned parent should be supported by affidavit evidence;
- 3) generally speaking, the application should be served personally or substitutionally on the parent against whom the declaration is sought;
- 4) in the exceptional case where such a declaration is made without notice, it should be made on an interim basis, subject to further directions for service of the application on the parent against whom the declaration is sought;
- 5) when a declaration is granted, it should be served upon the person found to be not a concerned parent as the person may wish to appeal;
- 6) given the policy of the *Children's Act* to promote family units and diminish the need to take children into care, a declaration that a parent is not a concerned parent should be granted only in the clearest of cases.

### **The *Children's Act***

[82] The focus of this decision is whether, on the balance of probabilities, this child is in need of protection. Counsel for the director submits that the father is unable to provide proper or competent care, supervision or control over the child as set out in s. 118(1)(b) of the *Act*. Counsel also submits that the child is in probable danger of physical or psychological harm as set out in s. 118(1)(d) of the *Act*, if her current living circumstances are significantly disrupted. The father submits that his rights as a natural parent should be respected since he is ready, willing and able to care for the child. The child advocate and counsel for the mother submit that the child is in need of protection and should be committed to the permanent care and custody of the director.

[83] The *Children's Act* is premised upon the best interests of the child always prevailing. This is found in s. 1 of the *Children's Act* which very clearly states that if the rights or wishes of a parent and the child conflict, the best interests of the child shall prevail. I interpret this to mean that the rights of the natural parent, or what may be described as blood ties, give way to the best interests of the child.

[84] This is not to say that the rights of the natural parent are given no weight. The policy of the *Children's Act* is set out in s. 108 of the *Children's Act* as follows:

**108** It is the policy of the Minister and the director to supply services as far as is reasonably practicable to promote family units and to diminish the need to take children into care or to keep them in care.

[85] The implementation of this policy is described in s. 109 of the *Children's Act* as follows:

**109** For the implementation of the policy described in section 108, the director shall take reasonable steps to ensure the safeguarding of children, to promote family conditions that lead to good parenting, and to provide care and custody or supervision for children in need of protection.

[86] The director is mandated to ensure that the provisions of the *Children's Act* are carried out which includes directing and supervising the visiting of any child. In s. 111(6), the *Act* states:

**111(6)** The director shall, in accordance with this Act, have general superintendence over all matters pertaining to the care and custody of children who come into the director's care under this Act.

[87] Pursuant to s. 128(1), if the child is found in need of protection, the judge shall commit the child to the permanent care and custody of the director. If the child is not a child in need of protection, the director shall return the child to the concerned parent. In this particular case, both the father and mother are concerned parents. However, they are separated and the pending custody dispute would have to be determined before ordering to which concerned parent the child should be returned. Section 128(3) authorizes a judge to establish a longer period of delay in returning the child than the usual requirement to return the child within 48 hours.

[88] The *Children's Act* also sets out in s. 133 certain factors to be considered in whether to make a permanent care and custody order:

**133** In deciding whether to make an order for temporary or permanent care and custody the judge shall have regard to the following considerations relating to the best interests of the child

(a) the bonding existing between the child, and its concerned parent or other care giver, but not necessarily the bonding existing between the concerned parent or other care-giver and the child;

(b) evidence about who the child identifies and relates to as their parent or care-giver;

(c) the length of time, according to the child's sense of time, that a child has been in care and the effect on the child of any delay in the final disposition in the proceedings;

(d) the effect on the child of any disruption of the child's sense of continuity;

(e) the child's right to be a wanted and needed member within a stable and secure family structure;

(f) the child's mental, emotional and physical stages of development;

(g) the risks and merits of the child returning to or remaining in the care of their concerned parent or other person entitled to the child's care;

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

(i) any physical or psychological risk to the child of returning the child to, or allowing the child to remain in, the care of their parent;

(j) the mental, emotional and physical needs of the child and the appropriate care or treatment to meet those needs;

(k) the cultural heritage of the child.

[89] I note in particular that the bonding referred to in s. 133(a) refers to the bonding from the child's perspective. While it does not exclude the bonding that a parent may have with a child, greater importance is given to the bonding from the child's perspective. This does not diminish the bond that a parent may feel towards their child but places greater emphasis on the child's best interests as opposed to parental rights.

[90] Finally, although it is not explicitly stated in the *Children's Act*, the assessment of whether a child is in need of protection necessarily encompasses all of the evidence with respect to the child whether arising before or after the apprehension of the child. See *B.A.T. v. C.L.T.*, 2004 YKSC 72, at paragraph 39. It is often the case that a parent's conduct and ability to parent a child improves considerably after the shock of the apprehension of the child. Nevertheless, the pre-apprehension conduct may still be an important factor in risk assessment and the determination of the best interests of the child.

### **DECISION**

[91] My analysis of the factors set out in s.133 of the *Children's Act* inescapably leads to the conclusion that the director should be granted the permanent care and custody of this child.

[92] This child has been in the care and custody of the foster parents for 3 1/2 years. The child has clearly bonded with the foster parents and her foster siblings, one of whom is her brother. The evidence supporting this conclusion came not just from the social workers and the foster parents, but was also strongly supported by the evidence of the child's kindergarten teacher and the CATS worker. The child also has a strong bond with the mother and that bond will continue to be nourished for the benefit of the child under the terms of agreement reached between the mother and the director. While the father has made efforts to re-establish his bond with the child since December 2004, it was almost non-existent prior to that date. Because the father has only recommenced actual physical visits in June 2006, it will be a long-term task and require a great deal of patience on the father's behalf to develop an enduring bond with his child. There is no doubt that the father has a bond to this child. However, it is the child's bond that prevails and that bond is with the foster parents and the mother.

[93] I do not accept the father's contention that his lack of access to the child was based upon some sort of conspiracy or corruption between the director and the foster parents to prevent him from bonding with the child. The fact is that the father's estrangement from his child resulted from his criminal conduct, incarceration and conditions of his probation. I appreciate that this decision will be devastating to the

father, as he has made a sincere attempt to straighten out his life and be a responsible father to his child.

[94] During the four years since the child was apprehended, a strong support network has been developed for her. The foster parents are capable and loving parents who are committed to providing this child with a stable home environment. Her mother is nearby and has regular access visits with her. These visits are important to the child, as are the access visits of the father, in her understanding of who she is and where she comes from. The foster parents also support supervised visits from her maternal grandfather which are very important to her as well.

[95] While there is no doubt that excellent support services would be available in Alberta, it would be unreasonable to remove the child from the support services that have been developed for her in the Yukon. I include both her school, which has a strong aboriginal component, and her treatment by the CATS worker in this consideration. She now has a track record in a school environment where an experienced teacher has gained her trust. Her CATS worker has just recently commenced a program of treatment that is based on a trust relationship that took three years to establish. It does not make any sense, given the child's precarious emotional development, to deprive the child of this treatment. Simply put, it is not in her best interests to terminate a support network that was so difficult and time-consuming to create.

[96] There is a further consideration in my decision. Despite the father's efforts to create a stable home environment for this child, considerable risk remains in my mind to return this child to him. The spousal abuse in this case has been prolonged and serious. It has had a devastating impact on this child from which she may take years to recover. The father unfortunately has yet to take full responsibility for this abuse and, to the extent that he does take responsibility, he does not understand the consequences of the abuse. Further, the home study from Alberta raises a number of red flags that would give pause to any court contemplating the return of this child to the father.

[97] During this proceeding, the father has made a number of serious allegations about the conduct of the director and her social workers. On balance, the director and her workers should be complimented for placing this child with these foster parents who

offer her the first chance she has had to a secure, stable and loving environment. I have no doubt that it is one of the most difficult jobs in our society to balance the often conflicting objectives of supporting families and at the same time protecting vulnerable children. The bottom line is that the mother and father did not provide the love, care, affection, and particularly, the stability that this child should have received. It is not in the best interests of this child to terminate a stable and loving relationship developed over 3 ½ years with foster parents while the father and mother get their lives back on track.

[98] However, the director and her workers did err in some of their contact or lack thereof with the father and his parents. The paternal grandparents were treated shabbily by the refusal or neglect of the workers to respond to their legitimate inquiries about their grandchild. The workers may have created an expectation in the father's mind that his child might be allowed to visit him in Alberta before obtaining the approval of the director which was ultimately refused. I also have a concern about how the preparation of the Alberta home study was arranged. One of the reasons that the author declined to make a recommendation was based on the lack of knowledge of the mental and emotional state of the child. The director or the social workers should have provided that information at the outset. The father's first in-person contact with his child in many years was made more difficult by a supervisor disclosing the location of the visit to the mother who inappropriately made her presence known. While these incidents should not be minimized, they do not detract from the stability and love provided to this child by the foster parents and the network of supportive professionals.

[99] In conclusion, I order that the child be committed to the permanent care and custody of the director. The child has a right to know her father and access visits should continue at the discretion of the director. This access may include the paternal grandparents. For the benefit of the father, I point out that applications to terminate or vary permanent orders may be made in the limited circumstances set out in s. 146 of the *Children's Act*. He may also appeal this decision to the Supreme Court of the Yukon Territory pursuant to s. 147 of the *Children's Act*. Should the foster parents proceed to adopt the child, the mother and father should be aware of the practice in the Supreme

Court of the Yukon Territory to attach access conditions, where appropriate, to adoption orders.

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VEALE J.