Citation: *Re: Matter of M.N.*, 2005 YKTC 79

Date: 20051207
Docket: 03-T0078
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

IN THE MATTER OF the *Children's Act*, R.S.Y. 2002, c. 31, as amended, and in particular s. 130.

AND IN THE MATTER OF an application for a conversion of the existing temporary care and custody order to a permanent care and custody order, pursuant to s. 130(1)(c) of the Act;

AND IN THE MATTER OF M.N.

Appearances:

Lana Wickstrom	Counsel for the Director of Family and Children's Services
Jamie Van Wart	Counsel for the mother, K.N.
Christina Sutherland	Counsel for the Child Advocate

REASONS FOR JUDGMENT

[1] M.N. has been in the care of the Director pursuant to a temporary care and custody order. Her mother, K.N., has filed a notice of motion seeking a determination that the Director has unreasonably withheld access and an order settling the terms and conditions of reasonable access.

[2] Until recently, access between K.N. and M.N. had been gradually increasing. In mid-October, access was increased to almost six days of each week, from Friday at 10:00 a.m. to Wednesday at 6:00 p.m. This occurred, apparently without incident, for the first two scheduled weeks. However, on

November 1st, during the third scheduled week, K.N. left M.N. in the care of M.N.'s fifteen-year-old sister, C., for several hours. M.N. also spent approximately one hour in the care of a neighbour, who is not an approved caregiver.

[3] While this may seem fairly innocuous, it is important to note that the primary child protection concern which initially resulted in M.N. being brought into care was K.N.'s pattern of leaving M.N. either with inappropriate caregivers or with C. for extended periods of time, sometimes days. Following a hearing before me in April of this year, after which I granted an application to extend the existing temporary care and custody order, K.N. was advised by this Court, in no uncertain terms, that she was not to leave M.N. alone in C.'s care for **any** length of time, nor was she to leave M.N. with non-approved caregivers. Yet it appears that K.N. has once again repeated the very pattern of behaviour which brought M.N. into care.

[4] Concurrent with this incident, the Director received reports of K.N. using drugs and alcohol, and potentially selling drugs from her home. All reports are from unidentified sources. K.N. denies the reports, admitting to only one incident of drug and alcohol usage on the 4th of November, as a result of stress.

[5] The Director subsequently made the decision to dramatically reduce access, and to seek a conversion to a permanent care and custody order. The Director advised K.N. of the change in access and cited the following reasons:

a) your expressed unwillingness to have worker's come to your home;
b) your current drug and alcohol use, both prescription and non-prescription;
c) your current state of crisis, chaos and instability (ex. Being evicted and in the process of moving);
d) your inappropriate behaviors (verbally aggressive, destructive, inability to control your temper;
e) your leaving M.N. in the care of C.; and

f) your not taking responsibility for leaving M.N. in C.'s care, or offering a solution as to how it won't happen again.

[6] At the time of hearing the application, the access schedule provided for K.N. to have supervised visits with M.N. each Monday, Wednesday and Friday morning, and for C. to visit M.N. at the foster home on Saturdays.

[7] K.N. asserts that access is being unreasonably withheld and has brought an application pursuant to s. 139(5) of the *Children's Act.* Her counsel argues both that the amount of the reduction in access is unreasonable, and also that the failure to provide for a family visit is unreasonable. The child advocate supports the latter of these two positions, arguing that it is unreasonable not to provide for an additional visit in which M.N., K.N. and C. are all in attendance.

[8] Counsel for the Director has filed three decisions of His Honour Judge Faulkner, which all counsel agree fairly set out the test to be applied. In K.B. (Re) [1998] Y.J. No. 187, he stated:

> I cannot make an order changing access even if I am simply persuaded that other arrangements might have been made, nor can I make an order simply upon the parents showing that some other arrangements are possible. Rather, I think it must be shown that the decision was an unreasonable one. That is a decision either that was made for an illegitimate purpose and not bona fide or a decision which was irrational in the sense that no prudent, caring, or cautious parent or guardian would make such a decision. (Paragraph 2)

[9] In determining whether there is a rational and reasonable basis for the Director's decision, I have had reference to the evidence included in an affidavit sworn by K.N. and two affidavits sworn by Liz Pittao, the current social worker, one of which includes a psychological assessment of K.N. prepared by Dr. Joanne Tessier.

[10] The reasons enunciated by the Director for reducing access fall into three general areas:

1. Drug and alcohol concerns;
2. K.N.'s progress and relationship with the Director; and
3. K.N.'s decision to leave M.N. in the care of C. and a non-approved caregiver.

Drug and Alcohol Concerns:

[11] As noted, the Director has received reports that K.N. is actively using and/or selling cocaine. Such a report, if found to be reliable, would certainly provide a rational and reasonable basis for the Director's decision to reduce access. Unfortunately, the source of the report is unnamed and the information provided to me is lacking in specificity, making it difficult to assess the credibility of the report.

[12] K.N. denies the allegation, admitting to only one incident of drug and alcohol use, which took place on November 4th. I have some concerns about K.N.'s credibility on this point.

[13] K.N. blames her drug and alcohol use on November 4th partially on the Director advising her that her access would be reduced and that the Director would be seeking a permanent care and custody order. The second affidavit of Liz Pittao makes it clear that this information was not conveyed to K.N. until the following week.

[14] Furthermore, K.N. has provided somewhat conflicting reports to the social workers regarding her usage. She has also sworn that November 4th "was the first time I had drank or used drugs in a long time" (paragraph 18, affidavit of K.N. filed November 15, 2005), yet she advised Dr. Tessier in September that "her drinking had been reduced to 'little to none', and stated that she had two drinks a month ago' (Tessier report page 8). K.N. has refused to participate in drug

testing. While she is certainly not required to do so, I am left with no objective information as to her actual consumption.

[15] Substance abuse would certainly go some distance in explaining K.N.'s erratic behaviour as detailed in the Director's affidavits and her continuing to engage in self-defeating behaviours which undermine her chances of regaining custody of M.N.

[16] I am of the view that there is enough evidence before me to conclude that drugs and alcohol may well be more of an issue for K.N. at present than at the April hearing, though I am unable to determine to what extent it is a problem. As a result, the evidence of drug and alcohol usage is insufficient, on its own, to provide a rational and reasonable basis for the reduction in access. At best, it can be considered a minor factor in assessing the overall reasonableness of the Director's decision.

K.N.'s Relationship with the Director:

[17] The relationship between K.N. and the Director was of major concern at the April hearing. Based on the affidavits before me, the relationship, if anything, appears to have deteriorated further.

[18] K.N. continues to demonstrate an unwillingness to work cooperatively with the Director. For example, in her affidavit, she expressed a willingness to have the Director attend at her home, yet when Ms. Pittao requested to visited, having seen the affidavit, K.N. advised that she was not welcome. Similarly, K.N. did provide a release of information to the Director regarding her attendance at Alcohol and Drug Services, but limited that release solely to confirmation of her attendance and not to her progress in treatment.

[19] This issue remains troubling to me; however, based on the case law, it is not an appropriate consideration upon which to base a decision to reduce access. As noted by Faulkner J. in *D.I. (Re)* [2003] Y.J. No. 48, "… it is unreasonable to withhold access as a means of coercing the parent into complying with the Director's wishes" (paragraph 2).

K.N.'s Decision to Leave M.N. in the Care of C. and a Non-approved Caregiver:

[20] It was made abundantly clear to K.N. that she was not, under any circumstances, to leave M.N. in C.'s care or in the care of a non-approved caregiver. K.N. provided sworn assurances that she would not do so again, yet she has once again done exactly that.

[21] K.N. is an intelligent woman. There is no possibility that she misunderstood what was expected of her to ensure M.N.'s safety. Indeed, two weeks before this incident, K.N. demonstrated her knowledge of what was expected by taking the appropriate steps to arrange for M.N.'s care with an approved caregiver and to secure the Director's permission.

[22] There is no excuse for her decision of November 1st. Her stated reason of leaving to assist a friend with a flat tire as she wanted to pay the friend back for rendering past assistance to her falls well short of an emergency situation.

[23] Equally troubling is K.N.'s attempt to lie to the Director by suggesting that she had gone to buy juice and had only been absent for 15 minutes. K.N. also continues to deflect blame onto others, failing to recognize that she is responsible for the choices she makes.

[24] K.N.'s decision to once again fail to make appropriate provisions for M.N.'s care and her subsequent attempt to cover up her behaviour clearly demonstrate that, in the words of the Child Advocate, K.N. cannot be taken at her word.

[25] This event, in my view, does provide a rational and reasonable basis upon which to both reduce access and to require that access be supervised, to ensure M.N.’s safety.

[26] I do agree that the reduction of access has been drastic in this case. However, I accept that the supervised access that can be offered will, of necessity, be greatly reduced from unsupervised access, given the logistical requirements. Having found the Director’s decision to have a rational and reasonable basis, it is not open to me to interfere with the schedule set up by the Director even if I were of the view that the visits could be more frequent.

[27] This leaves the outstanding issue of assessing the reasonableness of the Director’s decision effectively to deny visits of the entire family unit. M.N. has, for some time, been enjoying visits with both her mother and her sister present.

[28] I can find no rational basis on the evidence before me to deny M.N. continuing visits with her entire family. There is no suggestion that these joint visits present or create any concern. The Director’s counsel indicated that a family visit is, in fact, being considered by the Director, and they are in the process of determining the family support worker availability to supervise on the weekend. I take from this submission that the main barrier to providing a visit for the family unit is a resource one. This is not a reasonable basis upon which to withhold access between the family as a whole.

[29] Accordingly, I make the order that an additional supervised visit be provided each week involving the entire family, most likely on the weekend to accommodate C.’s schedule. However, I leave the actual timing of the visit to the Director’s discretion, with the exception of Christmas week, for which I direct that the visit take place on Christmas day. I am cognizant of the logistical problems

this will present, but I believe that it is in M.N.'s best interests to spend at least some period of time with her family on Christmas Day.

Ruddy T.C.J.