Citation: Re: Matter of *S.K.R.*, 2005 YKTC 68

Date: 20050919
Docket: T.C. 04-T0002
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

AND IN THE MATTER OF S.K.R.,
A CHILD
WITHIN THE MEANING OF THE SAID ACT

Publication of identifying information is prohibited by section 172(2) of the *Children's Act*.

Appearances:
David Christie — Appearing for the Mother
Lana Wickstrom — Appearing for the Director of Family and Children's Services

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): This matter is before me for a decision and at this point in time I am prepared to give that decision. However, I have a number of notes, so you will need to bear with me.

[2] In the matter of S.K.R., the Director seeks a permanent care and custody order. The mother, E.K., initially opposed the Director's application, but following a lengthy hearing, she now concedes that she is not in a position to parent S. at this time and is

no longer contesting the permanent order. However, she seeks an order granting her reasonable access to S.

[3] In terms of the history of child protection proceedings, this court granted a six month temporary care and custody order on July 15, 2004, and extended it on November 4, 2004. The Director filed an application to convert the temporary care and custody order to a permanent care and custody order on December 8, 2004. Hearing of the application proceeded in May of 2005. Counsel filed written submissions and the matter was argued on August 25, 2005.

[4] In terms of the factual background, S. was born on December 3, 2003 and is approximately 21 months old. His father, S.R., did not participate in the hearing of this matter and has not been involved with S. for some time, having left the Territory in May or June of 2004. S.'s mother E. and her family, on the other hand, have had ongoing involvement.

[5] E.'s own history can be described as somewhat unstable. Both of her parents have struggled with alcoholism. Her father, R.R., has been able to maintain sobriety for some time but her mother continues to abuse alcohol. E.'s parents separated when she was seven years of age, causing significant disruption in E.'s life. E herself began abusing alcohol at the young age of 13 and it has had a significant negative impact on her life ever since.

[6] At the age of 17, E. discovered she was pregnant with S. To her credit, she was able to successfully abstain from using alcohol or tobacco and to look after her own health during the course of her pregnancy. As a result, S. was born without any

cognitive or developmental delays, though he does suffer from some minor medical difficulties.

[7] Unfortunately, E. eventually resumed abusing alcohol. Not surprisingly, her alcohol problem interfered with, and continues to interfere with, her ability to parent S. S. first came to the attention of the Director on the 15th of March 2004, with the report of E. drinking "every chance she gets" and leaving S. with Sheldon or Sheldon's father for extended periods of time.

[8] E. admitted to Mireille Simon, the social worker, that she was drinking practically every day and that there were instances of violence between her and Sheldon. The Director did not initially bring S. into care; instead, alternatives were explored. Richard Rook agreed to provide ongoing care for S. and respite for E. However, he became overwhelmed with the stress of caring for S. and dealing with E.'s drinking. Other family members were explored and did provide some respite but ultimately were unable to care for S. on a full-time basis.

[9] On April 5, 2004, in response to an anonymous call, on-call social workers attended at the Bonanza Inn and found E. pushing and hitting S.R. The RCMP became involved. S.R. provided a breath sample of 110 milligrams percent and E. was noted to be very intoxicated. S. was present throughout. He was taken from the scene and placed with fraternal Uncle D.R. and his partner M.C.

[10] In late April 2005, E. and M.C. travelled with S. to Vancouver for the purposes of an operation to address S.'s diagnosed craniosynistosis. It should be noted that the operation was successful and S. has not had any ongoing related problems. During the

course of the visit to Vancouver, E. disappeared for some 36 hours. She later admitted to drinking with relatives in the area. S. remained with D.R. and M.C. for approximately one month. During that time, S.R. and E. visited with S. but not on a regular basis. Friction arose as a result of E.'s drinking and calling or showing up at the residence. M.C. and D.R. were not prepared to continue to care for S. in those circumstances. S. was brought into care and placed in an approved foster home, where he remains to date.

[11] S. has had the benefit of residing in the Neilson family home since May 5, 2004. Unfortunately, the Neilson's are unable to care for S. on a long-term basis but have committed to providing him a home until a permanent placement can be found. His foster mother, Betty Nielson, provided evidence to the court regarding S.'s time under her care. By all the counts, S. suffers from some minor medical problems but is developmentally advanced for his age.

[12] S. has experienced some respiratory problems which have required treatment with antibiotics, administered initially with an inhaler and later with a nebulizer. He appears to have responded well to the treatment and has not required antibiotics since January of this year.

[13] Betty describes S. as extremely energetic, very bright, inquisitive and determined. She indicated he was assessed by the Child Development Centre but it was determined that he did not require their assistance or intervention.

[14] E. has not faired as well in her development over the same period of time. She has not been able to make any significant inroads in addressing the child protection

concerns which brought S. into care. She has continued to associate with inappropriate peers and partners. While intoxicated, she has been involved in a number of violent altercations with others. She has not been able to consistently and effectively address underlying domestic violence concerns. Similarly, her efforts to address her alcohol problem have been sporadic and ineffective. She clearly recognizes that alcohol is ruining her life; she clearly has the desire to stop drinking.

[15] However, she has been largely unsuccessful in addressing her substance abuse problem. She has not been consistent in maintaining contact with Alcohol and Drug Services, though, in her defence, it appears that she was assigned a number of different ADS counsellors and experienced difficulty connecting with some of them. Her AA attendance has been equally inconsistent.

[16] She continues to consume alcohol on a regular basis. Her only substantial period of sobriety lasted 37 days. This period immediately preceded her admission into a 28 day residential treatment program on February 27, 2005. She left the program on March 4th, mere days after commencement and without completing the program. She began drinking again and continued to drink off and on until some 10 days before the hearing of this matter.

[17] At the hearing, the evidence suggested that perhaps E. was seriously prepared for the first time to engage in treatment. Both Martha White, her ADS counsellor, and Marian Boss, her Healthy Families worker, assessed E. to be in the action phase in the model of change. Argument was adjourned by agreement to give her additional time to

address her alcohol issues. Unfortunately, she relapsed within one week by consuming alcohol, commencing on her 19th birthday.

[18] Not surprisingly, E.'s significant alcohol problem interfered with access arrangements on a regular basis in terms both of frequency and quality of visits. Mireille noted that when E. was sober and not hung over, her visits with S. occurred as scheduled and were quite positive. However, when E. was drinking, visits were missed. When E. was hung over, visits were not positive with E. being less attentive.

[19] Betty indicated that E.'s visits were quite consistent at the very beginning and most consistent during January and February of 2005, a period which coincides with E.'s longest period of sobriety. At all other times, visits would be off and on, though E. would phone frequently. Inconsistency of the visits did present a problem as evidenced by the fact that S. would look for E. and be upset and disappointed if she failed to appear. As a result, Betty made a determination not to tell S. in advance of a scheduled visit until she had received confirmation from E. on the date of that visit. Betty also indicated that after a period of missed visits, S. would initially ignore E., though he would eventually warm up to her and want her to stay.

[20] Overnight visits were attempted on only three occasions. On the first two occasions, R.R. was present and the visits occurred without incident. On the third attempt, E.'s younger brother had to contact the foster parents to retrieve S. as E. was curled into a fetal position and was non-responsive. E. later admitted to consuming alcohol.

[21] Despite the inconsistency of access, it is fair to say that there is a bond between E. and S., though the exact nature of that bond is somewhat difficult to define. Mireille described E. as attentive to S.'s needs and observed positive interactions between them when E. was not drinking or hung over. She further indicated that S. was happy to see E. and that no one can make S. smile like E. can. Betty testified that S. runs to E. when he sees her and that he pushes Betty away after E. leaves. Similarly, Marian Boss, the Healthy Families worker, noted positive interaction and affection between S. and E.

[22] On the whole, the evidence clearly supports a finding that S. continues to be in need of protection. This has also clearly been recognized by E. and her decision not to further contest the permanent care and custody order.

[23] What remains at issue is E.'s application for reasonable access to S. Initially, the Director took the position that the Territorial Court did not have jurisdiction to entertain an access application, as it is not specifically provided for in the *Children's Act.* The Director now concedes jurisdiction. Notwithstanding this concession, counsel for E. still seeks a determination on the issue of jurisdiction. However, with jurisdiction being conceded by both parties, it is unnecessary for me to make such a determination for the purposes of this application and I decline to do so. I will confine my remarks to the merits of the access application.

[24] In support of E.'s application for access, her counsel urges me to consider the following arguments: There is no evidence that harm will come to S. if access is ordered; there is no evidence that a closed adoption is in S.'s best interest; it is important to protect the integrity of the family; there is a bond between E. and S. that is

beneficial and meaningful to S. and that bond should be preserved; and that there is no evidence that adoption is more important than access or that an order for access would weaken S.'s chances for adoption.

[25] In reply, the Director has put forth the following arguments: There is no evidence that access is beneficial or meaningful to S; E. has failed to put S.'s interests before her own by failing to address the underlying child protection issues despite numerous opportunities; S. needs stability and the inconsistency of access as exercised by E. is not in S.'s best interest; access should be the exception rather than the rule following a permanent care and custody order; and access may hinder the possibility of adoption by too steeply narrowing the pool of potential adoptive families.

[26] The test to be applied in determining whether or not to grant the application is the same test which must be applied to all child protection decisions. Section 1 of the *Children's Act* mandates that in all decisions made pursuant to the *Act*, the best interests of the child must be the paramount consideration. Section 1 reads as follows:

> This Act shall be construed and applied so that in matters arising under it the interests of the child affected by the proceeding shall be the paramount consideration, and if the rights or wishes of a parent or other person and the child conflict the best interests of the child shall prevail.

[27] Counsel has filed numerous decisions outlining various different factors to be considered in assessing the appropriateness of an access order following a permanent order. The Director has also referred to various factors set out in legislation from other jurisdictions as being appropriate factors to consider. In my view, all of the factors referred to in the various cases and pieces of legislation are subsumed in the five

principles set out in the most persuasive and influential of the cases filed, the Supreme Court of Canada decision in *New Brunswick* v*. L.M.*, [1998] 2 S.C.R. 534.

[28] In *L.M.*, *supra*, Mr. Justice Gonthier stated the following:

> An order for permanent guardianship is the result of a consideration of the best interests of the child. In considering whether visiting or access rights should be granted, the judge cannot ignore the fact that he or she has first found it necessary to remove the child from the parents' care completely and permanently, so that the child's welfare will not be jeopardized any further. The judge must therefore consider whether more limited contact might still be beneficial for the child.
>
> My consideration of whether access should be granted is based on the following principles. First, there is no inconsistency in principle between a permanent guardianship order and an access order. Second, access is the exception and not the rule. Third, the principle of preserving family ties cannot come into play in respect of granting access unless it is in the best interests of the child to do so, having regard to all the other relevant factors. Fourth, an adoption, which is in the best interests of the child, must not be hampered by the existence of a right of access. Fifth, access should not be granted if its exercise would have negative effects on the physical or psychological health of the child.

[29] Inherent in each of these principles is the overriding consideration of the child's best interests. I cannot stress enough that this decision is about S.'s best interests and only S.'s best interests. The right of access following a permanent order is S.'s right, not E.'s or her family's. While the many cases provided are helpful in clarifying the factors to be considered, in the end it comes down to the specific facts in any given case in determining the appropriateness of an access order.

[30] This requires an analysis of the principles of *L.M., supra,* in the context of the facts in the case before me:

(i) No inconsistency in principle between guardianship and access.

[31] In accepting the possibility that a permanent guardianship order and an order for access can co-exist, Mr. Justice Gonthier stated the following:

> In addition, even where the Minister intends to try to find an adoptive family for a child under his guardianship, it may be in the best interests of the child to maintain contact with his or her natural family. For instance, it may be necessary to ensure a child's emotional stability by keeping him or her in the foster family, so that the child does not have to live with a parent who is unable to provide for his or her welfare but can nevertheless have the opportunity to maintain and cultivate an emotional tie with that parent.

[32] In the case at bar, I have absolutely no doubt that S. is deeply loved by his maternal family. That love was clearly evident of the testimony of not only E., but of her father, R.R., as well. Furthermore, R.R. provided evidence of S.'s rich and diverse cultural history. I accept that it would be ideal for S. to have access to as many loving supports as possible and that exposure to his cultural background will be extremely valuable to him. Unfortunately, this potential benefit to S. is not the end of the matter. It must be weighed against the remaining factors to determine what is ultimately in S.'s best interest.

(ii) Access: the exception and not the rule.

[33] E.'s counsel argues that the *Children's Act* does not legislate a presumption against access following a permanent order. While this is true, I would note that the *Children's Act* does not legislate the authority to grant access after a permanent order either. That authority has been a product of judicial determinations, most notably the decision of His Honour Judge Stuart in *R.A.*, [2002] Y.J. No. 48 (QL). In such

circumstances, it is appropriate, in my view, to look to case law for the limits of that jurisdiction. The Supreme Court of Canada has said in *L.M., supra,* and I do accept, that:

> A review of the case law and legislation of the other provinces shows that access is the exception and not the rule in the context of a permanent guardianship order.

Mr. Justice Gonthier notes that access will only be granted in rare situations, with exceptional circumstances.

(iii) Preservation of family ties: a factor.

[34] As already noted in the factual overview, I accept that there is a bond between E. and S. What is unclear to me is the nature of that bond. Neither the Director nor the respondent called expert evidence on the nature of the attachment. Looking at the evidence before me, I would find it difficult to conclude that there is a primary attachment or parent/child bond between the two, given the fact that S. has spent the majority of his young life in care and E. has spent very little time in the role of primary caregiver. Betty Neilson is likely more of a maternal figure to S. at this point in time.

[35] I do, however, accept that there is a definite familial bond. E.'s counsel maintains that the bond between E. and S. should be maintained. I would note, however, that the preservation of any bond must be subject to the overall best interests of the child. Again, in *L.M.*, *supra*, Mr. Justice Gonthier concluded "while preserving emotional ties is one of the elements of the definition of the best interest of the child, it will only operate

in favour of granting access if access is in the best interests of the child, having regard to all of the other factors."

(iv) Adoption as a priority.

[36] In the *L.M., supra,* case, the Supreme Court of Canada held that:

> If adoption is more important than access for the welfare of the child and would be jeopardized if a right of access were exercised, access should not be granted. In other words, the courts must not allow parents to "sabotage" an adoption that would be beneficial for the child.

[37] In this case, sabotage is clearly not an issue. Throughout, both E. and her father have been cooperative and respectful in their dealings with the foster parents and I have no doubt that they would continue to be so in dealings with an adoptive family.

[38] However, I must turn my mind to whether an access order would hamper adoption in other ways. In the case at bar, E.'s counsel argues that there is no evidence that adoption is in S.'s best interest. With the greatest of respect, I disagree. It is self-evident that S.'s best interests, as with any child, are best served by being raised in a safe, secure, stable and consistent environment. In this case, E. is unable to provide that environment. The Neilsons are unable to provide that environment on a long-term basis. It would not be in S.'s best interest to be shuffled through a series of short-term foster placements. Adoption is S.'s best chance for achieving the home environment that he deserves on a long-term basis.

[39] The respondent further argues that an adoption for S. may never happen and it would therefore be safer to preserve his ties to his birth family.

[40] The evidence before me as it relates to adoption was provided by Reita Morgan, the supervisor of the adoption program. She testified to the following. There are 70 families waiting for adoption, five of those families are First Nations or mixed First Nation and white families. None of the 70 families are prepared to take severely special needs children but approximately one-third are willing to accept a child with low level medical needs, such as asthma or diabetes.

[41] Not all adoptive parents are open to contact with the birth family. Indeed, only about one-third of the 70 families have expressed a willingness to have ongoing contact. A child under the age of two can still form a primary attachment to an adoptive parent. After the age of two, a child can still form a secondary attachment but it will take longer. Most importantly, Reita Morgan testified, and I do accept her evidence, that it would be fairly easy to find a family for a child such as S., who is under the age of two, with low level medical needs and no developmental issues.

[42] E.'s counsel argues that as Ms. Morgan was not qualified as an expert, I should not accept her evidence as to attachment issues, specifically, the two year age limit on forming a primary attachment. However, whether age two is the magic number or not, what I do accept is that the younger a child is, the greater that child's chance is of bonding with an adoptive family. So time is of the essence in finding S. an adoptive home.

[43] The respondent argues that there is no evidence that an access order will jeopardize adoption, particularly as one-third of the families would be willing to have ongoing contact and only one family is needed. What is of concern to me is that only

one-third of the families would take a child with S.'s medical needs and only one-third would be willing to have ongoing contact. I have no information as to the overlap of these two groups, namely, the number of families prepared to take a child with low level medical needs who are also willing to have ongoing contact. I suspect we are not talking about entirely the same third of families, which would further limit the already limited number of potential adoptive homes for S. should there be an access order.

[44] While Mr. Christie is correct in saying that only one family is needed, this is not about finding just any family to take S.; it is about finding the right family for S. It is important, in my view, to maximize S.'s chances of finding the family that he deserves. Mr. Christie is also correct in saying that if an access order were to impede an adoption, in actual fact, the Director could bring the matter back to court to seek a termination of the order. However, the course of child protection proceedings in court can often be lengthy and drawn out. Having already found that time is an issue in maximizing S.'s potential to bond with an adoptive family; it would be unwise, in my view, to lengthen that time frame by requiring further court proceedings.

(v) Interests and needs of the child to take priority.

[45] This final of the five *L.M.* principles involves weighing the various components of the best interests of the child to determine which of the child's interests and needs should take priority. With respect to this delicate exercise, Mr. Justice Gonthier noted:

> The evidence as to how access has been exercised is particularly relevant, since it relates both to the attitude of the parent and to the affects of the visits on the child. Every parent must place his or her child's interests ahead of the parent's own.

[46] The evidence before me demonstrates a history of inconsistent access. It does not demonstrate direct harm to S. in those visits which did proceed, but rather demonstrates an indirect harm to S. where visits did not proceed. Betty Neilson was fortunately able to mitigate the harm to S. by not advising him in advance of visits to avoid disappointment. A child of S.'s young age needs consistency. E. has been unable to provide that consistency either as a caregiver or while exercising access.

[47] In urging me to grant an order for access, E.'s counsel points to the Yukon decision of His Honour Judge Stuart in *R.A., supra,* and suggests that it is factually similar to the case before me. Unfortunately, I am of the opposite view as I find *R.A.* to be factually distinguishable.

[48] Firstly, *R.A*. involved an established co-parenting relationship between the foster mother and the birth mother, and the foster mother was prepared to keep the child on a permanent basis. In this case, while there is a cooperative relationship between E. and Betty, Betty is unable to care for S. on a permanent basis.

[49] Secondly, in *R.A., supra,* adoption was unlikely given the special needs of the child. In this case, S. is clearly adoptable. Lastly, Judge Stuart was impressed in *R.A.* with the mother's efforts to address the underlying child protection risk to the best of her intellectual ability and made particular note of her remarkable record of consistency and visitation. In this case E., despite her best efforts, has made little progress in addressing the underlying child protection issues and has been inconsistent in exercising access to S.

[50] In so saying, I want to make it clear that I am not judging E. I believe that she has the very best of intentions in relation to S. and I recognize that it is her addiction which has interfered with her ability to follow through on those good intentions. Unfortunately, S. needs and deserves more than good intentions to ensure that he has the future he deserves. Though it is equally important, in my view, for E. to understand that S. has a chance at such a bright future because of her decision to maintain sobriety during her pregnancy. That decision was perhaps the greatest gift she could have given him.

[51] Having reviewed all of the principles set out in *L.M.*, *supra*, I recognize that there is value to S. in maintaining ties to his birth family; however, I am of the view that priority must be given to ensuring that an appropriate adoptive home is found for S. as soon as possible. Ideally, S. can have both an adoptive home and consistent ongoing contact with E. and her family, but having found adoption to be the priority, I am loath to make an order which could in any way impede that adoption.

[52] As a result, I am not persuaded, on the evidence before me, that it is in S.'s best interests for me to make an access order. I want to make it clear, however, that my declining to make an order for access does not preclude the Director or the future adoptive family from allowing access where it is in S.'s best interests to do so. In my view, the Director is in the best position at this point in time to assess S.'s best interests relating to ongoing access. She can monitor whether S. experiences any sense of abandonment, whether E. is able to control her addiction to the point where she can maintain consistent access, and whether appropriate adoptive parents can be found who are open to ongoing contact.

[53] It is my hope that both the Director and the future adoptive parents remain open to access where it is in S.'s best interests. In the meantime, I hereby make the formal finding that S. remains in need of protection and order that he be in the permanent care and custody of the Director. That is my decision.

[54] E., R.R., I want you both to understand that this was an incredibly difficult decision for me to make. I know that you both love S. very, very much and it is my hope that things go well enough for you that you are able to maintain contact with him.

[55] E., I hope that for your sake you are able, as you grow, to do everything that you can to try to control that your addiction. I know it is an incredibly difficult thing to do, but I wish you the best of luck in trying. Thank you.

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RUDDY T.C.J.