SUPREME COURT OF YUKON

Citation: *KPL v. RWE and SE*, 2015 YKSC 62

Date: 20151204
S.C. No.: 10-B0052
Registry: Whitehorse

BETWEEN:

K.P.L.

PLAINTIFF

AND

R.W.E. and S.E.

DEFENDANTS

Before the Honourable Mr. Justice R.S. Veale

Appearances:
David J. Christie — Counsel for the Plaintiff
No one — Appearing for the Defendant R.W.E.
Michelle Chan — Counsel for the Defendant S.E.

REASONS FOR JUDGMENT

[1] VEALE J. (Oral): This is an application by the mother of the child, C., who is six years old. The mother was granted interim custody, primary care and primary residence of the child on April 13, 2011, and that was in the context of a court action between the mother and the father. The mother has been the primary caregiver of C. for the best part of his life, subject to recent events. The mother made temporary arrangements for C. to be cared for by C's paternal grandmother and a paternal aunt. Unfortunately, S.E., the paternal grandmother, obtained an interim interim custody order without notice to C's mother in non-urgent circumstances. The mother applies to set

aside the without notice order, dated July 2, 2015. Counsel for S.E. did not make the application for the without notice order.

[2] I am not going to dwell in a great deal of detail about the events that took place between 2011 and the agreement that was reached on April 17, 2014, but the fact is that the mother was having difficulties. She had another child, she was having some postpartum depression, and having difficulties with alcohol. Those are facts that she readily admits.

[3] On April 17, 2014, the mother entered into an agreement, which effectively transferred the day-to-day care and control of the child to both S.E., the paternal grandmother, and the paternal aunt. The paternal grandmother resides in Watson Lake and the paternal aunt, who was going to have the day-to-day residency with the child, lives in Terrace, British Columbia.

[4] The agreement is interesting because it is very detailed. In this Court, we often see them on the back of a napkin or a letter or something and they are very simple. This one sets out an incredible number of factors, which normally are not contained in these agreements. I presume that is because of the involvement of the child protection worker in Watson Lake at the time.

[5] The agreement was a grant of permission for C. to reside in the home of the paternal aunt and her husband, a paternal uncle, in British Columbia, so that the child could have better access to support services and enrol in elementary school on September 2014. The agreement, which is called a "Consent Letter", was to remain in force from April 18, 2014, to June 17, 2015. The mother retained sole custody and parental rights, and should be notified in the event of any emergency.

[6] The Consent Letter authorized the paternal aunt to seek medical care for the child; to authorize medical treatment for him; to provide food and shelter; and to transport him in her car, including the authorization to pick him up and deliver him to school and daycare.

[DISCUSSION WITH COUNSEL]

[7] I infer from the Consent Letter that the child was to be returned to the mother in June 2015. It also indicates that any changes between April 18, 2014, and June 17, 2015, relating to his residence, school, and programming would only be done through consultation with the mother, the paternal grandmother, and the paternal aunt.

[DISCUSSION WITH COUNSEL]

[8] The agreement was very clear that the mother would retain custody of the child and that it was a temporary arrangement, which was obviously at the time beneficial to the mother and certainly at the time in the best interests of C.

[9] The difficulty arose in June and July of 2015. I hasten to add that the agreement did not work that well from the mother's perspective, as she had very little contact with the child during the temporary care and control of the paternal grandmother and paternal aunt.

[10] There is quite a dispute about this, but I am satisfied that there should have been a greater effort on the part of the paternal grandmother and paternal aunt to ensure that the mother was involved in the child's life so that it would not be a situation that we are faced with today, where the child has not had contact with the mother for a considerable period of time, in the neighbourhood of a year and a half or more. That was not

contemplated in the agreement because the mother was to remain involved in the child's life.

[11] Where this case went "sideways", as they say, is when there was a without notice application to this Court to grant an order to S.E., who at the time was not a party to the original court action, which had granted interim custody of the child to the mother. The application was made, on July 2, 2015. There is nothing inherently wrong with the application. It talks about how the child, C., has been thriving with his paternal aunt and has been receiving appropriate care and facilities in Terrace, British Columbia. But what was missing from the application was: one, notice; two, the mother's response.

[12] I cannot express how serious a breach that is, from my perspective. Without notice applications of this nature should only be made, and I add should only be granted, when there is serious jeopardy about the child's situation, which in this case would be the return to the mother, or the fact that it is impossible to serve the mother for reasons of unavailability, cannot find her, whatever the case may be.

[13] That was not the case in this circumstance. The paternal grandmother and the paternal aunt, as I understand it, were fully aware of where the mother was at the time. She was living in Whitehorse as of February 2015. They made no effort, from my review of the affidavit, to notify her whatsoever about the application that they were making, which was, in effect, to set aside the consent letter that gave temporary care and control to the paternal grandmother and the paternal aunt.

[14] That is a very, very serious matter for the Court because it is certainly a breach of the agreement; but more so, it really affects the relationships between the parties and it cannot be said to be in the interests of the child. It is in the interests of the child to

have everybody concerned, and particularly the mother who has the custody of the child, to be notified if there is going to be some change in a temporary arrangement that was made. That did not take place in this situation.

[15] The following three paragraphs were not part of my oral judgment but I add them here for the benefit of future applications.

[16] I note that the without notice application was made pursuant to Rule 43(13) which states:

> **Application of which notice is not required**
> (13) An application of which notice need not be given may be made by filing
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> (a) a requisition in Form 3,
> (b) a draft of the order in Form 54, and
> (c) evidence in support of the application.

[17] The application on July 2, 2015, does require notice as set out in Rule 47(3), as follows:

> **Notice of application**
>
> (3) Subject to subrule (2), a party wishing to bring an application must serve or deliver a notice of application at or before the time at which the notice of hearing is filed under Rule 48.

[18] Rule 50(13) and (14) provide as follows:

> **Powers of court if notice not given**
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> (13) If it appears to the court that a petition or application ought to have been but was not served on or delivered to a person, the court may
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> (a) dismiss the application or dismiss it only against that person,
> (b) adjourn the application and direct that service or delivery be effected, or that notice be given in some alternate manner, to that person, or

> (c) direct that any order made, together with any other documents the court may order, be served on or delivered to that person.
>
> **Orders without notice**
>
> (14) If the nature of the application or the circumstances render service of a petition or application impracticable or unnecessary, or in case of urgency, the court may make an order without notice.

[19] In other words, notice is always required unless it is impracticable, unnecessary or urgent. When the person is available for service, it is only in exceptional circumstances that service is not required.

[20] I have no hesitation about setting aside the without notice order dated July 2, 2015. I might add that the order was presented to the mother when she travelled to Terrace to pick up the child and return to Whitehorse. Those are situations that simply should not occur, particularly among families. I do not want to overdraw the issue, in the sense that I think both the paternal grandmother and the paternal aunt really do have the child's best interests at heart. I do not think there is any doubt about that, nor do I think there is any doubt about the care that the child has received with them.

[21] But the issue is that the mother of the child made an arrangement with them and, one, they are expected to honour the arrangement; and two, they are not expected to go behind her back and make a without notice application to the Court, which not only breaches the arrangement with the mother, but it deceives the Court and an order is made that is very disruptive to the mother.

[22] And I say "to the mother" because one cannot say it was necessarily disruptive to the child. In fact, there is a legitimate argument that it may have been in the child's best

interests. However, the child's best interests are to have all the information before the Court.

[23] The Court now has all that information and I am satisfied that the child should be returned to the mother. The issue that now presents itself is determining an appropriate timing for that transfer to take place. There are a number of issues that arise about this.

[24] One, of course, is that the child is halfway through the school year. He is halfway through the school year in Terrace, British Columbia, because the paternal grandmother and the paternal aunt obtained a without notice court order and, in fact, deceived the Court about the circumstances of the child being returned to the mother's custody, as was agreed upon.

[25] On the other hand, there is no question that the child has been thriving and all the evidence before me indicates that his time with the paternal aunt has been beneficial to him.

[26] However, the issue is how to return the child to the mother. The only issue before me is not that he should not be returned, because no one is saying that Terrace is a better place for the long-term custody of the child, but the issue is whether the child should be returned at the end of the fall term, which is December 18, 2015, or whether the child should be returned at the end of the school year, presumably in June 2016.

[27] Firstly, the mother has had the longest period of time with the child, when you think of the child's life. She, in fact, has to be complimented for the fact that she took the action with the assistance of the social worker and protection worker in Watson Lake to make sure that the child was well looked after at a time when she was having personal difficulties.

[28] The personal difficulties, as I understand it, are well in hand at this point -- not to say that the mother may not have issues, but they are well in hand -- in the sense that when she came to Whitehorse in February of 2015, she accessed support for herself and for the two other children that she has in her custody.

[29] There are some excellent reports in the material from Sara Galbraith, a provisional psychologist and Child and Adolescent Therapeutic Services counsellor with the Government of Yukon. She has given a report indicating that she and the mother are working to ensure that the children's needs are met, and it is a relationship that continues to this day. The mother has also begun to work with what is known as a "Healthy Families" worker to assist her in engaging in the Healthy Families Program, which runs in Whitehorse.

[30] I am satisfied from these reports that the mother has come a long ways in reasserting herself and being capable of looking after the children. This is not a case of where one compares the child being in the custody of the paternal aunt, who indeed may have superlative childcare skills. It is a case where a child of Aboriginal ancestry will be returned to his biological mother, who has had for the most part the child's life custody of the child, and, in my view, has the best interests of the child in her considerations at this time.

[31] I am not going to suggest that she necessarily has dealt with all the issues that she may have to face. And the fact that the child is a child with a number of very serious challenges, in terms of his behaviour and his ability to speak and his ability to behave in classrooms, I think the mother must know that she is taking on a huge challenge. The fortunate thing is that she is living in an area of Whitehorse where the

school is quite accessible in walking distance, and that will certainly assist the delivery and pick up of the child on a regular basis.

[32] I am not satisfied that the services that have been rendered in Terrace, British Columbia, are, quite frankly, any better or any different than those available in the community of Whitehorse. I do not think there is any great advantage. There may have been one when the agreement was entered into, in terms of what is available in Watson Lake. I do not have a lot of evidence about what is available there. But from the evidence that is available in Whitehorse, the care and the programming that will be available to the child is considerable and will be of great advantage to the mother and the child.

[33] I have given consideration to the submission on behalf of the paternal grandmother and the paternal aunt that the child should remain in Terrace until the end of the school year. There are a number of issues that arise with respect to that.

[34] There certainly is an argument that it might be in C.'s best interests to have the transfer take place at the end of June. On the other hand, that extends the period of time that this mother has not been able to have reasonable access to the child.

[35] In my view, there is some urgency in returning the child to his mother rather than having a longer period of time where the child is away from his mother and from his Aboriginal community, which I think is a factor to be considered in this case because the paternal grandmother and paternal aunt are not Aboriginal. I do not say for a moment that they have not done a great job. But, in my view, that is a factor that is certainly weighing on this Court, that the child should be returned to his biological mother for that reason.

[36] I am therefore going to order the paternal grandmother and the paternal aunt to travel from Terrace to Whitehorse and bring the child to the mother in Whitehorse to be transferred to the mother's care and control no later than December 23, 2015. I do so on the understanding that the school term ends on December 18 in Terrace, which would give more than adequate time to make that transfer.

[37] I think the transfer is very important because there should be a transfer that is sort of a healing transfer for the paternal grandmother, the paternal aunt, and the mother -- and particularly C., because for C., they are all his friends and supporters. I think it is important that they do that transfer in the hope that their future relationship will be a strong and healthy one, and constructive one, because there is no reason that the paternal grandmother and the paternal aunt cannot continue to have a role in the child's life.

[DISCUSSION WITH COUNSEL]

[38] Counsel for the mother is asking for court costs of this application. I am referring specifically to the application before me today, which is only a small part of all the legal effort that went into the application. Counsel is asking for a lump sum of $500.

[39] Counsel for the paternal grandmother makes a reasonable case that they were acting, as they thought, in the best interests of the child.

[40] But at the end of the day, they breached an agreement that was quite clear and specific. The paternal grandmother made an application behind the back of the mother. She knew where the mother was and may have even known that the mother had been making great strides of improvement.

[41] I find that the without notice application and the breach of the agreement should not be condoned by this Court and I can say, quite frankly, that the Court itself feels deceived in the matter. We make these without notice orders on the assumption that there is an appropriate reason behind it all. There simply is not an appropriate reason behind this without giving consideration to the mother's situation, which would have resulted in quite a different order than the without notice order that was issued on July 2, 2015.

[42] I am going to order that the paternal grandmother pay court costs in the amount of $500 immediately.

[43] I trust you will give her time on that, but I am saying that it is an order that requires immediate payment.

[DISCUSSION WITH COUNSEL]

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VEALE J.