

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

IN THE MATTER OF the *Child and Family Services Act*, R.S.Y. 2008, c. 1,
and M.K., H.K., M.K., and J.K.;

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* or section 162(2) of the *Child and Family Services Act*.

Appearances:

Tara Grandy

Counsel for the Director of Family
and Children's Services
Counsel for the Applicant
Counsel for the Children

Malcolm E.J. Campbell

Norah Mooney

RULING ON APPLICATION

[1] COZENS T.C.J. (Oral): This is an application by the Director of Family and Children's Services (the "Director") to suspend the order for access that I made on Thursday, October 2, 2014, after an earlier hearing.

[2] I ordered that C.S. be granted supervised access to the Children, being M.K., H.K., J.K., and M.H.K. (collectively referred to as the "Children"), initially for a minimum of 30 minutes a week and increasing to one hour, both the place of access being a public place and the supervisor had to be approved by the Director. I included in the order that the parties could bring the matter back before me if there was new information that would likely impact the issue of access. The Director filed this

application for an order suspending this access order on October 3, 2014, seeking that this matter be dealt with at the protective intervention hearing, based on new information that was available that was not before me.

[3] While all the evidence that was before me on the original access hearing was available for consideration on this application, I am not going to repeat or review this evidence for the purposes of this decision.

[4] The Director called one witness on this application, Cst. Plamondon, who had testified in the original hearing. The new information that was proffered by Cst. Plamondon is as follows: She met with Bob Kuntz from the Boys' Receiving Home. She had indicated in her earlier testimony she was seeking to do it but had not yet had the opportunity to. Mr. Kuntz told her that when M.H.K. and J.K. were in his vehicle after a visit with their sister several weeks prior, that M.H.K. had said he wanted to go and see C.S., and J.K. said, no, he did not. As a result, Cst. Plamondon interviewed J.K. on October 1st. He disclosed to her in this interview that he had been spanked on the bum by C.S. six times, although no time frame was given and there was no elaboration as to whether the six times was on one occasion or six separate occasions. I note that Cst. Plamondon had earlier, when relating to an incident about "five times" had inferred he meant five separate occasions with respect to one of the other Children.

[5] Using Cst. Plamondon's hand while holding a pen, J.K. drew a picture of the belt. In cross-examination, Cst. Plamondon agreed that when doing so J.K. asked if what they were drawing was something like a "lake" or something else she could not

specifically recall. J.K. also drew a picture of the Boys' Receiving Home and said he wanted to stay there. He told Cst. Plamondon he did not want to visit C.S.

[6] Cst. Plamondon also stated that J.K. told her that C.S. and J., who also lived in the residence, had each spanked him with a belt. He stated that he did not see his brother and sisters being spanked, although I understood that he had used the word "us" referring to being spanked and this means brother and sisters. When J.K. mentioned being spanked by J. and C.S. at the end of the interview, he was noted to be tired and fidgety and Cst. Plamondon was concerned about whether he understood the importance of telling the truth.

[7] Cst. Plamondon stated that there have not been any new charges laid as a result of the Information and she could not say whether there would be.

[8] Cst. Plamondon stated this was the first time J.K. had told her he did not want contact and that he had been hit with a belt.

[9] The child advocate called T.C. She is currently providing foster care for M.K. since September. She has provided care for M.K. in the past, as early as six months old, and on and off up until she was 5. She stated that M.K. has been doing very well in her home, and that in speaking with the school M.K. is doing very well there. There have been no problems with M.K.'s behaviour. She stated that M.K. has not asked to see anyone yet. She asked M.K. one time a week only, in accordance with her usual practice and her extensive experience with children, and M.K.'s response has been no. She stated that M.K. did not want to go to the meet and greet at the school because she might see people that she didn't want to see, that being M.K.'s words. When asked

about this on September 23rd, M.K. said it was C.S. she did not want to see. M.K. has said on several occasions since then she does not want to see C.S., a total of six to eight times. She also stated that C.S. had hit her brothers and her sister with a belt. The first time M.K. made reference to being hit with a belt was in her discussion on October 3rd. When asked how this made her feel, M.K. said it made her feel sad, but now she feels safe. T.C. stated she would love to have M.K. stay on in her home.

[10] C.S. testified. Essentially her testimony reiterated she has not hit the Children with a belt. In cross-examination she stated her brother had stayed with her for approximately six months in 2012; briefly in January 2013, and for one night in October or November 2013.

[11] She stated that he wore a belt. She stated that on one occasion he grabbed his belt between both hands when he was coming up the stairs and snapped it, making a loud noise, and the Children jumped. She told him not to do that.

[12] The Director submits that all of this information being new should result in there being a suspension of the order and that there should be no access between C.S. and any of the Children. She submits I should have serious concerns about C.S.'s credibility because she had earlier testified there had been no belt in her home and she had not testified that her brother had stayed there and he had a belt.

[13] The child advocate provided additional information in her submissions. She had met with M.K., and M.K. told her that she did not want to have visits with C.S. When the child advocate suggested several different ways in which a visit could take place, M.K.

continued to state that she did not want access. The child advocate stated that M.K. had said she wanted to live with T.C.

[14] The child advocate further stated that I should listen to the voice and wishes of M.K. in accordance with the Convention for the Rights of the Children of the United Nations and that I should not allow access.

[15] Counsel for C.S. submitted I should not vary the access order and that, in fact, I should provide clear directions for the access to be facilitated given the Director's refusal to facilitate access since my original order despite several requests by C.S. He submits that there is no new information before me that will allow for the order to be varied.

[16] First, with respect to the new information, I find that the testimony of Cst. Plamondon adds little to the information that I had in the original hearing. An indication by J.K. that they had been spanked on the bum by C.S. and that he said to Mr. Kuntz he did not want to go see C.S., which I infer from the circumstances would have been going to her home, is insufficiently probative to cause me to alter my original decision. There is no time frame and additional detail and no indication that there were any physical injuries or bruising that occurred as a result. This is to be compared to the allegations already before me at the original hearing, with the noticeable markings to J.K. and M.H.K.

[17] I keep in mind a matter that I discussed at some length in the application that, given that the access was supervised, I would, in the absence of probative evidence, otherwise be satisfied that supervised access would not allow for physically assaultive

behaviour. I am aware of the incidents in May that resulted in the bruise to M.H.K.'s cheek and J.K.'s face as well, but it is very unclear as to how those happened and I am not satisfied that that is an indication with any probative value that an assault had occurred by C.S. against the Children in that time frame. Therefore, the allegations of J.K., I think, can reasonably assume to have taken place prior to the charges in February. I am not saying that I can find that with ultimate certainty, but I am not prepared to find otherwise on the information before me.

[18] With respect to J.K.'s wishes, I consider his age in a much larger context. Here M.H.K. stated he wanted to see C.S. Should I consider that to be determinative in the same way I am being asked to consider J.K.'s statement? I think that would be unsafe as well. These are 4-year-old children and I have to weigh what they say carefully in light of their age and understanding of the larger issues. Had this information now proffered been before me at the original application, it would not have impacted my decision and it does not cause me to believe access should be denied now.

[19] When I consider the information regarding M.K., however, I find that this information is significantly different. I am less persuaded by the disclosure regarding C.S. allegedly striking all the Children with a belt than I am by M.K.'s express desire to T.C. and the child advocate that she does not wish to see C.S. M.K.'s behaviours seem to have not only stabilized since residing with T.C. but to show clear positive progress. T.C.'s approach to dealing with M.K. seems to me to be very cautious and effective. I am satisfied that M.K.'s comments to T.C. were genuinely and carefully made by her. I consider also the same views regarding a wish not to see C.S. were expressed to the child advocate, who took the time to ensure that M.K. would understand the visits were

not necessarily to be in C.S.'s home. In these circumstances, I find that the access order should be varied in respect of M.K. Had this information been before me at the original hearing, I would not have made the order that I did.

[20] On a final note, I do not find that M.K.'s disclosures regarding the belt to be of significant impact such that they should vary the original order in regard to access to the other three Children. The disclosure, while not undervaluing its content or what may perhaps ultimately come out of it, does not cause me to believe that the order should be varied. Had this information been before me in the original application, it would not have caused me to have made a different order other than in respect of M.K. for the reasons stated above.

[21] I find that I am not in a position to assess C.S.'s credibility in relation to her recent testimony regarding her brother being in the home and having a belt and the potential value of this possible inconsistency. The manner in which this testimony arose in both hearings does not, in my opinion, provide me a sufficient basis to make any assessment as to the impact this would have on her credibility for the purposes of this application. I have already addressed an issue regarding C.S.'s credibility in the original decision.

[22] I am cognizant of the fundamental principle that it is the best interests of the child that are paramount and of the principles set out in section 4 of the *Child and Family Services Act*. The issues before me and that are before the Court in the Director's application for a continuing custody order are complex and varied. I am satisfied that allowing supervised access to H.K., J.K. and M.H.K. as per the original order is in accord with the applicable principles and does not risk the physical or psychological or

emotional safety of these Children. If C.S. were to say anything inappropriate and potentially harmful, the access visit would be terminated and the Director justified in seeking to have any further access visits cancelled. Therefore, the access order of October 2nd is varied only to the extent that there are to be no access visits by C.S. with M.K. until further order of the Court, and I fully expect that the access visits on October 2nd be arranged for and facilitated by the Director in respect of the other three Children.

COZENS T.C.J.