

Citation: *J.A. (Re)*, 2015 YKTC 36

Date: 20151001  
Docket: T.C. 14-T0056  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Luther

IN THE MATTER OF the *Child and Family Services Act*,  
R.S.Y. 2008, c. 1, and *J.A., L.A., J.A., and L.A.*

**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:

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

**REASONS FOR JUDGMENT**

[1] LUTHER T.C.J. (Oral): Over the course of 12 days and after hearing from 31 witnesses -- three of them on two occasions -- and considering the arguments of three capable counsel, I am called on to determine whether the application by the Director of Family and Children's Services for a temporary custody order in relation to *J.A.* should be granted. The question as to whether *J.A.* was a child in need of protective intervention in August of 2014, and continues to be, is at the crux of the matter before me.

[2] There are three recent cases from our Court which give considerable guidance: *J.L. (Re)*, 2012 YKTC 20; *A.N. (Re)*, 2013 YKTC 44; and *M.K. (Re)*, 2015 YKTC 8.

[3] The burden of proof is on the Director. This is well established and has been set out in many cases, including one in 1998 by the B.C. Court of Appeal in *B.S. (Re)* (1998), 107 B.C.A.C. 87. The relevant portions are found at paras. 26 to 29.

26 I do not have any doubt that the burden of proof in child protection cases rests on the person who asserts the need for protection. Nor do I have any doubt that the standard of proof is the standard in civil cases, namely, the standard usually called "the balance of probability". Sometimes, in applying that standard, the seriousness of the allegation being made is thought to require a higher and more particularized measure of confidence on the part of the decision maker that the balance of probability test has been met. But the test remains the same. The weight of the evidence must show that it is more probable than not that the assertion being made is correct.

27 When the assertion being made is about a past event then the actual occurrence of that event must be shown by the weight of the evidence to have been more probable than not. That is the case with past abuse, neglect, or harm to a child.

28 But where the assertion being made is that there is a risk that an event will occur in the future, then it is the risk of the future event and not the future event itself that must be shown by the weight of the evidence to be more probable than not. That is the case with consideration of a threat of future harm.

29 The result is that in considering past abuse the degree of certainty that it has occurred will be more than is required in considering whether abuse will occur in the future. A ten percent risk of future abuse may meet the test of the risk being shown to exist on the balance of probabilities, whereas a ten percent assignment of the probability that the abuse had occurred in the past would not meet the balance of probability test.

[4] While no provincial and territorial acts are identical, all are similar and I, again, accept this statement of the law. As to what the civil standard really means, I had occasion to go over that and historically explore that concept of balance of probabilities

and preponderance of evidence in a civil case, *Whitehorse Condominium Corporation #2 v. Environmental Refuelling Systems Inc.*, 2015 YKSM 2.

[5] J.A. was born on April 2, 2006. He was apprehended on August 29, 2014, at the age of eight. The Director's application was filed on September 15, 2014. Specifically, it is made pursuant to s. 57(3)(c) of the *Act*.

[6] There was a court hearing on May 8, 2015, in relation to the standing of Mr. A., the father of J.A. There were also some pre-hearing meetings. A protective intervention hearing commenced with the hearing of evidence on June 16, 2015, in Dawson, and the conclusion of the protective intervention hearing is taking place this morning, October 1, 2015, with my decision. In fact, the Director is now seeking that the Court find J.A. in need of protection and order that he be placed in the temporary care of the Director until the end of the school year, June 2016. This is legally possible through s. 61(1)(b) of the *Act*.

[7] As we know, J.A. has already started school in Whitehorse where he has made so much progress since January 2015.

[8] Ms. A., the mother of J.A., acknowledges the progress that J.A. has made but strongly maintains that J.A. should be returned home to her in Dawson City because she is a loving and caring mother, who is capable of providing for J.A.'s needs. Also, in her view, the Robert Service School with additional educational supports, a renewed interest from her First Nation and a new principal at Robert Service School should be able to mimic the program in Whitehorse. Ms. A. denies the allegations of abuse and neglect, for the most part, that the Director has put forward.

[9] A recent wrinkle into this case is the criminal allegation of assault by Ms. A. on J.A. this past summer involving J.A.'s mouth, which may have been forcefully pried open or apart by her. What happens in that investigation, and possible prosecution, is having no effect on my decision. The Court is well aware of the guiding principles; the service delivery principles; the relevant factors to be considered for determining the best interests of the child; and when protective intervention is needed, all as outlined in the territorial legislation.

[10] The Director's concerns were based mainly on physical abuse but also there was significant evidence showing emotional abuse. The mother admits to spanking the children up to November of 2013. Spanking in and of itself, if done dispassionately and not excessively, would not lead to a finding of physical abuse in a case of this nature. Concerns here, though, are deliberately spanking on bare bottoms in front of the other children and stepping up the force if they giggled. The other aspects of the physical abuse, she denies.

[11] Before analyzing the nature of the abuse alleged, I want to make it abundantly clear that I am not ruling whether the Director can provide better for a child than a single mother can. I am not ruling whether J.A. can get better education in Whitehorse than in Dawson City. I am not ruling whether J.A. is a bad kid and a young criminal who is out of control. I am not ruling whether Ms. A. is a bad mother who does not love her children. I am not ruling whether Ms. A. needs to be punished for any past wrongdoings or neglect. This is not the purpose of child protection cases. The paramount test here is: What is in J.A.'s best interests? We all want J.A. to flourish in a stable, caring, and long-term family environment.

[12] Ms. A. gave a very detailed account of her life and that of her children, and was quite accurate with regard to dates and places. She was honest when she told us that she was not ready for children and that raising four children is difficult. Furthermore, she needs self-care time. As to her self-care time, this was clear to the Court as I examined Exhibits 22 and 22A in relation to her travel, oftentimes for work, but also for her personal time away. She admitted she is not the perfect parent, but does accept responsibility for the things that she has done.

[13] However, when she asserted that she has provided J.A. with a stable home from the start, she is wrong. She does not see things correctly. J.A. has not had a stable home from the start. The Nova Scotia experience was a disaster. The early school years in Dawson City were more than problematic. J.A. frequently attended school unable to learn because he was dirty, smelly, tired, and not appropriately dressed.

[14] Despite plans being prepared and countless meetings, J.A. grew more and more out of control. Expelled from the pool, the daycare, and several times from school, J.A.'s behaviours were escalating to the point that the Director apprehended three of the children in August of 2014, with J.A. ending up in Whitehorse at the boys' receiving centre.

[15] The school behaviours involving threatening other children and teachers, trashing classrooms and the downtown hotel conference room, et cetera, cannot be deflected off to sensory perceptions on J.A.'s part.

[16] Before this, J.A. and L.A. were essentially abandoned when they stayed out late and were not allowed into their own home. Fortunately, their grandmother lived nearby.

While J.A. displayed many wrong traits -- that is, lying, swearing, stealing, acting out in various sexual manners, disrespect, having meltdowns, and so on -- this is not a judgment on him. However, these traits and behaviors do not happen overnight.

[17] Where did all of this stem from?

[18] J.A. and the other children were threatened by their mother not to talk to social workers and others as to what went on in the home or they would be punished even worse. From the evidence, I believe that because of the mother's frequent absences from the home for work or social reasons, the children were often left with a babysitter. S.S. and S.T. for example, had major concerns. There were more times than Ms. A. would admit to that the children were left with J.A.'s older brother in charge -- not for days on end, but certainly for many hours. As an 11- or 12-year-old, he had substantially less skills than his mother in controlling a young, difficult J.A. J.A.'s older brother resorted to locking J.A. up and physically beating him, and probably sexually abusing him.

[19] Based on the various evidence and sources, I am satisfied that Ms. A. also physically beat on J.A.'s older brother. This behaviour was transferred to J.A. by his older brother and J.A. was extremely afraid to be left with him. There is no doubt that the children were exposed to horror films and pornography. Where else was J.A. going to learn what he knew at his age and what he did to the sock monkey and to his younger sister? The fascination with horror films continued well into his time at the Whitehorse school.

[20] Under normal circumstances, if a mother took her nine-year-old son to an R-rated movie, like "Spy", this would be considered a one-off, a single mistake, and no one would be particularly concerned; but not so here, where J.A. is already in the Director's care with many concerns in that very area of his life, i.e. swearing and sexuality.

[21] In terms of the sexual side of this case, it is not enough to try to lay the blame solely at the feet of Mr. A., the father.

[22] Returning to the aspects of dirt, hunger, and violence, the Court accepts the evidence of family support worker Willow Peerenboom that between January to March 2014, the children's room was often so dirty you could not see the floor; also, the presence of cat litter, rotting food, and occasionally dog feces. The children often had dirty clothes, had not eaten, and had markings on their bodies, with bruises under their eyes. Ms. Peerenboom even saw Ms. A. use physical force on J.A. and saw her drag him across the floor, pulling on his ear.

[23] Tanya Westland spoke of the exhaustion; the soiled, dirty, smelly clothes; the rancid backpack with the unread notices; and Ms. A.'s attitude, "I don't have time, nor should I be expected to help with homework and clean his backpack." As an aside, I do commend her, from a nutritional point of view, for using natural bread with no preservatives. But of course with that comes responsibility, and that is to even more carefully scrutinize what is happening with the lunches and within the backpack.

[24] I accept the evidence from Tanya Westland and others to the effect that there was a lot of name-calling going on both ways, Ms. A calling J.A. a "fucking bastard" and

J.A. calling and writing of her that she was a "bitch", et cetera. A more gentle appellation of his mother as a "sleeping beauty" -- which I believe to be true -- shows further neglect, as the children were left to do as they wanted while she slept more than one would expect of a mother with four active young children.

[25] One of the most troubling aspects of this case was the stolen camera, with J.A. walking through the streets of Dawson singing and chanting a deathly, disturbing song, and shooting deliberately directed footage of a girl's derrière.

[26] There was evidence from more than one source that when Ms. A. was away, the alternate caregiver sent J.A. to school better rested, fed, and clean.

[27] As to the efforts of the school, J.A. did have considerable help, but with no success. He left there at the conclusion of the school year in the late spring of 2014, at the age of eight, not being able to write his name, not knowing all the letters of the alphabet, and reading at a very low grade one level. His IQ was determined to be 77, in the sixth percentile. This abysmal score may well improve if he is in a stable, nurturing environment.

[28] The improvements in his learning from January 2015 to the end of the school year were amazing. The progress was phenomenal, both in terms of his academics and his socialization. Marjorie Logue, an educational psychologist who had spent time with J.A. in Dawson between August 2013 and April 2014, was moved to tears because, in the course of a year, J.A. was not the same kid she had seen in Dawson.



[29] N.D., J.A.'s grade three teacher, said that J.A. was quiet and blended in. The other children liked him. He was not an outcast like he appeared to be most often in Dawson. There were no incidents, other than he removed himself once in a responsible way. He was playing with the other grade three's at recess, unsupervised.

[30] Ms. A. clearly and honestly acknowledges the progress but strongly maintains and advocates that J.A. should be in Dawson City. She has spoken to the new principal, who wisely said, "There is no need to reinvent the wheel." Rather, they would strive to replicate and mimic the Whitehorse plan and build on J.A.'s successes. At the right time, this will be the route to take, especially with the First Nation coming on board.

[31] The option of homeschooling is not realistic. While intelligent and ambitious, Ms. A. has no background in teaching. She has done well at school herself and at college, including making the Dean's List. Ms. A. has had numerous positions of employment over the years. The focus should be on establishing a home which is stable and will provide for J.A.'s development so that he will flourish and not flounder. Unlike most mothers that we see in Family Court, addictions appear not to be an issue. Most cases we see, quite frankly, are virtually hopeless. On the other hand, Ms. A. is a non-smoker since 2011, she does not use recreational drugs, and there is no evidence of alcohol abuse.

[32] As to First Nation concerns, these are real and legitimate. William Byers, a supervisor with Residential Youth Treatment Services ("RYTS"), told us that there are 10 First Nation employees within RYTS but none at the one J.A. was at. J.A. attended a one-week culture camp at Champagne with elders, where he was taught, among

other things, fishing and gathering. J.A. is free to attend any First Nation functions. Furthermore, an elder will be coming to his residence once a week. In addition, he is open to visits from his family and friends, including S.M., P.S. and A.J., all of whom would be very positive influences.

[33] Placing J.A. at Fireweed eventually, after a four-month transition period at the boys' receiving home, is vastly different than the scooping up of First Nations' children in the past. J.A. has had 10 to 11 visits with his mother and other family members. Until the recent criminal allegations, Ms. A. has had almost daily phone calls.

[34] Contrast that with what happened to A.J., who was taken out of her home community and away from her family for six years and only saw her mother for two weeks in the summer.

[35] Ms. A., as a persistent advocate, raised a number of concerns, including:

- the time notice given before the apprehension;
- J.A. going to the boys' receiving centre and the ages of the other boys there from time to time;
- J.A. being out of school from September to December of 2014;
- the bungled efforts for them to make J.A. available to see his grandfather recently, before the grandfather returned to B.C.;
- frustrations with arranging visits to see J.A. from time to time;
- an alleged bias of Paul Johnston, Social Worker;
- the attitude of Wendy Dindia, Regional Social Worker, as she saw it; and
- the lack of help in Dawson City.

[36] The list goes on and contains issues very real to Ms. A. These issues, however, pale in comparison with those that brought J.A. to the ongoing attention of the Director.

[37] The evidence of William Byers is persuasive on the question of when J.A. will be ready to go home. He figures six months to a year. He frankly acknowledged with J.A.'s challenges and his professional staffing levels that his staff does not get burned out as much as normal parents would. William Byers indicated if they keep the child long enough, he or she tends to do well with no relapses if they are returning to a healthy home environment.

[38] I acknowledge that life is far from easy for a single mother with four children. Ms. A. came out of two failed relationships and was still in her twenties with four young children. This was a monumental challenge. It is unfortunate that the relationship with her and her mother and sister has been broken down. It seems to me that it would be helpful if it was restored.

[39] Contrary to her assertion that she provided J.A. with a stable home, the evidence is clearly to the contrary. On the balance of probabilities, I am satisfied that she lost control of J.A. at a very young age and resorted to physical violence and emotional abuse. J.A. may have had some deep-rooted psychological issues from birth, but her actions and words either caused J.A. to be who he was in August of 2014 or significantly added to the problem. Like I said before, this did not happen overnight.

[40] The evidence of many witnesses indicated that J.A. was either the most problematic or one of the most problematic children they had to deal with. I will long remember the gripping account of the young First Nation's man from James Bay who

had major behavioural issues like what we have heard about with J.A. This came from the evidence of Christiane Robert. He struggled well into his teens, and in time, he received a large sum of money from the James Bay Dam settlement; was involved in a gun incident, and died far too young.

[41] J.A. must be given a home setting where he can flourish and have a productive life. Many of the incidents of physical abuse were more likely than not to have occurred. It is the cumulative effect of many observations and statements from many sources; the Director does not have to prove each and every one beyond a reasonable doubt like in a criminal case.

[42] J.A. was a child in need of protection in August of 2014 and continues to be, until I am satisfied that there is no likelihood of physical or emotional harm. Thus, I am granting the Director's application. J.A. shall remain in the custody of the Director until the end of this school year. I will revisit the issue in June 2016.

[43] In the meantime, Ms. A. should undergo a parenting capacity assessment. That will be of great help to the Court in assessing future risks of physical and emotional abuse.

[44] Tr'ondek Hwech'in First Nation should work with Ms. A. and the Robert Service School to devise a plan for J.A. returning to school in Dawson in either late August or early September of 2016.

[45] Once the alleged criminal issue is dealt with, Ms. A. should be given increasing access to her son.

[46] As a matter of record, I will be staying with the case due to the fact that I know it so well. There is no need to have all the evidence gone over again. And to be honest, I am quite optimistic as to what the future holds here, in terms of J.A. going back with Ms. A. and back to Dawson City.

[47] I definitely want to see that parenting capacity assessment well before the return date of June 7, 2016.

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LUTHER T.C.J.