# IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *N.S.* v. *Family and Children's Services et al*
2004 YKSC 17

Date: 20040302
Docket No.: S.C. No. 03-AP0004
Registry: Whitehorse

**On Appeal from the Territorial Court of Yukon From The Order of His Honour Chief Judge Lilles Pronounced on the 27th day of March 2003**

Between:

**N.S., an infant under disability
By her Litigation Guardian and Child Advocate,
CHRISTINA SUTHERLAND**

Appellant

And

**THE DIRECTOR OF FAMILY AND CHILDREN'S SERVICES
AND D.S.B.**

Respondents

Appearances:
Christina Sutherland — For the Appellant
Zeb Brown — For the Respondents

Before: Justice R.S. Veale

## REASONS FOR JUDGMENT

[1] The Child Advocate for N.S. appeals a decision of Lilles, C.J.T.C., ordering a Permanent Care and Custody Order (PCCO) of N.S. On September 5, 2003, I allowed the appeal and ordered the Territorial Court to hold an oral hearing on the application of the Director of Children's Services (the Director) to commit N.S. to the permanent care and custody of the Director. These are my reasons.

**THE FACTS**

[2] The facts are as follows:

1. N.S. is 16 years old.
2. She has been in the care of the Director since June 2000, initially by a temporary care agreement and, since June 13, 2002, by a Temporary Care and Custody Order (the TCCO).
3. On December 6, 2002, the Director filed a Notice of Application to convert the TCCO to a PCCO.
4. The mother of N.S. consented to the PCCO.
5. The stepmother of N.S. also agreed to N.S. remaining in the Director's care until she is 18 years old.
6. On January 9, 2003, the Court recommended the appointment of a Child Advocate and counsel was appointed.
7. The Child Advocate and N.S. indicated to the Court on February 14, 2003, that N.S. wished to remain in the temporary care and custody of the Director instead of being in the permanent care of the Director.
8. On March 27, 2003, the trial judge heard further submissions from the Child Advocate. In addition, the social worker expressed her views from counsel table, and counsel for the Director made a brief submission. The trial judge noted that the other concerned parent had already consented to the Director's application, and then granted the Director's application for a PCCO, basing his reasons on the affidavit of a social worker.

9. There was no evidence before the Court that the mother or stepmother of N.S. had been made aware of the position of N.S. regarding an extension of the existing TCCO.

10. At the appeal hearing, the Child Advocate and counsel for the Director stated that on March 27, 2003, they expected the judge to set a hearing date. They were surprised when the judge made the order without a hearing.

11. The trial judge gave no clear notice that he was proceeding on a summary basis. The Child Advocate did not object when the PCCO was made.

12. N.S. has been diagnosed with a schizoaffective disorder and bipolar sub-type. She has a history of substance abuse problems.

13. She is presently residing in an approved group home facility.

14. Her behaviour involving psychosis has decreased and she takes her medication every day. She has made a lot of positive changes to her life.

15. The Director did not consent to N.S. remaining in the temporary care and custody of the Director. Such an order would require the consent of the Director.

**ANALYSIS**

[3] There are three sections of the *Children's Act*, R.S.Y. 2002, c.31, that are applicable:

**Orders on conclusion of hearing**

**128**(1) If, at the conclusion of the hearing of an application under this Part, the judge finds on the balance of probabilities that the child is a child in need of protection, the judge shall

(a) allow the child to be returned into the care of the concerned parent, or other person entitled to his care or custody, in whose care and custody the child was when he was taken into care or when proceedings were commenced pursuant to section 120;

(b) commit the child into the temporary care and custody of the director; or

(c) commit the child to the permanent care and custody of the director.

(2) If the child is in the care of the director and, at the conclusion of the hearing of an application under this Part the judge finds on the balance of probabilities that the child is not a child in need of protection, the director shall return the child to the concerned parent, or other person entitled to the child's care, in whose care and custody the child was when taken into care.

(3) The director shall return the child pursuant to subsection (2) as soon as the return may reasonably be done, having regard to the best interests of the child, but the return of the child shall not be delayed more than 48 hours unless a judge authorizes a longer delay.

…

**Further orders for temporary care**

**130**(1) If a judge has made an order under subsection 128(1), that judge or any other judge may later, after a hearing, from time to time, and on the application of the director make an order

(a) extending the duration of an order of the kind described in paragraph 128(1)(a) or (b);

(b) converting an order of the kind described in paragraph 128(1)(a) into one of the kind described in paragraph 128(1)(b) or (c); or

(c) converting an order of the kind described in paragraph 128(1)(b) into one of the kind described in paragraph 128(1)(a) or (c).

(2) The director may make an application under subsection (1) on not lest than 10 days notice in writing served on the concerned parent or other person who but for the proceedings under this Part would be entitled to the care and custody of the child.

(3) Before the conclusion of the hearing of an application under subsection (1) the judge may

(a) adjourn the hearing from time to time; and

(b) make an order for the temporary care and custody of the child, until the conclusion of the hearing.

**Order for temporary care by director**

**131**(1) No order for temporary care and custody of a child shall be, whether in consequence of adjournment, or of an initial order or any extension of an initial order, for a time exceeding

(a) a period of 12 months, for a child under two years of age at the date of taking into care or of issuance of the notice to bring before a judge;

(b) a period of 15 months, for a child under four years of age at the date of taking into care or of issuance of notice to bring before a judge; or

(c) 24 months in any other case.

(2) In calculating the continuity of periods referred to in paragraphs (1)(a), (b) or (c), the judge shall disregard any period or periods the aggregate of which does not exceed six weeks in which the child was temporarily returned to the care of the child’s parents or other person entitled to the child’s care and custody.

> (3) Any order for temporary care and custody of a child that purports to be for a time exceeding the time allowed by this section shall be deemed to subsist for only the time that is allowed under this section.
>
> (4) Despite the provisions of this section a judge may on the application of a child who has reached the age of 14 years and with the written consent of the director, extend a period of temporary care and custody to the director beyond two years for a further period not exceeding two years.

[4] In this case a TCCO was made under s. 128(1)(b) on June 13, 2002. Pursuant to s. 130(2), the Director made an application to convert the TCCO to a PCCO.

[5] Section 130(1) is quite clear that this can only be accomplished “after a hearing”. Section 183 of the *Children’s Act* states that the inherent jurisdiction of superior courts in relation to children does not vest in the Territorial Court or any judge thereof.

[6] The *Children’s Act* does not define the word “hearing”. Arguably, a hearing could be a full oral hearing with witnesses or a summary hearing on affidavits and submissions.

[7] In my view, a 16 year old child in a protection proceeding is a party. The Act recognizes this by authorizing the official guardian to provide a child with separate representation.

[8] The right of a child to be a party is also implicitly recognized by s. 1 of the Act:

> **Best interests of child**
>
> **1** 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.

[9] In this case, there is no dispute that N.S. should remain in care. But there was a clear issue raised by the Child Advocate that put the best interests of the child into question. The difference between a TCCO and a PCCO is significant as the latter results in a loss of natural parentage. Although in this case, the natural mother and the stepmother had not raised the issue, the outcome of the proceeding could have a profound effect on the child's cultural identity, well-being and sense of security.

[10] Thus, we are presented with a situation where a party to a proceeding has the expectation that there will be a full hearing with witnesses and is suddenly confronted with the reality that it has been a summary hearing and a final permanent order has been made.

[11] The rights of a child of the age and ability of N.S. have been recognized in Article 12 of the United Nations *Convention on the Rights of the Child,* GA Res. 44/25, (the Convention):

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Canada ratified the Convention on December 13, 1991.

[12] The question to be addressed is whether the procedure used in this case was "in a manner consistent with the procedural rules of national law".

[13] Section 7 of the *Charter of Rights and Freedoms* provides as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[14] In the case of *New Brunswick (Ministry of Health and Community Services)* v. *G. (J.) [J.G.]*, [1999] 3 S.C.R. 46, the Supreme Court ruled that the denial of state-funded legal aid to a parent in a protection proceeding was a breach of the parents s. 7 *Charter* right. At paragraph 2, the Chief Justice stated that "When government action triggers a hearing in which the interests protected by s. 7 of the *Canadian Charter of Rights and Freedom* are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair."

[15] Lamer, C.J., went on to say at paras. 73 and 76 respectively:

> For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. …
>
> …
>
> The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

[16] Although the Supreme Court was dealing with the issue of legal representation of a parent, the same principle, in my view, applies to a sixteen year-old child who has been denied a full oral hearing.

[17] I note that N.S. is seeking a remedy that requires the consent of the Director. This may not be forthcoming. However, N.S.'s right to oppose the PCCO should be protected as it may lead to an alternative outcome after the evidence is heard. It cannot be presumed that the position taken by the Director will prevail after a full hearing with witnesses.

[18] There are no doubt circumstances where a summary hearing may be appropriate. For example, in exceptional circumstances when there is no dispute on the facts and there is only one possible outcome. However, the trial judge must explicitly inform counsel and the parties of any intention to proceed summarily and permit full submissions to be made. It should only be exercised in exceptional circumstances where there is no real issue to be aired at the hearing (see *Catholic Children's Aid Society of Metropolitan Toronto* v. *O. (L.M.)* (1997), 149 D.L.R. (4th) 464 (Ont. C.A.), at paras 8 and 9. In that case, the parents were awaiting trial on charges of second-degree murder involving one of their children and the father had previously been convicted of assaulting one of their other children. After the ruling on a summary hearing, the mother and father were convicted on the second-degree murder charges.

[19] This case is not such an extreme matter that the rights of the N.S. should be decided without a full hearing.

[20] I conclude that the s. 7 of the *Charter* right of N.S. to security of the person has been breached by the failure to have a full hearing with witnesses. Pursuant to s. 24(1)

of the *Charter of Rights and* Freedoms, I order that the application for a PCCO be returned to the Territorial Court for a full oral hearing.

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VEALE J.