

Citation: Re: *In the matter of K.M. R.M. M.M. G.M. C.M.*,
2007 YKTC 10

Date: 20070213
Docket: 04-T0109
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,
as amended, and in particular s. 130;

AND IN THE MATTER of K.M., R.M., M.M., G.M., C.M.; CHILDREN
WITHIN THE MEANING OF THE SAID ACT

**Publication of the name of a child, the child's parent or identifying information
about the child is prohibited by s. 173(2) of the *Children's Act*.**

Appearances:
Tracy McPhee

Appearing for the Director of Family
and Children's Services

Debbie Hoffman

Appearing as Child Advocate

Sheri Hogeboom,
and as agent for Malcolm Campbell

Appearing for the Father
Appearing for the Mother

REASONS FOR JUDGMENT

[1] RUDDY T.C. J. (Oral): K., R., M., G., and C., are the children of V.
and V.M. They range in age from 10 to four years. As both V. and V. have been
diagnosed as suffering from Fetal Alcohol Spectrum Disorder or FASD, the Director
and numerous other agencies and organizations have been involved with the M.
family for several years. In 2005, the Director sought, and was granted, a

supervision order, which was later converted into a temporary care and custody order by consent. The Director now seeks a permanent care and custody order in relation to all five children.

[2] Mr. M. does not oppose the Director's application. While he would like the children to return to his and Ms. M.'s care, he recognizes that he and Ms. M. are not up to the task of managing and raising five energetic, developing children. As he noted, it is an extremely big job. While content with the permanent care and custody order, he does seek a finding that ongoing access is in the best interests of the children, and an order for reasonable access.

[3] Ms. M. opposes the Director's application for a permanent order, seeking to have the children returned to her and Mr. M.'s care, arguing that she and Mr. M. can raise the children if provided with the appropriate support and resources.

[4] Counsel have quite aptly described the circumstances of this case as unique or exceptional. Indeed, the case is not characterized by those factors, such as substance abuse, neglect, violence or inconsistency, particularly with respect to exercising access, which are so often seen in child protection cases.

[5] Rather, much to their credit, Mr. M. and Ms. M. have abstained from both drugs and alcohol, recognizing the harmful impact abuse of such substances can have on both them and their children. Indeed, their important decision to abstain from substances, particularly during the five pregnancies, has assured their five children a developmental potential far beyond their own.

[6] In addition, Mr. M. and Ms. M. have both been diligent and conscientious in their efforts to parent their children within the limits of their disability, and they have for the most part been open to seeking and receiving the assistance and support of others to help them manage with their disability. Beyond some indications of difficulties in managing frustration and anger appropriately, there is no indication of domestic violence within the immediate family.

[7] Lastly, Mr. M. and Ms. M. have been extremely consistent in exercising access to the children. In the past two years they have missed only one of the regularly and frequently scheduled access visits, which was due to illness and therefore clearly understandable. They have been equally consistent in meeting with the Director monthly to discuss the children and their progress. There is absolutely no doubt that Mr. M. and Ms. M. love all of their children, and very much want to be parents and do what is best for their children.

[8] However, notwithstanding these positives, there are significant child protection concerns identified in this case. Firstly, Mr. M. and Ms. M. have proven to be vulnerable to extended family members who seek to take advantage of their hospitality by taking their money and food, and by exposing Mr. M. and Ms. M. and the children to domestic violence and substance abuse. Mr. M. and Ms. M. have had only limited success in protecting themselves and their children from these negative influences. As Ms. M. noted in her testimony, sometimes it is hard for her to turn family away, and that is quite understandable.

[9] A second crucial child protection concern stems from the existence of Mr. M. and Ms. M.'s disability. Through no fault of their own, and despite their best intentions, their cognitive limitations have clearly affected their ability to fully meet their children's needs. This, in turn, has negatively impacted on the development of the children. In addressing these concerns, a psychological assessment prepared by Dawn Oiffer on Mr. M. and Ms. M. in September of 2004, filed as part of Exhibit 1 in these proceedings, noted that "without daily intervention and support, it would not be possible for this couple to safely or adequately parent their children."

[10] In opposing the Director's application for a permanent care and custody order, Ms. M., through her counsel, argues that the Director has the resources necessary to provide the daily intervention and support that she and Mr. M. need to be able to raise the children themselves, and that it would be in the best interests of the children to be returned home. To support her position, Ms. M. took the stand and provided evidence regarding her understanding of the children's needs and her ability to meet them. As a witness, Ms. M. presented as soft-spoken and somewhat hesitant. She struggled with many of the questions asked, but with prompting and direction from counsel she was able to demonstrate a limited understanding of the children's more basic physical needs, such as food, shelter, and basic hygiene.

[11] I am satisfied on the evidence before me that with a great deal of external prompting and support, Mr. M. and Ms. M. could meet those more basic physical needs of the children; indeed, they have done so in the past to a large extent. However, the evidence equally satisfies me that Mr. M. and Ms. M., as a result of their disability and through no fault of their own, are incapable of fully understanding,

let alone meeting, the more abstract intellectual, emotional and developmental needs of their children.

[12] Counsel for Ms. M. argues that any needs of the children which Mr. M. and Ms. M. are unable to meet themselves can be met externally through supports provided by the Director and other organizations. I accept that such supports could assist to meet the children's physical needs, but I am of the view that they would be insufficient to meet the emotional, intellectual, and developmental needs.

[13] Firstly, such needs tend to be constant and ongoing, with occasional crisis points, which rarely occur at convenient times. As a result, the ongoing home environment becomes crucial in meeting such needs. Absent live-in supports, I fail to see how external supports could adequately meet such needs. Furthermore, while Ms. M. was able to articulate that she would seek out the assistance of her supports when encountering a problem she could not handle, I am not satisfied that Ms. M. is capable of even identifying the more abstract needs of the children such that she would know to contact her supports for assistance in dealing with them.

[14] Lastly, the evidence of past experience demonstrates that external supports proved insufficient to assist Ms. M. and Mr. M. in meeting the developmental needs of their children. This is evident in the psychological assessments prepared by Dawn Oiffer on the three older children in November of 2004, while they remained under their parents' care, and filed as part of Exhibit 1 in these proceedings. By way of example, Ms. Oiffer noted that:

For K.M., these emotional concerns relate to marked restrictions in her self-confidence, social skills, and self-expression, that significantly interfere with current academic and social functioning. It can be anticipated that these factors can present increasing obstacles in future, and that the potential for negative outcomes in adolescence will rise as a result.

[15] Similarly, with respect to M.M., Ms. Oiffer noted that:

There was an inescapable sense of frustration and constriction in terms of this child's interior family experience; for example, that he is confined within a family that is quite limited in its ability to meet his emotional needs, that inadvertently constricts his creative expression and intellectual curiosity, and delivers a rigid script that effectively undermines his potential.

[16] These assessments contrast strongly with the significant developmental progress of the children while in foster care. While the progress is evident for each of the children, it is most pronounced with K.M., the oldest. She has progressed from struggling with developmental delays in both her academic and social skills, serious enough to require her to repeat her first year in school, to qualifying to represent her school in the spelling bee, and achieving a number of A's in various school subjects on her last report card.

[17] In considering whether to grant the Director's application for a permanent care and custody order, I am required to determine what is in the best interests of the children. In making this determination, I am guided by the factors set out in s. 133 of the *Children's Act*. I agree with counsel for the Director that the most important of those factors for the purpose of this case are those set out in s.133(f) and (j), which relate to identifying and meeting the mental, emotional and physical developmental

needs of the children. To these I would add s. 133(g) relating to the risks and merits of returning the children.

[18] When I consider these factors in the context of this case, I am of the view that despite the very best of intentions, and despite having herself having made great progress under the tutelage of her supports, Ms. M. is simply unable, at this time, to meet any but the physical needs of the children, and the evidence suggests, that as a result of the limitations caused by her disability, this is unlikely to change significantly in the future.

[19] I am further satisfied that to return the children to their parents would halt and potentially reverse the significant developmental progress they have made while in foster care. This would clearly not be in their best interests. For these reasons, it is my finding that the children remain in need of protection and I therefore grant the Director's application for a permanent care and custody order.

[20] This leaves the remaining question of access.

[21] All counsel agree that I have the jurisdiction to make an order for access in the context of a permanent care and custody order. Counsel for the Director, however, takes the position that such an order is unnecessary given the stated plans of the Director. It is the Director's intention to continue access between the children and Mr. M. and Ms. M., post permanent order, for the foreseeable future.

[22] There are no plans for adoption. If, however, I find such an access order to be appropriate in this case, the Director submits that access should be at the

discretion of the Director. Counsel for Mr. M. and the child advocate take the position that there ought to be an order for access which vests the ultimate discretion with this Court.

[23] In considering the question of access, I am mindful of the factors set out by the Supreme Court of Canada in *R. v. M.L.*, [1998] 2 S.C.R. 543. In applying those factors to this case, I note firstly, that given the Director's stated intentions, there is clearly no inconsistency in principle between the permanent order and access.

[24] Secondly, while access is the exception rather than the rule, all counsel have noted, and I agree, that this is an exceptional case.

[25] Thirdly, with respect to the preservation of family ties, I am of the view that access is crucial in this regard. There is a clear bond between the children and their parents. The access so diligently exercised over the past two years has clearly benefited both the children and their parents. It has also ensured that the children are able to maintain and nurture their bond with each other, as they do not, given their numbers, currently reside in the same foster home.

[26] Fourthly, adoption is not contemplated, and therefore clearly not a priority which could be hampered by an access order.

[27] Lastly, with respect to the interests and needs of the children, the *M.L.*, *supra*, decision notes the prime importance of a child's emotional stability. The evidence before me gives absolutely no indication that the children are disturbed in any way by access. Rather, the opposite can be said to be true. With the efforts of the

Director to foster positive interaction, and the actions of Mr. M. and Ms. M. in ensuring consistency in their access visits, the emotional stability of the children has only been enhanced by the ongoing access.

[28] An additional point I would make with respect to the best interests of the children is that, as noted by the child advocate, all of the children are currently in non-First Nation homes. Ongoing access provides an essential link to their First Nation community and to their cultural heritage.

[29] In considering all of these factors, I have absolutely no hesitation in finding that access is in the best interests of the M. children. I am also persuaded by the argument of the child advocate that inclusion of access in the permanent order is in the best interests of the children. It provides a measure of stability and sends a clear message to the children, and to Mr. M. and Ms. M., that the relationship between them is recognized as important and will continue.

[30] What is more problematic, in my view, is the question of whether the order for access ought to be at the discretion of the Court or of the Director. In terms of factors which weigh against the Court retaining discretion, the Court ought not, in my view, to be concerned with the day-to-day minutiae of access, such as determining whether an access visit occurs on a child's birthday or the day after, is on a Tuesday or a Wednesday, is two hours or three. Clearly, the Director is much better placed to monitor and respond in a timely fashion to factors affecting access.

[31] In supporting this position, counsel for the Director points to my decision in the *R. v. M.N.* case, wherein I left the discretion with the Director. However, I would

note that in *M.N.*, there was a real risk of access becoming disruptive, depending on how the mother adapted to her new role. As a result, I felt strongly that the Director needed to be in a position to respond immediately to any attempts to undermine the formation of new bonds for the child, through the access process. I do not share those concerns in this particular case

[32] Factors which weigh in favour of the Court retaining discretion include the fact that the developmental delays occasioned by the parents' disability are such that Ms. M. and Mr. M. are at a disadvantage in asserting their views and wishes in their negotiations with the Director. There is value, in my mind, in providing for an independent arbiter in such circumstances. In supporting this position, counsel for Mr. M. points to the constitutional underpinnings of Judge Stuart's decision in the *R.A.* case, [2002] J.J. No. 48, though I am not certain that this case requires or warrants a thorough examination and application of constitutional considerations. Rather, it is my determination that an appropriate resolution of this issue, in this case, is something of a balancing of the two positions. I am satisfied that access is important enough to the best interests of the children that a drastic curtailment or elimination of that access warrants the option of a review before this Court.

[33] However, it must be made clear that this avenue is available only in situations where there has been a major change in the Director's approach to access. This balancing can best be achieved, in my view, by applying the wording set out in s. 139(4)(a) of the *Children's Act* with respect to access and temporary care and custody situations.

[34] Accordingly, the order will read as follows: Mr. M. and Ms. M. shall have reasonable access to the children, with the consent of the Director, which consent will not be unreasonably withheld. In making this order, I want to make it clear that it is intended to protect against unforeseen circumstances and is not intended in any way to suggest a malafides on behalf of the Director. Indeed, it is important to note that Alla Blysak, as the assigned social worker, has throughout conducted herself with a great deal of tact and sensitivity in her dealings with this family and she should be commended for her efforts.

[35] I wanted to say a couple of things directly to Mr. M. and to Ms. M. Ms. M., in particular, I understand that this decision is not what you were wanting to hear, but I also want you to understand that, from everything I have seen, there are needs that your children have that you are just not able to meet, and that is not your fault. But you also need to understand that you still have, both of you, a very important role to play in your children's lives. You are still their mom and dad. They still need you. They need you to exercise access diligently in the way you have been doing in the last couple of years. They need you to go to their activities. They need you to cheer for them. They need you to be there for them. They need you to support them and they need you to love them. That is going to be incredibly important to them as they develop. There are other things that they need that they can get in the foster homes, but they still need you.

[36] It is important in my order that you understand that the access that you have to them is going to continue so that you can be there for them, okay? I know it is hard for you because you love them very much, and that you miss them, but what I

am trying to do is what is best for them, and I know it is hard for you. But I think in the long run it will be better for them and you will still have that contact, and you will still be able to give them everything that you can, in terms of that love and support.

[37] So I wish you both the very best of luck in the future with your kids and I wanted to let you both know how impressed I was by the efforts that you have made in the past to work with the Director and to do what is best for your kids.

[38] MS. V.M.: Thank you.

[39] THE COURT: So I wish you the best of luck.

[40] I also wanted to thank Ms. McKay and Ms. Smarch for taking the time to be here and to provide you with support. I think that is incredibly important, and you are very lucky to have them.

[41] The last thing I wanted to do is take a moment to thank Ms. Blysak and counsel for all of their efforts in ensuring that this matter was addressed in the most expeditious and sensitive way possible. I think it was very important to do so and I very much appreciate your efforts. That is my decision.

RUDDY T.C.J.