IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *T.A.B.* v. *A.E.B.*, 2004 YKSC 60

Date: 20040915
S.C. No. 03-B0030
Registry: Whitehorse

Between:

T.A.B.

Plaintiff

And

A.E.B.

Defendant

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*.

Before: Mr. Justice R.S. Veale

Appearances:

Elaine B. Cairns as agent for James A. Van Wart	For the Plaintiff
Lynn C. MacDiarmid	For the Defendant
Peter Morawsky	Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] This decision is about the role of the child advocate in custody proceedings. The father has applied for a variation of custody to grant him the right to leave the Yukon with the children. The mother opposes. A child advocate was appointed and has filed a

child advocate's report dated June 25, 2004 (the report) which I ruled inadmissible, with these reasons to follow. I instructed the Clerk to seal the report.

[2] I also ordered that cross-examinations be completed on the affidavits of the parents. The child advocate shall have the right to cross-examine the parents.

[3] Counsel have requested that I give direction on the appropriate role of the child advocate in the representation of children. I have not had the benefit of submissions from counsel. My observations are a response to concerns often voiced by child advocates.

EVIDENCE

[4] The following is a brief summary of the evidence for the purpose of setting the context. I make no findings of fact except as to the report.

[5] The father and mother commenced their common-law relationship in 1994. The relationship ended in 1999.

[6] Two children were born in the course of the relationship: 9 and 7 years old.

[7] In August 1999, the mother moved to Ontario to upgrade her education. It was agreed that the children would remain with the father in the Yukon. The upgrade course appears to have taken four years. Then the children resided with the mother from October 2000 to April 2002. The children returned to the father's care from August 2002 to April 2003.

[8] In April 2003, the mother returned from Ontario and a custody dispute arose.

[9] That dispute was resolved by an interim order dated September 18, 2003, which stated that the mother and father share joint custody and guardianship of the children.

The Court ordered the primary residence to be with the father who would have the children sixty percent of the time. The mother would have the children the remaining forty percent, which was specified to be on certain days of the week. Neither parent pays child support to the other.

[10] The evidence from the time of the September 18, 2003 order onward is hotly disputed. A previous order dated July 15, 2003, prohibited removal of the children from the Yukon without the written consent of the other parent or court order.

[11] On April 13, 2004, the Court recommended the appointment of a child advocate. The official guardian appointed a child advocate on April 22, 2004, pursuant to s. 168 of the *Children's Act*, R.S.Y. 2002 c. 31.

[12] The child advocate filed the report, a procedure not seen in this Court since at least 1992.

[13] The report contains the following information:

1. evidence of the child advocate's general impression of the children;
2. evidence of the children with respect to their mother's discipline;
3. evidence about the express wishes of the children in great detail; and
4. the ultimate preference of the children on the application of the father.

ISSUES

[14] The following issues will be considered:

1. Should the report be accepted in evidence?

2. What is the appropriate role of the child advocate?

Issue 1: Should the report be accepted in evidence?

[15] The *Children's Act* provides for the appointment of a child advocate as follows:

> 168 (1) In this section a reference to a child is a reference to a child while still a minor.
>
> (2) In proceedings under this Act, the official guardian shall have the exclusive right to determine whether any child requires separate representation by a lawyer or any other person that will be paid for at public expense chargeable to the Yukon Consolidated Revenue Fund.
>
> (3) In proceedings under this Act a child requiring separate representation may include
>
> (a) a child for whom there is no guardian other than the official guardian;
>
> (b) a child in the care of the director of family and children's services; or
>
> (c) a child alleged to be in need of protection.
>
> (4) The official guardian may act as guardian for the proceeding or appoint a guardian for the proceeding for a child needing separate representation.
>
> (5) When determining whether separate representation or the appointment of a guardian for the proceeding for the child at public expense is required, the official guardian
>
> (a) shall consider advice or recommendations from the judge before whom or court in which the proceedings are taking place and any party to the proceeding; and
>
> (b) shall consider
>
> (i) the ability of the child to comprehend the proceeding,
>
> (ii) whether there exists and if so the nature of any conflict between the interests of the child and the interest of any party to the proceeding, and

> (iii) whether the parties to the proceeding will put or are putting before the judge or court the relevant evidence in respect of the interests of the child that can reasonably be adduced.
>
> (6) If the official guardian is of the opinion that separate representation of a child is required and is best achieved by the appointment of a person other than a lawyer the official guardian may appoint that other person.
>
> (7) An official guardian who acts as or appoints a guardian for the proceeding pursuant to this section shall as soon as practicable inform the concerned parents or other person entitled to care and custody and cause the child to be informed if the child is of sufficient age and understanding to comprehend the appointment.

The official guardian means the public administrator appointed under the *Estate Administration Act*, R.S.Y. 2002 c. 77.

[16] As a practical matter, most judicial recommendations for the appointment of child advocates are acted upon. I note that the *Children's Act* does not use the words "child advocate." This leaves it open to the discretion of the Court to recommend the appointment of guardians *ad litem* or friends of the Court in appropriate cases. However, the practice, in all custody proceedings, has been to appoint child advocates who are lawyers. Thus, the focus of this judgment will be on the role of the child advocate and the methods of presenting the evidence of the children and representing them in custody disputes.

[17] The *Children's Act* also provides for standards of proof and admissibility in proceedings respecting children as follows:

> 169 (1) In proceedings under this Act, other than for the prosecution of an offence punishable on summary

conviction, the standard of proof shall be proof on the balance of probabilities, and that standard is discharged if the trier of fact is satisfied that the evidence establishes that the existence of the fact to be proven is more probable than its non-existence.

(2) In proceedings under this Act, other than for the prosecution of an offence punishable on summary conviction, the following evidence is admissible if relevant

(a) the views of the child, whether given directly to the judge or court in the proceeding or to some person who is a witness in the proceeding; (my underlining)

(b) opinion evidence, even if this is relevant to the very question before the judge or court, but the weight to be given to the opinion evidence shall be judged according to

(i) whether the opinion is in respect of a matter within an expertise possessed by the witness,

(ii) the extent to which the opinion is based on facts perceived by the witness, and

(iii) the nature of the testimony of the witness or of other evidence with respect to the facts on which the opinion is based;

(c) hearsay evidence, but the weight to be given to hearsay evidence shall be judged according to its apparent reliability and the availability of other evidence that would be admissible without relying on this paragraph. (my underlining)

(3) Either parent of a child shall be a competent and compellable witness in all proceedings under this Act, even if the evidence may tend to disclose that either of the parents has been guilty of a criminal offence.

(4) If previous proceedings, whether criminal or civil, have taken place with respect to the same child or that child's siblings, the court or a judge may exercise discretion to accept any evidence taken at a previous hearing in the Yukon or before a court of competent jurisdiction in any other part of Canada.

> (5) The weight to be attached to evidence referred to in subsection (4) shall be a matter for the court or the judge to determine.

[18] With respect to children testifying, the *Children's Act* provides:

> 174 Nothing in this Act shall prevent the court or a judge from requiring the presence of the child in court in any case where the attendance would not be prejudicial to the child's best interests and the interests of justice require the attendance.

[19] The Act also sets out extensive although not exclusive factors for the Court to consider in determining the best interests of a child which include:

> 30 (1) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including
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> (a) the bonding, love, affection and emotional ties between the child and
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons, including grandparents involved in the care and upbringing of the child;
>
> (b) the views and preferences of the child, if those views and preferences can be reasonably determined; (my underlining)
>
> …

[20] My interpretation of "the views of the child" in s. 169 (2) (a) and "the views and preference of the child" in s. 30(1)(b) is that it refers to the evidence of the child's views and preferences, not the instructions or position of a child which the child advocate may submit to the Court.

[21] To summarize, the *Children's Act* provides for the appointment of child advocates and relaxes the rule against hearsay evidence to facilitate the admission of evidence about the views and preferences of children. Thus, the evidence of a child may come from the child witness or from an adult or expert witness. The evidence may include the views and preferences of the child. However, the evidence of views and preferences of the child, where ascertainable by the child advocate, would not be presented as evidence by the child advocate, although the child advocate may indicate to the Court the instructions or position of the child, where the child is capable of giving instructions or a position. I will elaborate on this below in the discussion on the role of the child advocate.

[22] A unique situation for a child advocate in this jurisdiction arose in 1992 when a child advocate's report was filed as evidence in this Court in the case of *Lueck* v. *Green*, [1992] Y.J. No. 170. Cross-examination of the child advocate was ordered and Maddison J. said the following:

> The child advocate's report is of limited assistance since the child advocate made conclusions of untested evidence, when it was obvious that the evidence could be easily tested, and on speculation. She made unwarranted assumptions. She put ominous interpretations on conversations which may have been benign. She overstated some of the evidence. She did not give the mother an opportunity to respond to some of the allegations upon which she arrived at factual determinations …

[23] Since 1992, child advocates have not filed written reports. Rather, they have followed the more traditional role of a lawyer representing a client, whether the child is capable of giving instructions not.

[24] The rule that counsel for children cannot give evidence, despite the relaxation of evidentiary rules in cases involving children, has a solid foundation. *The Code of Conduct of the Canadian Bar Association*, 1987, and the *Code of Professional Conduct of the Law Society of Yukon*, both state that the lawyer should not offer evidence and become a witness in a court case. The reason is clear. Once the lawyer gives evidence, he or she may be subject to cross-examination in the same manner as a witness. The lawyer may then no longer effectively advocate for the child. There may be circumstances where this rule is relaxed somewhat with the consent of counsel and the Court. See *Strobridge* v. *Strobridge,* [1994] O.J. No. 1247 (O.C.A.).

[25] I have ruled that the report is inadmissible because it dealt extensively with evidence supporting the views and preferences of the children as well as evidence about their mother's discipline.

Issue 2: What is the appropriate role of the child advocate?

[26] In *Re W.,* (1980) 13 R.F.L. (2d) 381 (Ont. Prov. Ct – Family Division), Abella J., as she then was, stated that the role of the lawyer for the child is no different than the role of the lawyer for any other party. The lawyer must carry out the client's instructions and protect the client's interests. I interpret this to mean that a child advocate can indicate to the Court the instructions of the child, where the child is capable of giving instructions. Where the child is not capable of giving instructions but nevertheless has a position, in my view, it is appropriate for counsel to indicate that position to the court without giving evidence. However, this is not to say a child advocate is required to indicate the instructions or position of the child, as the advisability of doing so will depend on the circumstances of each case.

[27] The entire judgment of *Re W.* is well worth reading but it has been well summarized in the Territorial Court of the Yukon Territory by Stuart T.C.J., in *Re Christophe Chartier*

(1981 – 2), 3 Y.L.R. at p. 731:

> 1. Where the child is sufficiently competent and mature to provide clear instructions, the child advocate's task is similar to the task of representing an adult. In such circumstances the child advocate should not take any separate position than the child's instructions.
> 2. Where the child is not sufficiently mature to provide instructions but has some preferences, the child advocate must present evidence in support of the child's preferences and must as well present to the court all evidence the child advocate considers germaine (*sic)* to determine the best interests of the child.
> 3. Where the child is unfit, or simply incapable of giving instructions, or stating a preference, the child advocate must lead all evidence relevant to determine the best interests of the child and should submit to the court the child advocate's perception of the best interests of the child.

[28] Stuart T.C.J. went on to say that a court must allow a child advocate latitude to represent the child's instructions and the child advocate's perceptions. The child advocate must be "resourceful, imaginative and sensitively attuned to the nature of the proceedings".

[29] However, Abella J. warns the child advocate not to express or substitute their opinion for that of the child. It is then that the child advocate risks assuming the role of the judge. In my view, this still gives the child advocate great latitude without trenching upon the role of the judge or being in conflict with the child client.

[30] In *Strobridge*, the Court stated that counsel could only advise the Court on the children's views and preferences if all counsel consented. However, the Court did favour an expansive role for the child advocate in the following statement:

> Counsel retained by the Official Guardian is entitled to file or call evidence and make submissions on all of the evidence. In my view, counsel is not entitled to express his or her personal opinion on any issue, including the children's best interests. Nor is counsel entitled to become a witness and advise the court what the children's access-related preferences are. If those preferences should be before the court, resort must be had to the appropriate evidentiary means: see Carol Mahood Huddart and Jeanne Charlotte Ensminger, "Hearing the Voice of Children" (1992), 8 C.F.L.Q. 95. The Official Guardian, through counsel, will see that evidence going to the issue of the children's best interests is before the courts. (my underlining)

[31] I will discuss the "appropriate evidentiary means" below.

[32] The above quote makes it clear that child advocates should not become witnesses by giving evidence. The quote might also be interpreted as implying that child advocates should not give the instructions or position of the child as that would be giving evidence and becoming a witness.

[33] In my view, there should be a distinction between the child advocate informing the Court of the instructions or position of the child, where capable, and the evidence explaining or supporting those instructions or position. In my view, the Court does not require the consent of all counsel to hear the child advocate express the instructions or position of their client in appropriate cases. I am not referring to the views and preferences of the child which I interpret to mean the evidence that supports those instructions or position. Thus, the child advocate can indicate to the Court the child's view or the child's preference is to reside with one parent versus the other without

indicating the evidence to support that position which must be presented by the child, an expert or other adult, or as may be agreed upon by the parties and the Court.

[34] This is not to say that counsel for the parents cannot object to the child advocate expressing the instructions or position of the child on the ground that the child is not capable of giving instructions or that the child has been improperly influenced by a parent. It will then be for the Court to determine whether evidence must be heard on the subject. It will depend upon the age of the children, the nature of the dispute, the availability of expert or other suitable hearsay opinion on the capacity or views of the child. However, the simple objection of counsel for a parent does not decide whether the child's instructions or position will be stated by the child advocate. The overriding consideration in such case is to avoid the necessity of the child testifying, balanced with the rights of the parties to insist on hearing and challenging evidence regarding the instructions or position of the child.

[35] I am not aware of any opinion from the Supreme Court of Canada on the issue of a child advocate expressing the instructions of their clients. *Re Beson et al and the Director of Child Welfare for Newfoundland; Jones et al, Intervenants* (1982), 142 D.L.R. (3d) 20 (S.C.C.), is a case where there was expert evidence that the child, 5 years of age, was not capable of instructing counsel or expressing his wishes. Wilson J. said the child advocate:

> … assessed his role as being to advance his client's best interests as he saw them to the court. In order to satisfy himself as to where Christopher's best interests lay, Mr. Day conducted a very thorough investigation of Christopher's social, medical and legal antecedents and of his present circumstances. In the course of this investigation he reviewed the director's files on Christopher and interviewed

> all the people who had had Christopher under care including the appellants and the intervenors, former foster parents, child welfare workers, health care persons and his teacher. He also spent time with Christopher at his present residence. (p. 29)

[36] It is of interest to note that Mr. Day, the child advocate at the Supreme Court of Canada in *Re Beson*, in an articled entitled: *Counsel for Christopher: Representing an Infant's Best Interests in the Supreme Court of Canada* (1983) 33 R.F.L. (2d) 16, stated at p. 22 the requirements of capacity to instruct counsel as follows:

> Counsel would not act as an advocate pursuant to Christopher's instructions (as he would on an adult's behalf) unless satisfied Christopher was capable, inter alia, of:
>
> (1) Communicating, voluntarily, to counsel, instructions which were rational and reasonable;
>
> (2) Clearly and fully understanding counsel's advice; and
>
> (3) Appreciating the nature and legal significance for him, or judicial proceedings (including adjudications) in which Christopher had an interest.

[37] In some courts without specific legislation on the appointment of child advocates, there is discussion of the other possible roles for counsel. See *Dormer* v. *Thomas,* [1999] B.C.J. No. 1463 (B.C.S.C.) and *T.L.F. (Re)*, [2001] S.J. No. 353 (Sask. Q.B.). An *amicus curiae* or friend of the Court is a neutral person appointed by the Court but usually does not specifically represent the child. The guardian *ad litem* is not usually a lawyer, but a friend or relative of the child in civil actions. The guardian *ad litem* presents his or her views to protect the interests of the child.

[38] I do not see the appointment of child advocates in the Yukon falling into these categories. Nor do I consider it appropriate for a child advocate to tell the Court that they see their role as that of friend of the Court and not as advocate for the child. In my view,

once appointed, the child advocate always represents the child, in the variety of ways discussed below. The diminished capacity of the child may result in greater effort to interview other people in the child's life, but it does not change the legal obligation of lawyer to client, unless relieved by the Court.

[39] I interject at this point to make it clear that the child has all the rights of a party under the *Rules of Court*. For greater certainty in the Yukon, this includes but is not limited to:

(a) receiving copies of all professional reports, records and documents relating to the child whether in the possession of a parent or third party;

(b) the right to have production from and discovery of all parties according to the *Rules of Court*;

(c) the right to examine or cross-examine witnesses, call evidence and make submissions to the Court including the instructions or position of the child where the child is capable of providing the instructions or position;

(d) the right to apply to be removed as the legal representative of the child if the child advocate believes that continued representation is not in the child's best interests (see *Armitage* v. *McCann*, 2004 YKSC 01 at paragraphs 15 and 25);

(e) the right to apply for an order for production of documents in a relevant criminal investigation file subject to the consent of the Attorney of Canada;

(f) the right to take appeal proceedings;

(g) the right to seek costs; and

(h) any other role that the Court may order.

[40] Although the *Children's Act* does not explicitly confer party status on the child, I am of the view that it is entirely appropriate for children to have party status. The above list is not comprehensive of the rights of a party but is sufficient to allow children to be adequately represented.

[41] I am now going to discuss some of the means available to the child advocate to represent a client. I rely to a considerable extent on the articles of C.M. Huddart and J.C. Ensminger, *Hearing the Voice of Children* (1992), 8 C.F.L.Q. 95, and Judge R. James Williams, *If Wishes Were Horses, Then Beggars Would Ride: Child Preferences and Custody/Access Proceedings*, 3rd World Congress on Family Law and Rights of Children and Youth, Bate, England, September 20 – 22, 2001.

[42] In this jurisdiction, most of the custody disputes take place on interim applications based upon affidavit evidence. There is a tendency to rely on the evidence of parents and friends. In many cases the affidavit evidence is satisfactory to decide the application. The interim order often becomes, in effect, the final order and the case does not proceed further.

[43] However, in high conflict cases which do not end with one interim order, the practice is for the judge who hears the case in the first instance to be seized of the case. Thus the same judge hears all the applications in the case.

[44] The following are some of the tools available to the child advocate:

1. Examination for Discovery and Cross-Examination on Affidavits.

[45] Although infrequently used on interim applications, this traditional tool should be utilized when conflicting allegations are made without independent evidence to test them. I do not intend this to result in increasing the time and cost of interim applications. Rather these procedures may be used when other evidence from experts or independent witnesses is not available. The Court makes every effort to decide cases on disputed affidavits but the child advocate, and other counsel, are not limited to relying upon the affidavits of parents and their friends.

2. Pre-Trial Conferences and Settlement Conferences.

[46] The pre-trial conference is an extremely useful tool for counsel and child advocates alike. It can be used to sort out the issues and determine the required evidence to be called. It may lead to consent orders for the appointment of child advocates, ordering custody and access reports and for discussion of the type of evidence that the child advocate might pursue.

[47] The settlement conference can be used where the parties prefer the informal nature of a settlement conference to resolve their differences. Settlement conferences are voluntary. They are intended to improve communication between the parents and reach a settlement crafted by the parents rather than the Court.

3. Custody and Access Reports

[48] Section 43 of the *Children's Act* states that the Court may request the Director of Family and Children's Services to cause an investigation to be made and report to the Court on all matters relating to the custody, support and education of the child. These

reports are very useful and the director usually causes a report to be made on the request of the Court.

[49] There is a perceived disadvantage in that the reports sometimes take up to three months to complete. However, the reports are usually timely and extremely useful. They explore the best interests of the child from many viewpoints and make recommendations that the Court may or may not follow. The custody and access report often leads to settlement.

[50] In many circumstances, the custody and access report does the job of the child advocate in that interviews are conducted of all the family, friends and teachers that are involved in the child's life. Indeed, in some cases a custody and access report is ordered without a child advocate being appointed.

[51] Needless to say, the custody and access report is one of the best resources in many high conflict cases. It can be used to indicate the views and preferences of the child from an independent source. It can also be used to indicate if a support person (family or professional) should be provided to a child.

[52] However, in all cases where a request is made for a custody and access report, counsel should consider whether the request should also include specific issues to be addressed by the independent expert. These may include the capacity of the children and their views and preferences.

4. The Expert Witness

[53] Experts hired by one party are used less frequently than in the past for reasons of expense and the preference for the independent custody and access report. However,

they may be useful if the child advocate wishes to take issue with the custody and access report.

[54] As the Yukon has a small population, there may not be a lot of professionals prepared to be experts in child custody matters. However, doctors, social workers, child psychologists, teachers and other professionals may have areas of expertise that the child advocate can call upon.

5. The Child as Witness

[55] Calling the child as a witness is not recommended for those of tender years who would be negatively impacted by the requirement to appear in court. However, as the child approaches his or her teenage years, the likelihood of a negative psychological impact on the child diminishes. Still, it is not often the desire of either the parents or the Court to have the child express preferences for one parent or one home over the other in open court. Most often the child simply wants the dispute to end with the love and affection of both parents intact.

[56] In those cases where it occurs, the judge can hear the child's evidence and prevent questions that require the child to state a preference between parents, if it would be in the child's best interests to do so.

6. Judicial Interview of Children

[57] This method of placing the child's views before the Court is once again not common and at the discretion of the trial judge.

[58] The judicial interview has the advantage of being less intimidating than the courtroom. It has the disadvantage that few judges have the skill to conduct the interview and interpret the evidence.

[59] There may be reasonable procedural objections if the interview takes place privately with the judge. That can be remedied by having counsel and a court reporter present and permitting each party to call further evidence. The Court has the statutory power under s. 173(1) of the *Children's Act* to determine who is present at any part of the proceeding.

[60] In summary, the child advocate has a wide array of methods to represent the child and have the child's views and preferences raised and addressed. This is not to say that expressing the instructions or position of the child is the sole focus of the child advocate. Rather, the child advocate must utilize all the resources available to represent the child client just as a lawyer would represent an adult client.

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VEALE J.