Date: 19980521
Docket: 6101-02892

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PHOEBE HARRIS

Petitioner

- and -

HARRY HARRIS

Respondent

MEMORANDUM OF JUDGMENT

[1] The parties to this divorce proceeding are the parents of five children. Both parents claim sole custody of the children, who range in age from 15 to 9 years. Some of the children currently reside with the Petitioner and some with the Respondent. The issue of interim custody has not yet been addressed and by agreement of counsel has been set over to Chambers on May 22, 1998.

[2] Pursuant to an order dated May 8, 1998 made by Richard J., the Superintendent of Child Welfare provided certain records to the court. The order was made on application by the Respondent for disclosure by the Northwest Territories Department of Health and Social Services and the Superintendent of Child Welfare of records "related to the apprehension(s) of any or all of the children of the marriage".

[3] All parties agreed that I should review the records in accordance with the procedure suggested in *M.(G.M.) v. M.(S.A.)*, [1992] N.W.T.R. 249 (S.C.) and I have done so.

[4] Counsel agree that records from before 1997 are sufficiently dated as to be irrelevant for purposes of these proceedings. Therefore I need consider only any records from 1997 and 1998.

[5] Counsel for the Superintendent has also pointed out that access to school records can be obtained by either parent pursuant to the provisions of the *Education Act*, S.N.W.T. 1995, c. 28. I will not therefore consider any school records which may form part of the records produced by the Superintendent.

[6] Counsel for the Respondent, who seeks disclosure of the records, does not know what is in the records. She argued that if the records may be of assistance in the determination of the custody dispute, they should be disclosed.

[7] Counsel for the Petitioner took the position that the issue is whether the relevance of the records to the custody dispute overrides the confidentiality of the records. She also argued that because the Respondent's application referred to apprehensions, only those records relating to any apprehension of the children should be considered for disclosure.

[8] The Superintendent opposes disclosure of the records, arguing that they are confidential and in any event add nothing of substance to the allegations in the affidavit material before the court. Counsel for the Superintendent points out that some of the records came into existence because of a request by the Petitioner's counsel that Social Services look into the care of the children residing with the Respondent, which in turn led the Respondent to ask that they review the circumstances of the children living with the Petitioner. The Superintendent is concerned that Social Services workers not be drawn into a private custody dispute and takes the position that it is not the function of the Department to corroborate allegations made in such disputes. Accordingly, the Superintendent says, except where the records are particularly relevant, they ought not to be disclosed.

[9] This application should be placed in context. The affidavit material filed by the Respondent raises concerns about the Petitioner's care of the children. These concerns include alcohol abuse, leaving the children alone or with others without adequately providing for them, and the use of physical violence against the children.

[10] The Petitioner's affidavit material raises concerns about the Respondent's violence, abuse of alcohol and failure to care adequately for the children.

[11] The first issue I have to deal with is whether the records are confidential. In submitting that they are, counsel for the Superintendent placed reliance on the following observations by Vertes J. in *M.(G.M.)*:

> There is considerable merit to the argument that information supplied to child protection agencies should be cloaked with an expectation of confidentiality. There is an obligation to provide such information. An expectation of confidentiality was recognized in England when the principle of police informer privilege was extended to apply to those who supply information to authorities about suspected child abuse: see *D. v. National Society for the Prevention of Cruelty to Children*, [1978] 1 A.C. 171, [1977] 1 All E.R. 589 (H.L.).

[12] *M.(G.M.)* was a case where application was made for disclosure of the records of a Children's Aid Society investigation into an allegation of child abuse against one of the parents.

[13] Except as set out in paragraph [28] below, to the extent that the records in this case reflect any reports to Social Services by third parties, pursuant to the principles set out in *M.(G.M.)*, those communications are confidential and in no instance in the records I reviewed is there any information sufficiently probative or concrete that would outweigh the need to protect that confidentiality.

[14] However, the records in question contain not only information provided to the child welfare authorities but also observations made by Social Services workers of the Petitioner and her home and documentation of action taken by them. There are also records of various communications between social services workers and the Petitioner, the children and other individuals. I have reviewed all of these records in order to assess whether they are relevant to the issues in this case, whether the information contained in them is available from other sources and, of course, on the issue of confidentiality.

[15] There is no statutory privilege for any of the records under the *Child Welfare Act*, R.S.N.W.T. 1988, c. C-6. As set out in *M.(G.M.)*, the basis for a common law privilege is conformity to four conditions drawn from *Wigmore on Evidence*, 3rd ed. (McNaughton Revision, 1961), vol. 8, para. 2285, as approved in *Slavutych v. Baker*, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620:

> (1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

[16] As Vertes J. pointed out in *M.(G.M.)*, in cases of suspected child abuse, the expectation of confidentiality arises primarily from the statutory duty to report such cases.

[17] With respect to the records which do not involve reports from third parties, this case is similar to *Gagne v. Benness* (1996), 23 R.F.L. (4th) 323 (Ont. Ct. Jus., Prov. Div.), where the records at issue reflected a history of involvement by a children's aid society with one of the parents and the children. Although Brownstone Prov. J. used the analysis set out by the Supreme Court of Canada in *R. v. O'Connor*, [1995] 4 S.C.R. 411, he also addressed the issue of confidentiality of the records under Wigmore's four conditions. He referred to certain salient factors in applying Wigmore's test, factors relating to the status of the parent applying for disclosure of the records in that case, the function of the children's aid society and what disclosure rights the parents would have if the society were to bring protection proceedings.

[18] In this case, the salient factors reflect those in *Gagne*. The father is seeking custody of all of the children, some of whom already reside with him. He has a legitimate interest in the well being of all of the children.

[19] As to the Superintendent's (and the Department of Health and Social Services') functions, they include inquiring into allegations that children are in need of protection and the apprehension of children where there is reason to believe that they are in need of protection. The *Child Welfare Act* requires that, except in certain limited circumstances, where a child is apprehended, proceedings be instituted before a justice. In such a case, the parents of the children would be entitled to disclosure of the Superintendent's records.

[20] Of the almost identical factors in the *Gagne* case, Brownstone Prov. J. said the following:

> In view of the above factors, I cannot accept that the relationship between a parent and the society is one that, of necessity, is a confidential one, at least in so far as the other parent is concerned. The relationship and dynamic between parents and the society is complex and can oscillate between one of voluntariness, in which guidance, counselling and assistance are sought and provided, to one in which parents co-operate with the society in order to avoid court proceedings, to a highly adversarial one where the society seeks to remove children from their parents. Given this reality, I cannot see how society workers could give a parent any assurance of confidentiality in respect of communications regarding the children, when at any time such information might be relied upon by the society in a protection proceeding. A parent such as the respondent who has been the subject of investigations by the society could not have any reasonable expectation of privacy.

[21] I agree with these remarks and in my view the same considerations apply in this case to any records of observations by social services workers or communications between them and the Petitioner regarding the children. Except possibly in cases where social services workers provide counselling (and that would depend on the specifics of the case), I fail to see how there can be any expectation of confidentiality on the part of the parent in dealing with social services workers on issues relating to her children.

[22] The first of Wigmore's four conditions is therefore not satisfied with respect to the records of observations and communications with the Petitioner regarding the children.

[23] I have also considered in this regard the fourth of Wigmore's conditions, that the injury that would enure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation. The injury that might enure to the Petitioner's relationship with Social Services by disclosure of these communications or observations might, one could speculate, be a lessening of co-operation on her part. But I think that is speculation. It is not so clear as the harm that one could expect, for example, if information given in confidence were to be revealed. In any event, the primary consideration in the custody dispute between the parents will be the best interests of the children. Surely it is in their best interests that the court making the decision as to where they should live have relevant and objective information as to their

living conditions with the parents. That, in my view, outweighs any possible injury to the relationship between the Petitioner and Social Services and therefore Wigmore's fourth condition has not been satisfied.

[24] Counsel for the Superintendent argued that some of the observations by social services workers do not add to the allegations in the parties' affidavits, but acknowledged that they may provide corroboration for some of those allegations. In my view, that is precisely what makes them relevant and important. One would expect that the observations of the social services workers can provide an objective picture of the actual situation. This is likely to be very helpful to a court faced with allegations of wrongdoing on the part of both parties.

[25] I have also considered the Superintendent's concern about social services workers being drawn into private custody battles. While I think it is a valid concern, it does not, in my view, overcome the fact that the Superintendent's files may contain information pertinent to the children's welfare and their best interests. It seems to me that the real concern in this case is the fact that in one instance Social Services initiated an inquiry as a result of a request made by counsel for one of the parties to the custody dispute and that Social Services does not want to be used for investigative purposes by parties to such a dispute. Again, I think that is a valid concern, but once the inquiry or investigation is undertaken, I do not see the fact that it was instigated by counsel as a reason to bar disclosure of the information that results. In this case, however, the information that resulted from that particular inquiry consists mainly of further allegations by the parties but no independent observations. There are records of some brief discussions with one or more of the children but all of the information in question can be obtained from the original sources. For these reasons and the reason set out immediately below, I would not order disclosure of this part of the records.

[26] Although I have found that the records in question are not confidential, I take the view that because of the nature of such records generally the court should be very careful in ordering disclosure. The application of the Respondent requests only records relating to apprehensions of the children. I take that as in effect an acknowledgement that those are the records which are apt to have the most relevance in assessing where the best interests of the children lie. Indeed, in this case, the remaining records for the most part either do not provide information clearly relevant to and probative of the best interests of the children or the information in them can be obtained from other sources, such as the children's school.

[27] In my view, however, the records relating to the overnight apprehension of two of the children on November 8 to 9, 1997 should be disclosed to the Respondent and, obviously, to the Petitioner. For the reasons already given, I find that there is no confidentiality and therefore no privilege attached to those records. They describe action taken with respect to the two children and the observations that were the basis for that action. The records in question consist of the following documents, which I order be disclosed:

1. the form entitled Child Admittance for Care/Supervision, dated November 8, 1997;

2. the form entitled Change of Information - Child Admittance for Care/Supervision, dated November 9, 1997;

3. the On Call Record form that sets out the basis for the apprehension, dated November 8, 1997.

[28] I note that the information that led to this apprehension originated from a police officer and I have considered whether his name should not be disclosed. On further reflection, however, I note that the police officer also attended at the home and was present when the apprehension took place for the same reasons that he initially raised with the social services worker. In those circumstances, I consider that there could not have been any expectation of confidentiality on the part of the police officer when he raised the concern he did with the social services worker. Accordingly, I do not see any necessity to have his name edited from the records to be disclosed.

[29] The records that were provided to the court include some original documents. In the event that copies have not been retained by the Superintendent, I direct that counsel for the Superintendent be given access by the clerk of the court to the documents which have been sealed on the court file so that copies of the records I have ordered be disclosed may be made for counsel for the parties to this action. I further direct that there is to be no distribution of these records except to counsel and the parties themselves. The sealed documents shall remain on the court file pending any application to have the originals returned to the Superintendent.

[30] Should counsel require any clarification of this ruling, they can arrange to speak to me.

[31] Costs normally follow the event but if counsel are unable to agree they may, within 30 days of the date these reasons are filed, either file written submissions on the issue or arrange to bring it before me in Chambers.

[32] Dated at Yellowknife, this 21st day of May, 1998.

V. A. Schuler
J.S.C.

To: Angela Davies
Counsel for the Petitioner

Catherine Stark
Counsel for the Respondent

Shannon Gullberg
Counsel for the Superintendent of Child Welfare

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