Kalaserk v. Nelson, 2005 NWTSC 4 Date: 2004 01 07
Docket: CV 08639

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JUDY KALASERK

Applicant

-and-

BILLY NELSON

Respondent

REASONS FOR JUDGMENT

[1] The issue is the interim custody of a boy named Brent, who is now almost 9 years old. The contest, and I use that term advisedly, is between the applicant, who is Brent's aunt on his mother's side, and the respondent, Brent's biological father.

[2] The hearing took place in Yellowknife over parts of two days. The evidence was presented by way of affidavits and transcripts of cross-examinations of the parties. This is the norm on interim applications.

[3] The focus on these applications is usually the short-term needs of the child. The purpose of an interim order is to cover the period of time between the making of the order and a trial of the question of permanent custody. The test on an interim application is normally: What temporary living arrangements are the least disruptive, most supportive, and most protective for the children? In the words of Zuber J.A. of the Ontario Court of Appeal in *Sypher v. Sypher* (1986), 2 R.F.L. (3d) 413 (at 414): "... the purpose of the interim order is simply to provide a reasonably acceptable solution to a difficult problem until trial."

[4] In this case I had the benefit of submissions from counsel appointed on behalf of the child. I do not know how that appointment came about but I can only say that it

has been very helpful. Counsel for both parties agreed that the child's counsel should be given a right of audience at the hearing.

[5] A number of issues were canvassed at the hearing. Most notably, counsel for the respondent pressed the point that in a contest for custody between a biological parent and a legal "stranger" to the child, such as the applicant here, the governing test is not that of the "best interests of the child" but the "fitness" of the biological parent. At the conclusion of the hearing I informed counsel of my decision and said that reasons would follow. I said at the time that I was convinced that the appropriate test was the "best interests of the child" and that, based on the evidence before me, I was satisfied that it would be in Brent's best interests if interim custody was granted to the applicant. These are my reasons for so deciding.

Background Facts:

[6] Brent's mother, Betsy Kalaserk, and his father were in a common-law relationship from 1991 until 1997. Brent was born on January 29, 1996. Brent's mother is from an Inuit family living in Rankin Inlet, Nunavut. His father is from a Slavey First Nations family in Fort Liard, Northwest Territories. However, throughout his parents' relationship, they lived in Yellowknife. After his parents separated, Brent continued to live with his mother in Yellowknife. In March, 2000, an order was issued by this court granting Betsy Kalaserk custody of Brent and ordering the respondent to pay child support. The support payments were not consistently made by the respondent.

[7] The respondent lived in Yellowknife for a few years, then moved to Fort Liard, and then moved back to Yellowknife for a year or two. Since May, 2003, he has been living in Fort Liard again. He has two children, ages 4 and 3 years old, from a subsequent relationship, living with him. He is usually employed as a labourer. The respondent has a criminal record, including a conviction for manslaughter approximately 14 years ago, but he says he has changed his life since then.

[8] When the respondent lived in Yellowknife he had access to Brent. The frequency and regularity of the access is a matter of some dispute in the evidence. Brent also spent a two-week visit with his father at his father's home in Fort Liard sometime in 2001 or 2002. How successful that visit was is also a matter of some dispute in the evidence.

[9] In this period Betsy Kalaserk married a man named Ian Kirby. In March, 2002, Betsy and Brent, along with Mr. Kirby, moved to Rankin Inlet. Brent was enrolled in the elementary school there. In June, 2003, the family moved back to Yellowknife.

[10] On September 30, 2003, Betsy Kalaserk committed suicide. Her husband was charged and eventually convicted of criminal negligence in her death (see *R. v. Kirby*, [2004] N.W.T.J. No. 57). Brent was in the home when his mother died and witnessed some of the key events. He testified at Mr. Kirby's trial.

[11] Upon hearing of Betsy Kalaserk's death, Betsy's mother and sister Celina came to Yellowknife. The respondent also came to Yellowknife. He saw Brent over the course of a few days. On October 4, 2003, Brent travelled to Rankin Inlet with his aunt and grandmother. He has been in Rankin Inlet ever since living with his aunt, the applicant Judy Kalaserk, and her common-law husband. Brent is enrolled in the local elementary school attending third grade. As his special needs teacher related in an affidavit filed for this hearing, Brent is doing well in school; he has the ability to perform well but has difficulties when he is distracted or under stress; and it is obvious that he is facing social and emotional obstacles caused by the traumatic events of the recent past.

[12] The circumstances of Brent's relocation to Rankin Inlet are disputed. The respondent claims that it was his understanding that Brent would live with him on a permanent basis but that the Kalaserk family wanted Brent to return with them so that he could attend his mother's funeral. The respondent says that he expected Brent to be returned to him after a week or so. He claims that he even had to convince Brent to go to Rankin Inlet for this brief time. The respondent asserts that he did not consent to Brent living in Rankin Inlet on an ongoing or indefinite basis. The respondent has had no contact with Brent except for two brief telephone conversations.

[13] Brent's aunt, Celina Kalaserk, claims that she told the respondent that they were taking Brent to Rankin Inlet to live with them. She says that the respondent did not oppose this plan. It is apparent that since returning to Rankin Inlet the entire Kalaserk family has been involved in caring for Brent. Judy Kalaserk wants to continue caring for him. She claims that at some point in the past Brent's mother had asked her to adopt Brent should anything happen to her .

[14] In October, 2003, the respondent sought legal assistance from Legal Aid. The applicant's counsel acknowledged that any delay in bringing these proceedings was not due to any neglect on the part of the respondent. The respondent's previous counsel, the one originally assigned to him by the Legal Aid authorities, did not take prompt steps on his behalf. Eventually, in August, 2004, the respondent brought a motion seeking to vary the custody order made in 2000 so as to require the return of Brent to him. On October 1, 2004, another judge of this court ordered that Brent be returned to his father by October 31st. On October 8, 2004, that order was stayed so as to give the parties an opportunity to mount a custody hearing. In addition, Judy Kalaserk was added as a party (and eventually designated as the only party in opposition to the respondent). I was satisfied that she had the requisite standing.

The Wishes of the Child:

[15] One of the concerns expressed by counsel prior to the hearing was how best to put before me evidence from Brent himself. Section 83 of the *Children's Law Act*, S.N.W.T. 1997, c.14, says that, in any proceeding respecting custody, access, or guardianship of a child, a court "where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them". The views and preferences of the child are also identified in the Act as being among the factors to consider in determining the best interests of the child: s.17(2)(b).

[16] There are many different ways of accomplishing the objective of putting the child's views before the court. What seems to be commonly accepted, however, is the principle that a child's wishes, where they can be appropriately ascertained, should be considered and included in the decision-making process: Davies, "Access to Justice for Children: The Voice of the Child in Custody and Access Disputes" (2004), 22 *Canadian Family Law Quarterly* 153; see also *Stefureak v. Chambers*, 2004 CarswellOnt 4244 (S.C.J.).

[17] I indicated earlier that in this case I had the benefit of counsel appointed to represent Brent. As I said, I do not know how that appointment was made. I can only assume that the applicant, or the Kalaserk family, made arrangements with the Nunavut legal aid programme to appoint counsel on Brent's behalf. However it was done I am grateful.

[18] I digress to note that the *Children's Law Act* has what may be a significant deficiency in that it does not provide expressly for the appointment of counsel for the child. It clearly contemplates that a child may have separate legal representation since several sections allude to it, for example, those dealing with assessments (s.29(13)), consents to medical treatment (s.39(3)), and interviews by a judge to ascertain the child's views (s.83(4)). The lack of an express appointment provision can be contrasted with, for example, the Yukon legislation which provides that a child may have separate representation at public expense (s. 168 of *Children's Act*, R.S.Y. 2002, c.31) or the situation in Ontario where there is an office of "Children's Lawyer" which may provide legal representation to a child or conduct investigations and make recommendations to the court on questions of custody and access (see sections 89 and 112 of *Courts of Justice Act*, R.S.O. 1990, c.C-43). Closer to home there is s.86 of the *Child and Family Services Act*, S.N.W.T. 1997, c.13, which provides that, for child protection and apprehension hearings, the court "shall ensure" that the child is represented by independent counsel if it would be in the child's best interests.

[19] The lack of an express appointment power in the *Children's Law Act* means that a judge and the parties are left to rely on the court's *parens patriae* jurisdiction to appoint legal representation for a child. While this has been done in the past it would be preferable to have the parameters of such appointment power delineated expressly so that the role of the child's counsel is clearly understood. As Professor Christine Davies notes, independent legal representation for children is now seen as the favoured tool for relaying the child's views. But there are still differing opinions as to the role to be adopted by the legal representative, when such an appointment is appropriate, what skills and training a child's representative should have, and who should pay for the representation: see Davies, *op.cit.*, at 164-165. There are public policy, legal and financial implications to these questions and, in my respectful opinion, it may be preferable to have these points addressed in legislation, after debate by the public's political representatives, as opposed to discretionary direction by judges in isolated cases.

[20] In this case the child's counsel took on what I would describe as more of an *amicus curiae* role. She articulated her role as being to advance, as best as she could perceive them, those factors that can be considered to be in the interests of the child. Counsel did not take a position in favour of or against any one party in this custody dispute. She identified her role as a neutral one, more aimed at facilitating an

informed decision, as opposed to an adversarial one. Hence my description of the role as being akin to that of an *amicus*.

[21] Everyone in this case was concerned about minimizing any adverse impact on Brent. Yet, at the same time, everyone thought it helpful to hear from Brent directly. Counsel therefore agreed that I could view a videotaped interview of Brent conducted by his counsel a few days prior to the hearing.

[22] Brent's counsel did an admirable job in the interview of laying the groundwork; by that I mean, of establishing, through a dialogue with Brent, his ability to communicate, his understanding of the circumstances, and the need to be honest. He was responsive but in some things he obviously had difficulty identifying or articulating his feelings. He appeared to be comfortable, however, in the interview and I did not get the impression that he was coached in any way or that he was holding back. In my strictly non-professional opinion, he seemed like a typical 8 year old boy caught in a strained situation.

[23] Brent clearly knows who his father is, where he lives, and his circumstances. However, he was ambivalent when asked about his feelings toward his father. This is not surprising considering the limited and irregular contact between them over the years. Brent does not know, or at least could not articulate, whether he wants more contact with his father. He said he never thought about what it would be like to live with his father or to spend more time with him. Again, this is not surprising considering his age and circumstances. Throughout the interview, however, it was clear that Brent feels comfortable in Rankin Inlet and I detected no sign of unhappiness with his current family environment.

<u>The Governing Test:</u>

[24] It has become axiomatic to speak of the best interests of the child as being the governing test in all cases relating to the custody of a child. Respondent's counsel, however, made the argument that, as Brent's biological father, the respondent is entitled to custody absent a finding that he would be unfit as a parent. It is primarily to address this issue that I undertook to deliver written reasons.

[25] Respondent's counsel referred me to the decision of the Alberta Court of Appeal in *Bowes v. Gavin* (2001), 20 R.F.L. (5^{th}) 301. That was an appeal by a child's

mother from a trial decision granting custody of her child to the child's paternal grandparents. The appeal was allowed and a new trial ordered on the basis that the issue at trial should have been decided on the question of the mother's fitness to have custody as opposed to an examination of the best interests of the child. In its Memorandum of Judgment, the Court of Appeal held that, in the case of a contest between a legal stranger and a legal guardian, the governing test is not the best interests of the child but the fitness test. In doing so it followed an earlier decision of the Court, *W.D. v. G.P.* (1984), 54 A.R. 161, leave to appeal to S.C.C. refused (1984), 41 R.F.L. (2d) xxx, where Kerans J.A. wrote (at para. 14):

> While there is some confusion on the point in the authorities, I understand the rules to be that a stranger to a child - including a governmental agent - cannot wrest custody from the lawful guardian of the child without first demonstrating that the lawful guardian has either abandoned or neglected the child, or without offering other commanding reasons. But, in a contest between two recognized guardians, the person who can offer superior parenting will prevail. The first is the "fitness" rule; the second is the "best interests" rule.

[26] As respondent's counsel pointed out, the *Bowes* case was decided on the basis of Alberta legislation. She submitted, however, that the legislation in this jurisdiction cannot be distinguished and that the test set out in *Bowes* is the appropriate one here as well. She pointed out specifically that, in both jurisdictions, the legislation provides that the biological parents are joint guardians of a child and have equal claims to custody. In both jurisdictions a non-parent may apply for custody but the non-parent must first obtain standing to do so from the court. This, in her submission, affirms the paramount right of a natural parent to custody over the right of someone considered a legal stranger.

[27] In this jurisdiction, I held, in *G.D. v. G.M.*, [1999] N.W.T.J. No. 38, that standing will not be granted to anyone who simply has an interest in the child. A non-parent must demonstrate a connection to the child that can be almost equated to a parental one in the sense of care, nurture and support. In Alberta, the Court of Appeal set a similar test for standing in *J.W. v. J.C.*, [2003] A.J. No. 1465, where Fraser C.J.A. said that a non-parent must "establish a close personal relationship with the child almost akin to a parental relationship with respect to care, nurture and support" (at para. 8). Respondent's counsel, however, argued that even though a non-parent

may be granted standing she or he still stands as a legal stranger to the child so that the fitness test still applies.

[28] The evidence in this case would not be sufficient to necessarily conclude that the respondent is not fit to have custody. But is that the test? To properly analyze this question one must review the applicable legislation.

[29] In Alberta, s.50(1) of the *Domestic Relations Act*, R.S.A. 2000, c. D-14, provides that, unless a court orders otherwise, the mother and the father of a child are joint guardians. In the case of a custody dispute as between the parents, the court may make any order it sees fit and, in doing so, shall have regard to the welfare of the child and the conduct of the parents (s.59). This, in so many words, is the best interests test. However, where someone other than a parent applies for guardianship, then the fitness test applies. This is made clear in both s.53(1) and s.60(2) of the Act:

> 53(1) If on the application of a minor, or of anyone on behalf of the minor, it appears
>
> (a) that the minor has no parent or lawful guardian, or
>
> (b) that the parent or lawful guardian is not a fit and proper person to have the guardianship of the minor,
>
> the Court may appoint a guardian or guardians of the person and estate, of the minor.
>
> 60(2) If on an application made by a parent or other responsible person for an order for the production or custody of a minor the Court is of the opinion that the parent or other responsible person
>
> (a) has abandoned or deserted the minor, or
>
> (b) has otherwise so conducted himself or herself that the Court should refuse to enforce the parent's or other responsible person's right to the custody of the minor,
>
> the Court may, in its discretion, decline to make the order applied for.

[30] In the Northwest Territories, on the other hand, the *Children's Law Act* specifies in numerous places that any determination of custody will be made according to the best interests test. And this, in my opinion, applies whether the contest is between parents or between a parent and a legal stranger.

[31] First, there is the preamble which gives a clear expression of the legislature's intention in enacting the Act. Among the statements contained in the preamble is the following:

> And whereas it is recognized that decisions concerning the custody of and access to children, and the guardianship of the estates of children, should be made in accordance with the best interests of children, with a recognition that differing cultural values and practices must be respected in those determinations.

[32] In Part III of the Act, dealing with custody, access and guardianship, the purpose is set out as being, *inter alia*, to "ensure that applications to the courts in respect of custody of, incidents of custody of, access to and guardianship for children will be determined in accordance with the best interests of the children...": s.16(a). This is repeated in s.17(1) which states that "the merits of an application ... in respect of custody of or access to a child shall be determined in accordance with the best interests of the child...". Subsection 17(2) then provides a list of factors that a court shall consider in determining the best interests of a child. Among these legislated factors are the child's health and emotional well-being; parenting ability; the quality of the relationship between the child and the persons seeking custody; blood relationships and cultural ties; the child's views and wishes; and the effect of a change of residence on the child. The primary directive though is for the court to consider all the needs and circumstances of the child.

[33] Respondent's counsel submitted, nevertheless, that the Act draws a distinction between contests involving parents and legal strangers. She pointed to s.20 of the Act which provides that (1) a parent or any other person may apply for an order of custody, but (2) a non-parent must obtain leave before being able to apply. Then she noted that s.20(3) sets out the powers of the court on such an application:

> 20(3) On an application under subsection (1), the court may
>
> (a) grant custody of or access to the child to one or more persons;

> (b) determine any aspect of the incidents of custody or the right to access and make such order in respect of the determination as the court considers appropriate; and
>
> (c) make such additional order as the court considers necessary and proper in the circumstances.

[34] Respondent's counsel argued that, if issues of custody and access as between parents and non-parents were to be determined in the same fashion, using the factors set out in s.17, then there would be no need to specify the powers of the court respecting applications by non-parents, as done in s.20(3) of the Act. Counsel for the applicant submitted that s.20 merely recognizes that a non-parent may apply for custody. She noted that the legislation, in mandating the best interests test, clearly meant to include applications by non-parents since among the factors identified in s.17(2) are the love, affection and emotional ties between the child and *each* person seeking custody.

[35] I agree with these points made by applicant's counsel. Section 20(3) of the Act sets out generally what a court may order on an application for custody or access. It does not alter in any way the fundamental requirement to apply the best interests test.

[36] In my opinion, a clear distinction can be drawn between the situation in Alberta, as reflected by the judgment in the *Bowes* case, and that in this jurisdiction. The legislative landscape set out in the *Children's Law Act* is similar to that set out in the *Divorce Act* (Canada). In that statute, either parent or any other person may apply for custody or access: s.16(1). If a non-parent wants to apply then he or she cannot do so without leave of the court: s.16(3). And, in making an order for custody or access, the court shall take into consideration only the best interests of the child: s.16(8).

[37] I am in agreement with certain comments made by Carr J. in *Charrier v. Charrier* (1990), 26 R.F.L. (3d) 101 (Man. Q.B.), to the effect that, while the biological connection to the child is certainly not irrelevant, it is only one, albeit a significant one, of many factors relevant to the determination of what is in the best interests of the particular child. It is only the child's interests that are the focus of the inquiry, not a parent's rights.

[38] I think it is fair to say that generally the courts have exhibited a bias in favour of a natural parent where all things have been comparatively equal. But this does not

displace the clear shift in the law (certainly since 1984 when *W.D. v. G.P.* was decided) so that now the paramount consideration in determining custody is the best interests of the child. This was set out in *K.K. v. G.L.*, [1985] 1 S.C.R. 87, where the Supreme Court of Canada reviewed the changes in the law relating to custody of children and parental rights. McIntyre J., on behalf of the Court, wrote (at 93):

> ... The law has moved, first, toward an increase in maternal rights; a progressive diminution of parental rights; and then, a corresponding increase in the consideration of the interest or welfare of the infant, as the significant factor in custody determination. This latter factor has become progressively more important until it may now be said that the welfare of the child is the paramount consideration when the courts address the problem.

[39] That case, which originated in this jurisdiction, involved an unwed mother who sought return of her child from the couple to whom she had previously given the child for adoption. It, too, was a contest between a parent and legal strangers. Her application for custody was dismissed because the trial judge found that the bonding process between the child and the adoptive parents had reached such a stage that it was not in the child's interests to return him to his mother. This decision was upheld through two appeals.

[40] In the Supreme Court, McIntyre J. also discussed the fitness rule in such cases, as propounded by what he referred to as a "trilogy" of earlier cases, and the move away from it (at 95-96):

> ...In custody contests between contending parents the welfare of the child has become the dominant consideration without any initial preference given to either parent. In matters where the parent, usually the mother, was contesting a grant of custody to strangers, that is non-parents, the mother's claim had preference unless she was found to be unfit to have custody. This was the basis of the law applied in the trilogy and it was widely followed, save where a statutory provision permitted departure. The judicial reaction to the trilogy, however, in later years has been uneven and the courts have frequently favoured a more liberal application of the parens patriae, or equitable jurisdiction, and have moved away from the strict application of the rule approved in the trilogy.

[41] I cannot leave this issue without addressing a further point made by respondent's counsel. She argued that, if indeed all custody contests are to be determined solely by the best interests test, then there is potential for anyone to

interfere in the parent's custodial right by simply arguing that they can offer superior material benefits. I think there are a number of answers to this fear.

[42] First, as I noted in reference to the requirement for standing, my comments in *G.D. v. G.M. (supra)* with respect to the test for standing included the observation that merely having an interest in the child is not enough to force the custodial or biological parent into court. There must already be a relationship akin to a parental one. This threshold requirement operates to prevent frivolous or ill-founded applications by legal strangers to the child.

[43] Second, the Supreme Court in *K.K.* addressed this concern when it held that the best interests of the child cannot be determined solely on the basis of material advantage. McIntyre J. wrote (at 101):

> ...I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.

[44] Finally, the *Children's Law Act* expressly addresses this fear as well. Section 17(5) provides that the "economic circumstances of a person seeking custody or access are not relevant to the person's ability to act as a parent." Material factors may be a consideration, obviously, but they are secondary to the overriding consideration of the child's emotional, psychological and intellectual needs.

[45] For all these reasons, I concluded that the governing test in this case, as in every case regarding custody of a child, is the best interests of the child in question. Parental claims to custody must be given significant consideration and they will not lightly be set aside. But the dominant consideration is the welfare of the child.

The Status Quo:

[46] Previously, I made the comment that the focus on an interim custody application is on the short-term needs of the child. What arrangement would be the most stable one for the child? In that context, obviously, the status quo becomes quite important. If there is no good reason to disrupt an arrangement that has worked well for awhile, then that arrangement should be maintained pending a final trial on the merits. This is not to say that the status quo should pre-determine the final order; it merely recognizes the need to maintain stability for the child as much as possible.

[47] Respondent's counsel did not take issue with this general observation. She argued, however, that the status quo is less important if it is created by reason of the non-sanctioned action of a party. In her submission, it matters how the child came to be with the person who relies on the status quo. And, it is not in a child's best interests to reward someone who gained control of the child through inappropriate unilateral action. In this case she pointed to the fact that the respondent never consented to Brent living in Rankin Inlet on an indefinite basis and that the Kalaserk family, including the applicant, never had any intention of returning Brent to his father.

[48] Respondent's counsel emphasized how, in recent years, both domestic and international law has recognized the importance of preventing child abduction and self-help remedies by people claiming custodial rights. The *Children's Law Act* expressly recognizes that one of the purposes of Part III of the Act is to discourage the abduction of children as an alternative to the determination of custody rights by due process. Counsel also referred me to the Hague Convention on International Child Abduction, signed by Canada in 1980, and adopted in the Northwest Territories by the *International Child Abduction Act*, R.S.N.W.T. 1988, c.I-5. The Convention recognizes that removal of a child is wrongful where it is in breach of lawful rights of custody attributable to someone and where the child is removed unilaterally from his or her place of habitual residence. The purpose of the Convention is to protect children from the harmful effects of their wrongful removal. That is achieved by returning children to the status quo as it existed before the wrongful removal, i.e., the place of their habitual residence.

[49] Here, even if, for sake of argument, one can call the taking of Brent to Rankin Inlet a "wrongful removal", in the sense that it was a unilateral act in the face of the presumptive right of the father to custody, there is no status quo to return Brent to. He lived most of his life in Yellowknife. He lived all of his life with his mother. His mother was dead. His stepfather was charged as a result of the death. He had intermittent contact over the years with his natural father. He had never lived with his father in Yellowknife or in Fort Liard.

[50] On a strict jurisdictional basis, the decision as to his custody is being made in the place of his habitual residence. The *Children's Law Act* says that a child is habitually resident in the place where he or she last resided with one parent under a court order: s.25(2)(b). That place is the Northwest Territories. No one has questioned the jurisdiction of this court. So, in one sense, the concerns that are meant to be addressed by the Convention are not present in this case.

[51] I agree with respondent's counsel that people who deliberately go around the law should not be rewarded. And I recognize that the respondent did what was expected of him: he brought a court action to gain custody. But I am not so quick to condemn what the Kalaserk family did as either illegal or inappropriate. They had an immediate concern for Brent. Brent had lived in Rankin Inlet previously and knew his Kalaserk relatives. Taking him to Rankin Inlet may have been the most direct way of caring for him at a time of grief and confusion. The circumstances of his removal, whether it was by agreement of the respondent or it was some unilateral act, are disputed. Those circumstances may not be so benign once all the evidence comes out at trial. That is why a status quo, in these situations, can never be completely decisive in the ultimate determination of custody. But that will have to await a full trial on the merits.

[52] In any event, I note that the Convention does not place the circumstances of the child's removal as the determinative consideration. It affirms, in its preamble, that "the interests of children are of paramount importance in matters relating to their custody". It also provides that, even in the case of a wrongful removal, a court may decline to return the child if more than a year has elapsed and it can be demonstrated that the child is now settled into his or her new environment.

[53] So, even if I take into consideration respondent's arguments respecting the removal of the child to Rankin Inlet, I am still left in the final analysis with determining interim custody on the basis of Brent's best interests.

Brent's Best Interests:

[54] Based on the evidence presented to me I was satisfied that it would be in Brent's best interests to remain in the home of the applicant. He has gone through a great deal of stressful events in the past 16 months and, at the present, what he requires is stability. He has that in Rankin Inlet. He has accommodated himself to life there and, in contrast to the uncertainty of what his life may be like in the unfamiliar surroundings of Fort Liard, he is secure and comfortable. I see no sense in moving him now on an interim basis.

[55] I do not say that the respondent is not a fit parent. He is currently raising his two younger children and there seems to be no concerns about that. He had a difficult background but he seems to have overcome that in the past decade. And I do not say that Brent could not accommodate himself to life in Fort Liard with his father. But that requires more intensive analysis than possible on this interim application.

[56] I wish to emphasize something first said by Abella J.A. (as she then was) in *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.). The assessment of a child's best interests can be no more than an informed opinion made at a moment in the life of a child. Because there are stages to a child's life, what is in their best interests will vary from time to time. The assessment I make now is not cast in stone. It is simply my conclusion as to what, in the present circumstances, is the most conducive situation in which stress and instability will be minimized in an environment of care and nurture.

[57] For these reasons, I granted interim custody of Brent to the applicant.

Access:

[58] The law has long recognized that it is generally in the interests of the child to maintain and foster a relationship with his or her natural parents. In the divorce context, this is confirmed by s. 16(10) of the *Divorce Act* which obligates a court to "give effect to the principle that a child of the marriage should have as much contact

with each (parent) as is consistent with the best interests of the child". The *Children's Law Act* lists, as one of the considerations of a child's best interests in s.17(2), the "willingness of each person seeking custody to facilitate access between the child and a parent of the child who is seeking custody or access".

[59] One does not need a post-graduate degree in child psychology to realize that measures should be taken to see if a meaningful relationship between Brent and his father can be fostered. If they are not, Brent may well grow up resentful and full of questions as to his natural father. If they are, then a healthy relationship could only be beneficial to Brent. Also, if there is to be a trial on the question of permanent custody, the respondent and Brent should be given the opportunity to interact. This can only help in making an assessment of Brent's long-term interests.

[60] I indicated to counsel that, unless I heard otherwise, I would set out some general access provisions. Having heard nothing further, I make the following directions:

1. The respondent shall have access to Brent upon such terms, and at such times, as the parties may agree upon from time to time.

2. If the parties are unable to agree otherwise, the respondent shall have access on the following terms:

   (a) the respondent may communicate by letter or telephone at all reasonable times;

   (b) if the respondent telephones to the applicant's home, and Brent is available, the applicant shall allow him to speak to his father;

   (c) Brent shall spend a period of 8 days, inclusive of travel days, during the 2005 spring school break with the respondent (the exact dates to be confirmed by the respondent and applicant by no later than February 28, 2005);

   (d) Brent shall spend a period of 21 days, inclusive of travel days, during the 2005 summer school break with the respondent (the exact dates to be confirmed by the respondent and the applicant by no later than April 30, 2005).

3. In respect of the access visits, the applicant will be responsible for the costs and arrangements for Brent's travel between Rankin Inlet and Yellowknife; the respondent will be responsible for the travel costs and arrangements between Yellowknife and Fort Liard.

4. The applicant shall keep the respondent informed, on an ongoing basis, of Brent's address, telephone number, any other contact information, and shall regularly inform the respondent about Brent's progress in school and any health or developmental issues.

5. During access visits, the respondent shall keep the applicant informed as to where Brent will be and shall provide a contact number to the applicant.

6. If the parties cannot agree on any matter relating to access, they must first seek the assistance of an independent third party to mediate the disagreement. If such mediation is unsuccessful, then either party may apply to this court for further directions.

7. If this interim order continues beyond 2005, then access is to be exercised on the same basis in succeeding years.

[61] I wish to emphasize that these directions apply only in the absence of some other mutually agreeable arrangement. The parties are free to do what they want so long as they both agree. And I am sure everyone understands that it would be far better for Brent if there is agreement as opposed to further conflict.

Conclusions:

[62] For the foregoing reasons, I order as follows:

1. The interim order of October 1, 2004, is set aside in its entirety.
2. The applicant shall have interim custody of Brent.
3. The respondent shall have access on the terms specified above.

[63] Since no one referred to the question of costs, costs will be in the cause. I thank all counsel for their thorough submissions.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT this
7th day of January, 2005.

Counsel for the Applicant: Jill A. Murray
Counsel for the Respondent: Katherine R. Peterson, Q.C.
Counsel for the Child: Teena R. Thorne

Kalaserk v. Nelson, 2005 NWTSC 4

Date: 2004 01 07
Docket: CV 08639

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JUDY KALASERK

Applicant

-and-

BILLY NELSON

Respondent

Interim custody hearing.

Heard at Yellowknife on December 13 & 14, 2004.

Reasons filed: January 07, 2005

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

Counsel for the Applicant: Jill A. Murray
Counsel for the Respondent: Katherine R. Peterson, Q.C.
Counsel for the Child: Teena R. Thorne