

Carter et al v. Vachon et al, 2005 NWTSC 81

S-0001-CV-2005000240

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRIAN CARTER and INGRID CARTER

Applicants

- and -

LINDA VACHON, MARTIN HARDER and
LORETTA HARDER

Respondents

Transcript of the Oral Judgment of The Honourable Justice
J.Z. Vertes, sitting in Yellowknife, in the Northwest
Territories, on the 26th day of September, A.D. 2005.

APPEARANCES:

Ms. M. Staszuk, agent
for Ms. Keenan Bengts:

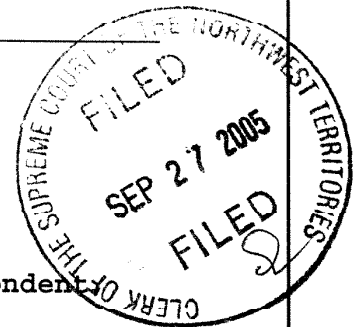
For the Applicants

Ms. S. MacPherson:

Counsel for the Respondents
Linda Vachon

Ms. K. Peterson, Q.C.:

Counsel for the Respondents,
Martin Harder and Loretta Harder



1 THE COURT: These reasons address the
2 interim custody application of Brian and Ingrid
3 Carter. I will review the facts only insofar as
4 it is necessary to explain my decision. The
5 issues in this application concern the best
6 interests of the child in question, as in all
7 custody cases, but they also concern questions of
8 conflicts of laws, standing for grandparents, and
9 the interests of proposed adoptive parents.
10 These are all questions of significant interest,
11 but having regard to the immediate circumstances
12 of this case, any in-depth exploration of these
13 issues will have to wait for another day. It
14 seems to me to be far more important to issue a
15 decision as promptly as possible.

16 The child in question is Hayley Vachon, born
17 on May 31st, 2003. The child's mother is the
18 respondent, Linda Vachon, who is now 21 years
19 old. The applicants are Linda Vachon's mother
20 and step-father. Hayley's natural father, Waylon
21 Pie, is not involved in these proceedings and
22 apparently has had no involvement in Hayley's
23 life.

24 Ever since Hayley's birth, she and her
25 mother have lived with the applicants, Hayley's
26 grandparents, in the applicants' home in
27 Yellowknife. The grandparents had a role in

1 Hayley's life that appears to be close to a
2 parental one in terms of providing care, nurture
3 and support to Hayley.

4 This is important because the *Children's Law*
5 Act requires that a non-parent must be granted
6 standing in order to apply for custody. Because
7 of the history of the care arrangements, I am
8 satisfied the applicants have the requisite
9 standing to bring this application, and I granted
10 them standing when the matter first came on
11 before me.

12 Even though the applicants play a
13 significant role in Hayley's care and support, it
14 is also apparent to me that Linda Vachon fulfills
15 the role of being Hayley's mother. She is the
16 primary source of care for her. And I should say
17 that my conclusions, limited as they may be, are
18 gleaned from the affidavit evidence that has been
19 presented, and as in many interim applications,
20 my knowledge base is therefore highly constricted
21 because of course none of the assertions in those
22 affidavits have been tested by cross-examination
23 or otherwise. But I have confidence in the
24 conclusions I have formed based on the evidence
25 that has been put before me.

26 It is readily apparent as well, however,
27 that there are stresses and strains in

1 Ms. Vachon's relationship with her parents. Soon
2 after Hayley's birth, Mr. Vachon expressed an
3 interest in placing Hayley for adoption. The
4 applicant grandparents were opposed to this and
5 expressed their willingness to either help
6 Ms. Vachon raise Hayley or to raise Hayley
7 themselves.

8 In July of this year, Ms. Vachon spoke with
9 a social worker about placing Hayley for
10 adoption. She was subsequently put in contact
11 with a private adoption agency in Edmonton.
12 Through them, she selected and met the other
13 respondents, Martin and Loretta Harder, who had
14 signed up with the agency as prospective adopting
15 parents.

16 On September 1st, without telling her
17 parents, Ms. Vachon left Yellowknife, along with
18 Hayley, and went to Edmonton. A few days later,
19 she left Hayley with the Harders. She gave her
20 consent to adoption. Ms. Vachon then returned to
21 Yellowknife.

22 According to Ms. Vachon, the natural father
23 agreed to this course of action.

24 On September 6th, Mr. and Mrs. Carter
25 launched proceedings seeking custody of Hayley.
26 The Harders, to their credit, and even though
27 they reside in Alberta, retained counsel to

1 respond to this application (as did Ms. Vachon).

2 The first question to address is whether
3 this court should assume jurisdiction in this
4 matter. Hayley is in Alberta with the Harders,
5 who, through the adoption agency, have started
6 steps to present an adoption petition to the
7 Alberta court. The Alberta Director of Adoptions
8 has been notified of the proposed adoption and
9 has started to do the necessary assessments.
10 Counsel for Ms. Vachon and for the Harders
11 suggested that the applicants could always apply
12 for standing in the Alberta court and contest the
13 adoption. The difficulty with that is that (a)
14 there is no requirement for notice to
15 grandparents in the Alberta legislation, and (b)
16 there is no guarantee that the applicants would
17 have standing in any Alberta proceeding. Because
18 I think they deserve standing does not
19 necessarily mean that they must be given standing
20 in some other proceeding in some other
21 jurisdiction.

22 Section 25 of the *Children's Law Act*
23 provides that this court has jurisdiction to make
24 a custody order if the child is habitually
25 resident in the Territories. There is no doubt
26 that the child is habitually resident here. She
27 lived throughout her life here until her recent

1 removal to Alberta. Her mother and grandparents
2 reside here. No one really questioned this
3 court's jurisdiction.

4 Next, I think it would be helpful to outline
5 what are the legal custody rights at present.

6 The *Children's Law Act* presumes right of
7 custody in the natural parents and, if the
8 parents are separated, then the parent with whom
9 the child resides, pursuant to the agreement or
10 consent of the other parent, has the custody
11 rights and responsibilities for the child.
12 However, the custodial rights of a parent may be
13 limited by law or by a court order. This is what
14 I take to be the combined effect of subsections 1
15 through 5 of s. 18 of the Act.

16 Of course, if the issue of custody is
17 brought before the court, then the overarching
18 criterion to be used is the best interests of the
19 child.

20 So in this case, Ms. Vachon, as Hayley's
21 mother, had the right to place Hayley for
22 adoption. However, the *Adoption Act* of the
23 Northwest Territories imposes a prerequisite to
24 placing a child for adoption outside of the
25 Territories. Section 42 prohibits anyone from
26 placing a child, who is ordinarily resident in
27 the Territories, for adoption outside the

1 Territories without having obtained the
2 Director's approval. If the child is to be
3 placed with a non-relative, the person doing the
4 placement must make application to the Director,
5 which must be supported by a pre-placement
6 report. I call these steps a prerequisite
7 because s. 43(3) requires that these be done
8 before the placement is to occur. If someone
9 does not obtain the Director's written approval
10 before placing a child for adoption outside the
11 Territories, then that person is subject to
12 summary conviction proceedings and liable to be
13 fined or even jailed.

14 In this case, these prerequisite steps were
15 not taken. Ms. Vachon took Hayley and, with the
16 assistance of the adoption agency, placed her for
17 adoption with the Harders in Alberta. Both
18 Ms. Vachon and the adoption agency director say
19 this was an oversight. They were not aware of
20 this requirement. I have no reason to doubt
21 these assertions. However, I cannot ignore the
22 clear intent of these sections of the *Adoption*
23 *Act*. They are there so as to ensure that the
24 Director of Adoptions in the Northwest
25 Territories approves the placement of every child
26 for adoption outside of the Territories before
27 the child is removed from the Territories (at

1 least in the case where the person with whom the
2 child is to be placed is not a relative).

3 I agree with Ms. Staszuk that if it were
4 acceptable to simply circumvent this explicit
5 prohibition by claiming inadvertence, then that
6 would mean that the statute has no meaning or
7 force. This prohibition is a law that limits the
8 custodial rights of Hayley's mother in these
9 circumstances. I cannot ignore it.

10 In my opinion, as far as the laws of the
11 Northwest Territories are concerned, the
12 placement of Hayley for adoption in Alberta is
13 without legal validity. Therefore she must be
14 returned.

15 I want to emphasize that I do not question
16 the ability and desire of the Harders to provide
17 a suitable home for Hayley. But the law that I
18 must apply is clear and it is the law of the
19 Northwest Territories. I cannot countenance a
20 circumvention of the requirements of the *Adoption*
21 *Act* no matter how unintentional it was. And I
22 note that s. 42 of the *Adoption Act* is written in
23 clear, straightforward, mandatory language
24 prohibiting the placement of the child outside of
25 the Territories without the requisite preliminary
26 steps being taken.

27 So we are now brought back to the

1 fundamental question of custody for Hayley and
2 what would be the best for her in the interim.

3 The Carters seek permanent custody.

4 Obviously there will have to be a trial of that
5 issue. But in the interim, I am convinced that
6 it is in Hayley's best interests to be with her
7 mother. I have not been provided with cogent
8 evidence demonstrating that Ms. Vachon could not
9 adequately care for and support her daughter.
10 There were never any child protection or child
11 welfare concerns. All indications are that she
12 is capable of suitably caring for Hayley.

13 Applicants' counsel submits that Ms. Vachon
14 has demonstrated that she does not want to be a
15 mother and that she has rejected Hayley. I do
16 not draw that definitive conclusion. I am not
17 prepared to reject the assertion by Ms. Vachon
18 that what she did, she did out of a carefully
19 considered concern for what she thought would be
20 best for Hayley.

21 I acknowledge the degree of involvement that
22 the applicants have had and want to have in
23 Hayley's life. I see no reason why that cannot
24 continue. Perhaps Ms. Vachon will realize the
25 benefits to be gained by allowing her parents to
26 have significant contact with Hayley (especially
27 if Ms. Vachon is working during the daytime).

1 I recognize that all this may do is delay
2 the inevitable (as one counsel put it). Maybe
3 so. If, after a trial, the Carters' application
4 for custody is rejected, then there will be no
5 impediment to Ms. Vachon proceeding with the
6 adoption. Perhaps, if that is the case, the
7 Carters will be able to reconcile themselves to
8 their daughter's decision. Or, perhaps,
9 Ms. Vachon will change her mind about the
10 adoption.

11 On the other hand, if the Carters gain
12 custody, they will then be able to make the
13 decisions in Hayley's life.

14 All I am making is an interim order. It
15 does not presume what the outcome will be of any
16 trial with respect to the permanent custody of
17 Hayley.

18 I also recognize that this is extremely
19 difficulty for the Harders. Their expected
20 adoption of Hayley is put on hold for the time
21 being. It may not happen at all. But there are
22 no guarantees that the adoption would be approved
23 in Alberta either. I realize that there is a
24 risk that the Harders will go ahead and adopt
25 some other child. But they have been involved in
26 Hayley 's life for less than a month only. Her
27 grandparents have been involved all her life.

1 I have also not ignored counsel's comments
2 to the effect that it is not in Hayley's best
3 interests to be shuttled back and forth and that
4 it would be better to leave her in the stable
5 environment provided by the Harders as opposed to
6 what appears to be a dysfunctional environment
7 created by the frictions evident between
8 MS. Vachon and her parents. There is much to be
9 said for this argument. But, as I said, Hayley
10 has been with the Harders for less than a month.
11 I think it would be far more difficult for her to
12 be wrenched away from the Harders several months
13 from now as opposed to right now. There is no
14 ideal solution in this situation. And if I may
15 be permitted an editorial comment that is purely
16 gratuitous, unfortunately this is the type of
17 situation where there may be no winners
18 whatsoever unless and until everybody starts
19 focusing solely on what may be best for Hayley.

20 In summary, I order as follows:

21 1. The child Hayley is to be returned to
22 Yellowknife. I direct that Mr. and Mrs. Carter
23 go and pick her up and bring her back. I say
24 that because I have the sense that Mr. and
25 Mrs. Carter are in a more capable position to do
26 so, and it may be an opportunity for Mr. and
27 Mrs. Carter to meet the people with whom their

1 granddaughter has been living for this past
2 month. I direct that arrangements be made
3 through counsel for an acceptable exchange time
4 and place. I expect that will be somewhere in
5 Alberta. That exchange is to occur sometime
6 between 12 noon on Saturday, October 1st and
7 Wednesday, October 5th. That should provide
8 sufficient time for both the Carters and the
9 Harders to make preparations.

10 2. No later than 12 noon on Saturday, October
11 8th, the Carters are to deliver the child to her
12 mother, Linda Vachon, at her residence in
13 Yellowknife. This should provide Ms. Vachon with
14 sufficient time to make her necessary
15 preparations.

16 3. Ms. Vachon will have interim custody of
17 Hayley pending further order of this court.

18 4. If it turns out that Ms. Vachon does not want
19 to, or does not feel able to, care for Hayley on
20 a day-to-day basis, then Hayley is to live with
21 Mr. and Mrs. Carter. If however, Hayley does
22 live with Ms. Vachon, then the Carters will be
23 entitled to have access to Hayley, in their own
24 home and elsewhere, on a regular and frequent
25 basis. If the parties are unable to agree on
26 access arrangements, they may apply to the court
27 for further directions.

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5. I direct a trial of the issue of the Carters' application for permanent custody of Hayley. Counsel may seek directions as to expediting such a trial. The parties to that trial will be the applicants and Ms. Vachon.

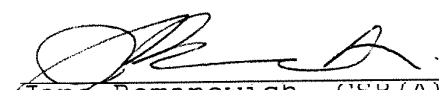
6. I direct that Hayley's natural father be served with a copy of the formal order in this matter and, also, that he be served with notice of the hearing date for the trial. Whether he wishes to participate is up to him.

7. The child shall not be removed from the Northwest Territories, once she has been returned to Yellowknife, without an order of this court or the prior written agreement of Ms. Vachon and the Carters.

I thank counsel for your assistance. I will leave it to you to prepare and file the formal order. There will be no costs.

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Certified Pursuant to Rule 723
of the Rules of Court


Jane Romanowich, CSR(A), RPR
Court Reporter