Date: 2012 05 22
Docket: S 1 CV 2004 000391

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

In the matter of the *Children's Law Act* of the Northwest Territories

BETWEEN:

STACEY WAGNER

Applicant

- and -

CORY MELTON, DALE WHEATON and BONNIE WHEATON

Respondents

MEMORANDUM OF JUDGMENT

BACKGROUND

[1] This application is brought by Dale and Bonnie Wheaton for an order appointing counsel for the child, S., through the Office of the Children's Lawyer. Stacey Wagner, the child's mother, opposes this request.

[2] The Wheatons are the child's grandparents. She is currently 7 years old and lives with her mother, who has sole custody of her. In April of 2011 the Wheatons sought standing to apply for joint custody and access to S. They were granted standing to bring an application for access, but not joint custody (see: *Wagner* v. *Melton,* 2011 NWTSC 21). Subsequently, in the fall of 2011, the Wheatons brought an application for specified access. This remains outstanding.

LEGAL FRAMEWORK

[3] A child's views and preferences, if they can reasonably be determined, are among the factors that the court must consider in an application for custody or access under the *Children's Law Act,* S.N.W.T. 1997, c. 14 (section 17(2)(b)). As noted by Vertes J., in *Kalaserk* v. *Nelson,* [2005] N.W.T.J. No. 3 (at paragraph 19) and by

Paperny, J.A., in *Puszczak* v. *Puszczak*, [2005] A.J. 1715 (at paragraph 10), the three most common means of obtaining a child's views in custody and access proceedings, other than through the representations of their parents, are the judicial interview, the appointment of an independent expert who can assess the child's views and the appointment of independent counsel for a child. It should always be borne in mind, however, that a child's views and preferences are but one of many factors that a court considers in determining what is in the best interests of a child.

[4] At present, there is no legislation in the Northwest Territories that addresses the parameters surrounding appointment of counsel for children in custody and access proceedings. Thus, the court must rely upon its *parens patriae* jurisdiction - that is, its jurisdiction to "guard and protect the interests of children" - to fill the legislative gap. *Isnor* v. *Isnor*, [1994] N.W.T.R. 378 (S.C.); *Kalaserk, supra.* The *parens patriae* power is a discretionary one of potentially unlimited scope, but it must be exercised in a principled manner. *E (Mrs.)* v. *Eve*, [1986] 2 S.C.R. 388

[5] A number of guiding principles have emerged from cases where courts have been asked to use their *parens patriae* jurisdiction to appoint counsel for a child in custody and access proceedings.

[6] First, the most important question is whether or not appointing counsel to represent a child is in that child's best interests. *Puszczak, supra*; *L.M.H.* v. *S.R.H.*, [2010] A.J. No. 1402, 2010 ABQB 769; *Smith* v. *Lagace*, [2011] A.J. No. 721, 2011 ABQB 405.

[7] Second, the court must be satisfied that the child can provide instructions to a lawyer. If the child cannot do so, then counsel should not be appointed and other methods of ascertaining the child's views must be explored.

[8] Third, the court should exercise its discretion to appoint counsel sparingly and only where the adult litigants cannot adequately represent the child's views to the court. *L.M.H.; Smith, supra.* I agree with the comments of Germaine, J., in *L.M. H.* that in custody and access disputes, " . . . the presumption should be against this type of appointment."

[9] There are sound reasons for this. While it may be an objective way to determine a child's views, the effect of appointing counsel for a child in custody and access proceedings is to involve that child directly in the litigation as a party. This can - and often will - place the child in the position of having to make very difficult decisions about the time they spend with people they love, knowing that they may

please one and hurt another. The point is, these are adult decisions that are properly within the purview of parents and, in some cases, like here, grandparents or other relatives. Children should bear this burden only in the rarest of circumstances.

[10] It was noted in *Puszczak* and *Smith*, *supra,* that the Full Court of the Family Court of Australia in *In the Matter of: Re K* (1994) FLC 92-461 set out a non-exhaustive list of circumstances where it *may* be appropriate to appoint counsel to represent a child in a custody and access dispute. Although these do not replace the court's discretion in exercising its *parens patriae* jurisdiction, they are instructive in illustrating the specific types of cases where appointing counsel for a child may be helpful in achieving a just result:

(i) cases that involve allegations of child abuse,
(ii) where there is an apparently intractable conflict between the parents,
(iii) where the child is apparently alienated from one or both parents,
(iv) where there are real issues of cultural or religious difference affecting the child,
(v) where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge on the child's welfare,
(vi) where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare,
(vii) where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the child,
(viii) any case in which, on the material filed by the parents, neither seems a suitable custodian,
(ix) in any case in which a child of mature years is expressing strong views, the giving effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent,
(x) where one of the parties proposed that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practical purposes exclude the other party from the possibility of access to the child,

(xi) cases where it is proposed to separate siblings,
(xii) custody cases where none of the parties is legally represented, and
(xiii) applications to the court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.

ANALYSIS

[11] For reasons that follow, this is not a case where it is proper for the court to exercise its *parens patriae* jurisdiction and appoint counsel for S.

[12] The evidence does not support the conclusion that it is in S.'s best interests to have legal representation. Mr. Wheaton swore two affidavits in support of this application, on March 8, 2012 and March 21, 2012. In the March 8, 2012 affidavit he deposes that S. is articulate and has a strong mind, and would, accordingly, be able to provide her lawyer with instructions. He also states that S. loves to spend time with her grandparents and has expressed that she is happy they are back together. Accordingly, he believes it would be in S.'s best interests to have counsel so she can have input into her future.

[13] In the affidavit he swore on March 21, 2012, Mr. Wheaton reiterated the reasons he feels that S. should have her own lawyer, but primarily focused on the access difficulties that preceded the application for standing. The Wheaton's access to S. over the past year, however, has been frequent and regular, taking the form of telephone, "Skype", in person and overnight visits. I do not find the evidence about the historical difficulties with access helpful in this particular application. Access is not being denied and S. is not being deprived of a loving relationship with her grandparents. There is not a terribly high level of conflict between the parties.

[14] It appears that at one point Ms. Wagner was contemplating a move from the Northwest Territories (a move that being one of the circumstances identified by the Australian court where it might be appropriate to appoint counsel), but that does not appear to be an immediate concern now. Moreover, the court would still need to determine if it was necessary or appropriate to appoint a lawyer to ensure that the child's views and preferences were heard. There are many cases where mobility is an issue and where children are not represented by counsel.

[15] Ms. Wagner feels that appointing counsel for S. would unnecessarily involve S. in the litigation. She believes that the child's views can be adequately put before the court through the affidavits of the parties and the representations of their lawyers. Ms. Wagner also questions the motivation of the Wheatons in bringing the application for access, although I find that this is not particularly relevant to the issue of whether or not the child should have counsel.

[16] While S. may be able to articulate her preferences and may even be able to instruct counsel, it does not appear necessary to appoint counsel so that her views can be represented to the court. Ms. Wagner and the Wheatons appear perfectly capable of adequately representing her views and preferences. In this application, Mr. Wheaton has represents that S. adores her grandparents and loves spending time with them. This does not seem to be disputed by Ms. Wagner, who, according to the evidence, is actively fostering a the relationship between S. and her grandparents right now.

[17] While I have no doubt that the Wheatons are motivated to make this application because they care sincerely about what S. has to say, I cannot escape the conclusion that the court is being asked to exercise its *parens patriae* power for their benefit, rather than for S. At paragraph 7 of his affidavit of March 8, 2012, Mr. Wheaton states that:

> If counsel for [S.] is assigned and it is determined through that counsel that [S.] does not wish to spend time with us and does not want some stability and certainty in the amount of time she spends with us, we will reassess whether we should proceed with our application.

[18] What is proposed here is that S. would, in effect, be asked through her counsel to assist the Wheatons in deciding whether or not they should proceed with their application.

[19] It would be inappropriate for the court to exercise its *parens patriae* power for this purpose. In *E (Mrs.) v. Eve*, *supra,* La Forest, J. described the parameters that guide the use of *parens patriae* as follows (at paragraph 77):

> Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuick in *Re X*, at pp. 706-07, and Heilbron J. in *Re D*, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a

> discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. *This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.* [Emphasis added]

[20] Appointing counsel in these circumstances would be at odds with the principled approach set out in *Eve*. The decision to proceed with custody and access litigation, or with a particular approach to it, is one that should and must be made by adult litigants. It would be neither appropriate, nor fair, to appoint counsel and thereby to place the burden of such an "adult" decision on S. Counsel should be appointed for a child only where it is that child's best interests. That is not the case here.

CONCLUSION

[21] For these reasons, I decline to exercise my *parens patriae* jurisdiction and the application is dismissed.

[22] Costs will follow the event.

K. Shaner
J.S.C.

Dated at Yellowknife, NT, this
22nd day of May 2012

Counsel for Dale and Bonnie Wheaton: Betty-Lou McIlmoyle

Counsel for Stacey Wagner: Paul Parker

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