Date: 2013 01 11
Docket: S-1-FM-2008 000014

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

PATRICIA LAFFERTY

Applicant

- and –

JOSH ANGIERS

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an Application by Josh Angiers to have counsel appointed to represent his daughter, A., in the context of proceedings dealing with her custody. Patricia Lafferty, A.'s mother, opposes this. A. was born in 2005 and is currently seven and a half years old.

A) BACKGROUND OF THE PROCEEDINGS

[2] The mother initiated the original custody proceedings by filing an Originating Notice in January 2008. On May 1, 2008, an Order issued in this Court, on the consent of both parties, granting permanent sole custody and day to day care and control of A. to the mother (the 2008 Order). The Order also provided that the father would have reasonable access as agreed by the parties, on the condition that he abstain from alcohol at least 24 hours prior to access and during access.

[3] On June 7, 2012, the father filed an Application seeking to have the 2008 Order varied to grant him sole custody of A., with generous, supervised daytime access to the mother. In that same Application, he sought other relief, including

having counsel appointed for A. The father later filed a second Application, on October 1, 2012, seeking shared custody of A.

[4] A date has not been set for the hearing of the variation application, as the request to have counsel appointed for the child had to be dealt with first. Submissions on that issue were presented on December 20, 2012.

B) THE PARTIES' POSITIONS

[5] The evidence adduced by the father raises several issues about the mother's lifestyle and how it impacts on her ability to care for A., her parenting choices, and her attitude and approach in dealing with the issue of access.

[6] The father argues that the evidence shows that A. is the victim of neglect in that: she is not always adequately supervised; A. has been exposed to violence and dysfunction while in her mother's care, and; A.'s basic needs are not always adequately met. He has concerns about the mother's choices of caregivers for A. He is also concerned because A. has reported having been sexually assaulted by her mother's younger brother. Finally, he alleges that the mother is using denial of access as a weapon against him when she is upset with him.

[7] The father argues that counsel should be appointed for A. for essentially two reasons. First, because A. having her own counsel is the only effective way of getting to the bottom of what is really going on in the mother's home. Second, A. is sufficiently mature to express her views about this matter because she has done so with respect to access. The father argues that given this, she should be given a direct voice in the variation proceedings.

[8] The mother disputes the allegation that A. is not being properly cared for. She deposes that as A.'s primary caregiver for her entire life, she has always ensured that A. is properly fed, supervised, and looked after. She acknowledges having struggled with alcoholism and other issues in her life, but deposes that she has taken steps to address those issues and continues to do so.

[9] The mother also acknowledges having been in a dysfunctional and violent relationship, but deposes that this relationship has ended and she does not intend to renew it.

[10] The mother argues that the father's variation Application is really an attempt to re-litigate issues that were dealt with when the 2008 Order was made. She suggests that the evidence adduced by the father in unlikely to establish the

threshold requirement - there being a material change in circumstances – that would justify reopening the issue of custody. This, she says, militates against appointing counsel for the child. She adds that the evidence suggests that what this dispute is really about at this point is access, and that this is an issue that can be dealt with without counsel being appointed for A.

[11] The mother, therefore, is adamantly opposed to counsel being appointed for A. She argues that involving A. directly in this litigation is unnecessary and not in A.'s best interests.

C) ANALYSIS

1. Applicable legal principles

[12] The parties are in agreement as to the legal principles that govern this application. Their disagreement is about what outcome should result from the application of those principles to the circumstances of this case.

[13] No one takes issue with this Court's jurisdiction to appoint counsel for a child who is the subject of custody and access proceedings. The *Children's Law Act* S.N.W.T. 1997, c. 14, does not provide for this power, but it has long been recognized as part of the Court's *parens patriae* jurisdiction. *Kalaserk* v. *Nelson*, 2005 NWTSC 4; *Smith* v. *Legace*, 2011 ABQB 405 at para.17; *Puszczak* v. *Puszczak*, 2005 ABCA 426, at para. 12.

[14] The appointment of counsel to represent children in family law proceedings has not been without controversy. Some of that controversy has been with respect to the role that counsel should take when so appointed: the role of an advocate for the child's position, or a more neutral role focused on advocating for what is in the child's best interest. See for example: Nicholas Bala, *Child Representation in Alberta: Role and Responsibilities of Counsel for the Child and Family Proceedings*, (2006) 43 (4) Alta L. Rev. 845 and Dale Hensley, *Role and Responsibilities of Counsel for the Child in Alberta: a Practitioner's Perspective and a Response to Professor Bala* (2006) 43(4) Alta L. Rev. 871.

[15] Other cases have underscored the importance of the appointment of counsel for a child to be "absolutely neutral and unbiased, in appearance, procedure and effect" *L.M.H.* v. *S.R.H.*, 2010 ABQB 769, at para. 15; *Puszczak* v. *Puszczak*, *supra*, at paras. 21-23. Those types of concerns do not arise here, as the father, quite properly, has not taken steps on his own to retain counsel for the child.

[16] As far as guidelines to determine when counsel should be appointed for a child, the Canadian case law is not highly developed, but certain parameters are well settled. First, as with all decisions in matters involving custody and access, counsel should only be appointed to represent a child in a family law dispute if doing so is in the best interests of the child. It is only where those interests cannot be adequately represented by the parents that it may be appropriate to appoint counsel for the child. *Puszczak* v. *Puszczak*, *supra*, paras. 10-11; *Strobridge* v. *Strobridge* (1994), 18 O.R. (3d) 753.

[17] It is also clear that appointing counsel for a child is one of the ways whereby the wishes of a child may be ascertained. The *Children's Law Act* provides that the views of a child, when reasonably ascertainable, are among the factors to consider in deciding issues of custody and access. But that is not to say that this should be the determining factor in deciding whether counsel should be appointed for the child.

[18] First, in order for the child's views to be conveyed through counsel, the child has to be capable of instructing counsel. And, even assuming the child can instruct counsel, his or her views of the matter are not determinative, especially when dealing with a young child. A child's perception and wishes about custody and access may not reflect what is in fact in that child's best interests.

[19] Second, it should not be assumed that it is in a child's best interests to be given a direct voice in custody proceedings. On the contrary, it might be preferable for a child to be shielded from the litigation between the parents as much as possible, to avoid placing that child in the position of having to "take sides" in the conflict between the parents.

[20] The application of these principles has led the courts to conclude that the appointment of counsel for a child in a family law proceeding should be the exception, nor the norm:

> No matter how authorized, the Alberta Court of Appeal in *Puszczak* has made it clear that the appointment of legal counsel for the children is an unusual procedure. In a custody or access dispute, the presumption should be against this type of appointment. Legal counsel should only be appointed in exceptional circumstances where the court can ascertain that it is in the best interest of the child (para. 10). That approach is consistent with the core value of Canadian family law jurisprudence which relates to a child. As Justice Abella observed in *Syl Apps Secure Treatment Centre* v. *B.D.,* 2007 SCC 38 at para. 45, [2007] 3

> S.C.R. 83, "[t]his Court has confirmed that pursuing and protecting the best interests of the child must take precedence over the wishes of a parent…".

L.M.H. v. *S.R.H.*, *supra*, at para. 12

[21] This Court has recently endorsed the principle that the discretion to appoint counsel to represent children in family law matters should be exercised sparingly, and that the presumption should be against this type of appointment. *Wagner* v. *Melton, Wheaton and Wheaton*, 2012 NWTSC 41. I wholeheartedly agree with the comments made by Shaner J. in that case, explaining why this is so:

> [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.

Wagner v. *Melton, Wheaton and Wheaton*, *supra*, para. 9.

[22] In deciding whether it is appropriate to appoint counsel for a child, some courts in Canada, including this Court, have adopted the factors set out by the Full Court of Family Court of Australia in *In the Matter of : re K* (1994) FLC 92-461:

> [10] As noted in *Puszczak* and *Smith, supra,* the Full Court of the Family Court of Australia in *In the Matter of: Re K* (1994) FLC 92-461 set out circumstances where it *may* be appropriate to appoint counsel to represent a child in a custody and access dispute. These do not, of course, hinder or replace the court=s discretion in exercising its *parens patriae* jurisdiction, nor are they an exhaustive list:
>
> (i) cases that involve allegations of child abuse,
>
> (ii) cases where there is an apparently intractable conflict between the parents,
>
> (iii) cases 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.

Wagner v. *Melton, Wheaton and Wheaton*, *supra*, para. 10.

[23] The Government of the Northwest Territories has recently created the Office of the Children's Lawyer, an office dedicated to the representation of children. As a result, where orders appointing counsel for children in family law or child protection matters are made, the logistics of identifying the counsel who will represent children have become streamlined and simplified.

[24] The creation of that office is a welcome development and brings many benefits. It is bound to foster the development of expertise, and a consistency in approach, when dealing with the complex issues that arise in the representation of children in family law proceedings. But it does not fundamentally alter the

principles that govern when deciding whether counsel should be appointed for children. In my view, it is not in and of itself a reason to adopt a more liberal approach to the appointment of counsel for children.

[25] There is no doubt that it is sometimes helpful, and in some cases essential, to have children represented by counsel. But there are good reasons why the courts have chosen to exercise restraint in using their jurisdiction to appoint counsel for children. In the absence of legislation mandating the application of different criteria, or a different approach, the presumption continues to be against such appointment.

2. Application of principles to the facts of this case

[26] The mother argues that the foundation for the father's variation application is weak, that this litigation is really about access, and that these are reasons that militate against appointing counsel for the child.

[27] Those arguments, in my view, relate to the merits of the variation application but they do not have a substantial bearing on the question of whether counsel should be appointed for A.

[28] Courts may well be disinclined to appoint counsel for a child in proceedings that appear frivolous and have no realistic chance of success. But I do not think the father's variation application can be so characterized. The evidence he has adduced raises concerns. I am mindful that many of the allegations are contested, and that the admissibility of some of the evidence he has adduced will be challenged by the mother at the variation hearing. Be that as it may, on their face, some of the allegations are of concern.

[29] In addition, some of those allegations are not disputed. The mother acknowledges having been involved in a volatile and violent relationship; she acknowledges that she has struggled with alcoholism; she acknowledges that the child has alleged having been sexually abused by the mother's brother while she was left in his care.

[30] Without in any way commenting on the substantive merits of the variation application, it cannot, on its face, be characterized as frivolous, such that the application to appoint counsel for A. could be summarily dismissed on that basis.

[31] Nor do I agree with the mother's submission that I should deal with the application to appoint counsel for the child on the basis that the variation hearing

will be primarily about access. Some of the father's answers during his Examination for Discovery do suggest a concern with the frequency and predictability of access. But the fact remains that his is an application to vary the custody regime in a significant way. There is no indication that the father does not intend to pursue that area of relief. On the contrary, his counsel confirmed at the hearing of this Application that he will.

[32] I have considered the factors referred to above at Paragraph 22. Many of those factors do not apply here. There is no suggestion that A. is alienated from her father. On the contrary, she has had regular visits with him and often requests such visits. There do not appear to be any cultural or religious differences between the parents that are affecting the child. Neither parent is proposing to remove the child from the jurisdiction in a way that would effectively preclude access to the child by the other. There is no evidence of medical, psychological or psychiatric concerns about the child. Both parties are represented by counsel. A. is not a child of mature years.

[33] Other factors are present, to a certain degree. The father does not allege that the mother is abusing the child, but there are allegations of neglect, and a concern about the child's allegation that she was sexually abused by the mother's younger brother. There is evidently some conflict between the parents, although the evidence does not suggest that it can be characterized as intractable; no doubt the situation has been stressful and difficult for both parents, but that is not unusual in matters involving access and custody.

[34] The father makes much of the fact that A. has been proactive in communicating her wishes about access. He argues that this supports his position that she should be given a direct voice in these proceedings. That submission overlooks the underlying reason why courts are reluctant to involve young children directly in litigation pertaining to custody and access in the first place.

[35] The question to be asked is not simply whether A. has views and is capable of expressing them. The concern about involving her directly this in litigation is about avoiding placing her in a situation where she will feel she has to take a side in the dispute. Another consideration is whether she is old enough for her views to be a determining factor in the decision that the Court will have to make on the variation application. As I have already alluded to, just because a young child wants the custody and access issue to be resolved a certain way does not mean that this resolution is what is in that child's best interests.

[36] In this regard, the fact that the information about the child's wishes appears to be available through the evidence of both the mother and father militates against resorting to the exceptional measure of involving her directly in the proceedings through the appointment of counsel. Hence, in my view, the evidence about A. having expressed her views about access is not a sufficient basis to appoint counsel to represent her.

[37] The allegation of sexual abuse is of concern. But the evidence shows that the mother took, upon being advised of those allegations, immediate steps to address the situation. The proper authorities were contacted and became involved. Those authorities, after investigating the matter, did not see fit to remove A. from her mother's care. Given their statutory obligations, this suggests they concluded that A. was not in need of protection and that they felt the mother's response to the allegations was appropriate.

[38] The child's exposure to the volatile relationship between her mother and her former partner is also of concern. But that relationship has now ended. More importantly, the mother acknowledges that it was a violent and volatile relationship. This greatly reduces the need to involve the child directly to probe that issue.

[39] The concerns about neglect are, for the most part, disputed. On that issue the Court is presented with conflicting evidence about the daily goings on in the mother's home. The allegations of neglect are relevant to what is in the best interests of the child. Involving her directly may assist in clarifying certain aspects of this issue. I recognize that there could be benefits to that.

[40] At the same time, both parents can and have presented evidence, and their views, on those issues. There has been an opportunity to test that evidence through the Examinations for Discovery. This must be considered in weighing the potential benefits of involving the child directly against the potential harm to her in doing so.

[41] On the whole, I am not persuaded that it is necessary to have counsel appointed to assist the Court in determining what A.'s best interests are. Both parents can, and have, provided evidence about the various matters that have a bearing on that issue. A. may be able to express her views to counsel, but whether she can actually instruct counsel in the true sense of the word is not clear. It is also not clear that she is of an age where her wishes, assuming they could be

ascertained, should carry significant weight in the decision that the Court will ultimately have to make.

[42] For those reasons, I decline to appoint counsel for A. in these proceedings. Given the nature of the Application, there will be no award as to costs.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
11th day of January, 2013

Counsel for the Applicant: Paul Parker
Counsel for the Respondent: Andre Duchene

S-1-FM-2008 000014

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PATRICIA LAFFERTY

Applicant

- and –

JOSH ANGIERS

Respondent

MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU
