Date: 2014 05 22
Docket: S-1-FM-2013-000147

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

G. B.

Applicant

-and-

A. B.

Respondent

Application for an order appointing counsel.

Heard at Yellowknife, NT, on May 5, 2014.

Reasons filed: May 22, 2014

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE K. SHANER

Counsel for the Applicant: P. Parker

Counsel for the Respondent: N. Leeson

Counsel for the Office of the Children's Lawyer: K. Wilford

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REASONS FOR JUDGMENT

[1] This is an application by G.B.[1] for an order appointing counsel for the parties' two children, currently aged five and six, through the Office of the Children's Lawyer (the "OCL"). The Respondent, A.B., opposes the application.

[2] The OCL was granted standing to make submissions in this application and supports G.B.'s position that this is an appropriate case in which to make the appointment.

I. BACKGROUND

[3] G.B. is the mother. She brought an application for sole custody, child support and related relief on November 20, 2013. Currently, the children are in the day-to-day care of their father, the Respondent, A.B., and G.B. has access, pursuant to an interim order that was granted in December of 2013.

[4] The parties were in a common-law relationship, during which the two children were born. Child protection authorities apprehended the children in April of 2008 and they were placed in foster care for six months.

[1] There having been child protection proceedings respecting the parties' children before the Territorial Court of the Northwest Territories, the parties' names have been replaced by their initials to ensure compliance with s. 87 of *Child and Family Services Act*, SNWT 1997, c. 13

[5] G.B. left the relationship in July of 2009. She left the community in which she and A.B. had been living, although she subsequently returned. The children, who had by then returned to their parents' care, remained with A.B.

[6] The children were subsequently apprehended from A.B.'s care in November of 2009 and again placed in foster care. They remained there for almost two years. The parties then entered into a number of Plan of Care Agreements with the child protection authorities and eventually, the children were placed back into A.B.'s care in April of 2012.

[7] The children remained with A.B. until December 5, 2012. At that time, he was arrested and charged with a criminal offence, of which he was subsequently convicted. The children were apprehended again and placed in foster care.

[8] Upon A.B.'s release in December of 2013 the children were returned to his care.

[9] There is a history of domestic violence. A.B. was convicted of assaulting G.B. in 2009 and was sentenced to a prison term. G.B. claims there have been other assaults, but A.B. denies this. At one point during the relationship, A.B. obtained an Emergency Protection Order against G.B. The factual basis for this was not disclosed in the affidavit materials, however.

[10] Both parties have struggled with substance abuse. To their credit, they have each sought treatment for alcohol addiction, although this is a relatively recent development. A.B. has also completed a violence prevention program.

[11] On December 20, 2013, G.B. attempted to exercise access in accordance with the interim order granted by this Court. A.B. refused to comply with the order and G.B. contacted the police, who attended with her to pick the children up for her access visit. G.B. deposes it was necessary for the police to physically restrain A.B. during this incident.

[12] A.B. does not deny this occurred; however, he says he had been released from prison just that day and had picked up the children only hours before. The lawyer representing him at that time was away and so A.B. did not have an opportunity to obtain an explanation of his obligations under the order from his lawyer before G.B. sought to exercise access. A.B. planned to spend the evening with the children and was not prepared for G.B. to take them. In essence, his explanation is that he was upset by G.B.'s wish to exercise access on that day and he reacted to it badly.

[13] In the affidavit material that each party has filed throughout these proceedings, they have expressed concerns about the ability of the other to parent the children.

[14] G.B. is concerned that A.B. is not taking the children to school. She intimates, based on what the children have allegedly reported to her, that A.B. uses illegal drugs while the children are in his care. She says the children report that A.B. yells at them. Finally, she deposes the children have expressed anger towards A.B. as well as a desire to remain in her care, rather than returning to A.B.'s home.

[15] A.B. feels the children are expressing these feelings because they only see G.B. occasionally, whereas he is the primary caregiver and it falls to him to provide structure and enforce rules.

[16] At earlier points in these proceedings, A.B. expressed concerns about continued alcohol use by G.B. and her new partner, as well as her ability to maintain sobriety. He also stated G.B. reported to him that her new partner did not want the children around, and he expressed skepticism regarding G.B.'s assertion that she and her new partner have stopped using alcohol.

[17] More recently, however, A.B. has indicated he is impressed with G.B.'s recovery efforts and he feels they have been able to put aside the issues they have with one another and focus on the children.

II. THE ROLE OF THE CHILDREN'S LAWYER

[18] In addition to submissions on its position respecting this application, the OCL provided affidavit evidence from Elaine Keenan-Bengts, a panel lawyer with the OCL, on the services it offers and the manner in which those services are carried out.

[19] The OCL provides legal representation to children in certain custody and access matters and child protection proceedings. Services are provided by one staff and three panel lawyers in private practice, each of whom have specialized training and experience representing children in a variety of contexts.

[20] If appointed to represent a child, the OCL takes on a solicitor/client relationship with that child. As such, the OCL does not offer its own opinions to the Court on what it considers the child's best interests to be. Rather, it represents the child's interests, including views and preferences, where appropriate, to the Court. It does so by presenting evidence that may assist the Court in determining overall what is in that child's best interest.

[21] The OCL follows certain processes to allow it to carry out its functions effectively. The steps taken by its lawyers are almost identical to those which would typically be followed by a lawyer for any client: gathering information, learning the facts, engaging with other counsel, sharing the client's interests and exploring settlement, as well as appearing before the Court as required to make representations. The processes are described in more detail below.

[22] Counsel from the OCL starts with a review of the documents on the Court's file, followed by an interview with each parent to explain the OCL's role and the steps that will be followed. The child is then interviewed.

[23] Following the interview with the child, the OCL conducts interviews with other sources identified by the OCL, as well as those identified by the parents, as having information that will assist in illuminating the child's needs, interests and views.[2] This is then shared with the parents and their lawyers, with the expectation that it will factor into how the parents will assess their respective positions. Sharing information that sheds light on the child's interests may also assist in resolving the matter by agreement.

[24] If the case is not resolved, the OCL may participate in the litigation as any other party would, including: conducting examinations for discovery, calling evidence and cross-examining witnesses.

[25] With respect to the evidence that may be called at a hearing, the OCL will present evidence relevant to the child's needs and interests in the context of that child's particular circumstances. Thus, the evidence is not limited to a mere recitation of the child's views, but would include information necessary to allow the Court to understand the reason the child holds the views he or she does and how he or she came to formulate them. Presumably, this could include evidence from individuals who have contact with the child, such as teachers, child care providers, social workers, health care providers and other relatives.

[26] The OCL has no age limitation for the children it represents. Ms. Keenan-Bengts deposes in her affidavit that she has observed in her own practice very young children who are able to understand and articulate their views, and others, at a more mature age, who were unable to do so.

[2] If counsel is appointed for a child in a custody matter, the order made by this Court typically contains terms that will allow counsel from the OCL to speak directly with, and obtain information from, various sources such as schools, day cares, teachers and others.

III. LEGAL PRINCIPLES

[27] There is no specific statutory authority that allows this Court to appoint counsel for a child in a custody dispute; however, it may use its inherent *parens patriae* jurisdiction to do so. There is no disagreement amongst the parties with this premise.

[28] The legal principles against which the Court will assess the facts and determine if it is appropriate to appoint counsel were expressed by this Court in *Wagner v. Melton*, 2012 NWTSC 41 and, subsequently, in *Lafferty v. Angiers*, 2013 NWTSC 03.

[29] First, it must be demonstrated that appointing counsel to represent a child is in that child's best interests. Generally, it is the parents' responsibility to represent the child's views and interests to the Court and thus, it is only where it appears they cannot do so adequately that the court should exercise its power to appoint counsel for a child.

[30] Second, appointing counsel is one of a number of tools available to the Court to hear a child's views and preferences. For this to be effective, however, the child must be capable of relaying instructions to counsel. If he or she cannot, then the Court must explore some other method.

[31] Third, the court should exercise its power to appoint counsel for a child sparingly. There is a presumption against such appointments. The rationale for this was expressed in *Wagner, supra*:

> [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 . . .

[32] G.B. and the OCL urge that the Court should take a more expansive approach to this last principle, pointing out that children whose parents are involved in custody litigation are often keenly aware of it, regardless of efforts to shield them. In her affidavit, Ms. Keenan-Bengts deposes:

> 10. In my experience as a family law lawyer and as a children's lawyer, it is often of no surprise to the children that there are legal conflicts within their family. Particularly in high conflict/frequent litigation situations, the children have already been brought into the fray, long before anyone has considered whether they should have their own counsel. They have often been subject to direct and indirect pressure from the parents.
>
> 11. The Office of the Children's Lawyer in the NWT acts as a mechanism to reduce pressure upon the children by the parties. . .

[33] I agree that it is not unusual for children to be aware of litigation between their parents, particularly if there is a great deal of conflict. Moreover, I do not doubt there are times when parents, whether intentionally or not, will put pressure on children to make difficult choices. In an appropriate case, the appointment of counsel for children can be an extremely helpful tool to alleviate some of that pressure, in addition to the other assistance it can bring to the entire process. The OCL appears well-equipped and prepared to provide legal services to children in a manner that is sensitive to the children, the parents and the entire family law context.

[34] These are not, however, reasons for the Court to be less vigilant in assessing the facts and options, or to exercise its discretion more readily. The fact remains that appointing counsel to represent a child's interests in a custody dispute makes the child a party to the litigation, which carries with it significant burdens and may put even more pressure on a child. Thus, in every application of this nature, the Court must be satisfied that it is in the child's best interests to have his or her interests, needs, views and preferences brought forward through direct involvement in the litigation.

[35] Despite the presumption against this type of appointment in custody and access cases, however, there are many cases where it is demonstrated that it is appropriate to appoint counsel for a child and the presumption thus rebutted. A list of examples was articulated by the Full Court of Family Court of Australia in *In the Matter of: re K* (1994) FLC 92-461. These were adopted as a set of general guidelines in both *Wagner v. Melton, supra,* and *Lafferty v. Angiers, supra,* and they illustrate the types of cases where it may be appropriate to appoint counsel for a child. Included are cases where there is a high degree of conflict between the parents, as well as a number of other circumstances.

[36] Of course, the fact that none of the circumstances described in *In the Matter of: re K, supra,* are present in a particular case does not mean appointment of counsel for the children is inappropriate. The list is not exhaustive. Similarly, that

a case may fall into one or more of those circumstances does not necessarily mean it is appropriate for a court to appoint counsel. The presence or absence of circumstances that fall into these categories does not displace the need for the Court to examine all of the circumstances before deciding to exercise, or not to exercise, its *parens patriae* jurisdiction.

IV. ANALYSIS

[37] This application is opposed by A.B. on a number of grounds, specifically: that the children are too young to provide instructions; that having to answer questions from "strangers" will place the children in a difficult position; that the level of conflict between the parents is no longer as high as it was; that he and the Applicant can represent the children's interests to the Court effectively; and that conflict, if it is still an issue, is the only factor from the list in *In the Matter of: re K, supra* present in this case. These are addressed in turn.

[38] It is a fundamental premise that lawyers require instructions to effectively place their client's position and interests before the court. This applies as much to the representation of children as it does to any other client. Lawyers are, however, called upon to represent a wide variety of clients with varying levels of sophistication and communicative skills and there are many ways in which instructions and direction may be provided which permit the lawyer to represent a client's interests effectively.

[39] The fact that a child cannot formulate and provide instructions in the same manner as an adult does not, in and of itself, mean the child lacks the ability to provide instructions adequate enough to allow for his or her interests to be represented. This point is recognized in the *Draft Policy Statement for Panel Lawyers of the NWT Office of the Children's Lawyer* (Exhibit "A" to Ms. Keenan-Bengts' affidavit) respecting representation of the child's interests, as follows:

> . . . There is necessarily a range of what a child client may be able to express. At its most sophisticated, the voice may be instruction and an ability to articulate a specific legal position. At the other end of the spectrum, a child may only be able to articulate generally about matters that cause discomfort or are sources of concern for that child. Such matters also constitute "interests" worthy of representation.

[40] I am mindful that the children's ages and relative immaturity may prevent them from formulating sophisticated instructions and further, that they may not appreciate fully how those instructions will shape or affect their legal position. Nevertheless, they are both in school and able to express themselves. According to

G.B.'s evidence, they are expressing views and preferences respecting their parents. As noted, lawyers who provide services through the OCL have specialized training and experience in representing children and as such have the tools required to glean information from children and other sources to enable them to effectively represent their clients' interests, even where the children are, as here, youthful.

[41] In the circumstances, I am satisfied that they are capable of relaying to counsel their views and preferences, albeit at a less sophisticated level.

[42] I appreciate A.B.'s concerns about placing the children in a position where they will have to answer questions from relative strangers. Again, however, I am satisfied that lawyers providing services through the OCL have the training and experience required to allow them to interact effectively with the children and thereby diminish difficulties and pressures they may experience.

[43] A.B. acknowledges there has been significant conflict between himself and G.B. in the past, but he contends this has diminished of late. From his most recent affidavit it does appear that there is a greater degree of cooperation between the parties in their parenting and he provides express acknowledgement that G.B. is capable of being an effective parent.

[44] I do not doubt the sincerity of A.B.'s evidence that there has been less conflict between himself and G.B. recently, nor his commitment to cooperation in the future. However, the Court has only the past conduct of the parties upon which to assess how things will unfold in the future. The relatively long history of very high conflict between the parties, which has preceded this much shorter period of reduced conflict, cannot be ignored.

[45] That G.B. was required to enlist the assistance of the police to exercise access in December of 2013 is clear evidence of a high degree of conflict between the parties and demonstrates how quickly the tension between them can escalate to something more serious. Further, there is a very high level of conflict in the parties' respective evidence and positions. The affidavits filed by both parties since this case was commenced in November of 2013 contain many accusations by one against the other of violence, poor parenting, substance abuse and neglect.

[46] A high degree of conflict between parties will not always lead to the conclusion that the Court should appoint counsel to represent a child. It may be that despite a high level of conflict, the parties are still able to bring forward evidence that enables the Court to make an informed decision respecting the

child's best interests. Unfortunately, this is not such a case. The affidavit evidence filed so far contains relatively little information about the children's interests and needs. Rather, it focusses almost exclusively on alleged wrongs and transgressions by each party *vis-à-vis* the other.

[47] Information about the parents and their conduct is important, but the absence of helpful and balanced information about the children leaves a gap that impedes the Court's ability to make an informed decision respecting their best interests. Appointing counsel to represent the children in the manner proposed by the OCL will assist in filling this gap.

[48] A.B.'s argument that counsel from the OCL should not be appointed because a high level of conflict is the only category from the list in *In the Matter of: re K, supra*, relevant to this case, cannot succeed. There is no threshold number of factors from that list which a given case must meet for counsel to be appointed for the children.

[49] Moreover, the list of circumstances set out in *In the Matter of: re K, supra*, is, as noted earlier, non-exhaustive. Indeed, there are a number of factors present in this case which, though they may not fall squarely within any of the enumerated circumstances, are nevertheless highly relevant here. There has been extensive involvement with this family by child protection authorities, starting very shortly after the first child was born. Both parties have a history of substance abuse. They both indicate that they are trying hard to overcome their substance abuse problems, which is to be encouraged, but this is a relatively new development. There is also a history of domestic violence between the parents, although the extent of it is in dispute. Combined with the high level of conflict that has characterized this litigation, these factors create additional pressures that no doubt serve to move the parties' attention away from the children's interests and to their own, in turn impeding their ability to adequately represent their children's interests to the Court.

[50] As a final comment, it is important to state that my findings respecting the level of conflict between the parties not be taken as a criticism of either parent in this case, nor their respective lawyers. Court processes generally, and particularly custody and access cases, can be emotionally charged and draining for all involved. The parties in this case have each had many serious personal issues and uncertainties with which to contend, and these have, without doubt, contributed to the degree of conflict between them. Hopefully, the appointment of counsel for the children will assist the parties in moving forward and concluding this case.

[51] In consideration of the foregoing, I conclude it is in the best interests of the children that counsel be appointed to represent them in these proceedings.

Order accordingly.

K. Shaner
J.S.C.

Dated in Yellowknife, NT this
22nd day of May, 2014

Counsel for the Applicant: P. Parker
Counsel for the Respondent: N. Leeson
Counsel for the Office of the Children's Lawyer: K. Wilford

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