*Betsedea v Norn et al*, 2022 NWTSC 17

Date: 2022 08 10

Docket: S-1-FM-2022-000022

 IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARK BETSEDEA

Applicant

- and -

MARTINA NORN

Respondent

- and –

PAYTON NORN

Respondent

MEMORANDUM OF JUDGMENT

1. There are two Notice of Motions before the Court: 1) the Applicant Mark Betsedea is applying for custody of R.; and 2) the Respondent Payton Norn (aka Magrum) [[1]](#footnote-1) is applying for leave to make an application for custody and access to R.
2. This decision will deal with Ms. Magrum’s application for leave to apply for custody and access. Peyton Magrum seeks leave of this Court to make an application for custody and access to her niece, R. who is 4 years old. She is the sister of the child’s mother, Martina Norn, who is the other Respondent in this proceeding. Mark Betsedea is the father of the child and is opposed to Ms. Magrum’s application.
3. This application is brought pursuant to the *Children’s Law Act,* SNWT 1997, c. 14 (the *Act*). Section 20(1) and (2) of the *Act* provide:
4. A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.
5. A person other than a parent may not make an application under subsection (1) for an order respecting custody of a child or determining any aspect of the incidents of custody of the child without leave of the court.
6. In previous cases like *SW v CM,* 2011 NWTSC 21 at para 3, and *WL v KDH*, 2007 NWTSC 38 at para. 8, this Court has said, in deciding whether to grant leave under s. 20(2), certain factors should be considered such as: whether the applicant has played a caregiving role to the child for a substantial period of the child’s life; whether the applicant has a parental-like connection to the child in the sense of providing care, nurture and support; and whether the application for custody or access lacks merit or is patently tenuous.
7. In *SW,* at para 5, the Court went on to state:

The Act does not give anyone who is not a parent of the child rights to custody or access. Anyone other than the parents is thus considered a “legal stranger” to the child. It is generally left to the custodial parent (or parents, if they have joint custody) to decide which legal stranger should have access to the child, even if they may have had access in the past. This is relevant to whether standing should be granted by the court as explained by Sparks J. in *Stewart v Macdonell*, [1992] NSJ No. 612 (Fam. Ct.) in comments adopted by Vertes J. in *GD v GM*:

It seems to me that before standing should be granted by the court, the legal stranger to the child must establish, at the very least, a prima facie case connecting the welfare of the child with continued visits. This may be proved by demonstrating a lengthy and meaningful prior relationship, positive bond with the child and a substantial reason for disregarding the contrary wishes of the custodial parent.

1. In this case, no custody order has ever been made. Mr. Betsedea brought an application in February 2022 seeking custody of R. who, at the time, was in the care of Ms. Magrum. In response to Mr. Betsedea’s application for custody, Ms. Magrum filed an application seeking leave to apply for custody and access to R.
2. Mr. Betsedea and Ms. Magrum have each filed multiple affidavits so far. Counsel for Ms. Magrum has also submitted an unsworn affidavit that has not been filed. That document is not sworn and has not been filed. It is not properly before the court so I have not considered it.
3. Ms. Norn has not filed any affidavits and, aside from a brief telephone appearance, has not participated in these proceedings. It appears undisputed that she is currently living in Edmonton and is not actively involved in caring for R.
4. Some facts are in dispute but there are also areas of agreement; the basic timeline of events can be discerned from the affidavits.
5. Mr. Betsedea and Ms. Norn were in a relationship and R. was born in April 2018. The relationship continued until the child was about 1 year old. After the relationship ended, R. remained with Ms. Norn in Hay River and Mr. Betsedea had less contact with the child. The extent and nature of the contact between Mr. Betsedea and R. appears to be an area where the parties differ.
6. In the fall of 2019, R. moved to Edmonton with Ms. Norn, Ms. Magrum and several members of her extended maternal family. Ms. Magrum says that when her sister was R.’s primary caregiver, she and her father helped care for the child. Eventually, R was primarily cared for by her grandfather with Ms. Magrum’s assistance until his death in October 2021. When Mr. Norn became ill in Edmonton, Ms. Magrum stepped in as the primary caregiver for the child. After her father passed away, she continued as the primary caregiver for R and has been primarily responsible for caring for R. since then.
7. Ms. Norn has had regular contact with R. but it does not appear from the evidence before me that she has been responsible for caring for the child in the past couple of years. Ms. Norn has left R. in the care of her father Jeff Norn and her sister Ms. Magrum.
8. After Mr. Norn’s death, Ms. Magrum and R. moved back to Hay River in November 2021. Ms. Norn stayed in Edmonton until February 2022, returning to the Northwest Territories for a period of time before returning to Edmonton. It appears that she struggles with addictions issues and is not in a position to care for R. at this time.
9. Mr. Betsedea currently resides in Fort Simpson. His contact with R. while the family lived in Edmonton was limited. He says that he saw R. in July 2019 before she moved to Edmonton. Following this, he had contact with her by phone and facetime. After R. moved back to Hay River, he has had access with R. since December 2021, sometimes for extended periods of time.
10. Ms. Magrum filed an application for leave to apply for custody and access over R. among other things on June 29, 2022. Since about July 17, 2022, R. has remained in Mr. Betsedea’s care as he refused to return her to Ms. Magrum’s care. Ms. Magrum filed another application on July 20, 2022 again seeking leave as well as the return of the child.
11. Turning to the factors to be considered, it is clear that Ms. Magrum has played the role of a caregiver to R. for a substantial period of R.’s life. Ms. Magrum’s evidence is that she has always helped care for R. and has gradually assumed more responsibility in caring for her. She stepped in as the primary caregiver for R. when her father became ill and has been primarily responsible for R. since his death.
12. Ms. Magrum has also had a parental-like connection to the child in the sense of providing care, nurture and support to R. R. is only four and Ms. Magrum has had regular and meaningful contact with R. for her entire life.
13. Ms. Magrum says that she has ensured that R. feels loved, nurtured, safe and never abandoned. R. refers to her as momma. Ms. Magrum has taken on responsibilities that a parent would exercise, she has placed R. in pre-school and ensured that R. has a regular routine. Ms. Magrum also has the support of her extended family and the child has regular contact with them. It appears that, on R.’s maternal side, Ms. Magrum is the person who has demonstrated the most parental-like connection to R. and has provided care, nurture and support to the child.
14. The next issue is whether the application for custody or access is devoid of merit or patently tenuous.
15. The arguments of Mr. Betsedea appeared to focus on the merits or possible success of an application for custody. Counsel for Mr. Betsedea argued that Mr. Betsedea is R.’s father and he is able and willing to care for the child and that he is in a much better position as a parent than Ms. Magrum who is a legal stranger to the child. He says that there is no basis in law to say that Ms. Magrum is in a better position to have custody of R. than Mr. Betsedea who is the father of the child.
16. Counsel for Ms. Magrum pointed out that in *Kalaserk v Nelson,* 2005 NWTSC 4, the Court stated that the consideration on applications for custody is the best interests of the child and not on a parent’s right to custody, even where the applicant for custody is not a parent. A biological connection to the child is a significant factor but it is only one of many factors relevant to the best interests of the particular child.
17. The issue is not just whether Mr. Betsedea is willing and able to look after the child properly but what is in R.’s best interests taking into account the considerations set out in the *Act.* This is reflected in the provisions of the *Act* which deal with custody and access. Section 17 states that custody of or access to a child is determined by the best interests of the child. The importance of the father and mother in the entitlement to custody is addressed in section 18 but section 20 also permits persons other than a parent to apply for custody of or access to a child. This clearly contemplates that there may be situations where it is in a child’s best interests to be in the custody of or have access to someone who is not a parent.
18. In *Kalaserk*, the issue was the interim custody of a child where the father and the aunt of the child each sought custody of the child. In that case, Vertes J. was satisfied that, in the circumstances of that case, it was in the child’s best interests to remain with his aunt on an interim basis.
19. An application for standing is not the time to resolve the issue of custody or to determine whether Ms. Magrum or Mr. Betsedea has the better claim to custody of R. Based on Ms. Magrum’s substantial and recent history of being a caregiver to R. and that she has a parental-like connection to R., it cannot be said that her application for custody or access is devoid of merit or patently tenuous.
20. Therefore, Ms. Magrum’s application for leave to apply for custody of and access to R. is granted. This matter should be brought back before the Court as soon as possible so that the issue of interim custody and access can be addressed.
21. This matter will be placed on the next Chambers docket which is August 18, 2022. If the parties are prepared to address interim custody and access at that time, the matter can proceed then. If the parties are not available, this matter can be withdrawn and relisted for a Chambers date that is suitable to both parties.
22. Ms. Magrum also sought to have the style of cause amended to Payton Magrum to reflect her name. It does not appear that this is in issue and the style of cause will be amended accordingly.
23. Costs will be in the cause as no one addressed costs during the hearing.

 S.H. Smallwood

 J.S.C.

Dated at Yellowknife, NT, this

10th day of August, 2022

Counsel for the Applicant: Idowu Ohioze

Self-Represented Respondent: No One Appearing for Martina Norn

Counsel for the Respondent Payton Norn: Tara Gault

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1. For ease of reference and to minimize confusion, the Respondent Payton Norn will be referred to as Payton Magrum (Magrum) in this decision. [↑](#footnote-ref-1)