

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE DOMESTICS RELATIONS ACT,
R.S.N.W.T. 1988 c. D-8 As Amended;

BETWEEN:

MICHAEL KRAFT

Applicant

- and -

CAROL ROSE BAILEY-KRAFT

Respondent

AND IN THE MATTER OF THE CHILD WELFARE ACT,
R.S.N.W.T., 1988 c. C-6 As Amended.

AND IN THE MATTER OF THE CHILDREN

Bailey-Kraft, Grant: Born on August 10, 1989
Bailey-Kraft, Corrine: Born on August 29, 1990
Bailey-Kraft, James: Born on December 21, 1991
Bailey-Kraft, David: Born on March 5, 1993

Transcript of the Ruling Delivered by the Honourable Judge
R.M. Bourassa, sitting in Yellowknife in the Northwest
Territories, on Thursday, October 12th, A.D., 1995.

APPEARANCES:

MR. C. BELL: For the Superintendent
MS. K. SHANER: For the Applicant
MS. J. MURRAY: For the Respondent.

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1 THE COURT: Well, there is a tug in many different
2 directions here of competing interests. Briefly in
3 summary as I understand the facts, a mother and father
4 separated. The children remained with the mother.
5 The separation was now six months. Apparently there
6 was little or no contact by the father with the mother
7 or the children.

8 The children were then apprehended by the
9 Department of Social Services. Service of the notice
10 of motion with respect to the apprehension was
11 effected on the mother and the father. They are
12 parents. They both have interests, an interest with
13 respect to their children. That's trite. It is
14 obvious in the Act. The father has to be served. The
15 only time service on one of the parents is dispensed
16 with is if it is virtually impossible to contact them
17 or they have absented themselves for years.

18 Now, the father belatedly as alleged by counsel
19 takes the position that the children be released into
20 his care and custody. The mother wants the children
21 released into her care and custody, and the
22 Superintendent of Child Welfare wants temporary
23 custody. The mother who was the custodial parent has
24 consented to temporary custody of the Superintendent
25 of Child Welfare. The Superintendent of Child Welfare
26 is going to have to release the children, and the
27 father wants the children released to him.

1 I appreciate and can fully understand the
2 discomfort of the Superintendent of Child Welfare if
3 he is perceived on a reasonable basis to be the
4 investigative arm for one party or another in a
5 custody dispute, and of course that's not his
6 function, nor is it the function of the social workers
7 that operate under the Child Welfare Act.

8 I observe, I underline that this is a child
9 welfare application or matter where there is only one
10 interest that must prevail and that is the interest of
11 the children. And that's the paramount interest. All
12 other interests have to defer to that interest.

13 What are the best interests of the children? The
14 Superintendent of Child Welfare and the officers and
15 workers under that regime are charged with the
16 statutory obligation of protecting children and seeing
17 to their interests. This is an essential, extremely
18 important role, and I don't think we can lose sight of
19 the fact that all of the efforts involved, all of the
20 competing interests all go to one point, and that is
21 to resolve the question of what is in the best
22 interests of the children.

23 At one point the Superintendent of Child Welfare
24 believed that it was in the best interests of the
25 children that they were in need of protection and that
26 they should be apprehended. The mother has agreed to
27 that. I expect given that this matter is in court

1 that at some point in the near future the mother is
2 going to advance the position that it is ~~not~~ in the
3 children's best interests that they been released to
4 her. The father is going to advance and is advancing
5 the proposition that it is in the best interests that
6 they be released to him. The Superintendent of Child
7 Welfare is caught in the middle in a way.

8 By order of this court, a hearing was ordered to
9 determine what is in the best interests of the
10 children. The Superintendent of Child Welfare and the
11 workers authorized under that Act presumably have
12 documents, notes, psychological studies that I have
13 ordered sealed and other documents relating to the
14 apprehension and probably relating to the dealings
15 with the custodial parent after the apprehension.
16 These facts are neutral. We cannot in my respectful
17 view wipe away facts. In criminal cases we ignore
18 facts or don't admit particular facts into evidence
19 because they may be prejudicial.

20 Under the Child Welfare Act with respect to the
21 application before me, it appears that the test is
22 that the courts will not release or modify the
23 undertaking that Ms. Shaner proceeded under with
24 respect to the use of the documents that she has seen
25 or the discovery, save in special circumstances where
26 the release or modification will not occasion
27 injustice to the person giving discovery. It is

1 submitted that the injustice will be to the Department
2 of Social Services because they will be compromised.

3 I have difficulty with that argument in certain
4 stages. If the mother had not consented to the
5 Department's request, for example, presumably all of
6 that evidence would have been called. There is no
7 compromise there. But it is the fact that there is
8 another parent involved, and if that other parent uses
9 this information, it compromises the argument of the
10 Department of Social Services because they may be seen
11 to be supporting one side or another or providing
12 ammunition for one side or another. I don't deny that
13 there are difficulties.

14 But I go back to what I think I started with is
15 that we are dealing with parents here both of whom
16 have an interest in the children, both of whom have
17 certain obligations and rights with respect to what
18 happens to those kids, both of whom have an interest,
19 and are currently advancing their interest in being
20 the custodial parent. This is extremely important. I
21 am not dealing with some third party that's only
22 indirectly involved. The father is by law a party to
23 this matter.

24 The argument with respect to confidentiality
25 contracts again are well founded but disturbing,
26 almost disturbing in the sense that taken to their
27 natural conclusion, they would keep all of this work

1 that's been done hidden behind some veil only to be
2 disclosed in the event of an actual hearing between
3 the Superintendent and the parent from whom the
4 children were apprehended.

5 But what is the difference between what I have got
6 before me now and if the children were apprehended
7 from both parents while the parents were together and
8 then they separated. The difference is that
9 apparently the research and the work that has been done
10 by the Superintendent of Child Welfare deals only with
11 one parent. The argument is that this puts her at a
12 disadvantage as well as the Department.

13 I would only observe that I don't believe any
14 court in this jurisdiction and in any event would
15 tolerate the use of the social worker's notes or
16 departmental notes for character assassination. There
17 is an old saw that he who throws dirt loses ground,
18 and I just don't see from my experience with counsel
19 that the information that might be contained in those
20 documents or notes could be used in that fashion. I
21 would anticipate counsel would object, and as I say, I
22 don't believe any court in the Northwest Territories
23 would tolerate that.

24 I note as well that any hearing involving this
25 matter will be a closed court. No one will be allowed
26 in the courtroom. To prohibit the father from using
27 the documents or denying him access to the documents

1 for the purposes of this hearing is to effectively
2 prevent him from calling witnesses who may have
3 significant insights on the problems, on solutions, on
4 the needs of the children, and it seems to me that it
5 would be a great advantage to the court to have the
6 evidence of the individuals involved in deciding what
7 is in the best interests of the children.

8 The fact of the apprehension by itself does not
9 condemn the mother or start her off in a negative
10 position with respect to custody. It is a fact. The
11 observations, conclusions, insight of professionals or
12 social workers may assist the court in understanding
13 the circumstances, and then again, I just go back to
14 what are we all here for. What is the law there for.
15 The best interests of the children. This court is
16 going to have to make a determination whether the
17 children go back to the mother or the father.

18 I appreciate as I said earlier that some people
19 perceive that it puts the Department of Social
20 Services in a difficult position, and I don't deny
21 that. But the discomfort in my respectful view has to
22 defer to the evidence. And the court should have
23 before it all of the evidence that's available that
24 will assist it in determining what are the best
25 interests of the children.

26 In my view, the needs of the children in a case
27 such as this is special. In my view, the release of

1 the information for use by counsel for the father for
2 the purposes and narrow purposes of advancing the best
3 interests of the children in a custodial application
4 will not create an injustice.

5 With respect to those it is claimed would clam up
6 or cease to cooperate: firstly, I wouldn't expect a
7 professional social worker to respond in that way nor
8 would I expect any professional. Any professional who
9 was called upon to exercise their profession in a
10 particular area, be it psychological, social, medical,
11 surely is prepared to stand up and repeat those
12 observations and justify them on cross-examination if
13 necessary.

14 I am not contemplating that citizens who call the
15 Department of Social Services and complain about
16 possible abuse, I am not contemplating that anyone
17 will call that kind of evidence, but evidence as to
18 facts, evidence as to conclusions in my respectful
19 view is material. It is relevant. No one will
20 tolerate it being used for character assassination.
21 And I don't see that it will have a so-called chilling
22 effect or a silencing effect on professionals involved
23 in the Department of Social Services who are all
24 working for the best interests of the children. In
25 fact, I think it is healthy that there be a beam of
26 light into the furthest recesses where decisions can
27 be made that affects mothers, fathers, and children

1 for years and years.

2 So my order in conclusion is that I will allow Ms.
3 Shaner to use the matters that have been disclosed. I
4 will allow her to use it for the narrow purposes of
5 the hearing with respect to the children between the
6 father, the mother and the Superintendent of Child
7 Welfare. And I leave it open to counsel during the
8 hearing to object to any items that are not material
9 or relevant or are of the nature that I mentioned a
10 moment ago, complaints by citizens or people not
11 necessarily directly involved with the matter.

12 It is certainly open for Ms. Shaner to subpoena
13 whoever she chooses. I would only reiterate that in
14 my view in any event, the Department of Social
15 Services is an essential element in the regime to
16 protect children. It is a neutral role it plays in
17 one sense. In another sense, it plays an important
18 role in advancing the interests of the children.

19 But the information that it garners, the
20 conclusions that it comes to, I don't think that there
21 should be any compunction or hesitation or discomfort
22 in sharing that with both parents who are involved.
23 After all, the interests are the children, and if the
24 discovery of evidence or information or facts or the
25 sharing of it between the parents will advance the
26 interests of the children, then what better way can
27 the Department of Social Services achieve its goals.

1 That's my ruling.

2 Now, I take it counsel will want to draft an
3 order. If you have difficulty with the wording, I can
4 be spoken to. I know I have gone on at length, but I
5 hope I have made clear what the information can be
6 used for. If you want to draft an order and share it
7 between counsel, if you can agree on a wording fine.
8 If not I can be spoken to.

9 MR. BELL: Your Honour, in the circumstances, I
10 think my instructions would be to seek an appeal to
11 the Supreme Court on this matter.

12 THE COURT: By all means.

13 MR. BELL: Given that under Section 21 of the
14 Territorial Court Act, there is no stay of execution
15 that's operative in the interim unless you grant one
16 or a judge of the Supreme Court.

17 THE COURT: I am not going to hold up the matter.
18 If you want to appeal, that's your right. Go ahead.
19 It would be useful perha to have the Supreme Court
20 rule definitively on it. My ruling affects no one.
21 It is not even binding on myself. By all means
22 proceed, but this matter is going to go ahead, so
23 proceed expeditiously, Mr. Bell.

24 MR. BELL: Thank you.

25 THE COURT: Now, I take it it is a matter to fix a
26 hearing date?

27 MS. SHANER: Sir, I believe that--are you speaking

1 about the trial of these two matters? It was my
2 understanding that we had already fixed the 28th, 29th
3 and 30th of November.

4 THE COURT: All right. That gives you a month and
5 a half, Mr. Bell. Surely you can do what you need to
6 by then. And in that way if the Supreme Court comes
7 down and either confirms or overrules me, the hearing
8 can still go ahead and Ms. Shaner will know what
9 position she is in.

10 MS. SHANER: Thank you.


11 MR. BELL: Thank you.

12 THE COURT: Thank you, Counsel.

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(AT WHICH TIME THESE PROCEEDINGS WERE CONCLUDED)

Certified correct to the best of my
skill and ability, (Subject to Review
by Presiding Judge)



Laurie Ann Young
Court Reporter