

In the matter of K., B.J., 2013 NWTTC 11

T-0001-CP2013-000001

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the Child and Family Services Act,
S.N.W.T., 1997, c. 13 as amended

AND IN THE MATTER OF the child:

K., B. J.

Born: February 14, 2005

Apprehended: January 15, 2013

Transcript of the Proceedings before The Honourable Judge
B. E. Schmaltz, at Yellowknife the Northwest Territories
on February 25th, A.D. 2013.

Initials have been used in this transcript as per direction
of the presiding Judge

APPEARANCES:

Ms. BL McIlmoyle:	Counsel for the Director of Child and Family Services
Ms. J. Savoie, agent	
Mr. P. Parker:	Counsel for the Mother
Mr. K. Kinnear:	Counsel for the Father

1 THE COURT: This is the director's
2 application to confirm the apprehension of B.,
3 who is eight years old. I will not go into
4 all of the facts, they are set out in the
5 affidavit of Ms. M, but B. was apprehended in
6 [community name edited] where her father lives
7 and B. had been living with her father.
8 Ms. K., B's mother, and Mr. K. were in a
9 relationship. They separated in March of
10 2009. Ms. K., B's mother, lives in
11 Yellowknife.

12 In March of '09, Ms. K. moved to
13 Yellowknife. She did intend to return to
14 [community name edited] and get custody of B.,
15 and in September of '09 she brought B. back to
16 Yellowknife with her and it was agreed at that
17 time between the mother and father that B.
18 would live with Ms. K., her mother. In
19 September of '09, Ms. K. commenced an
20 application in Supreme Court and she obtained
21 a custody order giving B's mother and father
22 joint custody with Ms. K., her mother, having
23 the day-to-day care and control of B. That
24 order was obtained in October of '09.

25 I do note, just for the record, in Ms. K's
26 affidavit it says it was obtained in October
27 of 2012 but it is October of 2009 that Justice

1 Charbonneau made that order.

2 Then, in late '09, Ms. K. did not feel
3 that her living situation was the best for B.,
4 and there was an agreement between Mr. and Ms.
5 K. that temporarily B. would return to
6 [community name edited]. So B. went back to
7 [community name edited] to live with Mr. K.

8 Ms. K. has stated in her affidavit that in
9 early 2010 she asked that B. be returned, and
10 Mr. K. refused. She states in her affidavit
11 that "he continued to refuse despite my
12 continued requests that he return her to my
13 care".

14 Between May of 2010 and August of 2010,
15 Ms. K. worked in the MacKenzie Delta area, I
16 believe she was working in Inuvik but going to
17 the communities up in the area, and she
18 visited B. regularly and often brought B. back
19 to Inuvik with her to stay with her at Ms. K's
20 sister's home.

21 Her affidavit further states that last
22 October she visited with family in [community
23 name edited] and she took B. with her to visit
24 her family in Inuvik. Ms. K. says in her
25 affidavit that when she is not in [community
26 name edited], she speaks to B. on the phone
27 three to four times per week and since January

1 15th when B. was apprehended, Ms. K. has
2 spoken to her approximately ten times. That
3 affidavit was sworn on January 31st, so over a
4 little more than a two week period.

5 Ms. K. wants B. returned to her care and
6 wants to raise B. in Yellowknife.

7 Ms. K. has stated in her affidavit that
8 she is now in a relationship. She is living
9 in a three-bedroom home with her partner.
10 There is room for B. in the home, and Ms. K's
11 partner has told her, and again I quote from
12 her affidavit, that "he would welcome B. to
13 live in his home".

14 Now, as I said, B. was apprehended and I
15 do find that there are reasonable grounds for
16 the apprehension which is the first part of
17 Section 12.4, and I am going to go into Ms.
18 M's affidavit that set out the circumstances
19 leading to the apprehension.

20 It appears that Mr. K. may have had, and
21 perhaps just at the time or around the time of
22 the apprehension, difficulties with drinking,
23 but there were concerns with respect to B's
24 care by Mr. K. and his drinking. I think that
25 is sufficient to say on this application.

26 Section 12.4 of the Child and Family
27 Services Act states where,

1 Upon hearing an application for an
2 apprehension order, the Court
3 determines that

4 (a) there are reasonable grounds
5 to believe that the child needs
6 protection; and

7 (b) the person who apprehended the
8 child had, at the time of the
9 apprehension, reasonable grounds
10 to believe that the child's health
11 or safety would be in danger if
12 the child were returned to a
13 person having lawful custody of
14 the child, then the Court shall
15 make an order confirming the
16 apprehension.

17 As I said, I have no difficulty with
18 12.2(1)(b) - that at the time of the
19 apprehension, there were reasonable grounds
20 for the apprehension. But I also have to find
21 that there are reasonable grounds to believe
22 that the child needs protection. Now I
23 recognize that that is not finding that B.
24 needs protection; it is simply reasonable
25 grounds to believe that.

26 Ms. K. has, according to the court order
27 from October of 2009, and I recognize that

1 that order is just over three years old now,
2 but she has joint custody with Mr. K. and she
3 has the day-to-day care of B. or was given the
4 day-to-day care by Justice Charbonneau. I
5 recognize that the status quo since late '09,
6 perhaps early 2010, has been that B. has been
7 in [community name edited] with her father, I
8 recognize that is what the status quo is.
9 But, there is a court order in place giving L.
10 A. K. joint custody of B. and having the
11 day-to-day care and control of B..

12 The director concedes that that is a valid
13 court order and I take it by that concession
14 that that order has not been varied or changed
15 and is, on the face of it, in effect. As I
16 understand the law, and I recognize this is
17 family law, I do not see that family law is
18 any different with respect to legal principles
19 than any other kind of law. But as I
20 understand the law, a court order is effective
21 until it is varied, quashed, changed, in some
22 manner something is done that makes it not in
23 effect any longer.

24 Nothing has been done to that order. I do
25 not believe that a court order goes bad
26 because it is "stale".

27 I recognize that often custody orders,

1 access orders, maintenance orders are changed.
2 They are fairly fluid instruments in family
3 law. But that is because they are changed,
4 not because we decide they should be changed
5 in that it has not been exercised or it has
6 not been enforced and therefore it should not
7 be been enforced. If Mr. K. wanted to change
8 that order, he could have perhaps made an
9 application but at this point the order is
10 still in effect.

11 I do find that Ms. K. does have lawful
12 custody of B. because of the order of Justice
13 Charbonneau from October 29th, 2009. That
14 order gave L. A. K. joint custody of B. with
15 day-to-day care and control. So I find Ms. K.
16 has lawful custody of B.

17 I recognize as well that at this hearing,
18 in all matters involving child protection
19 concerns, it is the best interests of the
20 child that has to be paramount.

21 The director wants the apprehension
22 confirmed and then says it will be bringing an
23 application for temporary custody placing B.
24 in foster care if a temporary custody order
25 were obtained. Being that Ms. K. has lawful
26 custody of B. and from what I know of Ms. K.,
27 and I have referred to it, what she has in her

1 affidavit, and even taking into account D. R's
2 affidavit, the supplementary affidavit sworn
3 on February the 21st, and I will refer briefly
4 to that: It refers to either one or two
5 conversations, I do not know the details of
6 these conversations, where B. told D. R.
7 what B. says her mother told her. It says
8 that B. stated that her mother told her that
9 her father drinks too much and "even when you
10 were young he drank lots". I don't know what
11 context that was told to B. in and you could
12 certainly put many different slants on that
13 comment. Whether perhaps Ms. K., if she said
14 it even, was trying to explain to B. why the
15 status quo may change and to explain to her
16 why she was not living with her father,
17 certainly that little bit of information does
18 not cause me concerns about Ms. K. as a
19 mother.

20 The other comment with respect to "your
21 grandmother is weaknow, you may have to live
22 with me as your grandmother won't live long".
23 That comment is in quotes in Mr. R's
24 affidavit. I have to say the wording of that
25 surprises me from an eight-year-old. I do not
26 know what was said and, again, I do not know
27 the context of that, or as well how that arose

1 in conversation.

2 With respect to that affidavit, being that
3 it is based on hearsay, causes me some concern
4 as well with respect to weight. But even if
5 that did happen, even if those conversations
6 did transpire, they cause me no concerns with
7 respect to Ms. K's ability to parent B.

8 Taking everything into consideration,
9 recognizing that it is the best interests of
10 B. that I have to keep in mind here, I do not
11 find that there are reasonable grounds to find
12 that today B. needs protection. B's mother
13 has stepped forward, she has lawful custody of
14 B., and I have no concerns with her ability to
15 parent B. on the information that has been put
16 before me. I do not find that Ms. K. has to
17 prove that her situation is the best situation
18 for B., or that her situation is not a bad
19 situation for B.. from what I know of Ms. K's
20 situation, and the fact that Ms. K. has
21 stepped forward and said she wants B. returned
22 to her care, there being nothing before me
23 that B. has ever been in danger when she was
24 in Ms. K's care, I am denying the director's
25 application to have the apprehension
26 confirmed. I do not find that there are
27 reasonable grounds to find B. in need of

1 protection today and B. is to be returned to
2 Ms. K's care. Ms. K. has lawful custody of
3 B..

4 Is there anything further needed on this,
5 Ms. McIlmoyle?

6 MS. McILMOYLE: Your Honour, I am thinking
7 that it is going to take some time to have B.
8 brought down and I am wondering if Mrs. K.
9 will be going up to pick her up or whether the
10 director should have someone accompany her
11 down here. I am thinking Ms. K. should make
12 the trip up there and then that way assist B.
13 in saying good-bye to her grandparents, who
14 she is very close to, and it is just my
15 suggestion, Your Honour. But I think that we
16 have to be cognizant of the connection that
17 the child does have with her grandmother and
18 that we make that split as gentle as possible
19 for her, and with her mother being there that
20 might be the best way of getting through that
21 transition period.

22 THE COURT: B. was not living with her
23 grandparents, was she?

24 MS. McILMOYLE: Yes, she was.

25 THE COURT: Was Mr. K. living with his
26 parents?

27 MS. McILMOYLE: Mr. K. was living with his

1 parents.

2 THE COURT: I have no jurisdiction, Ms.
3 McIlmoyle, over any of that.

4 MS. McILMOYLE: I think that it is not going
5 to happen that we get her on a flight out of
6 there today but give us a few days to get
7 everything in place and the director will
8 follow the order that you have granted today.

9 THE COURT: I have not granted an order
10 today, I have just dismissed the application.

11 MS. McILMOYLE: That's true, thank you, Your
12 Honour.

13 THE COURT: Anything further, Ms.
14 Savoie?

15 MS. SAVOIE: No, Your Honour.

16 THE COURT: Mr. Kinnear?

17 MR. KINNEAR: No, Your Honour, thank you.

18 THE COURT: Good luck, Ms. K.

19 That is everything for today? We will
20 adjourn until tomorrow morning at 9:30.

21 (ADJOURNMENT)

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best of my skill and
ability,

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Lois Hewitt,
Court Reporter