

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

In the matter of the *Child and Family Services Act*, SNWT 1997 c. 13 as amended,  
and in the matter of an application by G.B. for a declaration on a question of law

And in the matter of the children:

A.D.B.  
Born June 28, 2007

-and-

N.D.B.  
Born July 31, 2008

Apprehended December 5, 2012

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**REASONS FOR DECISION**

**of the**

**HONOURABLE JUDGE CHRISTINE GAGNON**

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**These Reasons are subject to Publication Restrictions pursuant to section 87 of the  
*Child and Family Services Act*, S.N.W.T. 1997, c.13, as amended**

87. No person shall publish or make public information that has the effect of identifying
- (a) a child who is
    - (i) the subject of the proceedings of a plan of care committee or a hearing under this Act, or
    - (ii) a witness at a hearing; or
  - (b) a parent of foster parent of a child referred to in paragraph (a) or a member of that child's family or extended family

**And further . . .**

90. Every person who contravenes a provision of this Act for which no specific punishment is provided is guilty of an offence and liable on summary conviction to a fine not exceeding \$10,000, to imprisonment for a term not exceeding 12 months or to both.

Application heard at:	Yellowknife, Northwest Territories
Date of hearing:	October 7, 2013
Reasons Filed:	March 28, 2014
Counsel for the Applicant, G.B.	Paul Parker
Counsel for the Director, Child and Family Services	Laura Jeffrey
Counsel for the father, A.B.	Jeremy Walsh

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Introduction

[1] G.B. and A.B. are the biological parents of two children, A.D.B. and N.D.B.

[2] These children were apprehended on December 5, 2012. The Director of Child and Family Services was granted a 6-month temporary custody order of the children on February 18, 2013 and is now seeking an extension of that order for a further period of six months.

[3] I am seized with an application by the mother G. B. for an order declaring that her children are not in need of protection and therefore dismissing the Director of Child and family Services' application.

[4] The Applicant relies on Rule 303 of the Supreme Court of the NWT Civil Rules which she argues applies by implication to the Territorial Court. This Rule reads as follows:

s. 303(1) Where a point of law has been raised by the pleadings, it may, by leave of the Court, be set down for hearing at any time before trial.

And further,

s. 304. (1) The Court may (a) order any question or issue arising in a proceeding whether of fact or law or partly fact and partly law to be tried before, at or after the trial;

(2) Where it appears to the Court that the decision in the question or issue separately tried substantially disposes of the action or proceeding or renders the trial of further issues unnecessary, it may dismiss the action or proceeding or make such other order or give such other judgment as it considers proper.

[5] I heard this application as a preliminary motion, as the parties successfully argued that I should determine as a point of law whether or not the term “lawful custody” used at section 28(4) of the *Child and Family Services Act* can be read to include any of one of the biological parents and that a favourable determination may render a trial unnecessary.

### Background

[6] G.B. and A. B. are A.D.B. and N.D.B.’s biological parents. The affidavit of the Child Protection Worker reveals that since 2009, G.B. has been absenting herself from the family home, leaving the children in A. B.’s care. At the time, they were living in Hay River, NT.

[7] The parents entered into sequential Plan of Care Agreements with the Director, but it is alleged that since the summer of 2009, the father has been the main caregiver for his children, while the Applicant was living at times outside of the Northwest Territories, and at times in communities of the Northwest Territories other than Hay River.

[8] From 2009 up to this date, the children were either living with their father or were in the care of the Director, but they have not been living with their mother.

[9] On December 5, 2012, the father was arrested and charged with a criminal offence. He was committed to custody pending trial. His children were living with him at the time and were apprehended by a Child Protection Worker. The father has since been convicted and sentenced and he expects to be released some time in December 2013.

[10] The Applicant now says in an affidavit of June 27, 2013, that she is available and that she is willing to care for her children and that they are no longer in need of protection. She wishes her children to come and live with her. She says that she is a parent defined at section 7 of the *Child and Family Services Act*.

[11] The Director of Child and Family Services takes the position that the children were not in the Applicant's care and that she did not have their lawful custody when they were apprehended in December 2012, and argues that the children could not be returned to her, pursuant to s. 28 (4) of the *Act*, even if the court were to decide that they are not in need of protection.

[12] The father takes the position that the Director's interpretation of the *Act* is the correct one.

#### The issue of law

[13] It is necessary to determine before trial whether or not the term "lawful custody" used at s. 28(4) of the *Child and Family Services Act* refers to custody of a child that has been determined pursuant to the *Children's Law Act* and whether the terms custody and lawful custody refer to different or similar realities.

[14] It is also necessary to determine preliminarily the meaning of the word parent within the context of the *Child and Family Services Act*.

#### a) Parent

[15] The ordinary meaning of the word parent is "one that begets or brings forth offspring: Father, Mother.", as one may read in the Webster's Third New International Dictionary.

[16] However, parent is a term which has been specifically defined in the *Child and Family Services Act*, suggesting that the Legislator sought to impart to this word a meaning that differs from its ordinary meaning:

1. In this Act,

“parent”, except in the expressions “the rights and responsibilities of a parent” and “the rights of a parent” and in Part II, includes a person, other than the Director, who has lawful custody of a child;

7. (1) In this section, “parent” includes

(a) a person who has lawful custody of a child, other than the Director; and

(2) except in paragraph (3)(q), a person having charge of a child.

30. In sections 31 and 32,

“parent” means a parent as defined in subsection 7(1)

[17] I take this to mean that the term “parent” may have alternative meanings depending on the varying circumstances contemplated in the *Act*.

[18] When dealing with family-related issues, it is also necessary to consider any definition or context found in the *Children’s Law Act*, which pertains to the rights of a child in relation with the obligations of his parents. The *Children’s Law Act* does not define parent, but its subject is about parenting and it may offer contextual information relevant to our purpose.

[19] In order to resolve the issue of the meaning of “parent”, I must also consider the meaning of the expression “lawful custody” as opposed to custody used alone. By comparing the various provisions of the *Child and Family Services Act* and the *Children’s Law Act*, it is possible to determine the intention of the Legislator.

#### b) Custody and Lawful Custody

[20] **Custody** is not defined in the *Child and Family Services Act* or in the *Children’s Law Act*. One must therefore give this word its ordinary meaning, which is:

1. guarding, keeping; the act or duty of guarding and preserving; protection, care, maintenance and tuition; 2. Judicial or penal safekeeping; control of a thing or person with such actual or constructive possession as fulfills the purpose of the law or duty requiring it: imprisonment or durance of persons or charge of things. (Webster)

[21] **Lawful** is not defined in the *Act*. Its ordinary meaning is:

1. **a:** Conformable to law: allowed or permitted by law: enforceable in a court of law: LEGITIMATE **b:** constituted, authorized, or established by law: RIGHTFUL; **syn** LAWFUL, LEGAL, LEGITIMATE AND LICIT. (Webster)

[22] In the *Child and Family Services Act*, the word “custody” is always accompanied by the word “lawful”. In the *Children’s Law Act*, custody is used alone.

[23] The *Child and Family Services Act* provides at times that a parent is a person having “lawful custody” of a child other than the Director of Child and Family Services, but it also says that the Director, when he is granted custody of a child, has the rights and obligations of a parent.

[24] The *Children’s Law Act* determines issues pertaining to the custody of a child depending on the relationship of the parents. When both the child’s parents live together with their child, they are sharing their child’s custody.

[25] Section 18(5) of the *Children’s Law Act* specifies that the right of one parent to his or her child’s custody is suspended when

- The parents live separately, and
- The child lives with one parent with the express or implicit consent of the other parent, or the child lives with one parent with the acquiescence of the other.

[26] When parents separate, their right to the custody of their child is determined by law.

[27] The *Children’s Law Act* provides that a court may decide on the issue of custody by following the procedure outlined at section 17 of the *Act*, or that the parents may agree about it. These two forms of decision under the *Children’s Law Act* result in the lawful custody of a child.

[28] Any other form of custody exercised by a parent when a child lives with him or her may exist as a question of fact, but is not called *lawful* custody.

[29] A child in the custody of a parent is also under his or her day-to-day care and may also be said to be in the parent’s charge.

## Analysis

[30] The parents' rights toward their child include:

- To decide where and with whom he or she will live (custody)
- To have access to him or her (visit)

[31] The parents' obligations include:

- To care and provide for their child
- To supervise and protect him or her
- To ensure that the child receives medical attention
- To ensure that the child's physical, mental and emotional needs are met
- To ensure that the child has access to education

[31] According to section 35(2), 37(3.1), and 47(2) of the *Child and Family Services Act*, when the Director of Child and Family Services is granted custody of a child, he assumes all these rights and obligations, while the child's mother and father retain the right to have access to their child. At sections 28(5) and 38(2), the *Act* adds that the persons granted access, or the parents, may also be granted the right to make inquiries as to the child's health, education and welfare.

[32] Finally, the procedure to be followed in order to determine if a child needs protection is provided at sections 24 to 29 of the *Child and Family Services Act*. More specifically, section 28 identifies the court's options at the conclusion of a protection hearing.

[33] One of these options is to return the child to his or her parent, or to the person who had actual care of the child, with or without supervision: section 28 (1)(a)(ii) or (b)(ii).

[34] However, this option is limited by the addition to section 28 of subparagraph (4), which precludes the return of the child to a person who did not have lawful custody of this child unless this person had the actual care of the child at the time of apprehension.



[35] So from these dispositions and for the purpose of applying the *Child and Family Services Act*, I draw the following conclusions:

- 1) The **parents** of a child are his biological mother and father
- 2) A parent is one or many of the following:
  - a) a child's mother, or
  - b) a child's father, but also
  - c) a person having lawful custody of a child, who may be the mother or the father, but not the Director, or
  - d) for the purpose of determining if a child is in need of protection, also a person having charge of this child.
- 3) When a child resides with a mother or father, this parent materially exercises the right to the custody of this child and has the obligation to care for him or her. This person may be said to have charge of the child and will assume the day-to-day care of the child.
- 4) A person who is not the child's mother or father could assume this role.
- 5) A person may at the same time be a father and a person having the charge of the child, without having lawful custody; or be a mother and a person having the charge of the child, without having lawful custody. The other, non-custodian parent retains the right to access his or her child and continues to fulfill his or her obligations as parent.
- 6) When a court, a parental agreement or a separation agreement awards custody of a child to one parent, this custody is known as lawful custody.
- 7) There may be instances where a person having lawful custody may not necessarily be the mother or the father of a child; however a mother or a father who has lawful custody of his or her child also has the actual day-to-day care of this child while the other parent retains the right to access the child, as well as his or her parental obligations.
- 8) The definition of parent found at section 1 of the *Child and Family Services Act* applies to the entire *Act*, whereas the definition found at section 7, which is larger than that of section 1, applies to the determination of whether a child is in need of protection. In order to determine if a child is in need of protection, the court may consider under the definition of parent a

father, a mother, a person who has lawful custody (but not the Director) of the child or a person having charge of the child. This broader definition also applies, by reference, to section 27(1) of the *Act*.

9) In the context of a protection hearing, the court must first determine if the child is in need of protection, referring to the criteria of section 7 of the *Act*. If the court is satisfied that the child is in need of protection, it orders that the child be placed in the custody of the Director, who shall assume the rights and obligations of a parent, as they are defined at s. 47(2) of the *Act*.

10) If the court is satisfied that the child is not in need of protection, it may order the return of the child pursuant to section 28(1)(a) or (b). This section must nevertheless be read jointly with section 28(4) of the *Act*, which provides that a child shall not be returned to a person who does not have lawful custody unless the person had the actual care of the child at the time the child was apprehended.

11) This means that if the court determines that a child is not in need of protection,

a) the child may be returned to a person who did not have lawful custody at the time of the apprehension *but* who had the actual care of the child at that time.

- This would include a father or mother
  - who lives separately from the other parent,
  - who has not been granted custody of his or her child by an order of the court or by a separation or parental agreement
  - with whom the child has been living at the time of the apprehension

b) the child could not be returned to a person who does *not* have lawful custody of the child *and* who did not have the actual care of the child at the time of the apprehension.

c) the child could be returned to a person who has lawful custody even if this person did not have the actual care of the child at the time of the apprehension.

12) So even if section 28(1) (b) provides that a child may be returned to his or her parent, which includes a person having lawful custody of the child, section 28(4) precludes the return of a child to a parent *who does not* have lawful custody of this child.

[36] Further support for this reasoning is found in the difference between sections 27 and 28 of the *Child and Family Services Act*.

[37] At the stage of determining whether a child is in need of protection, the court must hear from the child's parents (s. 27(2)(iii)) and from the person having actual care of the child at the time where the child was apprehended (s. 27(2)(iv)).

[38] For the purpose of this section, one applies the definition of parent as found at section 1, and it includes a person who has lawful custody of the child. The Act makes it clear that the mother and father must have an opportunity to be heard and provides the obligation to notify the mother and father of any procedure taking place with respect to their child. In this context, the word parent is used in the plural form and refers both to the mother and the father of the child.

[39] It includes a person having lawful custody of the child and it makes sense to infer that this means that the Act refers to the mother and father, who may or may not have lawful custody of their child as well. What matters in this context is the fact that the parents have a right to be heard.

[40] However, for the purpose of the return of the child, the *Act* uses specific language to exclude a category of person.

[41] When reading the *Child and Family Services Act* in conjunction with the *Children's Law Act*, I come to the conclusion that it became necessary to use this exclusionary language in the *Child and Family Services Act* to avoid a situation where a court's order to return a child with a parent who did not have his or her actual care would result in granting *de facto* lawful custody to this parent without having followed the process established at section 17 of the *Children's Law Act*.

[42] The apparent difficulty of interpretation of section 28(4) of the *Child and Family Services Act* only arises when the child's parents are separated and the child was living with one parent at the exclusion of the other. In the absence of a custody order under the *Children's Law Act*, or a separation or parental agreement, neither the mother nor the father has lawful custody of their child. Only one parent has the day-to-day care of the child and the other parent's exercise of his or her

right to the child's custody is suspended until it is judicially determined or agreed upon.

[43] The court conducting a protection hearing only has jurisdiction to determine whether the child is in need of protection. The court does not assess who the child *should* live with when his or her return is ordered, because this function is exercised by a court seized with an application for custody pursuant to section 17 of the *Children's Law Act*, and this application is governed by different principles and rules.

### Summary

[44] In the *Child and Family Services Act*, "parent" always includes the mother or the father and is said to include a person who has lawful custody of a child, but not the Director.

[45] Lawful custody means that the issue of where and with whom a child shall live has been determined according to law. The *Children's Law Act* provides that parents who have separated may agree on this issue in a parental or separation agreement. Alternatively, a parent may apply to a court for the custody of his or her child, in which case the court is bound to apply principles and rules of the *Children's Law Act*.

[46] For the purpose of determining if a child is in need of protection, the term parent is extended to include a person who has the actual charge of a child.

[47] The purpose of section 28(4) of the *Child and Family Services Act* is to limit the scope of section 28(1) and is meant to address the situation of parents who are separated but who have neither come to an agreement with respect to custody of the children, nor have obtained a ruling by a court with respect to the custody of their child.

[48] Even though the court may order that a child be returned to a parent, which includes a father, a mother or a person having lawful custody of the child, if this parent does not have lawful custody of the child and the child was not in this parent's care at the time of the apprehension, the court, in effect, cannot order that the child be returned to that parent.

[49] As this application was framed as a request for a determination on a question of law, I will forego the application of the law to the facts of the case, which will be left for the judge who will hear the Director's Application for an extension of the Temporary Custody Order and the mother's Application to dismiss the Director's Application on the merits.

Dated this 24<sup>th</sup> day of October, 2013, in Yellowknife, Northwest Territories

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Christine Gagnon, J. T.C.

2014 NWTTC 12                      *Date: 2014 03 28*  
*File: T-2-CW- 2005000005*

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