Date: 19990409
Docket: CV 07096

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GERRIANN DONAHUE

Applicant

- and -

GABRIEL MANTLA

Respondent

Trial of an application for access by a non-parent.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife, Northwest Territories
on March 30 & 31 and April 1, 1999

Reasons filed: April 9, 1999

Counsel for the Applicant: Katherine R. Peterson, Q.C.

Counsel for the Respondent: Thomas H. Boyd

Counsel for the Director of
Child and Family Services: Shannon R.W. Gullberg

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REASONS FOR JUDGMENT

[1] The applicant seeks an order giving her access to the child Brenden Mantla. The applicant has no biological connection to the child. She did, however, have a relationship with the child's father, the respondent in this case, for about four years. For two of those years, between 1994 and 1996, they lived together in a common-law relationship. There is no longer any relationship between the parties (except one of animosity). The respondent does not wish to have anything to do with the applicant and he does not want his son to have anything more to do with her either.

[2] The trial of this matter took place over three days. I heard from a number of witnesses including the parties. I was provided with an assessment report prepared by a psychologist. I had the benefit of helpful and thorough submissions by counsel. I did not, however, hear directly from Brenden as to his wishes. I assume everyone wanted to avoid placing any undue stress on the child. I did, however, hear from many witnesses as to things said by Brenden. No one objected to this hearsay evidence. Where such evidence was given I have treated it not as evidence proving the truth of the substance of what was said but as evidence of what was said to the witnesses who in turn used those statements to formulate the opinions that those witnesses expressed. Courts have long recognized the need for flexibility in receiving evidence in child custody cases and

evidentiary rules are often relaxed: see E.P. Rossiter, "Children as Witnesses in Civil Proceedings", (1991) 13 Advocates' Quarterly 222 (at pages 227-228).

[3] The trial also involved more than just the named parties. Counsel for the Director of Child and Family Services also participated to a limited degree. The child is currently subject to an apprehension order and living in a foster home. The Director appeared on this proceeding not to take a position with respect to the application for access but to put forward relevant considerations concerning the interplay of this court's jurisdiction to order access and the Director's jurisdiction with respect to child protection. The Director's counsel also played a role in addressing disclosure concerns during the testimony of Brenden's child protection worker.

Summary of Facts

[4] Brenden was born on May 27, 1987. His natural mother removed herself from his life shortly after his birth and has no relationship with him. He has been cared for since infancy by his father.

[5] The respondent is a Dogrib Dene with life-long connections to the Rae-Edzo community. He has a large extended family there. He has limited education but he is currently enrolled in an adult education programme in Yellowknife. He apparently has a long-standing problem with alcohol abuse but is attempting to overcome it through counselling. It is his alcohol abuse that is the main source of the child protection concerns of the Director's officials. No one disputes his love and affection for his son, and no one suggested that there should be any change in his long-standing custody of Brenden (subject to any child protection concerns). The applicant's Originating Notice in this action made reference to seeking custody but no such claim was advanced at trial.

[6] The applicant is a non-aboriginal woman who has lived in Rae-Edzo for the past 9 years. She holds post-graduate degrees in education and she is the director of the Dogrib Divisional Board of Education. The evidence revealed that she is very much an active and accepted member of the Rae-Edzo community.

[7] The applicant and respondent commenced a relationship in 1992. From 1994 until September of 1996 they lived together. The respondent moved into the applicant's home. The respondent maintained care and custody of Brenden during this period. It is clear, however, that the applicant also cared for the child. She took him into her home; she spent money to help support him; she assisted in his daily needs; she expended effort in his educational development. There were times when she had the sole care of Brenden because the respondent was sent to jail for drinking-driving offences. They took vacations together. While her relationship with the respondent lasted, she stood in the place of a parent to Brenden.

[8] After the parties' relationship broke up, the child continued to spend significant periods of time with the applicant. Some of these were at the request of the respondent. Some were due to the fact that the respondent was incarcerated from time to time. Between October, 1996, and June, 1997, Brenden spent over seven months living with the applicant. In June the applicant commenced these proceedings due to what she perceived as an abrupt change in attitude by the respondent. He was no longer prepared to let her see the child. Interim orders were issued by this court granting the applicant specified access. On July 25, 1997, this court issued an order, with the consent of the respondent, granting custody of Brenden to the applicant for a three-month period. The order also allowed the applicant to travel outside of the Northwest Territories with the child. Brenden ended up living with the applicant until the beginning of November.

[9] In November 1997 Brenden returned to live with the respondent. On November 24th, the respondent's sister took the child to the applicant's home for a visit. The respondent, who had been drinking, forcibly removed the child from the applicant's home, threatening her in the process. The police were called and the Department of Social Services became involved. Brenden was apprehended as a child in need of protection (under the terms of the *Child Welfare Act*, R.S.N.W.T. 1988, c. C-6, since replaced by the *Child and Family Services Act*, S.N.W.T. 1997, c. 13). The first in a series of temporary care orders was issued by the Territorial Court on December 4, 1997.

[10] Brenden remained in foster care from his initial apprehension until February, 1999. During that time the applicant tried, without success, to have the Department place Brenden in her home. I think it is fair to say that the Department personnel did not know how to deal with the applicant since the legislation, past and present, does not recognize any role or status for non-parents (except as a lawful "guardian"). In addition, the child

protection worker assigned to Brenden's case focussed her energies on developing a working relationship with the respondent so as to enable the reunification of Brenden and the respondent. The respondent opposed any contact between Brenden and the applicant so the worker did nothing to facilitate such contact.

[11] There were submissions at the trial concerning the role and decision-making of the Department in this matter. I said then that those are not issues before me. This case is not a review of the child protection worker's actions. It cannot be. So nothing I say in these reasons should be taken as condemnation or commendation of those actions.

[12] The applicant continued her efforts at access through the courts. In January, 1998, she sought standing in the child protection proceedings. A judge of the Territorial Court refused her standing (I will have more to say about this decision later in these reasons). She continued these proceedings commenced in this court. On July 3, 1998, the applicant was granted custody of Brenden for the purpose of a holiday. This lasted until mid-August. On September 11, 1998, this court granted interim access to the applicant on alternate weekends. This was continued by a further order on February 12, 1999. In all of these instances, the Director, while not opposing access, would not agree to it without an order. The respondent and the Director complied with all of these access orders.

[13] In January, 1998, the respondent was sentenced to a nine-month jail term for threatening the applicant during the previous November altercation. In August he was released on parole to the Salvation Army. The child visited with him then and after his complete release. In 1998 Brenden had been enrolled in school in Yellowknife since his foster home was there. The Department worked with the respondent on obtaining housing in Yellowknife. On February 22, 1999, Brenden was returned to live with the respondent under the terms of a supervision order. On March 24th, the child protection worker was notified that the respondent was drinking. The child was therefore apprehended again and returned to the foster home. The worker was quite candid in saying that the Department will have to assess the situation very carefully before deciding on the next step.

[14] Based on the evidence presented to me, I calculate that, of the 31 months between the beginning of September, 1996, and the end of March, 1999, Brenden has lived for 6 months with his father, 10 months with the applicant, and 15 months in foster care.

The Child's Circumstances

[15] Brenden was described throughout the trial as a "special" child. By all accounts, he needs and deserves a lot of attention. In 1996 he was diagnosed as suffering from attention deficit disorder and hyperactivity. He is on medication. Everyone, however, described him as an affectionate child who wishes to please the adults in his life.

[16] It is apparent from the evidence that the two principal adult figures in Brenden's life are his father and the applicant. He is devoted to his father and it seems that he is somewhat "protective" of his father. Several instances were noted in the evidence about Brenden's awareness of his father's problems with alcohol abuse and incarceration. But, in terms of parental figures, Brenden identifies his father and the applicant in those roles (although he is aware of who his real mother is).

[17] With respect to Brenden's psychological situation, I have drawn my conclusions from a consideration of the evidence of Ms. Janice McKenna (Brenden's child protection worker), Ms. Blanche Shahbaghlian (Brenden's therapist for the past 14 months), Ms. Rosa Mantla (a friend of the applicant but also related to the respondent by marriage), and the assessment report of Heleen J. McLeod, chartered psychologist, dated January 13, 1998. All of this evidence was helpful. In my opinion, the witnesses testified in an unbiased manner, evidencing a true regard for Brenden's interests. The report as well was very thorough

[18] The evidence convinces me that there is a strong bond between Brenden and the applicant. He looks on her as someone who provides love, attention and a consistency of affection and attitude. She is someone he has come to count on. He has an "emotional investment" in his relationship with the applicant (to use Ms. Shahbaghlian's phrase). His contacts with the applicant are obviously very important for him and, in my assessment of the witness's opinions, he is helped by those contacts. It would be a loss if she were not in his life. He has come to rely on her and (as Ms. Mantla said) he would be "lost" if she were not there anymore.

[19] The difficulty, as these witnesses recognized, is that Brenden is torn between his loyalty to his father and his emotional tie to the applicant. The respondent has not hesitated in making his dislike for the applicant and his displeasure at her seeing his son known, to his son and others. This has obviously affected the child, so much so that Ms. McKenna, for example, felt the conflict in Brenden was so great that it would be safer for him to not see the applicant. She, however, recognized the positive things provided by the applicant to Brenden.

[20] Two witnesses, Ms. Shahbaghlian and Ms. McKenna, reported that very recently Brenden told them that he did not want to see the applicant. This was after he had been returned to live with his father on February 22nd. So I think it is safe to conclude that these expressions are likely not true indicators of Brenden's feelings but more likely things that his father influenced him to say.

[21] The psychologist's assessment report, even though it is over a year old, gives a summary that accurately reflects my perception of the situation as it exists today:

> From this assessment of Brenden Mantla, his father, Gabriel Mantla, and his former stepmother, Gerriann Donahue, it was evident that Brenden cares deeply for them both, although the relationship between the two adults has changed significantly. Both Gabriel and Gerriann clearly stated to the psychologist that they do not expect, or even wish reunification with the other. Brenden's father has actively opposed contact between his son and Ms. Donahue and stated that he no longer wishes to have any contact with Ms. Donahue himself, while Ms. Donahue stated that she would like to continue to interact in a friendly manner with Mr. Mantla. Whether or not there can be an amicable relationship between the adults is uncertain. The more important issue relates to Brenden's best interests. This young boy already has numerous areas of concern. Although he may not consciously recognize this, he harbours feelings of abandonment by his biological mother who has kept her three other children. Brenden also exhibits significant developmental and learning delays and attentional deficits which make him vulnerable, and which necessitate ongoing, specialized medical and educational intervention; he worries about his father's problems and use of alcohol; he is uncertain about where he will live, or with whom, or how he will be treated; and he is uncertain about his present and future relationship with the woman who has been his most consistent female caregiver over the past five years. This child has progressed remarkably well under these circumstances. However, steps need to be taken to ensure the greatest stability possible for Brenden. From the psychologist's assessment of Brenden it was apparent that this boy wishes to be a good

> and obedient child, and to accede to adult requests. There is no question that Brenden loves his father and his father loves him, and Ms. Donahue accepts that fact. Thus, Brenden is clearly in a very difficult position in trying to yield to his fathers wishes, which would require him to no longer see or rely on someone he loves and who has cared for him for approximately half of his life.

The psychologist recommended that Brenden have continued contact with both the applicant and the respondent, even if he is not living with either of them. Of particular note is a further recommendation that, if the respondent was unable to care for Brenden from time to time, Brenden be cared for by the applicant.

The Applicant's Position

[22] The applicant's position is that the sole governing factor should be the best interests of the child. Her counsel submitted that the evidence indicates that the child's best interests would be served by continuing contact with the applicant. The only person opposed to such contact is the respondent and, while deference should be shown to the wishes of a biological parent, the court should not reward what is obviously dysfunctional behaviour. It is the respondent's attitude that is causing the child's stress and, in effect, the court should expect that attitude to change as opposed to allowing it to undermine the child's best interests.

The Respondent's Position

[23] The respondent raised a number of issues, some not directly related to the question of the child's best interests.

[24] First, the respondent's counsel argued that the applicant has no legal status to bring this application. Second, as a corollary to the first, the issue of the applicant's standing was determined by the Territorial Court last year. She was denied standing and therefore, it was argued, the issue is *res judicata*.

[25] With respect to the child's interests, a number of points were made to show that the respondent's wish to cut off all contact between his son and the applicant is based on grounds that are reasonable and based on the interests of the child. Counsel noted the

gross disparity in the economic circumstances between the parties. The applicant can provide many more material things than can the respondent. The fear is that this will inevitably lead the child to view his father in a critical way. The comparisons would be harmful to the child. Also, the conflict between the adults would harm the child if there were continued contact. The conflict was said to flow both ways since the respondent gave evidence about times when the applicant disparaged and insulted him in front of the child.

[26] The respondent also testified how his Dogrib culture and Catholic religion are important to him and therefore he wants to raise his child in those traditions. This is worthy of respect. However, I heard nothing in the evidence to suggest that the applicant did not recognize and appreciate the importance of maintaining Brenden's cultural and religious roots.

[27] Respondent's counsel also made the point that the law should not countenance the intrusion of an outsider into a parent's relationship with his child. He pointed out that the law does not permit one who stood *in loco parentis* to unilaterally withdraw from that status so the reverse ought to hold as well. The applicant here should not be able to insert herself into the respondent's family unit and perpetuate her position on a unilateral basis.

Discussion

[28] It is axiomatic that the courts, and the adversarial system of adjudication, are ill-equipped to address questions of child custody and access. It is especially so in a case such as this that contains so many cross-currents.

[29] Many people may be inclined to ask why should the father's wishes not be the final word. After all, the applicant has no biological connection to this child. What connection she has is only because of a brief cohabitation. So this raises the general question of how much deference should be given to the respondent's wishes. On the other hand, if the evidence points overwhelmingly to contact with the applicant being in Brenden's best interests, why should the court not override the parent's wishes? This raises the question of what factors are relevant for that determination when the issue is access.

[30] Many other people, especially in Rae-Edzo, may also ask why this matter could not be resolved through some community-based mediation. After all, the parties are both well-known to many people in Rae-Edzo and Brenden has a large extended family there. I am sure that many of these people would only have his best interests at heart. Why that was not done I cannot say. Obviously, the fact that the parties are in court means that either no alternative was tried or any alternative was not successful. In any event, the parties have a right to come to court and I have an obligation therefore to make a decision.

[31] I will discuss the issues raised on this case under the following headings:

(a) The jurisdiction to make an access order in light of the child's status as a child "in need of protection" and under apprehension;
(b) the applicant's standing to bring these proceedings;
(c) whether the issue of standing is *res judicata*;
(d) the status of the applicant as being *in loco parentis*; and,
(e) what is in this child's best interests with respect to access.

All of these issues were raised during the trial in one way or another.

(a) Jurisdiction

[32] As noted above, the Director of Child and Family Services took no position on the application for access. The Director's concern was that any access order be specific so that everyone will clearly know their obligations. When asked, the Director's counsel conceded that if the Director did have specific concerns about the applicant having access at all, I would have heard about it.

[33] The jurisdictional issue arises because of the fact that the child is currently under apprehension. He is in effect a ward of the Director. The statutes do not address the question of access by a non-parent. The previous *Child Welfare Act* did not mention access at all. The present *Child and Family Services Act*, however, does refer to access but only with respect to the child's parent or the person having actual care of the child at the time the child was apprehended: sections 28(1)(c) and (d).

[34] The Director's counsel acknowledged that case law has recognized the power of the court to order access even in the context of child protection proceedings. She referred me to the case of *Minister of Social Services v. W.M. and L.M.* (1983), 32 R.F.L. (2d) 337, a decision of the Saskatchewan Court of Appeal which upheld an order granting access to the parents of a child who had been made a permanent ward of the Minister. That judgment made reference to a long line of cases that support the jurisdiction of a superior court to make an access order in such circumstances. The governing consideration for the court in exercising such jurisdiction is the welfare of the child.

[35] It seems to me that this principle applies in this case as well. Since it is the court that must exercise its authority based on the welfare of the child, if that criterion is satisfied, then there is no jurisdictional impediment to granting access whether it be to a parent or a non-parent. The statutory grant, in the *Child and Family Services Act*, of authority to order access to a parent cannot be interpreted as a prohibition to ordering access to anyone else. In any event, this court is not engaged in child protection proceedings under that statute; it is being asked to make an access order under other legislation dealing with children. This leads to the question of standing.

(b) Standing

[36] This application was originally brought pursuant to the *Domestic Relations Act*, R.S.N.W.T. 1988, c. D-8. That Act specified that if the parents of a child are separated and cannot agree as to the custody of the child, they may apply to the court for an order. The court may then make such order as it considered fit regarding the custody of the child and the right of access to the child by either parent. There was nothing in that Act expressly permitting someone not a parent to apply to the court. Hence this court adopted the practice that a non-parent must apply for standing to bring an application. Whether or not to grant standing was an exercise of judicial discretion, a discretion however impressed with the obligation to act in the child's best interests, an obligation arising from the court's *parens patriae* jurisdiction.

[37] The issue of standing, and the principles guiding the exercise of the court's discretion, were explained by de Weerdt J. in *V.S. and J.S. v. M.M. and C.M.*, [1989] N.W.T.R. 169 (S.C.). That was a case where the persons seeking custody of the child had no biological connection to the child. Justice de Weerdt held that a bond of

friendship, as he put it, could be a sufficient basis upon which to grant standing to the applicants. He wrote (at pages 176 and 177):

> Not only is there nothing in the legislation, as I read it, to prevent the making of this application, but the parens patriae jurisdiction is recognized by the legislation and is not constrained by it. That jurisdiction places the interests of the child in a position of paramountcy, recognizing the child as a human being having its own rights to life and liberty in circumstances favourable to the child's sound and healthy development into adulthood.
> ...
>
> Counsel for the applicants has cited a number of cases in which persons other than the parents or legal guardians of a child were given legal standing to seek custody of the child: *Re McMaster and Smith*, [1972] 1 O.R. 416, 6 R.F.L. 143, 23 D.L.R. (3d) 264 (H.C.); *Smith v. Hunter* (1979), 27 O.R. (2d) 683, 15 R.F.L.(2d) 203, 15 C.P.C. 181 (sub nom. *Re Sears*) 3 Fam. L. Rev. 121, 107 D.L.R. (3d) 451 (H.C.); *Re Z. (E.W.)* (1975), 23 R.F.L. 82 (Ont. Prov. Ct.); *Re Smith and Kent Children's Aid Soc.* (1980), 29 O.R. (2d) 502 (Co.Ct.); and *V.-F. (T.) V. C. (G.)*, [1987] 2 S.C.R. 244, 9 R.F.L. (3d) 263, 9 Q.A.C. 241, 78 N.R. 241 (sub nom. *C. v. F.)*. While the decisions in those cases turned upon the interpretation of statutes, I have found nothing in them to qualify the view that the court may grant legal standing to someone other than a parent or guardian in such a case.
>
> Is the bond of friendship a sufficient basis upon which to rest a claim to legal standing, for the purposes of the present application? I have come to the view that this question may be answered in the affirmative, provided that it is clearly understood that such a claim cannot succeed as a matter of right, but only in the exercise of a judicial discretion.

[38] On November 1, 1998, the *Domestic Relations Act* was repealed and replaced by the *Children's Law Act*, S.N.W.T. 1997, c. 14. That Act provides that the court may grant custody of a child to one or more persons and may determine any aspect of the incidents of custody or the right of access to a child. It sets out who may apply:

> 20. (1) 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.
>
> (2) 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.

[39] Subsection 20(1) refers to applications for custody or access while subsection 20(2) makes no express reference to access. It seems to me that it would be anomalous to require non-parents to seek leave only with respect to custody. I cannot imagine that the legislators meant to give automatic standing to non-parents to seek access. In my opinion, the reference to "incidents of custody" must be read to include access. Thus the requirement to establish standing by a non-parent under the old legislation is incorporated expressly in the requirement for leave in the new Act.

[40] The Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C-12, has a provision (section 21) in exactly the same wording as subsection 20(1) quoted above. The Ontario courts have held that, although persons other than parents (an "other person" under the statute) have a right to apply for access, they must, as a preliminary step, establish that they already have a close relationship to the child at the time of the application and that they were not using the application to create or establish such a relationship: *C.G.W. v. M.J.* (1981), 34 O.R. (2d) 44 (C.A.). There is a threshold test that must be met to establish that the application is not devoid of merit or patently tenuous: *Finnegan v. Desjardins*, [1985] O.J. No. 725 (C.A.); *A.L. v. B.A.M.*, [1993] O.J. No. 2068 (Gen. Div.). So, even if I am incorrect in my interpretation of subsection 20(2), I think there is good reason to maintain the requirement for a non-parent to establish his or her standing by obtaining leave to bring an application.

[41] In my opinion, the best interests of a child are not served by frivolous or ill-founded applications for custody or access. Not anyone who merely has an interest in the child should be allowed to force the custodial or biological parent into court. There must be a connection to the child that can be almost equated to a parental one in the sense of care, nurture and support. On this point I respectfully adopt the comments of Family Court Judge Sparks of Nova Scotia in *Stewart v. MacDonnell*, [1992] N.S.J. No. 612 (Fam. Ct.), at paragraph 16:

> 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 substantive reason for disregarding the contrary wishes of the custodial parent.

[42] Counsel for the applicant submitted that the respondent should not be entitled to raise the issue of standing at such a late date in these proceedings. It was never raised before so the respondent should be deemed to have acquiesced to the applicant's right to apply for access.

[43] While it seems to me that ordinarily delay in raising any issue could result in adverse consequences, the more appropriate response to this submission is that the obligation to seek leave, or to establish standing, is an obligation imposed by the statute or, at least, by judicially recognized practice. The respondent cannot grant standing, or consent to it; it is something only the court can do. So delay on the part of the respondent does not relieve the applicant of the burden of establishing her status. In addition, I do not think the issuance of interim orders affects this question of standing since the particular question was never put to the court at those times. As a general comment, however, the question should be addressed early in the proceedings so as to avoid unnecessary litigation and expense should standing not be granted.

[44] Having had the benefit of a full trial, I have no hesitation in concluding that the applicant has met the threshold test for standing. She developed a close and meaningful relationship with the child. All of the independent observers have recognized a bond between Brenden and the applicant that has had a positive influence on him. Furthermore, the applicant's relationship with Brenden is one that the respondent created by his relationship with the applicant. He moved into her home bringing Brenden with him. He continued his son's relationship with the applicant for some time after his separation from the applicant by asking her to care for Brenden for some periods. For these reasons, leave to bring these proceedings is granted.

(c) *Res Judicata*

[45] The respondent's counsel argued that the standing issue was determined against the applicant on January 19, 1998. At that time the applicant sought standing in the child protection proceedings brought by the Director in Territorial Court. Respondent's counsel submitted that the decision was final and it involved a determination of the same issue which is advanced by the applicant in this court. If the applicant wanted to challenge the denial of standing, she should have appealed as opposed to seeking standing from this court. Thus, it is argued that the question is *res judicata*.

[46] The plea of *res judicata* is an allegation that the legal rights and obligations flowing between the parties have been conclusively disposed of by an earlier judgment. It is a part of the law of estoppel. Estoppel can apply to a cause of action generally or to a single issue. In this case, the respondent submits that the doctrine of issue estoppel prevents the relitigation of the issue of the applicant's standing. I have already made my ruling on the standing question, but I will address the estoppel argument since counsel relied on it.

[47] The requirements for issue estoppel were defined by Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.), at page 935:

> ...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[48] The applicant's counsel submitted that estoppel does not arise simply because the issue is not the same. The applicant may have been seeking standing in the Territorial Court, as she does in this court, but the issue which was determined in the Territorial Court was a narrow one that was applicable solely to the child protection proceedings. I agree.

[49] The Territorial Court judge expressly defined the issue before him: "... the issue before me is a relatively narrow one within the meaning of the *Child Welfare Act*, not any other piece of legislation; is Donahue a parent?" He concluded: "I am simply dealing with the definition of the word 'parent' in the *Child Welfare Act*. In my view, the ordinary meaning of the word 'parent' is the biological parent ...". The application for standing was brought in the context of the Director's application (then the Superintendent of Child Welfare) for a temporary custody order respecting Brenden. The *Child Welfare Act* stipulated that only the parents or the person having custody of the child when apprehended were to have notice of the proceedings. Therefore, the applicant's request for standing had to be determined within the confines of that statute. That is what the Territorial Court did and nothing more.

[50] The issue before me is what is in the best interests of the child. The *Children's Law Act* expressly provides that a non-parent may apply for custody or access. The only

prerequisite is that the non-parent must seek leave from the court. There is no issue about the statutory definition of "parent" as there was in the Territorial Court proceeding.

[51] Therefore, I have concluded that the question of standing is not *res judicata*.

(d) *In loco parentis*

[52] The doctrine of *in loco parentis* arose in the applicant's argument because she submitted that, since she assumed parental obligations toward Brenden in the past, she has acquired certain rights, specifically the right to continuing access in the future.

[53] The concept of *in loco parentis* has generally been meant as applying to one who stands in the place of a parent. It can be a relatively temporary status (such as a schoolteacher or a baby-sitter) or a long-term one (such as a step-parent). In the context of this case, and generally in the case law, it relates to one who "has made at least a permanent or indefinite unconditional commitment to stand in the place of a parent" by a "voluntary assumption of that role": per Kerans J.A. in *Theriault v. Theriault* (1994), 2 R.F.L. (4th) 157 (Alta. C.A.) at page 162.

[54] Recently, the Supreme Court of Canada addressed this doctrine in the context of a claim for child support, under the *Divorce Act (Canada)*, against a former step-parent. The Court considered the factors that must be taken into account to determine whether a parental role has been assumed by the adult. The Court also hinted at the applicant's submission in this case. Bastarache J., on behalf of the Court in *Chartier v. Chartier* (S.C.C. No. 26456; January 28, 1999), wrote (at para. 39):

> Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively. What must be determined is the nature of the relationship ... The Court must determine the nature of the relationship by looking at a number of factors, among which is intention. Intention will not only be expressed formally. The court must also infer intention from actions, and take into consideration that even expressed intentions may sometimes change. The actual fact of forming a new family is a key factor in drawing an inference that the step-parent treats the child as a member of his or her family, i.e., a child of the marriage. The relevant factors in defining the parental

> relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent. The manifestation of the intention of the step-parent cannot be qualified as to duration, or be otherwise made conditional or qualified, even if this intention is manifested expressly. Once it is shown that the child is to be considered, in fact, a "child of the marriage", the obligations of the step-parent towards him or her are the same as those relative to a child born of the marriage with regard to the application of the *Divorce Act*. The step-parent, at this point, does not only incur obligations. He or she also acquires certain rights, such as the right to apply eventually for custody or access under s. 16(1) of the *Divorce Act*.(emphasis added)

[55] The concept of *in loco parentis* can obviously apply in non-marital situations as well: see, for example, *Laraque v. Allooloo*, [1992] N.W.T.R. 124 (S.C.). The *Children's Law Act*, when dealing with custody and access, does not refer to step-parents per se but it does refer to "a parent of a child or any other person". I note, however, that "parent", for the purposes of child support under Part IV of that Act, is defined as including "a person who stands in the place of a parent for the child" (s.57). So the concept is not foreign to the legislation.

[56] The fact that one stands in the place of a parent does not determine the right to access. It merely means, as the Supreme Court said above, that the person who does acquires the right to apply for access. It would give that person the requisite standing to apply. That person is no longer a "stranger" to the child.

[57] In this case the evidence has convinced me that the applicant stood in the place of a parent to Brenden. During the two years of cohabitation with the respondent, the applicant treated Brenden as a member of the family (taking him on several vacations to her family as an example); she provided financially for him by buying clothes, meals, and the like; she disciplined him and set controls over his behaviour; and, she expressed to others her care and concern for his welfare. The only qualification that she has imposed on her role is a recognition of the strong parental bond between Brenden and his father, hence her acceptance of the fact that the respondent should have custody.

[58] As noted above, however, the declaration of *in loco parentis* status means only that the applicant has a right to apply for access. The determination of whether this should be ordered ultimately rests on one factor, that being the best interests of Brenden.

(e) The Best Interests Test

[59] The *Children's Law Act* expressly mandates that any determination as to custody or access must be based on the best interests of the child:

> 17. (1) The merits of an application under this Division in respect of custody of or access to a child shall be determined in accordance with the best interests of the child, with a recognition that differing cultural values and practices must be respected in that determination.

[60] With respect to access, I think it is fair to say that it, like custody, is viewed from the child's perspective. As such, there is no point in talking about a "right" to access. Generally speaking, when it comes to adults and children, the adults have responsibilities, not rights. All rights of custody and access exist only to the extent that they permit the custodial or access parent to act in the best interests of the children: *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (at page 68). The role of the court, in any contest involving children, is "to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult": *K.K. v. G.I. and B.J.I.* (1985), 44 R.F.L. (2d) 113 (S.C.C.), at page 126.

[61] The principles governing access were discussed at length by the judges of the Supreme Court of Canada in *Young v. Young* (1993), 49 R.F.L. (3d) 117. L'Heureux-Dubé J., while dissenting in the result, made the following comments which reflect the consensus of the judges (at page 194):

> Access rights exist in recognition of the fact that it is normally in the interests of the child to continue and foster the relationship developed with both parents prior to the divorce or separation. This being said, the right to access and the circumstances in which it takes place must be perceived from the vantage point of the child. Wherever the relationship to the non-custodial parent conflicts with the best interests of the child, the furtherance and protection of the child's best interests must take priority over the desires and interests of the parent.
>
> As the ultimate goal of access is the continuation of a relationship which is of significance and support to the child, access must be crafted to preserve and promote that which is healthy and helpful in that relationship so that it may survive to achieve its purpose.

> Accordingly, it is in the interests of the child, and arguably also in the interests of the access parent, to remove or mitigate the sources of on-going conflict which threaten to damage or prevent the continuation of a meaningful relationship.

This extract speaks in terms of an access parent in the context of a divorce, but it is equally appropriate in a non-marital situation where the proposed access "parent" is not a biological parent but one who stands in the place of a parent. The critical point is the "continuation of a relationship which is of significance and support to the child", as stated above.

[62] One of the issues addressed by counsel is the degree to which a biological parent's wishes are to be respected. The respondent made it quite plain during his testimony that he wants to raise his son according to what he thinks is best and that he does not want his son to have contact with the applicant. Brenden is his son and he says he should be allowed to decide what is best. I think most parents would express somewhat similar sentiments.

[63] Generally speaking, there is a presumption that a biological parent is in the best position to ensure his or her child's well-being: *Droit de la famille - 320* (sub nom. *C. v. V.-F.*), [1987] 2 S.C.R. 244 (at page 280). Some experts go so far as to say that once the court decides on who should have custody it is the custodial parent who should decide the conditions under which the child is to be raised, including whether to allow access visits: see Goldstein et al., Beyond the Best Interests of the Child (1973), at Chapter 3. The law, however, accepts that contact with both parents is of incalculable benefit to the child. This has been extended to include a non-biological "parent" where a significant bond has developed between the child and that adult. Furthermore, as the applicant's counsel has pointed out, the wishes of the biological parent are given deference only so long as they are not in conflict with the best interests of the child. The courts have not hesitated to override the wishes of a parent to protect and promote the best interests of a child, such as in cases where a parent objects to blood-transfusions during surgery on the child (as in *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, for example).

[64] In my opinion, the attitude of the respondent is unreasonable. His desire to prevent contact between Brenden and the applicant appears to be motivated not by a rational assessment of his son's best interests but by his resentment and anger at the applicant. That may be due in part to what he feels is a demeaning and disparaging attitude on the part of the applicant towards him, but it is also likely due to the fact that he views the applicant as the one responsible for his incarceration for nine months last

year. His irrational attitude is reflected in his testimony when he said that he would let Brenden see the applicant if he wanted to, but he does not know if Brenden wants to because he never asked Brenden about how he felt and what he wanted to do.

[65] There is no doubt that the reason the child feels such stress and discomfort about his relationship with the applicant is because of his father's opposition to any contact. It is not the relationship with the applicant that bothers him. All of the evidence points to the benefits of ongoing contact and reveals that Brenden places great importance on those contacts. The applicant is the most significant, most constant, female adult in his life. He has no relationship with his biological mother, so in some ways the applicant may be a surrogate in Brenden's eyes. The conflict in Brenden is due, however, to the fact that he does not wish to be disloyal to his father.

[66] The issue therefore comes down to this: Recognizing the respondent's intransigent attitude, and the stress that this is causing for Brenden, is it still in his best interests to order access to the applicant? Or, does the potential harm of continuing this stress outweigh whatever benefits there may be from access?

[67] I think it is important to recognize, as applicant's counsel submitted, that cutting off access because of a custodial parent's intransigence can be a dangerous precedent. It would be a reward for unreasonable behaviour. I think that the law should expect better of people. In this case, I note that the respondent has complied with the previous interim access orders. There is no reason to think he would not comply with any order I issue. Perhaps, instead of expecting the conflict to continue, we should instead express the hope that the respondent can change his attitude once he sees that contact between the applicant and Brenden is actually helpful and healthy for Brenden.

[68] I recognize the concerns about the disparity between the economic and education levels of the parties. There is always a risk that a child will harbour resentment against the parent who cannot give him the same material goods as someone else can. But, just as I expect the respondent to be responsible enough to change his attitude, I also expect the applicant to be responsible enough to not abuse her economic power by ostentatious spending on the child. Nothing in the evidence suggests that she would.

[69] The evidence reveals much that is positive about Brenden's relationship with the applicant: consistency in care and affection, structure and focus. There is also evidence as to the potential negative aspects of cutting off that relationship: sense of loss, abandonment and grief. It is not a matter of simply saying what would be least harmful as of today. I must approach this from the perspective of Brenden, that is, what would

be most beneficial for him today and in the long run. All of the evidence convinces me that what would be most beneficial, and in his best interests, is to maintain and regularize ongoing contact between Brenden and the applicant.

Conclusions

[70] An order will issue granting the applicant access to the child, Brenden Mantla. I indicated to counsel at the conclusion of the trial that if I ordered access I would give counsel an opportunity to make further submissions as to the terms of that access. I agree with the Director's counsel when she said that access terms should be specific. I therefore ask all counsel to consult with each other on proposed terms of access. If they are able to agree, they can submit a draft order to me. If they are unable to agree, I direct that they obtain a convenient date from the Clerk of the Court for submissions in Chambers. I expect such hearing to take place within 60 days of the date of these reasons.

[71] Similarly, if counsel are unable to agree on costs, they may make submissions at a hearing to be held within 60 days. I expect that if we must have a hearing on the terms of access, then we will address the question of costs and any other outstanding items at the same hearing. If costs are to be claimed from the Director, notice should be given to the Director's counsel.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 9th day of April, 1999

Counsel for the Applicant: Katherine R. Peterson, Q.C.

Counsel for the Respondent: Thomas H. Boyd

Counsel for the Director of
Child and Family Services: Shannon R.W. Gullberg

CV 07096

IN THE SUPREME COURT
OF THE NORTHWEST TERRITORIES

BETWEEN:

GERRIAN DONAHUE

Applicant

- and -

GABRIEL MANTLA

Respondent

Reasons for Judgment
of the Honourable Justice J.Z. Vertes
