Wetrade v. *The Director of Child and Family Services*, 2012 NWTSC 70

Date: 2012 09 20
Docket: S-1-CV-2011 000169

IN THE SUPREME 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 children

W., (M.)

W., (T.)

Apprehended: July 10, 2009

BETWEEN

W., (T.)

Applicant (Appellant)

- and -

THE DIRECTOR OF CHILD AND FAMILY SERVICES

Respondent

MEMORANDUM OF JUDGMENT

Introduction

[1] This is an appeal by T.W. from the decision placing her children M.R.W. and T.M.W. in the permanent custody of the Director of Child and Family Services (the "Director"). The children were apprehended in July 2009, a temporary custody order was granted in November 2009 and extended twice. Following a

hearing pursuant to the *Child and Family Services Act*, S.N.W.T. 1997, c. 13 (the "*Act*"), a judge ordered the children into permanent custody in July 2011.

[2] T.W. claims that the judge made a number of errors and seeks the return of the children or alternatively, a new trial. Both T.W. and the Director have each applied to introduce fresh evidence on two occasions. As such, the issues that must be considered on this appeal are:

a. The interpretation and application of the "best interests of the child" test;

b. The credibility of and the weight to be given to the evidence of T.W.'s witnesses;

c. The appropriateness of other less intrusive orders;

d. Findings of fact and whether they were supported by the evidence; and

e. The effect of fresh evidence in this case.

Facts

[3] T.W. is the mother of M.R.W., who was born in 2004, and T.M.W., who was born in 2007. T.W. is an aboriginal woman from Behchoko, Northwest Territories. C.J. is the father of M.R.W. but has not been involved in her life to date and has not participated in these proceedings. A.B. is the father of T.M.W. He has not been involved in T.M.W.'s life to date but was represented by counsel at trial. Other than when the children have been in the custody of the Director, T.W. has been their primary caregiver.

[4] M.R.W. was born with bilateral atresia and received three liver transplants by the time she was one year old. During the third transplant, M.R.W.'s spleen was removed. The evidence is that she is not eligible for a fourth liver transplant. As a result of her medical condition, M.R.W. has significant needs. She is on anti-rejection medication which she is required to take twice daily. This medication requires regular blood tests in order to monitor M.R.W.'s levels and ensure that her liver is functioning properly. She also takes another medication to ward off infection. The immunosuppressant medication which prevents M.R.W.'s body

from rejecting her liver renders her susceptible to infection, as does the absence of her spleen. Because this medication can damage her kidneys, M.R.W. has to drink at least 2 litres of water a day to protect her kidneys. If M.R.W. has a fever, she has to be seen immediately by a health care professional because of the risk of infection. M.R.W. also has monthly and semi-annual medical appointments in Yellowknife and Edmonton to monitor her medical condition.

[5] Aside from her medical condition, M.R.W. also has developmental delays. Prior to entering kindergarten, it was recommended that M.R.W. receive speech therapy and preschool programming. This recommendation was not followed and M.R.W. had to repeat kindergarten. T.M.W. also has special needs; speech therapy and preschool programming are also recommended for him.

[6] M.R.W. was first apprehended on July 15, 2006 when she was approximately 21 months old. T.W. left M.R.W. with a caregiver who did not know how to feed M.R.W., who was tubefed at the time, and did not know how to administer her medications. A child protection worker apprehended M.R.W. after T.W. had been gone for approximately 25 hours. M.R.W. was returned to T.W.'s care on July 17, 2006.

[7] M.R.W. was apprehended a second time on August 30, 2006. T.W. again left M.R.W. with a caregiver who did not know how to feed M.R.W. or administer her medications. M.R.W. was apprehended after T.W. had been gone for approximately 15 hours. An application for Temporary Custody was granted on October 16, 2006 for a six month period. On April 16, 2007, M.R.W. was returned to T.W.'s care.

[8] T.M.W. was born in May 2007 and T.W. had no further involvement with child protection authorities until 2009. On July 10, 2009, T.W. left her children at the Centre for Northern Families daycare. At the end of the day, she did not return to pick them up. As a result, child protection workers were notified and both M.R.W. and T.M.W. were apprehended. T.W. contacted a child protection worker on July 11, 2009 to inquire about her children.

[9] A Plan of Care Agreement was entered into by T.W. and the Plan of Care Committee on July 17, 2009. It was to last for four months and be reviewed after two months. The Plan of Care set out that M.R.W. and T.M.W. needed to live in a "healthy and stable home that is condusive [sic] to their overall wellbeing and promotes positive and responsible parenting." T.W. committed to attend

counselling to address her addictions and to deal with the grief over the recent death of her mother. A number of steps, tasks and services were going to be utilized to assist T.W. They included T.W. attending counselling, utilizing programs at the Centre for Northern Families, having appropriate caregivers who were aware of when she was to return and to provide them with her contact information.

[10] The apprehension of M.R.W. and T.M.W. was confirmed in Territorial Court on July 20, 2009.

[11] As a result of the failure of T.W. to follow through with the commitments in the Plan of Care Agreement, the Agreement was terminated effective September 18, 2009. The Director was concerned that T.W. had missed several appointments with the children, had failed to attend addictions treatment or counselling and had continued to consume alcohol.

[12] A Temporary Custody Order which found that the children were in need of protection and placing them in the care of the Director for a 6 month period was granted on November 17, 2009. The Temporary Custody Order was extended for a further six month period on May 17, 2010 and again on November 15, 2010.

[13] During this period, T.W. continued to consume alcohol, did not attend treatment on several occasions and missed scheduled appointments with the children. T.W. moved back to Behchoko during this time. She did not have a vehicle and had difficulty getting transportation to Yellowknife. Arrangements were made for T.W. to get rides to and from Yellowknife in order to meet with her children. Despite this, she continued to miss rides and, therefore, her appointments with the children and child protection workers. There were also concerns that T.W. was in an abusive spousal relationship.

[14] M.R.W.'s health continued to be a concern while she was in the temporary custody of the Director. M.R.W. was hospitalized from December 15-25, 2010 with suspected meningitis. T.W. attended the hospital on December 17th and stayed with M.R.W. until December 24th.

[15] T.W. did attend treatment in June 2010 but began drinking a few days after completing treatment. T.W. successfully completed treatment again in May 2011. Starting on June 5, 2011, T.W. attended five appointments with the children with no missed appointments.

[16] On July 4, 2011, Cheryl Mitchell, a child protection worker, and a co-worker observed T.W. in the liquor store. T.W. advised the co-worker that she was there doing a friend a favour. Ms. Mitchell did not speak to T.W. and thought that T.W. appeared sober. On July 7, 2011, Ms. Mitchell observed T.W. on 50th Street, near the Gold Range Bar around 11:00 p.m. Ms. Mitchell was driving past and was not able to make any observations regarding T.W.'s sobriety.

[17] T.W. was advised in March 2011 that the Director would be making an application to place M.R.W. and T.M.W. in the permanent custody of the Director. The hearing occurred on July 12, 13, 15 and 22, 2011.

[18] This summarizes the evidence that was available to the trial judge. On the appeal, both T.W. and the Director applied to introduce fresh evidence. The admissibility and use of the fresh evidence will be discussed later in these reasons.

Standard of Review

[19] Section 88 of the *Act* provides a statutory right of appeal to the Supreme Court where an order is made by a justice of the peace or, as in this case, by the Territorial Court. In considering an appeal, section 88(5) provides some guidance to an appellate court:

> 88 (5) The Supreme Court or Court of Appeal may, on hearing an appeal made under subsection (1), affirm, reverse or modify the order, and make any other order that the court considers necessary and proper, including a declaration that a child needs protection, where in the opinion of the Supreme Court or Court of Appeal it is in the **best interests of the child** to do so. [Emphasis added]

[20] The standard of review with respect to errors of law is that of correctness and for findings of fact is that of palpable and overriding error. These standards of review are applicable in matters involving child protection hearings. *Housen* v. *Nikolaisen*, [2002] 2 S.C.R. 235; *Re. S.F.*, 2009 SKCA 121.

[21] Appellate courts reviewing child protection matters should also not interfere with a trial judges' decision "absent an error in principle, a failure to consider all relevant factors, a consideration of an irrelevant factor or a lack of factual support for the judgment." *C.(G.C.)* v. *New Brunswick (Minister of Health and Community Services*, [1988] 1 S.C.R. 1073 at para. 5.

[22] The term "best interests of the child" is referred to throughout the *Act* and specifically in s. 88(5). This criterion must be kept in mind not only by the trial judge but also by an appellate court in determining an appeal.

Legislation

[23] In a child protection hearing, pursuant to section 27 of the *Act*, the court must determine whether a child needs protection. Section 7(3) of the *Act* outlines the criteria for determining when a child is in need of protection. In this case, the relevant subsection states:

> 7 (3) A child needs protection where
>
> (r) the child's parent is unavailable or unable or unwilling to properly care for the child and the child's extended family has not made adequate provision for the child's care or custody

[24] In considering whether a child needs protection, a court is required, pursuant to section 7(2), to respect differing cultural values and practices and to consider community standards.

[25] Section 28 outlines the orders that can be made once a child has been determined to be in need of protection:

> **28.** (1) A court may make one of the following child protection orders that is, in the opinion of the court, in the best interests of the child who is the subject of the hearing:
>
> (a) the child remain with or be returned to his or her parent or the person having actual care of the child
>
> (i) at the time the declaration was made under subsection 27(2), where the child was not apprehended, or
>
> (ii) at the time the child was apprehended, where the child was apprehended;
>
> (b) the child remain with or be returned to his or her parent or the person having actual care of the child
>
> (i) at the time the declaration was made under subsection 27(2), where the child was not apprehended, or

(ii) at the time the child was apprehended, where the child was apprehended, subject to supervision by a Child Protection Worker and to any terms and conditions that the court considers necessary and proper, for a specified period not exceeding 12 months;

(c) the child be placed in the temporary custody of the Director for a specified period not exceeding 12 months, and the court may specify in the order

(i) any terms and conditions that the court considers necessary and proper, and

(ii) that the child's parent or person having actual care of the child

(A) at the time the declaration was made under subsection 27(2), where the child was not apprehended, or

(B) at the time the child was apprehended, where the child was apprehended,

be granted access to the child on the terms and conditions that the court considers appropriate;

(d) the child be placed in the permanent custody of the Director, and the court may specify in the order

(i) any terms and conditions that the court considers necessary and proper, and

(ii) that the child's parent or person having actual care of the child

(A) at the time the declaration was made under subsection 27(2), where the child was not apprehended, or

(B) at the time the child was apprehended, where the child was apprehended,

be granted access to the child on the terms and conditions that the court considers appropriate.

[26] Section 28(10) of the *Act* prohibits the court from making or extending an order that places the child in the temporary custody of the Director for a period exceeding 24 months.

[27] In considering what is in the best interests of the child, section 3 outlines the relevant factors that a court must take into account:

> **3.** Where there is a reference in this Act to the best interests of a child, all relevant factors must be taken into consideration in determining the best interests of a child including the following factors, with a recognition that differing cultural values and practices must be respected in making that determination:
>
> (a) the child's safety;
> (b) the child's physical, mental and emotional level of development and needs, and the appropriate care or treatment to meet those needs;
> (c) the child's cultural, linguistic and spiritual or religious upbringing and ties;
> (d) the importance for the child's development of a positive relationship with his or her parent, a secure place as a wanted and needed member of the family, and a stable environment;
> (e) the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity;
> (f) the risk that the child may suffer harm through being removed from, kept away from, returned to, or allowed to remain in, the care of a parent;
> (g) the merits of any proposed care plan for the child;
> (h) the child's relationship by blood or through adoption;
> (i) the child's views and preferences, if they can be reasonably ascertained;
> (j) the effects on the child of a delay in making a decision.

Standard of Proof in Child Protection Cases

[28] The standard of proof in child protection cases is the civil standard of balance of probabilities with the onus or the burden of proof upon the Director: *Prince Edward Island (Director of Child Welfare)* v. *N.W.*, [1977] P.E.I.J. No. 103 (S.C.-A.D.) at para. 5; *The Children's Aid Society of the Niagara Region* v. *P.-L.R. and M.T.P.*, 2005 CanLII 11791 (ON S.C.) at para. 32.

[29] There are two standards of proof in Canada: 1) the criminal standard of proof requiring proof beyond a reasonable doubt; and 2) the civil standard of proof on a balance of probabilities. There have been differing views about whether the standard of proof in child protection matters requires a higher standard within the

balance of probabilities. Some courts have held that there are different degrees of probability within the civil standard and that depending on the subject matter, a higher degree of probability is warranted. Other courts have held that the standard of proof remains on a balance of probabilities but what is required is clear and compelling evidence.

[30] The Supreme Court of Canada appears to have resolved these issues in *F.H.* v. *McDougall*, [2008] 3 S.C.R. 41, where the court addressed whether there are varying degrees of proof within the civil standard and whether clear and compelling evidence was required in more serious cases. Justice Rothstein held that there was only one standard of proof in civil cases and that was on a balance of probabilities. He stated at paras. 45- 46:

> To suggest that depending on the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency.

[31] As such, I am satisfied that in child protection matters, as in all civil matters, there is one standard of proof which is on a balance of probabilities. The evidence that is required must, again as in all civil cases, be analyzed with care and be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

Best Interests of the Child

[32] The test to be used in child protection matters is that of the "best interests of the child." This is clear from the *Act* and the case law which has developed in this area: *Catholic Children's Aid Society of Metropolitan Toronto* v. *C.M.,* [1994] 2. S.C.R. 165.

[33] The trial judge was aware that the test was the best interests of the children. He used the term throughout his reasons and specifically stated (at p. 30 of the Appeal Book):

> The rest of my reasons will focus upon [T.W.] in a number of ways but the ultimate focus is the best interests of the children.

[34] Prior to this, the trial judge had reviewed the children's situation: their background, their personal and medical needs, and their prior involvement with the Director. The trial judge went on to consider T.W.'s situation and her plans for herself and her children.

[35] T.W. contends that the trial judge erred in his application of the best interests of the child test by focusing too heavily on T.W.'s shortcomings, misapprehending the evidence and failing to properly consider the overarching principles of the *Act*. Further, the trial judge's approach had the effect of shifting the burden of proof to T.W. which was unfair and resulted in another error. In my view, the trial judge's main focus was the best interests of the children and his approach to the evidence and application of the principles of the *Act* was appropriate. There was no error.

[36] In determining whether to return the children to T.W. or to make another custody order, either temporary or permanent, the trial judge was required to consider the best interests of the children. Pursuant to section 3 of the *Act*, this requires a trial judge to consider a number of factors including the children's safety, any proposed care plan for the children, and the risk that the children may suffer harm through being returned to the care of the parent.

[37] In considering the applicable factors in the best interests of the children test, a trial judge is required to analyze the parent's situation: their personal circumstances, abilities, skills, strengths, weaknesses and shortcomings. A child protection proceeding by its nature and pursuant to the *Act* contemplates a parent putting forward a plan to care for their children. Determining the best interests of the children requires a trial judge to scrutinize with care any proposed plan for their future. The trial judge's analysis of T.W.'s circumstances and plans was part of his determination of the best interests of the children and did not have the effect of shifting the burden of proof to T.W.

[38] In analyzing T.W.'s plan, the trial judge considered all of the circumstances which might impact upon T.W. and her ability to properly care for the children: her willingness to move to Yellowknife, her lack of housing, her substance abuse

problem, the anticipated birth of her 3rd child, her history of leaving the children with caregivers for extended and unanticipated periods of time, her problematic and uncertain spousal relationship, her plans for schooling and employment, and the recent changes she had made to her life. Unfortunately, there were many areas of concern in T.W.'s life. The trial judge could not ignore them and by highlighting them, he did not place too much emphasis on T.W.'s shortcomings.

[39] Counsel for T.W. also argues that the trial judge disregarded T.W.'s testimony regarding the importance of the children's cultural, linguistic and spiritual upbringing and the effect of losing their family ties as he was required to under the *Act*. The Preamble and sections 2 and 3 of the *Act* establish a number of principles and factors that must be considered in determining the best interests of the child. The *Act* establishes that differing cultural values and practices are to be respected when considering the best interests of children. They are one of many factors to be considered.

[40] While the trial judge made no specific mention of cultural values and practices in his oral reasons, he referred extensively to the best interests of the children which is the overarching principle under the *Act*. Moreover, the cultural, linguistic and spiritual upbringing of the children does not appear to have been a major issue at the trial. While I do not have the benefit of counsel's closing submissions (which were not included in the Appeal Book), the issue of culture arose only briefly in evidence at the trial where T.W. testified about speaking Tłįchǫ at home with the children and her plan for the children to continue to learn Tłįchǫ. Given how the evidence unfolded at trial, I cannot conclude that the trial judge's failure to refer to the cultural values and beliefs of T.W. or her children in his interpretation of the best interests of the children was an error.

[41] Counsel for T.W. also contends that the trial judge erred in his overall interpretation of the best interests of the children by misapprehending the evidence. Essentially, that the evidence was not clear and compelling and the trial judge set the bar too low. There was a considerable amount of evidence before the trial judge. There were a number of exhibits which comprised hundreds of pages and there were several witnesses who testified on behalf of the Director and T.W. Within this evidence, there was hearsay, opinion and other questionable evidence. However, there were also witnesses who testified with direct knowledge of the events, specifically the instances where M.R.W. and T.M.W. were apprehended by the Director and, following the apprehensions, the interactions the child protection workers had with T.W. and their observations of T.W. and her children.

[42] The trial judge was aware that the quality of the evidence varied and that he had to approach the assessment of the evidence with caution. He stated (at p. 19 of the Appeal Book):

> I have assessed and weighed all of the admissible evidence. I have had to be careful here because some of the evidence, while arguably admissible hearsay within the context of what is allowed in this sort of a proceeding, amounted to hearsay upon hearsay, perhaps even more. And that sort of evidence... one has to view it, I think, in a way from the stronger more admissible evidence. In fact, a part of the exhibit book was not admitted for the truth of what is asserted in it and I have approached that part of the book with that caution in mind.

[43] The trial judge's approach and assessment of the evidence was reasonable and the evidence itself was sufficiently clear, convincing and cogent to justify the trial judge's conclusions on the best interests of the children.

The Credibility of and Weight to be Given to the Evidence of T.W.'s Witnesses

[44] In addition to T.W., two witnesses testified on T.W.'s behalf at the trial. T.W. claims that the trial judge failed to make findings of credibility or to give reasons for disregarding the evidence of T.W.'s witnesses, Arlene Hache and Tina Drew. Further, this evidence was not contradicted and was deserving of more weight as it related to T.W.'s parenting abilities both before and after her recovery for her addictions. While the trial judge does not specifically discuss the evidence of Arlene Hache and Tina Drew in his decision, I am satisfied that their evidence was of limited assistance and his failure to refer specifically to their evidence was not an error.

[45] In his reasons, the trial judge listed the witnesses who testified during the hearing and included Ms. Drew and Ms. Hache. He did not further discuss their evidence or make any assessment of their credibility.

[46] While a trial judge has a duty to provide reasons, he is not required to analyze evidence that is not controversial or to set out every finding or conclusion that he has made during the process of coming to a decision: *R.* v. *R.E.M.*, 2008 SCC 51.

[47] In this case, much of the evidence was not in dispute. The history of T.W.'s contact with the Director was, for the most part, admitted. The evidence of Arlene Hache and Tina Drew related to their contact with T.W. and her children at the

Centre for Northern Families. T.W. attended a number of classes and utilized the daycare there prior to her children being apprehended in 2009. Both witnesses made observations about T.W. and her parenting abilities. None of this was controversial or disputed.

[48] What was in issue was whether the efforts that T.W. had made since M.R.W. and T.M.W. had been apprehended in 2009 established that she could properly care for her children. As the trial judge stated (at p. 44 of the Appeal Book), "There is the issue of ability, and that, to me, is the main issue."

[49] It is apparent that T.W. had a number of issues to deal with after the apprehension of M.R.W. and T.M.W. and that she had varying degrees of success in dealing with those issues. The evidence of Ms. Drew and Ms. Hache's contact with T.W. after the 2009 apprehension of her children was limited. In the circumstances, their evidence was of limited assistance to the trial judge and he made no error in not specifically discussing their evidence in detail.

The Appropriateness of Other Less Intrusive Orders

[50] In making a decision under section 28 of the *Act*, the trial judge had essentially three options: returning the children to T.W. (with or without conditions), extending the temporary custody order or making a permanent custody order. T.W. argues that in making a permanent custody order, the trial judge failed to consider other less intrusive orders which would have been in the children's best interests. Further, in his analysis, the trial judge erred by relying upon cases solely for their principles without considering that the cases were distinguishable on their facts. In my view, the trial judge did consider the options available to him and used the relevant case law appropriately.

[51] The trial judge was clearly aware of the options available to him. At page 29 of the Appeal Book, the trial judge listed the orders that were available to him. Later in his reasons, he reviewed the options and discussed them. He found that M.R.W. and T.M.W. were in need of protection and could not simply be returned to T.W.

[52] The trial judge also considered whether it was in the best interests of the children to make a temporary custody order, which could only be made until November 2011 because of the time limits within the *Act*. Considering M.R.W.'s medical condition, the trial judge was concerned that providing T.W. with another

chance had "a potentially deadly impact." The trial judge acknowledged T.W.'s progress but viewed it as relatively recent when considering the overall history. The trial judge concluded that it was not in the best interests of the children for a temporary custody order to be made.

[53] It is apparent that the trial judge did consider the options that were available to him and came to a reasonable conclusion about which order was appropriate in the circumstances.

[54] In reviewing the case law provided to him, the trial judge noted that some were of persuasive value. There is no indication that any of the cases provided were binding upon him. The trial judge noted that counsel for T.W. had urged him to distinguish the cases on their facts. In rejecting that submission, the trial judge stated (at p. 46 of the Appeal Book):

> But then every case is different, every child is different from every other child, every parent is different, every set of circumstances is different so that is really not a problem for me. It is the principles that are important.

[55] As noted by the Supreme Court of Canada in *R.* v. *Henry*, 2005 SCC 76 at paras. 52-57, the traditional view when analyzing case law was that a case was only authority for what it decided and every judgment was applicable to its particular facts. The recommended approach is now to determine what the case decides and what legal principles the case stands for. Some cases will stand for a narrow legal point while others will involve wider analysis intended for guidance in a particular area.

[56] The facts in every child protection case will be different, to one degree or another, and every case submitted at a child protection hearing could potentially be distinguished on the facts. I agree with the trial judge that it is the principles that are important. It is the principles that have been developed through a body of case law that are of assistance to a court, rather than a specific decision in a similar case. Each case needs to be examined with a view to its decision (based upon its particular facts), what general principles it stands for and whether it is of assistance in the case before the court. The best interests of the children require an analysis individual to each case, drawing on principles which may guide the court. As such, the trial judge made no error in his use of the case law.

Findings of Fact and Whether They Were Supported by the Evidence

[57] Medical evidence was considered by the trial judge including evidence contained in a letter by a pediatrician, Dr. Radziminski. T.W. claims that the trial judge erred in placing too much weight on Dr. Radziminski's letter and making findings of fact regarding M.R.W.'s future medical needs which were not supported by the evidence. I do not agree. The conclusions that the trial judge made regarding M.R.W.'s medical condition and future needs were reasonable and available on the evidence before him.

[58] The letter of Dr. Radziminski was the subject of disagreement at trial. Counsel for T.W. initially objected to its admission. Subsequently, the letter was admitted with the following caveats, which were with respect to the weight to be given to the letter:

1) Dr. Radziminski was not part of the liver transplant team who treated M.R.W. and is not a liver specialist; and

2) Dr. Radziminski was a reasonably new pediatrician in treating M.R.W. and only began seeing M.R.W. in April 2010.

[59] The letter contained a description of M.R.W.'s medical condition, treatment and prognosis. The trial judge noted the limitations placed upon Dr. Radziminski's opinion and noted that the doctor's opinion was that M.R.W. should "not be allowed into an unstable or potentially unstable home environment, even for brief periods of time."

[60] In considering the doctor's opinion, the trial judge stated (at p. 50 of the Appeal Book):

> That passage by itself speaks volumes because the doctor, when she wrote that, did not have all of the evidence before her that I have and I find that remark to be right on target. It doesn't take a medical expert to make that statement.

[61] M.R.W. is 7, almost 8 now, and counsel for T.W. argues that as M.R.W. gets older, her situation will not be as severe as when she was an infant. While M.R.W. may be able to administer her medication and monitor her medical situation as she grows, that does not change the reality of M.R.W.'s situation.

[62] The uncontroverted evidence is that M.R.W. has had three liver transplants and is not eligible for a fourth; she is required daily to take immunosuppressant medication to prevent her body from rejecting her liver and antibiotics to prevent infection; she has to drink at least 2 litres of water a day to protect her kidneys; and if she has a fever, she needs to be seen immediately by a health care professional. M.R.W.'s medical condition is something that she and her caregivers have to deal with on a daily basis. Instability has the potential to threaten M.R.W.'s medical condition. I agree that it does not require a medical expert to come to that conclusion.

[63] T.W. also contends that the trial judge erred in inferring other findings of facts regarding T.W. and her evidence. As discussed above, the trial judge reviewed T.W.'s situation and noted a number of concerns regarding T.W.'s evidence and personal circumstances. Having reviewed the evidence before the trial judge and his reasons, his conclusions in these areas were reasonable and available to him on the evidence.

[64] Having concluded that the trial judge did not err in his decision, I turn to the fresh evidence applications brought before me.

Fresh Evidence Applications

[65] T.W. and the Director each filed two applications to introduce fresh evidence. The first application of T.W. and the Director were heard at the appeal hearing before me on April 3, 2012 and the second applications were heard in special chambers on June 20, 2012. Both parties essentially consented to the evidence being admitted but differed on the weight to be applied to the evidence and the use that was to be made of the evidence in the appeal process.

The First Fresh Evidence Application

[66] I allowed the fresh evidence in the first applications heard at the appeal hearing on the basis of the decisions in *Re Genereux and Catholic Children's Aid Society of Metropolitan Toronto* (1985), 53 O.R. (2d) 163 (C.A.) and *C.M.*, supra. In *Re Genereux*, it was noted that when dealing with child welfare matters that a judge may exercise discretion and hear fresh evidence that is relevant to the best interests of the child. In *C.M.*, the Supreme Court of Canada noted the importance of having accurate and up-to-date information on children in child welfare matters. The evidence presented by T.W. and the Director was in Affidavit form and

provided an update on T.W.'s situation as well as notes from case workers regarding T.W.'s contact with her children since the order of the trial judge.

Evidence of the Applicant (Appellant) T.W.

[67] The evidence of T.W. was that she had been sober since February 2011 and had maintained her sobriety. She had been attending counselling and postnatal classes in Behchoko. She was living with her brother in Behchoko because she did not have housing in Yellowknife. Her name was on the waiting list with the Housing Authority in Yellowknife. T.W. was not employed and indicated that she was planning on consolidating her bills and then applying to a housing emergency fund so that she could pay her debts and be placed on a waiting list for a housing unit in Yellowknife.

[68] With respect to her children, T.W. stated that initially it was very difficult for her to accept the decision granting permanent custody to the Director but that she had since visited with her children for one hour every two weeks at the social services office. She called the social worker often to find out how the children were doing. She missed her children very much and found it difficult to be apart from them. She did not have a vehicle so it was difficult for her to visit her children. She gave birth to a third child I.S.W. in September 2011 and was caring for her full-time.

Evidence of the Respondent Director of Child and Family Services.

[69] The evidence filed on behalf of the Director was from Cheryl Mitchell, the child protection worker who is responsible for this file. Attached as an Exhibit to the Affidavit were the case notes made by the child protection workers who were under a duty to make notes on the file. The case notes updated what had occurred with respect to T.W. and her children M.R.W. and T.M.W. since the decision placing the children into permanent custody. The case notes also detailed conversations with the foster parents who are caring for M.R.W. and T.M.W.

[70] T.W. had supervised visits with M.R.W. and T.M.W. on July 28, August 4, September 1, 8, 15 and 29, October 27, November 10, December 8 and 22, 2011, and January 5, February 16, and March 6, 2012. It is not necessary to describe each visit in detail but I will highlight certain evidence that I view as relevant.

[71] First, it is apparent from the case notes that T.W. has visited regularly with M.R.W. and T.M.W. and had not missed any scheduled appointments in the period

since July 28, 2011. At the visits, she had been appropriately affectionate and loving to the children. She had brought them presents and snacks. At times, she had been emotional at the conclusion of visits.

[72] While T.W. had brought snacks to the visits, she had frequently brought snacks that were not appropriate. She had brought chips, chocolate milk, chocolate, and candy on multiple occasions. This occurred despite T.W. being advised numerous times by child protection workers that the snacks were not appropriate. It resulted in problems with the children at the visits and had repercussions after the visits, including M.R.W. becoming sick after a visit and having to be taken to the hospital.

[73] T.W. also had issues with her interactions with the children at visits. She had frequently given in to the children's demands for more snacks and was unable to discipline them. She repeatedly questioned them about the foster home that they are placed in and told them how to act or respond to the foster parents on various issues.

[74] The case notes also revealed that there continued to be issues with M.R.W.'s health. She had chronic yeast infections and was prescribed an inhaler because of a constant cough. M.R.W.'s bedwetting continued to be a concern which might require medication in the future.

[75] The foster parents also frequently reported that there were behavioural issues with both children after the visits with either M.R.W. or T.M.W. misbehaving with the foster parents, each other or other children.

The Second Fresh Evidence Application

[76] The second fresh evidence application arose when the Director filed an application to introduce fresh evidence. T.W. filed a responding application and both applications were heard before me on June 20, 2012. The appeal was still under reserve at that time.

Evidence of the Respondent Director of Child and Family Services

[77] The evidence filed on behalf of the Director consisted of two affidavits, that of Cheryl Mitchell and Myza Hill who have had contact with T.W. since the appeal was heard on April 3, 2012. Case notes and investigation reports were attached as Exhibits to the Affidavits.

[78] Myza Hill is a child protection worker in Behchoko and received a report on May 9, 2012 of an allegation of domestic violence involving T.W. Ms. Hill went to T.W.'s residence where T.W. had been arrested for assaulting her common-law spouse, S.L. Ms. Hill apprehended T.W.'s baby, I.S.W., on May 9, 2012. I.S.W. was returned to the custody of S.L. on May 10, 2012. Information in the case notes suggests that T.W. was released from custody on conditions not to have any contact with S.L. T.W. was apparently arrested for breaching the no-contact condition that same day and held in custody for a few days.

[79] Myza Hill saw T.W. outside of the courthouse in Yellowknife on May 15, 2012. T.W. advised her that she had just gotten out of custody and was going to participate in a family violence program. On May 17, 2012, T.W. called Ms. Hill and advised that she wanted to attend a treatment program in June. T.W. also requested that Ms. Hill facilitate a visit with I.S.W. because she was not permitted to have contact with S.L. Ms. Hill indicated that she could assist with that and T.W. just needed to call to arrange it.

[80] Cheryl Mitchell's Affidavit details a conversation she had with T.W. at a regularly scheduled visit with M.R.W. and T.M.W. On May 15, 2012, T.W. arrived for the visit without I.S.W. and Ms. Mitchell inquired where the baby was. T.W. advised her that I.S.W. was with S.L. and advised her about the domestic violence charges and apprehension of I.S.W. Ms. Mitchell was not aware that T.W. had reconciled with S.L.

[81] Ms. Mitchell expressed concerns because the relationship with S.L. had been a factor at the trial involving M.R.W. and T.M.W. Ms. Mitchell's view is that the safety of M.R.W. and T.M.W. would be a concern if they were returned to T.W.'s care and she continued in a relationship with S.L.

Evidence of the Applicant (Appellant) T.W.

[82] The evidence of T.W. was that she is no longer in a relationship with S.L. After their child was born, S.L. had promised T.W. that he would go to treatment and support T.W. and their child. T.W. now realizes that she should not have let S.L. back into her life.

[83] T.W., as of June 7, 2012, was residing at a shelter in Yellowknife. Her plans are to stay in Yellowknife and attempt to secure housing. T.W. has applied to Legal Aid for assistance in getting legal custody of I.S.W. T.W. advises that she

has remained sober since February 2011 and is attending counselling at the Healing Drum Society.

Admissibility of the Fresh evidence

[84] The test as set out in *C.M., supra* for the admissibility of fresh evidence establishes four criteria:

a. Could the evidence have been adduced before?

b. Is the evidence highly relevant in that it provides an accurate picture of the situation?

c. Is the evidence potentially decisive as to the best interests of the children?

d. Is the evidence credible?

[85] Neither party took the position that the evidence was not admissible. The prevailing view was that it was important to gain an accurate view of the current situation. As the evidence provides an update on T.W.'s situation and events that have transpired since the permanent custody order was made, it could not have been adduced before, it is highly relevant, potentially decisive and credible. While counsel for T.W. has challenged the credibility of the evidence, my understanding is the objection relates to the use to be made of the evidence and whether it is sufficiently credible so as to be decisive rather than the admissibility of the evidence. As such, I find that the evidence adduced at the fresh evidence applications is admissible.

Effect of the Fresh Evidence

[86] Given that I have concluded that the trial judge made no error in his decision, I have to now consider whether the new evidence could have altered his decision, had it been available to him: *Re. J.B.*, 1998 CanLII 18071 (NL CA). In my view, the evidence could not have altered the trial judge's decision.

[87] The evidence demonstrates that T.W. has made some progress in that she has visited regularly with the children since the permanent custody order was made, she is reportedly sober and has maintained her sobriety since February 2011, and she has attended counselling and postnatal classes.

[88] The evidence also demonstrates that many of the concerns that the trial judge expressed are still concerns. T.W. does not have housing in Yellowknife. She is living at the women's shelter and is apparently on the waiting list for housing. She has not attended school or secured employment. T.W. reconciled with S.L. despite advising the trial judge that she had no intention of doing so. T.W. was charged with assaulting S.L. in May 2012 which appears to have precipitated their break-up. She is now trying to get legal custody of I.S.W.

[89] While T.W. has made progress and her continued sobriety is to be commended, there have also been setbacks and instability still appears to be a factor in T.W.'s life. I recognize that this evidence has not been tested in cross-examination and that the trial judge may be the most appropriate person to make the ultimate determination regarding this evidence. However, I have to be satisfied that this evidence could have affected the trial judge's determination. On the evidence before me, I do not see that this evidence could have changed the trial judge's decision. If anything, the evidence supports many of the concerns he had.

Conclusion

[90] For the foregoing reasons, the appeal is dismissed.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
20th day of September 2012

Counsel for the Applicant: J. Savoie
Counsel for the Respondent: S. MacPherson

S-1-CV-2011 000169

IN THE SUPREME 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 children

W., (M.)

W., (T.)

Apprehended: July 10, 2009

BETWEEN

TINA WETRADE
Applicant (Appellant)

- and -

THE DIRECTOR OF CHILD AND FAMILY
SERVICES
Respondent

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE S.H. SMALLWOOD
