IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the Adoption Act

AND IN THE MATTER OF an application for the Adoption of **M.J.**, a female child born December 20, 2005, by K.S. and A.S. both of the City of Yellowknife, in the Northwest Territories.

Transcript of the Reasons for Decision delivered by The Honourable Justice L. A. Charbonneau, in Yellowknife, in the Northwest Territories, on June 10, 2015.

APPEARANCES:

Ms. T. Paradis: Counsel on behalf of the Petitioners

Ms. B. McIlmoyle: Counsel on behalf of the Child

THE COURT: Good afternoon, everyone.

I just want to ask a few questions before I start. I am prepared to give my decision, and the answer to this question is not going to change anything to it, but I just want to clarify some things for the record. When I was reviewing all the materials on this file before this hearing, but also at the conclusion of the hearing yesterday, I did not see in the affidavit of service folder which is on the court file anything showing that the order appointing counsel to the child and the order amending that order was ever served on the L.s. Are either of you able to help me with that? There's an affidavit of service that deals with the order setting the matter for a special chambers hearing, and I know those two things happen on the same date, but I could not see an affidavit of service confirming that the order appointing counsel and the amending order was served.

MS. PARADIS: Your Honour, I understand the question. The day that we appeared in chambers and had the office -- the children's lawyer appointed, we had served those materials in advance upon the OCL, and Ken Kinnear had appeared on it. The standard practice is for the office of the children's lawyer to draft the

order appointing, as well as -- I believe serve it as well in their capacity. So if there was no affidavit of service on file, I think that we would have to ask Mr. Kinnear of what their normal practices are.

THE COURT: So, in other words, you don't have proof of service of that?

MS. PARADIS: I don't have proof of service of that. I also know that the order had been amended.

THE COURT: Yes. There's no proof of service of that.

MS. PARADIS: Yes.

THE COURT: All right.

Can you help, Ms. McIlmoyle?

MS. MCILMOYLE: Your Honour, I did not serve, but I did provide copies of the orders when I sent correspondence to the L.s.

THE COURT: So those -- you sent two letters at the end of --

MS. MCILMOYLE: Yes. One in January and one in March.

THE COURT: Okay. And you sent those -- copies of those two orders, the initial one and the amending one, with your letter?

MS. MCILMOYLE: Yes, I did.

THE COURT: Okay. I think, just for

future reference, you may want to take this back to Mr. Kinnear. I think it is important that those orders be served just so that the record is complete. This occurred to me in the context of assessing the significance of their lack of response to you.

MS. MCILMOYLE: Right.

THE COURT: If someone did not know, they might be quite puzzled and not quite understand what this is about, but I'm glad to hear that they got a copy at least. But I think this is a procedure that needs to be sorted out between -- I know it's not your office, but the office you're working for in this capacity and the family bar in general.

MS. MCILMOYLE: Thank you, Your Honour. I'll pass that along to Mr. Kinnear.

THE COURT: All right. Thank you.

I have a fair bit to say this afternoon and I will ask you, Madam Reporter, to prepare a transcript of my decision. I ask that anytime I'm referring to anyone by name in that decision, whether it's the party's or even a witness, that you use initials only. Although I will refer to names as I speak here this afternoon.

Now, because this application

today is one step in the context of a broader process, there are a number of things I wanted to go over in ruling on this application. And although I heard the evidence just yesterday, I've attempted to be thorough in explaining why I've come to the conclusion I have. I will say at the outset that I am going to grant the application dispensing with the consent of the biological mother and maternal grandparents as part of this process, but I want to spend some time explaining why, and I also want to spend some time explaining some of the steps that I think will have to be undertaken and some issues that will have to be addressed at later stages in this matter as this petition process continues.

The Petitioners commenced proceedings by Petition filed April 4, 2014. They seek to adopt the child, M., who is their granddaughter. The Petitioner's son is the child's biological father and he has signed a document whereby he consents to the adoption. In this application the Petitioners seek an order dispensing with the consent of the child's mother and the child's maternal grandparents, W.L. and S.L.

In considering this application, I have taken into account the

affidavits that were filed by Ms. S., the joint affidavit filed by S.L. and W.L., as well as the viva voce evidence that was adduced at the hearing yesterday.

The child was born in December 2005. Proceedings related to her custody were commenced in 2007. Her paternal grandmother, Ms. S., and her maternal grandparents, the L.s, were granted leave to seek custody as part of those proceedings. On October 29th, 2007, a Consent Order issued whereby Ms. S. and the L.s were granted joint custody of the child, with the child being placed in the day-to-day care of Mr. and Ms. L. in Tulita. The Order also provided for generous access by the paternal grandparents, who live in Yellowknife. The access clause, which was paragraph 3 of the Order, stated that the father and M.S., the grandmother, would have generous and liberal access to the child, and specifically until the child becomes of school age the child would spend up to four months, and no less than three months, of each and every year in the care of the child's father and M.S. Access was to be exercised in the home of K.S. or as could otherwise be mutually agreed by the parties.

The access clause contemplated

the possibility for the access to take place in the father's home if he was able to provide a home for the child, that the length of each period of access would be at the discretion of the parties and in consideration of the best interest of the child, that it would be exercised at a minimum of six weeks per visit twice a year or as could be otherwise mutually agreed to.

There was a clause that dealt with what would happen when the child became of school age, stating that the child was to spend six weeks during the summer holidays each and every year in the care of her father and Ms. S., and there were further clauses dealing with alternate holidays access and how much in advance the access would be organized. And there was also a clause saying that there would be any additional access that the parties could mutually agree to.

At the hearing yesterday Ms. S. testified that between October 2007 and September 2010 the child, in fact, spent much more than four months per year in Yellowknife. She testified that the child spent as much as eight months each of those years with her husband and her in blocks of approximately four months. This changed in September 2014; the child was to

start school that fall and it was not expected that she would be able to be in Yellowknife for the same lengthy periods of times as before.

The evidence about the extent of access that took place between October 2007 and December 2010 is not contradicted. The joint affidavit sworn by the L.s does not provide any details as to the frequency of access between 2007 and 2010.

It is uncontradicted that since December 2010 the child has been in the day-to-day care of the S.s, but there is very conflicting evidence in the affidavits as to how this came to be. This was one of the reasons why this matter was scheduled for a special chambers hearing with viva voce evidence.

In her affidavit, Ms. S. deposed that in the context of the Christmas visit in December 2010 it came to her attention that the child was not going to kindergarten regularly. She also testified that the child appeared to her to have lost weight and that her hair was greasy. But school was really her main concern on my understanding of her evidence. She deposed in her affidavit that she called Ms. L. to express her concern about the child not being in school and that she suggested perhaps that it

would be better if the child remained with the S.s in Yellowknife so that she would attend school regularly. In her affidavit, she deposes that Ms. L. did not object to this.

Ms. S.'s evidence at the hearing yesterday was not wholly consistent with her affidavit. Her testimony was that when she found out the child had not been going to school this made her angry and she called the L.s and told them she would not be returning the child to them because they were not caring for her adequately if they were not ensuring that she was going to school. Ms. S. testified that Ms. L. hung up on her during that conversation and did not respond one way or another to what she was telling her. She also testified that since then the L.s have never asked that the child be returned to them, nor taken any legal steps to have her returned to them.

The version of events in the joint affidavit sworn by the L.s is quite different. They depose that the child went to Yellowknife for the Christmas visit in December 2010 and that during that visit they tried to reach the child several times and were unsuccessful. They depose that there were instances where the phone seemed to be off the

hook, as it always rang busy, and other times it would just ring and ring and no one would answer. They depose that they took steps to get legal assistance in early 2011 in order to have the child returned to them. In June 2011 they commenced the application of process for a custom aboriginal adoption of the child. Their affidavit does not make any mention of the concerns expressed by Ms. S around the child not going to school or the fact that she told them she would not return the child to them for that reason.

In her testimony yesterday, Ms. S. denied firmly doing anything to cut off the L.s' access to the child during that Christmas visit or at any other point. She testified that she recognizes the importance of the child maintaining contact with both sides of her heritage and that if the L.s want to spend time with the child she would be happy to let that happen. She also explained that there has always been an answering machine in her home, that the phone number has been the same throughout the last several years, that she never got any messages on that answering machine from the L.s, and that she knows of no reason why the house phone would have been off the hook during

this period of time.

As far as contact between the L.s and the child since December 2010, it seems, again, fairly clear that there has been very little contact, but, again, the evidence is conflicting as to how this came to be.

In her evidence yesterday, Ms. S. testified she got two phone calls from the L.s since December 2010. She testified both those calls were received during the evening after the child had gone to bed and that she told the L.s they needed to call before 8 p.m. if they want to speak to the child. This is different from what she deposed to in her affidavit. In her affidavit she deposed that there were two calls and that the L.s did speak to the child on those occasions. Ms. S.'s counsel submitted that this and some of the other differences between the affidavit and the in-court testimony is likely attributable to fading memories due to the passage of time.

By contrast, the L.s' affidavit is to the effect of they tried multiple times to contact the S.s, that the phone would either ring continuously or they would get a busy tone. Sometimes they called when they were in Yellowknife, they say, and they depose that when

they did get through, once Ms. S. knew it was them she "did not receive their calls well," as they put it. They say in that sense this is why they've not had any contact with the child in the last several years. Again, in her testimony in court Ms. S. specifically and firmly denied that she refused to let the L.s have contact with the child and, as I've mentioned, she gave evidence about her phone number, her answering machine, and firmly denied doing anything to prevent contact between the child and her maternal grandparents.

As far as contact between the child and her biological mother, there were difficulties in determining the mother's whereabouts, such that the Petitioners obtained, in July 2014, an order allowing them to serve her by serving the parents in Tulita. This is how service of this Petition and motion were effected on her. There is very little information before the Court as to the biological mother's whereabouts. There is some information in the affidavit filed by the L.s that she lives in Edmonton. Their affidavit was sworn in September 2014 and in that affidavit they depose that she "has visited them in Tulita recently and then returned home." By that time, in the fall of

2014 or late summer or 2014, the child was in Yellowknife, so the mother would clearly not have had any contact with her during her last visit in Tulita. There is no other evidence about any contact between the child and her mother between October 2007 and December 2010.

Ms. S. testified that the last time she spoke to the biological mother of the child was in September 2014 over the phone. She testified that the call came in late at night, that the child's mother was yelling and swearing and slurring her words. Ms. S. believes that she was intoxicated. The mother did not speak to the child on that occasion.

The evidence about the child's current situation is uncontradicted. She lives in Yellowknife, she attends school, and she is involved in several activities. E.B., the assistant principal of the school she attends, was called by counsel for the child. She testified that the child had some difficulties when she first started attending school in January 2011. Ms. B. explained what was put in place by the school to assist her and testified that she has progressed very well since then.

I want to make it clear, as I did during the evidence, that in my view some of

the things Ms. B. talked about were well beyond what can properly be adduced from a non-expert witness. The opinions that she expressed about some of the child's diagnoses, how her struggles might evolve in the future, what types of measures might be necessary to assist her with those special needs, are well beyond the scope of what an ordinary witness can testify to. It may well be that Ms. B.'s training and experience is such that after a voir dire she could, at some other point, be permitted to give opinion evidence on these topics, but in this hearing counsel did not ask to have her qualified as an expert witness, and because of that I must treat her evidence as that of a regular witness. I have kept this in mind and for present purposes I have relied on her evidence only inasmuch as it relates to factual information about how the child is functioning in school and things that have been put it place to assist her. On that basis, I certainly accept that at present everything that can be done to assist her has been put in place, that she is well looked after and well supported both in her home environment and in her school environment, and that she is thriving. But I think that is the extent to which I can use Ms. B.'s evidence. As I say,

opinions she expressed about ways to deal with her -- whatever special needs she might have, how those needs will evolve and change in the future, and what types of supports would need to be put in place are not admissible coming from a witness who is not being called as an expert witness.

Turning to the analysis of the issues that arise on this motion, I first want to go back to the issue of the L.s not having appeared on this motion and issues of service. Because they did not appear yesterday, because they had participated previously when they had counsel, because they have not had counsel for several months, and given the importance of this matter, I asked a number of questions at the start of the hearing yesterday to satisfy myself that service was in order and that the matter should proceed this week. One of the concerns I had was that counsel advised that their briefs were picked up at the post office in Tulita the day before the hearing, meaning the day before yesterday. Clearly that is not ideal. But the overall circumstances must also be considered, including how long the L.s have had notice that this hearing date was set and the fact that there is no indication that they contacted counsel or the Court at all since November 2014.

Again, the L.s initially did have counsel on this matter. Their counsel got off the record in the fall of 2014. There is an affidavit of service showing that they were served with counsel's Notice of Ceasing to Act by mail and by fax on November 6. At that point the matter had been adjourned to be spoken to in family chambers on November 20th, among other things, for an application to have counsel appointed for the child. The documents served on the L.s by their counsel included a letter advising them that they should make arrangements to attend the application scheduled for November 20th.

On November 20th the L.s did not appear. The order appointing counsel for the child was made. The Court also then directed that the matter be scheduled for a special chambers hearing date. Although there is nothing on the file confirming service of the order appointing counsel to the child, counsel for the child has advised that those orders, the initial order and the subsequent order that amended it, were sent to the L.s with counsel's correspondence.

There is an affidavit of service that confirms that the order directing

that the matter be set for a special chambers hearing date was served on the L.s. It was served by registered mail on December 8th. The Court then set the hearing date to June 9 and 10th, and a docket issued on April 9th to that effect. According to the documents on the Court's file, that docket was mailed to the L.s.

The Petitioner's counsel did not hear from the L.s at all since the November 20th appearance. Counsel for the child advised the Court that she attempted to contact them by sending letters, and on one occasion by trying to phone them. These attempts were unsuccessful. Counsel never got an answer to her letters. I can appreciate that it might have taken some time for the L.s to make decisions about retaining new counsel, or representing themselves, after their former counsel got off the record. Certainly up to that point they were engaged in this matter, they had filed materials suggesting that they would strongly oppose the application to dispense with their consent, and indeed had a very different version of what happened since October 2007.

I have no way of knowing why they did not seek leave to appear by phone, appear themselves, send an agent, or even contact

counsel or the Court about this matter, and I cannot speculate about those reasons. In the absence of any indication that they wanted or needed to have this matter adjourned, I decided that it should proceed.

The first thing I must do in deciding this matter is to decide on what factual basis the application to dispense with consent must be decided. This is because of the significant conflict in the evidence about how the child came to live with the S.s, contrary to what the 2007 Order of this Court stated, and the conflict in the evidence about why there has been little to no contact between the L.s and the child since December of 2010. On Ms. S.'s version, she acted out of concern for the child, and since then the L.s have shown no interest in the child and have taken no steps to stay in touch with her. On the version set out in the L.s' affidavit, Ms. S. took advantage of an access visit to unilaterally change the day-to-day care situation and then actively blocked the L.s' attempt have contact with the child. The conduct described in the L.s' affidavit, if established to be true, would be highly reprehensible and in direct violation of the October 2007 Order. Such conduct would in

and of itself be a reason to dismiss the present application, and indeed may have a serious bearing on the adoption process itself.

Parental alienation is something that the Courts view as a very serious matter and militates against allowing the alienating party to gain any benefit from such conduct. Because the L.s did not participate in this hearing, the only viva voce evidence I have is the evidence of Ms. S. As I noted, there were aspects of that evidence where there were inconsistencies between what is in her affidavit and what she said in court. Internal inconsistencies sometimes have an impact on the reliability of the witness's evidence. But Ms. S. was very firm in her denial of the allegations made in the L.s' affidavit. In particular, she firmly denied the allegation that she cut off contact to the child during the access visit and the inferred allegation that she took active steps not to be reachable, not to answer phone calls, or otherwise prevent the L.s from having access to the child. She did admit that she unilaterally decided that the day-to-day care of the child should be changed and was not going to return the child notwithstanding the Court Order. Although not following Court Orders

is not usually something that enhances a person's credibility, generally speaking, Ms. S.'s candour in that respect, to me, lends some credence to her denial as far as having done some of the other things that the L.s allege that she did.

There are also things about the L.s' evidence that is somewhat problematic from my point of view, especially because I did not get an opportunity to have those things explained by them. First, they depose that they took steps to get legal assistance in early 2011 to have the child returned to them. There is no evidence or trace of anything having occurred by way of a legal application to secure the return of the child, and this is surprising. In situations where a party breaches a Court Order and attempts to unilaterally change things like who has day-to-day care of a child, applications to have children returned are usually made quickly and often are made ex parte. Unfortunately, situations where people attempt to circumvent Court Orders and make these types of unilateral changes are not unheard of. It would be surprising to me, if the L.s did seek legal advice on this, that nothing would be done to take immediate action to ensure compliance with the 2007 Order. I cannot speculate about what

happened, but I simply note that this is somewhat surprising.

The second concern stems from the evidence about the custom adoption process that the L.s undertook. On the document which is attached as an exhibit to the L.s' joint affidavit, I note that the name of the father of the child was left blank. This is odd because this is not a case where the identity of the child's father is unknown. On the contrary, the father, child, and mother at one point all lived in Tulita. Further, it is also stated on the form that the date of the custom adoption is the date of the child's birth, which on its face would suggest to the reader that the L.s assumed care of this child from the very start of her life on a full-time basis. Again, this does not quite fit with the evidence that I have heard and certainly does not reflect that there were in fact proceedings regarding custody in 2007.

Finally, the form appears to have been submitted to the adoption commissioner in June 2011 and filed with the Court in July 2011, at a time where the child had not been living with the L.s for over six months. None of these things were disclosed when the custom adoption form was completed, and that is of

concern.

The standard of proof in a non-criminal matter is balance of probabilities. The party who makes an assertion that advances his or her case must prove that assertion on that standard.

On the whole of the evidence before me, I find it more probable that events transpired in the manner described by Ms. S. than the version that is outlined in the L.s' affidavit. I do not have the benefit of viva voce evidence from the L.s, I only have their affidavit, and that affidavit leaves many questions unanswered, which I have already referred to. I also find there is no reason, on the record before me, to reject Ms. S.s' strong denials of having actively prevented the L.s from having contact with the child. Despite some of the inconsistencies in her evidence, which I have noted, I do not consider they are the types of inconsistencies that taint her evidence as a whole.

So for the purpose of dealing with the present application, and given the whole of the evidence, I find that the following facts have been established on a balance of probabilities: First, the child has been

residing with the S.s continuously since December of 2010. Second, the circumstances of this change in the day-to-day care of the child arose because of Ms. S.'s concern about the child not being in school, and this was communicated by Ms. S to the L.s at the time. Third, the L.s may not have explicitly agreed to the child staying in Yellowknife, but they took no steps to have the October 2007 Order enforced to compel the S.s to return the child to them. To that extent, they, at the very least, acquiesced to the change in day-to-day care of the child. Fourth, there has been very limited contact between S.L. and W.L. and the child since December 2010. Fifth, there have been no in-person visits between the L.s and the child in this period of time. Whatever the reasons were for the lack of contact, I find as a fact it has not be due to Ms. S. actively preventing it or evading attempts by the L.s to have contact with the child. As far as the child's biological mother, there has been no contact between them since before December of 2010, and I do not find it possible to determine when that last contact was. I also find that the last time the mother had contact with the S.s was in that phone call in September 2014 at a time where she was angry, possibly

intoxicated, and in circumstances where it would not have been in the best interest of the child to actually have any contact with her.

As I have noted at the outset, this application is governed by Section 13 of the Adoption Act. Paragraph 13(1) of the Act reads as follows:

> Where the consent of a parent is not produced at the hearing of a petition or where a parent has revoked his or her consent, the court may order notice of the petition to be served on the parent and the court may dispense with the consent of the parent in the following circumstances where the Court considers that it is in the best interests of the child to do so:
>
> (a) the parent has, with the knowledge that he or she is the parent of the child, demonstrated an attempt to forego the rights and responsibilities of a parent in respect of the person of the child;
>
> (b) the parent fails to appear

at the time and place stated in the notice;

(c) the parent appears and objects to giving consent on grounds that the court considers insufficient;

(d) the court, for reasons that appear to be sufficient to the court, considers it necessary or desirable to dispense with the consent of the parent.

Paragraph 2 creates a presumption that a parent has demonstrated the intent to forego the rights and responsibilities of the parent in certain circumstances.

Another important provision to keep in mind is Section 3 of the Act because it provides additional clarification as to what factors are to be considered when considering what is in the best interests of the child. Section 3 applies to the Act as a whole and reads as follows:

> 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 physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;

(b) the importance for the child's development of a positive relationship with a parent and a secure place as a member of the family;

(c) the child's cultural, linguistic and spiritual or religious ties or upbringing and the importance of a family environment that will respect the child's cultural and linguistic heritage and traditions and religious or spiritual background;

(d) the child's views and preferences, if they can reasonably be ascertained;

(e) the parent's views and preferences;

(f) the family or extended family relationship between the child and each person seeking to adopt or receive the placement of a child.

The L.s are not the biological parent of this child but are captured in the definition of "parent" at Section 1 of the Act, given the October 2007 Order. The word "parent" is defined in paragraph (c) of the definition as the person who has lawful custody of the child, other than the Director of Child and Family Services. The L.s do not have de facto custody of the child, but by virtue of the 2007 Order they have joint custody of her and her day-to-day care.

As illustrated in the case of *D.M.M, 2008 ABQB 564*, different jurisdictions have provisions dealing with the dispensation of consent of a parent in the adoption context. They describe the applicable test and factors in different ways. The common thread is the paramount consideration given to the best interests of the child in making that decision. The step of granting an application to dispense

with the parent's consent to an adoption is a significant one, given the finality of an adoption process that is ultimately completed. That process results in a severance of the ties between the parent and the child. These are very significant consequences for the parent, but also for the child.

I agree with the comments in *D.M.M* at paragraph 25 that the Court must examine whether there would be a positive contribution to the welfare of the child by dispensing of the consent. In that case, the Court dismissed the application because it concluded that the child was in a win/win situation. The biological father, while not parenting the child, was providing financial support for the child and hoped to one day re-establish a relationship with the child. The child had a very positive relationship with his step father, who was the party wishing to adopt. The family unit was stable, and there was no suggestion that not dispensing with the father's consent would create any risk of uncertainty or deprive the child from that stable secure environment.

In the British Columbia case *(re) British Columbia Birth Registry No. 2006-59-039958, 2010 BCCA 137*, the decision of

the chambers judge to dispense with consent was overturned on appeal precisely because the Court of Appeal found that the chambers judge had not recognized the strictness of the test to be applied in such matters, nor the need for serious and important reasons to justify dispensing with consent. The situation in that case was not entirely unlike this one in the sense that both biological parents had significant personal issues and the child was in the care of the paternal grandparents.

The mother had struggled with drug addictions but had always expressed the wish to be a part of her child's life. Fresh evidence adduced at the appeal was that by then she had been drug free for two years. The chambers judge had found she was capable of looking after her child if she stayed away from drugs but was concerned that she may not be able to do so. The mother was not seeking to have the child removed from the grandparent's care but simply did not want to agree to the adoption because she did not want her ties to her child to be severed permanently. The Court of Appeal found that there was no question that the grandparents were providing a safe, stable, and secure environment for the child. It found that the chambers judge

was correct to consider the importance of permanence, continuity, certainty, stability, and security for the child, but had given those factors undue weight while placing insufficient weight on the significance of the child being able to maintain ties with his parents.

There are similarities between the situation in that case and this one, but there are also some differences. As far as the biological mother is concerned, she had not demonstrated a continued desire to eventually resume caring for this child. There is no evidence about her current situation or about any progress she might have made towards dealing with her drug issues. Her parents' affidavit confirms at paragraph 36 that she is someone who is troubled with alcohol and drugs.

The L.s are in a different situation. They were part of the child's life for the first five years of her life and have taken an active role in parenting her. Under an existing order from this Court, they are the ones who were given the day-to-day care of that child and they have initiated the process to have the child recognized as having been custom adopted by them. On the other hand, they have not appeared on this application. They have taken little to

no steps to have contact with the child since December 2010. They have taken no legal steps to get this Court to enforce the day-to-day care provision of the 2007 Order. I do appreciate that they reside in Tulita, which makes contact more challenging than if they were in Yellowknife, and that they may also find accessing the Court more challenging than if they were in Yellowknife.

I also appreciate that their counsel got off the record in the fall of 2014, which placed them at a disadvantage in relation to these proceedings, but I have to balance that against the fact that they were involved in the court proceedings that led to the 2007 Order. They were able to retain counsel to respond to this application initially. By all accounts, they were aware of how to proceed to bring matters to court. They are not complete strangers to court proceedings, and there is no explanation for why they have not participated at all in this hearing, knowing what it was about.

Similarly, there is no explanation for why they did not respond to the correspondence sent to them by counsel for the child who was trying to engage them in a dialog about this matter. And speaking of that, I must

also take into account the evidence presented and submissions made by that counsel who was appointed to represent this child. Counsel has made submissions in favour of granting this application to dispense with the consent of the biological mother and the maternal grandparents. I understand that position to be based on several factors: The child is thriving in her current environment; is involved in numerous activities; has the support she needs in school, given some of her special needs; has expressed to counsel that when she lived in Tulita there was nothing for her to do and she was not involved in any particular activities. She has also expressed that she wishes to stay in Yellowknife and she wishes to continue living and being cared for by her paternal grandparents.

The wishes of the child must be taken into account, if ascertainable, but with some caution, especially dealing with a child as young as this one. That concern was explained in *J.C.S v. C.B.R.S, 2011 ONCJ 191*, and I agree with the comments made in that case, and in particular the statement at paragraph 28, that the responsibility of severing the child's relationship with her parent - and in this case her grandparents - should not rest on the

shoulders of a young child. That said, those wishes are before the Court and should be considered along with other factors.

There are aspects of the evidence of Ms. B. that relate to what might be best for this child in the long run, and in that sense those may not be directly related to the application now before me. However, her evidence about observations that she made of the child when she first started attending school corroborates the evidence of Ms. S. about the fact that the child had not been attending school regularly in Tulita. In addition, although stability would be important for any child, Ms. B.'s evidence does suggest that in the case of this child it is particularly important that there be stability and a routine and a structured environment around her.

Going back to the circumstances specifically referred to in Section 13 of the Act, when it comes to an application like this one, and I am dealing now with the application as it relates to the biological mother, one of the circumstances listed is the failure to attend the hearing. The biological mother has not attended the hearing, and indeed has not participated at all in these proceedings

at any point or responded to this application in any way.

Another circumstance referred to in the provision is where the parent whose consent is the subject of the application has demonstrated an intent to forego the rights and responsibilities of a parent in respect of the child. The mother has not filed any evidence, but the evidence I do have from the other parties and even from her own parents is that she has not had contact with the child for a long time.

As for evidence of where things were at as far as her substance abuse issues, there's nothing to suggest any improvement or change since the time when she consented to the day-to-day care of the child being with her parents and not herself.

Finally, her whereabouts are unknown to the point that the Court was satisfied that an order for substitutional service ought to issue in relation to the application. Practically speaking, this means obtaining her consent could be highly problematic. For those reasons, in my view, not dispensing with her consent would not be in this child's best interest.

As far as dispensing with the

consent of the maternal grandparents, again, the failure to attend the hearing is a circumstance that applies to them and must be considered, even taking into account some of the challenges that people who do not reside in Yellowknife may face in participating in court proceedings. As far as the intent to forego parental rights and responsibilities, the lack of contact since December 2010 is a concern, but I'm not persuaded that it establishes that the maternal grandparents have demonstrated an intent to forego their rights and responsibilities when I consider the whole of the circumstances, including their participation in the proceedings that led to the October 2007 Order, their participation in these proceedings up to the fall of 2014, and the steps they took in 2011 with respect to the custom adoption process.

When I look at all of that, I'm not satisfied it can be said they have demonstrated an intent to forego their rights and responsibilities as parents.

Another circumstance referred to in Section 13 is when the Court finds that the grounds for objection to giving the consent are not sufficient. Here, the L.s did not appear and I do not have the benefit of their submissions

articulating what their grounds might be not to give consent. That said, I think those grounds can be inferred from what is in their affidavits. They would include not wanting to sever their legal ties to the child, the detrimental effect that it could have in the long run, the need to ensure that she remains exposed to the aboriginal side of her heritage, among others.

Counsel for the S.s noted that there is no reason why granting this application would result in severing the ties with the maternal grandparents because Ms. S. has testified she would be quite willing to facilitate contact if the maternal grandparents wish to see this child. But I do not think that is the point, really, as far as the concerns expressed in the case law about the risk of severing the ties. The concern is severing the legal ties and the prospect that the adoptive parents will have complete control over whether the relationship is maintained or not.

It's difficult for me to assess whether the grounds why the L.s may not want to consent to this adoption are sufficient or not sufficient given their lack of participation in this hearing. So, on the whole, I don't think I can say that it's been

established that whatever grounds they have are insufficient. Overall it seems to me the issue does boil down, as the Court put it in *D.M.M.*, to whether there would be a positive contribution to the welfare of this child by dispensing with the consent of the L.s as part of this adoption process. This, of course, taking into account the factors listed in Section 3 of the Act, which I have referred to already and which I have considered.

Counsel for the S.s argue that it is in the best interest of this child to have permanent clarity and stability as far as where she is going to be living, growing up, and attending school, and knowing who has the responsibility of caring for her. Counsel for the child makes the same argument. Counsel argue that given the overall circumstances of this case, the fact that neither biological parent is taking an active role in caring for the child, given the earlier legal proceedings and the uncertainty that may stem from the custom adoption process, there is, in fact, much uncertainty at this point, and this uncertainty is not good for the child who is now well settled in Yellowknife and needs to know that she is in the care of the S.s for good without any

possibility of circumstances causing her to be forced to go back to live in Tulita.

After careful consideration, I think it comes down to this: if this application is not granted, the L.s will have an ability to veto the adoption process. In other words, if this application is not allowed, it will for sure be the case that this adoption cannot proceed unless they consent to it. On the other hand, if the application is granted, it does not necessarily follow that an adoption order will ultimately be granted. Under the Act, an adoption order can only be made if the Court is satisfied that the adoption order is in the best interest of the child. Those interests have to be considered at the stage that I am dealing with today, but they also have to be considered at the stage where the issuance of an adoption order would be sought. Granting this application does not in itself sever the legal ties between the child and her mother and her maternal grandparents. It simply takes away their ability to put a unilateral stop to the adoption process that the paternal grandparents have undertaken. Assessing the child's best interests at this stage, I conclude that this situation is different from the situations assessed in the

various cases that I was referred to and where the decision was to not dispense with consent. In my view, the overall context here is such that it would not be in this child's best interests to have her biological mother and maternal grandparents be in a position to block or veto the adoption process.

I'm satisfied that even taking into account the very strict test that applies to an application under Section 13 of the Adoption Act and the need for serious grounds to be established before such an application can be granted, the test is met here. I have reached this conclusion based on the overall circumstances and the findings of facts that I have made, the provisions of the Act, the Respondents' failure to attending the hearing, and also the maternal grandparent's failure to respond to the attempts made by the child's counsellor to engage them in communication about this matter. But that finding is not determinative of the ultimate finding as to whether the Court will be satisfied, when matters reach the stage of an adoption hearing, that an adoption order is in the best interest of this child. Many aspects of the submissions that I heard yesterday actually go to that issue, as

opposed to the dispensation of consent issue, and I think those submissions will have to be presented again at a later time. But I want to make it clear that in addition to complying with the various steps that are set out in the Act, I think that there are very real issues in this case that will need to be specifically addressed, and I want to mention them now so that everyone is on notice that I view them as issues that will have to be addressed through evidence or submissions or a combination of the two.

One thing that is not for me to entertain today, but was part of the submissions that were made yesterday, and will be a central issue, is this: why does the mechanism of adoption, which would sever all legal ties between the child and her mother and her maternal grandparents, need to be resorted to here, as opposed to other mechanisms such as an application to vary the existing custody order to change not only the day-to-day care to reflect the current situation, but also possibly place the child in the sole custody of her paternal grandparents, for example. I think that issue will have to be addressed at later stages in these proceedings.

Another issue that I think

will have to be addressed thoroughly is the effect of the custom adoption process undertaken by the maternal grandparents and the fact that according to the exhibit to the L.s' affidavit, the aboriginal custom adoption application was actually filed in this Court and it appears a certificate was issued in July 2011.

A third issue that is somewhat related to the first one is, what is the effect of the existing custody order that no one, to date, has taken any steps to vary? The existing order is in direct conflict with the ultimate objective of this Petition.

Another issue that I noted when I was reviewing materials is that there does not appear to be any evidence before the Court that paragraph 8 of the Consent Order from 2007 was complied with. Paragraph 8 of the Consent Order states that the parties shall refer any disputes between them pursuant to this Order to mediation before resorting to legal proceedings to resolve the dispute. That was part of this Court's Order, and as everyone realizes, the Court is concerned about its own Orders being followed. So I think that's an issue that will have to be addressed.

For all those reasons, if an

application for an Adoption Order is to be made, that application should be made on notice to the Respondents even though I have granted today's application. Also I think it would have to proceed on the record and not in the way that uncontested adoption Petitions normally proceed.

I make these comments, and I hope everyone realizes, not in the spirit of having prejudged any of these issues, but because they are issues that arose in my mind as I reviewed these materials.

I do not consider myself seized with this matter, but the transcript of my reasons will be on the Court file. I think those are some of the things that would have to be addressed in order to assist the Court in making a final determination if an adoption Order is sought. There might be others. It will be, obviously, for the judge who deals with the application to decide.

But for today's purposes I will issue the following order: I will ask you to prepare the order, Ms. Paradis. First, the application to dispense with the consent of the respondents pursuant to Section 13 of the Adoption Act is granted. Second, the hearing of the Petitioner's application for an adoption

order shall take place on notice to the Respondents. Third, a copy of this order shall be served on the Respondents. As well, a copy of the Order appointing counsel and the Order amending that Order should be served on the Respondents.

Now, I think probably, procedurally, it is likely that given some of the issues to be addressed, unless an agreement can be reached, this matter will require a further special chambers hearing. If the application is made it probably should be initially returnable in regular chambers, so in the usual way, as opposed to trying to move directly to setting a date. I do not think that needs to be part of the order, it is just what I think would be the most logical way to proceed. I know there are other steps that have nothing to do with anything I've said, and the timing is probably a variable or an unknown at this point, but this is how this matter should proceed from here.

Do you require any clarifications, Ms. Paradis?

MS. PARADIS: I don't believe so, Your Honour.

THE COURT: All right.

And what about you,

Ms. McIlmoyle?

MS. MCILMOYLE: No, Your Honour. Thank you.

THE COURT: Thank you for your submissions, counsel. This concludes this application.

(PROCEEDINGS CONCLUDED)

CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 25th day of June, 2015.

A. Willard, CSR(A)
Official Court Reporter