

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

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

**AND IN THE MATTER OF** the children,

E., C.  
Born October 22, 1993

E., J.  
Born April 22, 1997

E., M.  
Born April 10, 2000

E., R.  
Born May 14, 2001

APPREHENDED: November 6, 2001

E., K.  
Born December 12, 2002

APPREHENDED: December 12, 2002

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**REASONS FOR DECISION**

**of the**

**HONOURABLE JUDGE B.E. SCHMALTZ**

**These Reasons are subject to Publication Restrictions pursuant to s. 87 of the *Child and Family Services Act*, S.N.W.T. 1997, c. 13 (See Appendix "A")**

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Application to discharge a Permanent Custody Order by the Mother, pursuant to section 49 of the *Child and Family Services Act*.

Heard at: Yellowknife, Northwest Territories

Date: June 9-10, 2005; October 3-6, 2005; and August 27-29, 2007

Reasons Filed: September 11, 2007

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Counsel for the Director: S. MacPherson and S. Kay

Counsel for the Child C.E.: B.L. McIlmoyle

Counsel for the Mother: H. Latimer; J. Murray; K. Wilford

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**I. INTRODUCTION:**

[1] This is an Application by the mother (BK) to discharge a permanent custody order with respect to her child KE. The Application is brought pursuant to section 49(1) of the *Child and Family Services Act* (the *Act*).

[2] On September 15, 2003, five of BK's children were placed in the permanent custody of the Director of Child and Family Services (the Director) pursuant to section 28(1)(d) of the *Act*. KE is the youngest of these children, born December 12, 2002. On December 10, 2004, BK brought an Application to discharge the permanent custody order with respect to all five of the children, but her Application with respect to the four older children has since been withdrawn.

[3] Evidence was heard on June 9-10, 2005; October 3-6, 2005; and August 27-29, 2007. On February 28, 2006, with the agreement of the parties, an Order was made adjourning the Application to discharge the permanent custody order with respect to KE to February 26, 2007; at that time the Application to discharge the permanent custody order with respect to the four older children was withdrawn. On February 28, 2006, a Memorandum of Agreement was entered into between BK and the Director (Exhibit 24), and the matter was adjourned for one year.

[4] The Memorandum of Agreement recognized that the parties wished to resolve the matter between themselves, and with respect to KE, the one year adjournment was “to determine whether reunification of KE and BK could be achieved.” Despite sincere efforts on the part of BK and the Director, the matter with respect to KE could not be resolved, and the Director continues to oppose BK’s Application to discharge the permanent custody order. The continuation of the hearing and evidence heard on August 27-29, 2007, was only in respect of the Application to discharge the permanent custody order pertaining to KE.

## II. LEGISLATION

[5] Section 49 of the *Act* states:

49(1) Where a child has been placed in the permanent custody of the Director, the Director, the child’s parent or, where the child has attained the age of 12 years, the child may apply to the court that made the original order to make an order discharging that order.

(2) Where, in the opinion of the court to which an application is made under subsection (1) it is in the best interests of the child to do so, the court may make an order discharging the order placing the child in the permanent custody of the Director and may impose any terms and conditions that the court considers necessary and proper.

[6] Before discharging the permanent custody order, I have to be satisfied that it is in the best interests of KE to do so. Section 3 of the *Act* states:

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 plan of care 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.

### **III. ANALYSIS**

[7] KE was apprehended at birth, and she has lived with the same foster parents for her whole life other than for approximately one month when she did live with BK. KE has 3 brothers and one sister who live in Yellowknife and who she sees on a fairly regular basis; KE has a positive developing relationship with her siblings in Yellowknife. BK also has two daughters that live with her in Cambridge Bay, PKU (born February 8, 2005) who is about two years younger than KE, and IKU (born June 24, 2007) who is about 4.5 years younger than KE. KE also knows and has spent some time with her younger sisters.

[8] KE is Inuit, and her cultural and linguistic background is an important consideration. I accept that BK and JU would be in the good position, perhaps the best position, to ensure that KE understands and appreciates her heritage. I also accept that KE's foster family is amenable to teaching KE her culture, and to supporting KE in learning her language.

[9] Since February 2006, BK and her daughter PKU and at times her partner JU, have visited with KE approximately once per month. From the evidence I heard, these visits have been stressful for KE, and very likely confusing. It is difficult to say what might have made the visits and the hoped for transition easier, or more successful, but I find on the evidence that the reunification of KE and BK was not successful. KE has a strong bond with both her foster mother and her foster father, and their two older children. KE's foster family wants to adopt KE.

[10] I accept without reservation that BK loves KE, that she would do everything she could for KE, that she would sincerely try to be a good and loving mother to KE; it would be devastating to BK if KE were not returned to her care. I also accept that KE's foster family loves KE, that they too would do everything they could for KE, that they would be a good and loving family for KE; I also accept that it would be devastating to this family if KE were to leave them. But at this point it is not BK's interests or the foster family's interests that are to be considered. *Is it in the best interests of KE* that the permanent custody order be discharged?

[11] KE is almost five years old now. KE knows her current foster parents as her parents, they have been referred to as her psychological parents during these proceedings. From the evidence I heard, KE appears to have resigned herself to visiting with BK and her younger sisters. I did not hear any evidence that convinced me that KE came to accept BK as her "mommy" nor JU as her "daddy". I accept that KE has bonded with her foster parents; I also accept that if that bond were severed, and KE was not able to form another bond, this could be

harmful to KE. One of the concerns expressed by Dr. S. in his evidence is that over the past year and a half, it did not appear that KE had developed a relationship with BK, and further there were no assurances that BK could or would be able to build a relationship with KE. I too, from all the evidence I heard, have that concern. And certainly if BK were not able to form such a relationship, to establish a bond with KE, it could only be harmful to KE's emotional development.

[12] In considering KE's development of a positive relationship with her parents, I take into consideration that KE accepts her foster family as her family, her foster parents as her psychological parents, and that she has a very positive relationship with them, and they with her. KE is almost 5 years old, and has been a member of the same family for almost her whole life; her environment has been stable and secure. I am satisfied that KE is secure in her current family, and is loved and wanted by all members of that family. I also take into consideration the growing and strengthening relationship that KE has with her older siblings who live in Yellowknife, and I find those relationships beneficial to KE, and will continue to be as they grow stronger.

[13] I have concerns that if the continuity and stability that KE has known in her life to this point is disrupted it could be harmful to KE. There are significant risks posed in moving KE to Cambridge Bay to live with BK and her children, and I am not satisfied that these risks have been, or could be, addressed or reduced.

[14] It appears that BK continues to have issues in dealing with anger management and relationship issues arising from jealousy. When BK testified she refused to answer questions concerning an incident of domestic violence on Christmas day 2005, involving her current partner, JU. From the evidence heard, and the material filed, it may be that charges against JU arose out of this incident. However, even shortly after that incident, BK denied any violence or substance abuse issues in her relationship when interviewed by Dr. S. in early 2006. In October 2005, Dr. S. testified that:

[BK] would likely be an individual who would attempt to please or calm down the abuser and at the same time she would be the type of individual who would likely attempt to forgive and forget and to make allowances for that individual or downplay or minimize the significance of that violence, and I did see that as the case where she perceived Mr. [E]. as being a good father despite the occurrences that had been happening in the home and in particular those occurrences occurring in front of the children.

[15] Considering the evidence I heard regarding continuing issues surrounding jealousy on the part of both BK and JU, BK's reluctance to admit to *any* violence in her current relationship, and her history of abusive relationships, I have concerns about the risk of KE being exposed to domestic violence and the effect such could have on her.

[16] No plan has been suggested as to how KE could be returned to BK's care. BK simply wants to take KE home to Cambridge Bay. Dr. S. testified that KE could potentially be traumatized by being removed from her family here in Yellowknife and "immersed" into BK's care; Dr. S. would not recommend such a transition. For close to eighteen months now, monthly visits have been arranged with BK and KE on a fairly regular basis. Considering all of the evidence, I am not satisfied that those visits have been successful in establishing a bond between KE and BK. I do not know how a transition into BK's home could be accomplished that would not pose a significant risk of trauma to KE, and I have concerns that such trauma could have permanent harmful effects.

[17] In October 2005, Dr. S. testified as to the circumstances that led to BK's children being placed in care:

- *BK's abusive relationship at the time.* That relationship has since ended, but though her current relationship appears to be a much healthier relationship, there continues to be issues in dealing with jealousy and the relationship has not been violence free as BK maintains.
- *BK's need for psychological intervention.* BK has received some counseling, and likely has a better support system now than she had when her

children were initially apprehended. I accept that her situation has improved.

- *Parenting education, and further education in the area of child safety.* BK has attended, and continues to attend, a *Moms and Tots* group in Cambridge Bay. However, from the testimony relating to BK's visits with KE since February 2006, it is apparent that BK continues to have a very rigid parenting style that would not be conducive to removing KE from the home and family that KE has come to know, to BK's care; it seems to be difficult for BK to empathize with KE, perhaps because of her rigid parenting style. That being said, I find it would be of the utmost importance, if one were to remove KE from her current stable, happy, and secure environment, that KE be placed with someone who recognized and understood the stress, confusion, and potential trauma such a transition could cause. At the current time BK does not have the resources or skills to deal with the issues that KE would present and encounter, and nor has any plan been suggested to enable BK, nor and perhaps more importantly KE, to deal with these issues. I find that KE's psychological and emotional well-being would be at risk if KE were removed from her current home and returned to BK's care.
- *The need for BK to expand her support system.* BK has returned to Cambridge Bay, and apparently has an expanded support system there. It may be that BK would now be better able to cope with the stresses that BK may encounter if KE were returned to her care, but not to the point that the risk to KE would be significantly reduced.
- *BK's need to deal with her substance abuse.* BK says that she has not used or abused alcohol since her return to Cambridge Bay; Dr. S.'s evidence was that this conflicted with what he had been told by BK's partner JU; this inconsistency causes me concern. However I do accept that BK has come a long way towards reducing any risk to her children due to substance abuse.



[18] BK has taken steps to improve her situation, and has been quite successful in certain areas. However, there still remains a significant risk that KE would suffer psychological or emotional harm if she were returned to BK's care.

[19] There is no proposed plan that would assist either BK or KE or both, if KE were returned to BK's home in Cambridge Bay; there is nothing in place to reduce the risks and the potential harm to KE if she is returned to BK's care. Notably, Dr. S. would not recommend returning, or as he put it "immersing" KE into the care of BK, as such a course of action could be potentially traumatizing for KE.

[20] In *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)*, 1994 CanLII 83, the Supreme Court of Canada offers guidance in cases where it is the best interests of the child that must be considered, exclusively:

The wide focus of the best interests test encompasses an examination of the entirety of the situation and thus includes concerns arising from emotional harm, psychological bonding and the child's desires, ...

Within the realm of best interests perhaps the most important factor in the present case, as probably in many others, is regard to the psychological bonding of a child to her or his foster family

[21] In *Racine v. Woods*, [1983] S.C.J. No. 70, the Court emphasized that the best interests of the child has to be paramount to recognizing the laudable, even successful efforts a parent may have made in improving her or his situation:

The real issue is the cutting of the child's legal tie with her natural mother. This is always a serious step and clearly one which ought not to be taken lightly. ... While the Court can feel great compassion for the respondent, and respect for her determined efforts to overcome her adversities, it has an obligation to ensure that any order it makes will promote the best interests of her child. This and this alone is our task.

In this case as well, difficult as it is, it is only the best interests of KE that are to be considered.

#### **IV CONCLUSION**

[22] Again I want to stress that I have no doubt of the love that BK has for KE. But at this time I cannot find that it would be in KE's best interests to discharge the permanent custody order and return KE to BK. The potential risks to KE's well-being are too great, arising primarily from my concerns with respect to the issues surrounding jealousy that remain apparent on the part of both BK and JU in their relationship; the incident of domestic violence between BK and JU in the past; BK's denial or refusal to admit this incident; the potential for further domestic violence considering the jealousy that both partners continue to harbour, and BK's history of violent and abusive relationships. I also have concerns that no information was put forward as to what JU's prior criminal record is, yet it was apparent from the evidence that he did in fact have a prior record. Any risk that may arise from his prior record remains an unknown. And lastly, attempts to establish or re-establish a bond between KE and BK have not been successful; I cannot envision a plan which would significantly reduce the risk to KE's well-being if she were returned to BK, and no plan has been proposed.

[23] At this time it would not be in KE's best interest to return her to BK's custody, and BK's application to discharge the permanent custody order is denied.

Bernadette E. Schmalt  
J.T.C.

Dated this 11<sup>th</sup> day of September, 2007  
at Yellowknife, Northwest Territories

## **APPENDIX “A”**

*Child and Family Services Act, S.N.W.T. 1997, c. 13*

Section 87:

87. No person shall publish or make public information that has the effect of identifying

- (a) a child who is
  - (i) the subject of the proceedings of a plan of care committee or a hearing under this Act, or
  - (ii) a witness at a hearing; or
- (b) a parent or foster parent of a child referred to in paragraph (a) or a member of that child's family or extended family.

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