IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Birth Certificate No. BF031783 (Re)* 2006 YKSC 58

Date: 20061108
Docket No.: S.C. No. 04-B0033
Registry: Whitehorse

IN THE MATTER of the *Children's Act*, R.S.Y. 2002, c. 31, as amended;

AND IN THE MATTER of the Petition of **B.A.S.B. and D.T.B.**, both Petitioners for an Adoption Order in respect of **A.A.S.**, whose birth was registered in Nova Scotia under Birth Registration No. BF031783

Publication of the name of a child, the child's parent(s) or identifying information about the child is prohibited by section 173(2) of the *Children's Act*.

Before: Mr. Justice L.F. Gower

Appearances:

Debbie P. Hoffman	Counsel for the Petitioners
Christina Sutherland	Counsel for the Respondents
Kathleen M. Kinchen	Child Advocate

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] This is an application by the petitioners, B.A.S.B. and D.T.B., to dispense with the consent of the biological father in an adoption proceeding. B.A.S.B. (the "mother) and her husband, D.T.B. (sometimes referred to here as the "adoptive father") seek to adopt A.A.S. (the "child"). S.R. (the "biological father") opposes the application, together with

his parents, L.R. (the “paternal grandfather”) and K.R. (the “paternal grandmother”). I will refer to S.R., L.R. and K.R. jointly as the “respondents”.

[2] The child was born on December 14, 1993 and will therefore be 13 years old this coming December. She has been represented by a child advocate since May 2006 and has consented in writing to the adoption by the adoptive father pursuant to s. 83(1) of the *Children’s Act*, R.S.Y. 2002, c. 31 (the “*Act*”).

[3] The mother and D.T.B. commenced a relationship in 1998 and were married in 2002.

II. BACKGROUND

[4] The petitioners’ application for the adoption was filed over two years ago, on July 26, 2004. The respondents retained counsel both in the Yukon and in their home province of Nova Scotia. The paternal grandmother and the biological father each swore affidavits opposing the adoption on October 19 and 22, 2004, respectively. The petitioners filed their notice of motion to dispense with the biological father’s consent on October 29, 2004.

[5] A report from the Director of Family and Children’s Services was filed on February 3, 2005, recommending that the application for adoption be granted.

[6] The paternal grandfather swore his affidavit in opposition to the adoption on February 9, 2005.

[7] The petitioners then waited to schedule the hearing of their motion until August 9, 2006, in order that the child would, by then, be 12 years of age, such that her consent to the adoption would be required pursuant to s. 83(1) of the *Children's Act*.

[8] In June and July, 2006, affidavits were filed by each of the petitioners, as well as an affidavit from the maternal grandmother, R.M.S., and the child's former live-in caregiver, M.G.T. I will refer to this cumulatively as the "material in support of the motion".

[9] On August 9, 2006, the hearing commenced, with the biological father and paternal grandfather participating by telephone. The paternal grandfather acknowledged that he had received the notice of hearing in April 2006 and that all three respondents again retained counsel in Nova Scotia about that time. He further acknowledged that he received some of the material in support of the motion around the end of June 2006. (It appears he would have received all but the affidavit of R.M.S., which was not filed until July 20, 2006. However, I am advised that all the material in support of the motion was delivered in a timely fashion to the respondents' Whitehorse counsel.) Finally, the paternal grandfather confirmed that he discussed this material with the respondents' legal counsel.

[10] The biological father acknowledged that he received the material in support of the motion about one month prior to the hearing date and that he intended to file affidavits in response, after consultation with the respondents' counsel. In fact, he submitted that draft affidavits had been prepared with that counsel.

[11] Nevertheless, as of the specified hearing date, August 9, 2006, the respondents had not filed any supplementary affidavits in specific response to the motion. Rather, the biological father and the paternal grandfather sought an adjournment to retain new counsel in the Yukon. They claimed to have been in contact with Whitehorse counsel, Christina Sutherland, who was apparently willing to act, but was unavailable until the end of August. Notwithstanding opposition to the adjournment application by both the petitioners' counsel and the child advocate, I adjourned the hearing to August 28, 2006.

[12] On August 28, 2006, Ms. Sutherland appeared as counsel for the respondents. While she made submissions on their behalf, she did not file any supplementary materials in response to the application to dispense with the biological father's consent to the adoption. Ms. Sutherland indicated that the biological father had wanted to attend the hearing via speaker phone, but he did not because "he had to go back to school". The paternal grandparents did not participate at the hearing either, except through counsel.

[13] Having heard the submissions of all counsel, it seemed to me that it would not be in the child's best interests to delay my decision any longer than necessary. Therefore, I orally granted the petitioners' application to dispense with consent on August 28, 2006 and indicated that these written reasons would follow.

III. ISSUES

[14] The global issue is whether it would be in the best interests of the child to make an order dispensing with the biological father's consent to the adoption pursuant to

s. 88(1) of the *Act*. In making that determination, I am to consider all relevant factors, including:

a) Whether the biological father is a “concerned parent”, as defined in the *Children’s Act*?

b) Whether the biological father has deserted the child or neglected to provide adequate care and nurture or financial support for the child? and

c) Whether continuing to require the consent would prejudice the best interests of the child?

[15] Further, pursuant to s. 94(3) of the *Act*, I must consider whether it would be more appropriate to deny the application to dispense with consent and grant an order for custody, or custody and guardianship, to the petitioners.

IV. ANALYSIS

A. Section 88(1) of the *Children’s Act*

(i) Is the biological father a concerned parent?

[16] Under s. 88(1)(b) of the *Act*, in considering whether it is in the best interests of the child to make an order dispensing with the biological father’s consent, I must consider whether he is a “concerned parent”. That term is defined in s. 88(2) as meaning:

> “. . .
>
> a) a parent with the lawful care or lawful care and custody of the child;
>
> b) a parent regularly exercising rights of custody or of access in relation to the child, or attempting to exercise those rights;

c) a parent regularly providing financial support for the child; or

d) a parent whose application respecting care, custody or access in relation to the child is before a court and awaiting adjudication."

[17] Clearly paras. (a) and (d) above have no application in the case before me. The biological father is not a parent with the lawful care or custody of the child, nor is he a parent whose application respecting care, custody or access in relation to the child is before a court and awaiting adjudication.

[18] As for whether the biological father is a parent "regularly exercising rights of . . . access in relation to the child, or attempting to exercise those rights", I will make specific reference to the affidavit evidence. However, before I do so, I must say that the quality of this affidavit evidence, and the manner in which the litigation has progressed, has affected my determination of the matter. First, the original affidavit material filed by the respondents is now quite dated. In particular, the affidavits of the biological father and the paternal grandmother were almost two years old at the time of the hearing. That is a significant amount of time whenever one is dealing with the question of the best interests of a pre-adolescent child. Second, many of the allegations made in the respondents' initial affidavits have been specifically addressed by the material in support of the motion. Further allegations have also been made in that material and those allegations remain uncontradicted. As a result, on certain points, notwithstanding that the ultimate onus is on the petitioners, the evidentiary burden shifted to the respondents and I have concluded that they have not met this burden.

[19] The mother was 15 years old at the time of the child's birth in 1993. The biological father was not involved with the pregnancy or the birth and initially denied paternity. He

was 17 years old at the time and was attending school in the United States. He agreed that the mother and the maternal grandmother could have custody of the child, providing he had access rights. Access was apparently opposed by the mother and the maternal grandmother. In December 1994, the respondents obtained an order from the Nova Scotia Family Court granting them reasonable access. According to the biological father, both he and the paternal grandparents initially sought to exercise their access rights, but were continually thwarted from doing so, particularly by the mother. For a period of time, the child was in the care of the maternal grandmother, while the mother was attending school, and the biological father said that he was able to exercise “consistent” visits with the child. However, his access became more difficult to exercise following his move to Calgary in September 2002 and he claims that those difficulties have continued to date.

[20] The biological father has recently become involved in another relationship, which has produced a son, P., born June 29, 2004. The biological father claims that his attempts to maintain a relationship with the child and to acquaint her with P. have been frustrated by the mother. He asks this Court not to remove the access rights he and his parents have “fought so hard to achieve”. He states that the mother has managed to keep the child away from his family “the best she could” and that if the adoption is granted, the child will lose all chances of seeing her father and his extended family, including her “little brother”, again.

[21] The report filed by the Director of Family and Children’s Services includes information about the child’s views towards her biological father and the paternal grandparents, at page 3:

> "[A.A.S.] expressed that she does not feel a closeness to her birth father or to his parents; she indicated that she has seen [S.R.] rarely and that his parents did not attend her concerts or school activities when she lived in Nova Scotia. [A.A.S.] described her paternal grandparents as being like 'friends of the family', a situation she does not anticipate will change with adoption".

I found that information to be particularly instructive, as it comes from a totally objective source. It indicates that the child does not view her paternal grandparents with hostility and tends to counter the respondents' allegations that the mother has consistently tried to drive a wedge between the child and her paternal extended family. The passage also indicates that, from the child's perspective, she has seen her biological father "rarely" and does not feel "a closeness" to either him or his parents. That suggests that there is no particular attachment between the child and the biological father or the paternal grandparents.

[22] The other relatively important source of information in this hearing was the affidavit of the child's former live-in caregiver, M.G.T. Although M.G.T. continues to maintain a relationship with the child and the maternal extended family, she is nevertheless one step removed from that family and therefore relatively objective. She deposed that from January 1995 to 1997, the biological father exercised access with the child in her presence no more than "a handful of times" and she believed that he was only doing so to appease his parents. Further, although the paternal grandparents showed more interest in the child than the biological father, "they were not involved on a regular and consistent basis". M.G.T. deposed that, after 1997, the visits by the paternal grandparents "became less frequent and [the biological father] did not exercise access". At no time when she was with the child for birthdays, Christmases, sleepovers, hospital

visits, school performances, skating and other special events, did she observe the biological father present. She did however acknowledge the presence of the paternal grandparents at such occasions, but even those visits were limited in number. M.G.T. deposed that the child showed no interest in the news about the biological father's new son, P., and at one stage emphatically stated "he's no brother of mine". Perhaps the most telling of all was para. 27 of M.G.T.'s affidavit:

> "From my discussions with [A.A.S.] it is clear that she feels [the biological father] has moved on and he is a stranger to her. [S.R.] has his own family which does not include her and she feels entitled to the same consideration of being allowed to enjoy 'Her Family' without interference from him".

[23] The mother deposed in her second affidavit that she kept notes of every conversation and every contact she and the child had with the biological father. She set those out at para. 71, stating that she had not picked and chosen the information, but had included it all. According to the mother, the biological father's access or attempts to exercise access to the child from her birth to the present were as follows (and I paraphrase):

a) **1993 – 1995 (A.A.S.'s birth to age two):** The biological father and his parents began to exercise access at Christmas 1994, however he continued to live in the United States and have limited visits during holidays with his parents. A schedule of access was established to accommodate the paternal grandparents' work schedules. They were inconsistent in exercising access and often did not show up.

b) **1995 – 1996 (A.A.S., age two):** The biological father was attending university about forty minutes away from A.A.S.'s home. He never spoke with the mother about the child and visited her only sporadically when his parents accessed her. That was mainly on school holidays, as he was usually occupied on regular weekends playing hockey.

c) **1996 – 1997 (A.A.S., age three):** The biological father was living in the same town as the mother, but did not approach her or ask her about the child. He accessed the child on some school holidays with the paternal grandparents.

d) **1997 – 1998 (A.A.S., age four):** He exercised access sporadically, while spending time with the paternal grandparents. The child did not recognize him as her father because they spent so little time together.

e) **1999 – 2000 (A.A.S., age five):** The biological father moved to Halifax, which was an hour and a half drive from the child's home. He arranged visitation through his parents, but failed to show up for every visit that was arranged. The paternal grandparents became increasingly involved in attempting to maintain a relationship between their son and the child.

f) **2000 – 2001 (A.A.S., age six):** The biological father did not visit the child nor did he contact the mother. It is alleged that he was moving back and forth from Antigonish and Halifax and was selling and consuming illegal drugs and attending all night parties.

g) **July 2001 (A.A.S., age seven):** The mother initiated her first and only conversation with the biological father regarding the child's well-being. She was concerned about his admitted drug habit. She informed him that she planned to marry D.T.B. She asked him to take an interest in the child and that it was very important for him to establish a bond with her during the following year, failing which D.T.B. would be applying to adopt the child.

h) **December 2002 (A.A.S., age nine):** The paternal grandparents had arranged to take the child to a Christmas party. The day before the visit, the child cried and said that they were not taking her to the party, but rather to the Halifax airport, an hour and a half away, to pick up the biological father. [I presume the child learned this from speaking to the paternal grandparents on the telephone.] The mother contacted the paternal grandparents and advised them that the child was upset and did not want to go. She also complained that they had lied to her about their plans in failing to disclose the proposed visit with the biological father.
On Christmas Eve, the mother received a message from the biological father saying that he would bring down the child's presents the next day. He did not show up nor ask to see the child that Christmas.

i) **February 2003 (A.A.S., age nine):** The biological father withheld his consent to the child's passport application. The mother had intended to have the child accompany her on a cruise vacation out of the country.

j) **2004 (A.A.S., age ten):** The biological father wrote an email to the child that she was going to have a new brother or sister. The child was upset after reading the email. Eventually, the mother blocked the child's email after the child told her that she did not want to receive anymore emails from the biological father.

[24] In addition, the maternal grandmother, R.M.S., deposed, at paras. 70(v)(c) and 71(a)(xv), that she took the child to the funeral of the paternal great-grandmother in April 2002. She said that this was the first time the child had seen her biological father in four years and it was also the last time she saw him. R.M.S. added, that in her view, the child was “apprehensive and was not left unsupervised in his presence”. From R.M.S.’ perspective, at para. 71(a)(v), the biological father accessed the child only rarely when she was one to three years old and after that, his life and priorities did not include the child. At para. 28, R.M.S. deposed that the biological father was never present for, nor did he ever express any interest in, the child’s health issues. Those issues have been significant and included recurrent kidney infections and renal dysfunction, as well as two dental surgeries and follow-up laser treatment. Further, R.M.S. swore, at para. 39, that the biological father never attended or showed any interest in the child’s academic achievements or musical or theatrical performances. Finally, according to R.M.S., at para. 68:

> “The [R.] family had difficulty maintaining consistency for visits. There were a number of cancelled visits, no-shows and eventually no telephone calls. The visits dwindled to a point that unless I personally initiated access by telephoning the [R.] family there was no contact initiated by the [R.] family”.

All this evidence is uncontradicted.

[25] While the biological father may have legitimately experienced some difficulty in communicating with the child by email, he made no efforts to try to re-establish that line of communication, or find out what the problem was. Further, D.T.B. deposed, at para. 15 of his second affidavit, that since 2001, when he, the mother and the child started living together as a family, the biological father “has not telephoned or written a letter to

[A.A.S.]". D.T.B. also swore that he (and I presume he meant his family) always had a publicly listed telephone number while living in both Nova Scotia and the Yukon.

[26] The evidence of the mother, D.T.B., the maternal grandmother and the child's former live-in caregiver is that the biological father has had virtually no contact with the child of any kind in the last two years and no in-person contact for over four years. Further, prior to the brief meeting between the child and her biological father at the funeral in April 2002, she had not seen him for the previous four years. In other words, in the last eight years or so, the child has only seen her biological father once. That evidence is uncontradicted and unexplained and, in my view, it is most cogent. While the biological father claims to continue to want a loving and caring relationship with the child, he has done little or nothing in the last eight years or more to demonstrate that his professed love and interest in the child are genuine. Rather, the repeated references by the biological father and the paternal grandmother to having "to fight" for their rights relating to the child seem to suggest a continuing power struggle and unresolved hostility towards the mother and her family, as opposed to an authentic desire to maintain healthy and functional contact with the child.

[27] In any event, returning to s. 88(2)(b) of the *Children's Act*, a concerned parent is "a parent" who is regularly exercising access or attempting to do so. Section 4 of the *Act* defines parent as "the father or mother of a child by birth, or because of an adoption order made or recognized under this *Act*". Thus, it is not the access by the paternal grandparents which is at issue here, but rather the access by the biological father. I find that he has not regularly exercised access to the child, nor has he attempted to do so, and therefore he does not fall within that particular definition of "concerned parent".

[28] Section 88(2)(c) of the *Act* further defines concerned parent as “a parent regularly providing financial support for the child”. It is uncontested here that the biological father initially contested the paternity of the child and did not pay child support. In fairness, the maternal grandmother deposed that neither she nor the mother ever requested child support. Rather, pursuant to the applicable legislation, the Nova Scotia Family Court ordered, in response to the applications initiated by the biological father and his parents for a paternity test and access, that child support be paid in the amount of $217 per month.

[29] The paternal grandmother concedes at para. 13 of her affidavit that she and the paternal grandfather have been paying this child support on their son’s behalf. As of the date of swearing that affidavit on October 19, 2004, they were continuing to do so. However, she further deposed as follows:

> “That said, [S.R.] recently used funds from a motor vehicle settlement to repay my husband and I for prior maintenance payments”.

I find that last statement to be ambiguous. It does not say whether the biological father repaid his parents entirely for the prior child support they paid on his behalf, or only partially. In my view, there was an evidentiary burden on the respondents to establish that child support was regularly provided by the biological father, in order for him to fall within the related definition of “concerned parent” under the *Children’s Act*. The respondents’ evidence fails to establish this fact on a balance of probabilities.

[30] Further, there is evidence to the contrary. In the mother’s second affidavit she deposed, at para. 71(g)(ii), that in January 2000 she received child support cheques in

the mail signed by the biological father. This was the first time the cheques were signed by him, although the other writing on the cheques was that of the paternal grandmother. In any event, the first such cheque which the mother deposited bounced and the paternal grandparents replaced it. The mother also deposed that during her visit with the biological father in July 2001, she asked him about child support, because she had heard that he had received money from a car accident settlement. She said that she asked the biological father to start paying child support, rather than his parents continuing to do so. He responded that his money was not her business.

[31] I find that the biological father is not a parent who has “regularly” provided financial support for the child and therefore he does not fit within this particular definition of a concerned parent either.

[32] As a result, the biological father does not fit within any of the definitions of concerned parent in s. 88(2) of the *Children’s Act*.

(ii) Has the biological father deserted the child or neglected to provide her adequate financial support?

[33] I further find that the evidence I have just reviewed indicates the biological father has essentially deserted the child through his virtual lack of contact in the last eight years, which is about two-thirds of the child’s lifetime. There is also a lack of evidence that he has provided adequate financial support for the child. Pursuant to s. 88(1)(d) of the *Children’s Act*, I am directed to consider both of these factors in determining whether to dispense with his consent.

(iii) Will requiring the biological father's consent prejudice the child's best interests?

[34] The remaining factor under s. 88(1)(a) of the *Children's Act* is whether it would prejudice the best interests of the child to continue to require the biological father's consent.

[35] The petitioners' counsel argued that the circumstances relating to the child's best interests are set out in ss. 30(1)(a) to (g) of the *Children's Act*. The respondents' counsel countered that those circumstances are inapplicable to adoptions and only relate to applications under Part 2 of the *Act* for custody, access and guardianship. However, the main issue raised by the respondents' counsel was that I must also consider, under s. 94(3) of the *Act*, whether it would be more appropriate to deny the application to dispense with consent and alternatively proceed with an order under s. 94(2) for custody, or custody and guardianship, in favour of the petitioners. Under s. 94(2), such an order specifically refers to Part 2 of the *Act*. Therefore, it seems to me that it is entirely appropriate to consider the specific circumstances of the child set out in ss. 30(1)(a) to (g). That subsection reads as follows:

> "30(1) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including
>
> (a) the bonding, love, affection and emotional ties between the child and
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and

> (iii) persons, including grandparents involved in the care and upbringing of the child;
>
> (b) the views and preferences of the child, if those views and preferences can be reasonably determined;
>
> (c) the length of time, having regard to the child's sense of time, that the child has lived in a stable home environment;
>
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the [necessities] of life and any special needs of the child;
>
> (e) any plans proposed for the care and upbringing of the child;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live; and
>
> (g) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child."

[36] Even if I am wrong about the applicability of s. 30(1) to adoptions under Part 3 of the *Act*, the factors I have just quoted are similar in nature to those identified in the case law on dispensing with consent, which I will come to shortly.

[37] Dealing firstly with the list of statutory considerations, I conclude as follows:

a) The preponderance of the affidavit evidence clearly shows the child is bonded with the mother and adoptive father and has strong emotional ties to her maternal grandmother, D.T.B.'s parents, her maternal great-grandparents, her maternal aunt, D.T.B.'s brother and sisters, and the other members of the extended family of the maternal grandmother.

b) It is the stated preference of the child to proceed with the adoption. The child advocate, an experienced family lawyer, has met with her client on four occasions since May 2006. She submitted that the child understands the nature of the application and is very mature and intelligent. The child will soon be turning 13 years of age. The child advocate stated that her client is very "clear and unequivocal" in her wishes and that her wishes are her instructions. In the child advocate's submission, the child's wishes are also in her best interests. The child has instructed her counsel in general terms that the adoptive father is "her father in every sense of the word and that she wants to have that relationship legally recognized". According to the child advocate, "her reality is that [D.T.B.] is her father". The child also signed her written consent to the adoption on June 8, 2006. She stated there that she has been advised by the child advocate of the legal effect of the adoption and fully understands that such an order will transfer her biological father's "privileges, rights, duties, obligation[s] and responsibilities" with respect to her, to her mother and D.T.B. She further understands that such an adoption will end her biological father's legal right to have access to her.

c) The child has lived in her current stable home environment all her life, with the exception of the early years when the maternal grandmother was the actual guardian, while the mother completed her post-secondary education. The adoptive father has been involved with the child since 1998, which is well over half of the child's lifetime.

d) Clearly, the mother and the adoptive father are able and willing to provide the child with guidance, education and the necessities of life. It is further apparent that they are similarly able to meet any future special needs of the child.

e) Plans proposed for the care and upbringing of the child are sufficiently set out in the respective affidavits of the mother and the adoptive father and are similarly reflected in the report of the Director of Family and Children's Services. They are in all respects appropriate.

f) The family unit of the mother and adoptive father is apparently a permanent and stable one.

g) Proceeding with the adoption order will terminate the parental rights of the biological father, as well as any access rights currently held by the parental grandparents.

[38] This last point invites consideration of the case law relied upon by the petitioners, in particular *N.J.R.* v. *R.J.M.*, [1994] O.J. No. 1331 (Ct. Just.). *N.J.R.* is important not only for its summary of the law on dispensing with consent, but also because of its similarities in fact. The child in that case was 11 years old at the time of the court hearing. The child's mother and her new husband (the "co-applicant") applied for an order dispensing with the consent of the child's biological father to the child's adoption by the mother's new husband. The mother and the child's father were married in 1975. The child was born in 1983. The parties separated in 1985 and were divorced in 1986. The mother had custody of the child and her younger brother and the father was awarded access. The co-applicant resided with the mother and her two children from

1987 on and acted as a full parent to the child. The mother and the co-applicant were married in 1989. The father had been exercising only sporadic access to the child since 1986. About one year prior to the hearing, when the child was almost 10 years old, she executed a consent to her adoption by the co-applicant. The father consented to the adoption of the child's younger brother by the co-applicant, because he did not feel he was that child's biological father. While the father contended that the mother had interfered with his access to the child, it was common ground that he had seen the child very little over the previous few years. On the other hand, since the divorce judgment he had paid child support for the child.

[39] *N.J.R.* involved the application of s.138 of the Ontario *Child and Family Services Act,* which is roughly equivalent to s. 88 of the Yukon *Children's Act*. Not surprisingly, the test under the Ontario legislation was also the best interests of the child. Hardman J. reviewed the case law applying the "best interests" test to dispensing with consent. She referred to the test as a "rigorous" (para. 13) and "strict one, with the onus squarely on the applicant" (para. 21). In addition, she cited *W. et. al*. v. *C*. (1982), 35 O.R. (2d) 730 (Prov. Ct.), which described the test as a "stringent one", going "well beyond the mere balance of probabilities".

[40] At para. 18, Hardman J. quoted *Re: L. and L.* (1985), 51 O.R. (2d) 345 (Unif. Fam. Ct.), which she said had reviewed the law extensively. *Re: L. and L.* commented as follows at p. 359:

> "… The court should be ever conscious of the awful finality of an adoption order, and of the fact that such an order severs the relationship that formerly existed between the child and the child's natural parents. …

> While the court should intervene with caution, these issues, as well as all others, must be perceived through the eyes of the child. The wish of the natural parents to maintain the parent-child relationship is a relevant and substantial consideration that demands the court's attention. But it is one that should be assessed from the vantage point of the future well-being of the child, which, when all is said and done, is the crucial and determining factor." (my emphasis)

Hardman J. concluded from *Re: L. and L.* that it was clear that "there is a presumption that the child's 'relationships by blood' . . . are relevant" and that there "must be cogent benefits to terminate that sort of relationship" (at para. 24).

[41] Hardman J. also recognized, at para. 26, that many cases state that matters such as name change, inheritance and so on should be dealt with by less intrusive types of orders and that courts should be cautious in using the vehicle of adoption to "shore-up" step-relationship families. Given the fluidity of family relationships, Hardman J. agreed with that approach, but also stated that determinations must be based on the particular situation before the court. She stressed the importance accorded to the views of the child in the Ontario legislation. (I gather the Ontario legislation considered in *N.J.R.* is roughly equivalent to s. 83(1) of the Yukon *Children's Act*, which requires children's consent to their adoption when they are 12 years of age or older.)

[42] In applying the law to the facts, Hardman J. noted, at para. 21, that the benefits to the child from the adoption were similar to those "commonly raised":

1) similar family name;

2) security at home in the family unit;

3) benefit of stability in inheritance situation and upon the death of the biological mother;

4) confirmation of the reality of who is doing the parenting;

5) reaffirmation of the child's relationship with her younger sibling, who had previously been adopted.

[43] In addition, at para. 25, the court recognized that the relevant circumstances in that case were:

1) the child had lived most of her life with her mother;

2) the child had known the co-applicant as a fully involved parent since she was about 4 years of age;

3) the child executed a consent to the adoption when she was almost 10 years old and there was no change in her position at the time of the hearing;

4) it continued to be the child's wish, expressed through her mother, that she be adopted by the co-applicant; and

5) the mother had indicated that the child could continue to visit the biological father, if she so desired.

[44] Hardman J. gave particular emphasis to the importance of confirming the child's "current reality" as to who she perceived to be her family unit. At para. 28, she again referred to *W. et. al.* v *.C.*, cited above, which stated at p. 737:

> "Although it has been said that such matters as security, continuity, inheritance, change of name, already are either ensured or can be secured by other less rigorous means, on balance this is not really so in this case. The child's perception is closer to the reality of the situation. … There are very many other normal and naturally desirable consequences which flow out of the establishment of permanent relationships through adoption." (my emphasis)

[45] As for the prospect of severing the relationship with her natural father, Hardman J. noted, once again, the child's "reality" was that there was little if any bond between them. Therefore, from the child's perspective she "had nothing to lose", given her father's lack of contact in the past few years and her very slight relationship with him (paras. 23 and 30). Nevertheless, the court ended its decision with the hope that the child may decide to maintain a relationship with her biological father, which the mother indicated she would support, if the child so desired.

[46] In summary, *N.J.R.* concluded that there was more to be gained from the adoption than would be lost by cutting the child's parental tie with her natural father. Of prime importance, among the various benefits, was the child's perception that the adoption would solidify her family unit (para. 30).

[47] In the case before me, there are several circumstances similar to those in *N.J.R.*:

a) The child has lived all of her life with her mother. She has known the co-petitioner, D.T.B., since she was 4 years old. Indeed, he began to take on the role of a father figure in the child's life shortly thereafter and she has lived with her mother and D.T.B. since September 2001. The mother and D.T.B. were

married on July 5, 2002, and moved to Whitehorse about one year later, where they currently reside.

b) The child has clearly expressed her views and wishes the adoption to proceed.

c) There is no evidence that the child will feel any significant sense of loss from the termination of her relationship with her biological father and his parents. It is clear that she does not feel close to either and that they are simply not a big part of her life. Her biological father has had virtually no contact with her in the last eight years. His explanation that the mother has frustrated his attempts to maintain such contact rings hollow. As a result, the child has come to the point where she feels the biological father has moved on and is a stranger to her. Consequently, she feels no sibling attachment to his new son, P. She also feels ambivalence towards the paternal grandparents and describes them as being like “friends of the family”. She wants to be allowed to enjoy her current family without interference from the biological father and his parents. Thus, in my view, the child has nothing to lose in terms of her very slight relationship with her biological father and her paternal grandparents.

d) The mother has indicated in her second affidavit, at para. 75, that should the child decide that she wants to have a relationship with the respondents, collectively or individually, then she and D.T.B. would support her. Further, the child advocate was confident in submitting that if the child chooses to have access to the respondents in the future, she will do so. I also agree with the

child advocate that, given that the report of the Director of Family and Children's Services suggests that the mother and D.T.B. have done everything they can to act in the child's best interests to date, one should not assume, as the respondents' counsel suggests, that the mother and D.T.B. would not support the child in reaching out to the respondents, if she chooses to do so in the future.

e) The adoption will also allow the child to be affirmed as a full sibling to the mother's expected newborn - a fact which only became evident to the mother and D.T.B. at the time of this hearing on August 28, 2006.

f) The child will benefit from having the same family name as her parents.

g) The child will also benefit from the stability of knowing that she will remain with D.T.B., in the event of the death or disability of her mother, and from the expected stability of inheritance, in the event of the death of either or both of the mother and D.T.B.

h) Most of all, from the child's perspective, she wishes to have the "reality" of her current family situation recognized and solidified and she will no doubt benefit from the continuing security of the legal recognition that D.T.B. is her father.

[48] Should the biological father or the paternal grandparents wish to continue some form of relationship or communication with the child, while they have no legal right to do so, there is nothing to prevent them from continuing to make efforts to stay in touch. Further, should the child be willing to accept such communication, there is no objective

reason to believe that the mother would prohibit it. While I have my doubts about the sincerity of the biological father's desire to maintain a relationship with the child, given his past history, I cannot say the same about the paternal grandparents. However, whether or not the child will desire any continuing contact with the paternal grandparents will be the child's choice. As was the case in *N.J.R.*, I similarly hope that the child may decide to maintain some connection with her paternal grandparents, but at the same time I recognize that she is apparently mature and intelligent enough to decide for herself whether such a relationship is truly in her best interests.

B. Section 94(3) of the *Children's Act*

[49] The reference in *N.J.R.* to the desirability, where possible, of using less intrusive remedies than adoption is consistent with the intention behind s. 94 of the Yukon *Children's Act*. That section requires the court to consider whether to deny an application for dispensing with consent, where it would be "more appropriate" to proceed with an order for custody, or custody and guardianship, under Part 2 of the *Act.* I agree with the assessment of the law in *N.J.R.* that courts must be very cautious in granting adoptions to simply "shore-up" families involving step-relationships, especially given the relative impermanence of marriages and family relationships in recent times. I also recognize that the test for dispensing with a natural parent's consent is a strict one and that the onus clearly rests with the applicant. Nevertheless, each case must be decided on its own facts and the issues must be perceived "through the eyes of the child". In particular, the older the child is, the more the child's views should be given importance.

[50] At the outset of this hearing on August 9, 2006, the biological father seemed to indicate that he and his parents doubted the accuracy of certain evidence about the

child's attitude towards him and the paternal grandparents. However, there was no indication that any of the respondents attempted to contact the child advocate to confirm the authenticity of that evidence, despite having plenty of opportunity to do so.

[51] I have considered this issue cautiously and did not reach my conclusion lightly. However, as in *N.J.R.*, I am of the view that there are many significant and cogent benefits to the child from dispensing with the biological father's consent and allowing the adoption. At the end of the day, in addition to all the factors I have set out above, I give primary importance to viewing this application and the related adoption proceeding from the child's perspective. She is of an age and level of maturity that this should largely be her decision. Thus, it would be inappropriate to deny the application and proceed with a less intrusive order under Part 2 of the *Children's Act*.

V. CONCLUSION

[52] Based on the evidence before this Court, and the application of the law to the facts, I conclude that:

a) Having considered all the relevant factors, it is in the child's best interests to dispense with the biological father's consent to the adoption. Those factors include my earlier findings that the biological father is not a concerned parent and that he has both effectively deserted the child and neglected to provide her with financial support. Continuing to require his consent would prejudice the best interests of the child.

b) It is not appropriate to consider an order for custody, or custody and guardianship, under Part 2 of the *Children's Act*, instead of an order dispensing with the biological father's consent to this adoption.

[53] As no costs were sought on the notice of motion, none are awarded.

GOWER J.