QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2007 SKQB 36**

Date: **2007 01 29**
Docket: F.L.D. No. 117 of 2006
Judicial Centre: Saskatoon, Family Law Division

BETWEEN:

"ADAM HENDRICKS"

PETITIONER

- and -

"ROSE SWAN"

RESPONDENT

- and -

"LINDA TURNER AND DAVE TURNER"

THIRD PARTY RESPONDENTS

VERSION FOR DISTRIBUTION. ALL NAMES HAVE BEEN CHANGED EXCEPT THOSE OF COUNSEL AND EXPERT WITNESSES.

Counsel:

M. Vanstone	for the petitioner
G. Curtis	for the respondent
D. Blenner-Hassett and R. Danyliuk, Q.C.	for the third party respondents

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JUDGMENT R.S. SMITH J.
January 29, 2007

Introduction

1) In the fall of 2005, the respondent, Rose Swan (hereinafter "Rose"), realized that she was pregnant. Although she had recently terminated a relationship with the petitioner, she did not consider him the father as he had always declared he was unable to have children as a result of a 1997 industrial

accident. Further complicating the picture was the fact that she had been intimate with other men at the relevant time.

2) Rose knew she was not in a position to provide her baby with a healthy, nurturing home and enlisted the aid of her sister, who had a position with a First Nations child and family services department, to identify an appropriate couple to take custody of the child.

3) In due course, the third party respondents, Linda Turner and Dave Turner (hereinafter “Linda” and “Dave” or the “Turners”), were approached and an agreement was entered into granting them custody of the child.

4) At or about the time the child was to be born, the petitioner (hereinafter “Adam”), through members of Rose’s family, was advised that Rose was pregnant and that he was likely the child’s father. More troublingly, Adam was advised that it was Rose’s intention to place the child for adoption.

5) By the time Adam was alerted to Rose’s pregnancy (late March or early April, 2006), he had developed a new relationship with Ruth Taylor (hereinafter “Ruth”). Adam and Ruth discussed the matter and resolved that if Rose did not wish to raise Adam’s baby, they should seek custody of the child.

6) Pursuant to their agreement with Rose, the Turners took care and charge of the baby known as Ian Turner, born xxx, 2006, immediately after the child’s birth. At or about the time of the birth, Adam and Ruth were making numerous inquires with various governmental institutions and offices with a view to alerting the authorities that Adam may be the child’s father and that if he was, he sought custody.

7) Adam and Ruth made little progress with the authorities. Perhaps this is not surprising as Adam presented as someone who was unacknowledged by the birth mother, nor did he have a current relationship with her. To the authorities, he was simply a male voice on the phone asserting paternity.

8) There are a number of circumstances where statute law recognizes a man as the father of a child. Section 45(1) of *The Children's Law Act, 1997*, S.S. 1997, c. C-8.2 provides:

> 45(1) Unless the contrary is proven on a balance of probabilities, there is a presumption that a man is, and that a man is to be recognized in law to be, the father of a child in any one of the following circumstances:
>
> (a) at the time of the child's birth or conception the man was cohabiting with the mother, whether or not they were married to each other;
>
> (b) the man and the mother of the child have filed a statutory declaration, acknowledging that the man is the father of the child, with the Director of Vital Statistics or an equivalent official in another jurisdiction in Canada;
>
> (c) the man signed the birth registration form pursuant to *The Vital Statistics Act, 1995* or a form of similar effect pursuant to a similar Act in another jurisdiction in Canada;
>
> (d) the man married the mother after the child's birth and acknowledges that he is the father;
>
> (e) the man and the mother have acknowledged in writing that the man is the father of the child;
>
> ...

9) Adam did not fit within any of the above scenarios. As a result, his only recourse was to seek a declaration from the Court that he is the father of baby Ian.

10) Although the authorities were never explicitly dismissive of Adam and Ruth's requests, they, nonetheless, received all assistance short of help. Through dogged pursuit, they eventually determined, in broad terms, what had transpired between Rose and the Turners and brought this action in which they seek custody of Ian.

11) Linda and Dave resist Adam's application. At the time of trial, Ian had been in their custody for almost eight months. They love the child as their own and assert they can offer Ian a better life than Adam. Adam replies that he and Ruth (now his fiancé) can adequately provide for the child and, as the biological father, he should be given the opportunity to raise his son.

Facts

12) Adam and Rose met in February, 2005. At that time she was a server in a restaurant and Adam, who operated a courier business, would sometimes make deliveries there and periodically transport employees home after work.

13) Within a short time they developed an intimate relationship although they did not cohabit. Adam was then residing with his mother and Rose had her own residence. Although the relationship was uneven, Adam did introduce Rose to his family and in that sense they exhibited some of the badges of being a couple.

14) Their relationship was not without its stresses. Rose was a drug user. Adam testified that he believed she was trying to withdraw from regular use of meth-amphetamines. He admitted buying her marijuana as he was under the impression that was less damaging than meth-amphetamines and assisted her in

her withdrawal. In her evidence, Rose would not concede a meth-amphetamine addiction but did confirm Adam provided her with marijuana from time to time.

15) The relationship, always tenuous, began to completely unravel after an alcohol-fuelled violent incident in late June or early July of 2005. Although they were periodically intimate after that time, they ceased being a couple and began moving in their separate ways.

16) Adam asserts the violent episode was an anomaly. Generally, he does not consume alcohol as he understands he has a medical condition which precludes his brain from properly processing it. He advises that as a result of the medical condition, he becomes intoxicated even after the most modest alcohol consumption. He blames his problematic relationship with Rose for prompting him to drink on the evening in question, all of which resulted in him striking Rose.

17) Rose confirmed that the violent incident essentially ended their relationship as a couple. However, she also testified that it was not the sole cause. She complained that Adam was controlling, insecure and generally neither emotionally nor mentally healthy.

18) Rose was also self-aware of her own failings. When she found out she was pregnant, she knew the child's best interests lay elsewhere. Steps were then taken, as described in the Introduction, to place her child with a loving couple. The agreement with the Turners provided:

> CUSTODY AND GUARDIANSHIP AGREEMENT
>
> WHEREAS Rose is the natural mother of a male child born on xxx, 2006, to be named "Ian Edward";
>
> AND WHEREAS Rose, for personal reasons, is unable to parent the child, but wishes to ensure that the child is raised in a safe and caring home;

AND WHEREAS the Guardians [theTurners] have been family friends of Rose and her family for many years, and have been selected by Rose as suitable guardians and custodians of the child;

AND WHEREAS Rose is not married to, nor cohabiting with the biological father of the child or any other person in a spousal relationship;

AND WHEREAS the biological father of the child is not known, and no person has acknowledged paternity, nor supported or maintained Rose during her pregnancy, nor acknowledged responsibility for the unborn child, nor indicated an intention to seek custody of or access to the said child;

AND WHEREAS Rose desires to appoint the Guardians as guardians and custodians of her child, to have care, custody and control of the child, with full authority to determine and decide upon matters respecting the child's residence, health, well-being, education, activities and spiritual development, subject only to the terms and conditions of this Agreement;

NOW THEREFORE the parties covenant and agree as follows:

1. Rose hereby covenants and agrees that the Guardians shall have sole legal custody and guardianship of Ian Edward, and shall be solely responsible for the care, upbringing and education of the said child and the Guardians also covenant and agree to accept this responsibility. For greater clarity and without limiting the generality of the foregoing, the Guardians shall have the full and sole legal authority to make medical and health-care decisions for the child, and to instruct medical personnel and health care providers accordingly.

2. The parties agree that the guardianship shall be in effect from the moment of birth of the child and that the Guardians shall take Ian Edward home from the hospital immediately after the birth when the doctors have ascertained that it is in the best interests of the child to leave the hospital.

3. The parties agree that they have jointly selected the name “Ian Edward” for the child, and the parties further agree that the Guardians may apply to change the child’s last name to “Turner” if so desired.

4. Rose and the Guardians agree that it is their joint desire and intention that Ian Edward be informed of his heritage and introduced to his extended family at an appropriate age and stage of development. The parties agree that they shall consult with one another and jointly decide upon the timing and manner in which such information is given to the child.

5. The parties agree that Rose may exercise access to the child if she so desires, provided that the timing and terms of such access are agreeable to the Guardians. The parties further agree that Rose’s extended family may exercise access to the child, but only subject to the following terms and conditions:

    a) no extended family member may exercise access without the approval of both Rose and the Guardians;

    b) any extended family member who exercises access must agree to respect the wishes of Rose and the Guardians respecting the disclosure of information regarding the child’s heritage and family relationships, as provided for in paragraph 4 of this Agreement;

    c) if any family member exercising access fails to respect the wishes of Rose and the Guardians respecting disclosure of information to the child, the Guardians shall have the authority and responsibility to terminate such access;

    d) if any family member wishes to be provided with photographs or information regarding the child, the Guardians agree to provide such information to Rose, and it shall be Rose’s responsibility to deliver or distribute such information.

6. The parties agree that this agreement shall constitute a custody and guardianship agreement for the purposes of *The Children’s Law Act*.

> 7. The parties acknowledge and agree that the Guardians, as legal custodians of Ian Edward, shall have the right to apply for and to receive the Child Tax Credit and any other benefits or supplements which may be available for the child.
> 8. The parties agree that if it becomes necessary for any reason following the birth of the child to execute any further or other documents in order to give effect to, or to carry out the terms of this Agreement, they shall execute such documents promptly.
> 9. Rose acknowledges that she is signing this Agreement voluntarily, and without compulsion.

19) The agreement is signed by Rose, Dave and Linda and witnessed with appropriate affidavits of execution. Although a lawyer prepared the agreement, there was no certificate of independent legal advice for any of the parties.

20) Adam commenced his petition for custody of Ian in May, 2006. Originally, Rose Swan was the respondent along with the Minister of Community Resources for Saskatchewan and the Saskatchewan Regional Health Authority. At the time of commencing the action, Adam knew Rose had placed the child somewhere but did not know with whom, nor was he aware of what involvement, if any, the provincial authorities had.

21) In his initial steps to determine the whereabouts of the child, Adam engaged the aid of the media, freely giving interviews and outlining to any reporter interested the particulars of his quest and his suspicions as to what might have transpired. There were suggestions that there was a conspiracy to keep him from his child. As events played out, many of those suspicions proved false, and, as is often the case, the matter was much more straightforward than Adam and Ruth had originally thought.

22) In time, the whereabouts of Ian was identified and in due course, arrangements were made for a DNA test which confirmed that Adam was Ian's father. Subsequently, the Turners were added as third party respondents and the Province and the Health Authority deleted as parties.

23) Once the DNA test confirmed Adam as the father, there was considerable interlocutory skirmishing. In October, 2006, provision was made for supervised access by Adam to Ian, said access having continued up to the time of trial.

24) The parties come to trial seeking resolution of the custody of Ian. Rose supports the Turners and maintains the home they could provide would be far superior to that of Adam. Rose's mother, Iris Swan, with whom she is at odds, was proffered by Adam as a witness on his behalf.

25) Iris Swan prefaced her testimony with an unanticipated brief soliloquy on why she, as opposed to Adam, should have custody. The essence of same was that she is the sole source of stewardship for the child's First Nations heritage. This position is maintained even though she, herself, is not biologically First Nations, but rather married into that status.

26) While cultural heritage is a relevant factor in assessing the spiritual and social needs of a child, I conclude it is not a contentious issue here. Both Adam and Ruth and the Turners agree that if circumstances allow Ian to be registered with a First Nation, then it would be worthwhile to take those steps. This is not only for cultural reasons, but to unlock any benefits that accrue from that status.

27) In the end, Iris Swan's preference is that she should raise the child. If she cannot, her second position is for Rose to raise Ian. If Rose is unable, then

Iris would support Adam raising the child. Iris Swan presents as an anguished maternal grandmother who cleaves to the doctrine that a child should be raised by blood relations as opposed to biological strangers.

Issue

28) In all debates concerning custody, the primary imperative of the Court is the best interest of the child. Given that overarching obligation, the Court must determine which of the competing parties will be granted the right to raise, guide and nurture Ian.

Adam and Ruth

29) Adam is 34 years old. His family moved from a small town to Saskatoon when he was six or seven years of age. The Hendricks family is not without its burdens. Adam's father and brother were both alcoholics and that addiction had a negative impact on the larger family unit. To their respective credit, both of Adam's father and brother achieved sobriety, his brother for the last 26 years and his father for the last 30 years, up to the time of his death in 2005.

30) Adam is alive to his family's potential for alcoholism and admits he has, in the past, abused it to a considerable degree. He acknowledges that alcoholism can affect relationships and have other serious consequences such as his 1989 conviction for exceeding .08.

31) Adam believes that compounding his familial predisposition to alcoholism is the fact that, due to the injuries suffered in the 1997 industrial accident, he is unable to consume alcohol to any degree, without becoming immediately intoxicated.

32) Adam testified that since 1997 he has only had two instances of alcohol consumption, namely during a trip to Las Vegas two or three years ago and the previously outlined violent episode with Rose.

33) As a teenager, Adam had no appetite for academics. His formal education ends at Grade VIII. He has been involved in spousal type relationships since he was 18 or 19. None have exceeded three years in length. Adam accepts that he has had a history of being attracted to women who were “a little on the wild side”. His experience of short-term uneven relationships have taken an emotional toll.

34) His first relationship resulted in a daughter. He was 20 years old at the time and he and the mother both felt they were unable to provide the child with an appropriate home. As a result the daughter was put up for adoption. The adoption was an open one and he still sees the child sporadically but does not purport to have a father/child relationship. When asked the child’s birthdate, he could not recall.

35) In August, 1996, Adam married Yvonne Bonneau. At the time, Yvonne already had two young children. The relationship was brief and volatile. Yvonne was a drug user and, in the nature of drug users, would from time to time act out. Social Services were involved with the family periodically, although the children were never apprehended.

36) Adam says that he was often left by Yvonne to care for the children which he did without incident. The relationship ended in 1998 when Yvonne returned to eastern Canada. The parties are still married as Adam never took the necessary steps to terminate that status. He is now doing so as he is engaged to Ruth and they look forward to getting married as soon as the clerical details can be put behind them.

37) Since 1998 Adam has had a number of other relationships prior to his current one with Ruth. Depending on how you define “relationship”, as distinct

from dating, there have been between three and five. It is worthwhile to observe that each one has ended somewhere between badly and very badly.

38) There is no question that Adam's personal life may be characterized as one of serial monogamy (more or less) with no commitment extending beyond three years. All the relationships have uneasy aspects, several of them deeply troubled. When asked in cross-examination whether he was attracted to vulnerable women with drug problems and a history of abuse, he frankly replied, "yes or they are attracted to me".

39) Adam met his current partner, Ruth, on a dating website. As they initially exchanged e-mails, each came to realize that they had met years ago when Adam was taking a martial arts class at a business operated by Ruth's then husband. Over the years, they had seen each other, by happenstance, several times before a chance meeting on the dating website.

40) At the time of the web-based communication, Ruth was living in eastern Canada, however, she was then making arrangements to move to Saskatoon as her mother lived there and required assistance. Once Ruth returned to Saskatoon, her relationship with Adam progressed very quickly. Adam began spending significant time at her home (he was still living with his mother) and they commenced cohabiting full time in or about April or May, 2006. They had no sooner taken that step when they began discussing marriage.

41) Their imminent plans for marriage have been delayed not only by the fact that Adam has not yet acquired a divorce from Yvonne but by the financially and emotionally draining custody dispute with the Turners.

42) Adam's experience with employment has been somewhat eclectic. He worked in the construction industry until he was injured in the industrial

accident in 1997. After that there would appear to be a number of odd jobs until he began a wedding business which he operated in partnership firstly with one girlfriend and finally with a second. Both the relationships and the business ended in failure.

43) Currently, Adam operates a courier company in the City of Saskatoon. He testified that the business generally was doing well, saving and excepting for the last several weeks, just before trial. He complains that as a result of him being distracted with the trial, a number of employees have been "running amok". Adam testifies that he has an income of roughly $35,000 per annum. Unfortunately, that assertion is unsupported by any documentation.

44) Adam runs his courier company as a proprietorship. He has not filed personal income tax returns for the last three years. In terms of probative value, his testimony that he will earn an income of roughly $35,000 must be taken as the amount he hopes he will earn, assuming everything works out. As to his debts, Adam was unable to offer any meaningful evidence other than to acknowledge that as he has not filed income tax or GST for three years, he is likely to face a debt with the Canada Revenue Agency.

45) The confluence of Adam's troubled relationships and difficulties with business have exacted a price. He declared bankruptcy sometime in 2002 and has only recently been discharged. In 2002 he was also hospitalized for depression which he attributed as primarily arising from the stresses of business and the lingering problems from his industrial accident.

46) When one considers the path Adam has travelled, it is, perhaps, not surprising that he presents as emotionally fragile. However, it is appropriate to

note that he has shown grit and determination in his pursuit for custody of his child. Many in his circumstance would have faltered. He has not.

47) Adam testified that his relationship with Ruth is, without exception, the best he has experienced to date. It is a relationship that is mature and has sustained itself through the pressures of a custody battle that has attracted more than its share of media glare.

48) Ruth Taylor is eight years older than Adam. I accept that she has been, and continues to be, a positive influence in his life. Her journey has also been one that has endured many challenges. Ruth's father was an alcoholic and violent with her mother. Her relationship with her father was estranged for many years but improved shortly before his death.

49) Ruth has had three significant relationships (all marriages) before Adam. Unfortunately, all three of her previous partners were abusive alcoholics. Her two grown children both suffered from drug addiction but both of whom, thankfully, appear to be on the road to recovery.

50) Notwithstanding the burdens she has borne, Ruth has persevered and is a productive member of society. She has a Grade XII education and has been a health worker for children for the Prince Albert Grand Council, a personal care provider, and is currently working with a private nursing operation. She earns in the neighbourhood of $29,000 per year and testifies that she welcomes the opportunity to assist Adam emotionally and financially with his child.

51) Ruth advises that her relationship with Adam is one that has not been characterized by alcohol and violence, as were her others. She suggests that they compliment each other.

52) Ruth and Adam have prepared their home and it is “baby ready” with nursery room, crib and all the other accoutrements necessary for child care. Ruth’s observation of Adam with his many nieces and nephews is that he has a good and natural relationship with children. Ruth testifies that she has been living with Adam since April or May, 2006 and that their relationship is strong, not the least evidence of which is that it has been able to withstand the pressures of a public custody battle.

53) When this action was at an interlocutory stage, Adam and Ruth engaged the services of Dennis Bueckert, a social worker who, for the last 13 or 14 years, has been preparing custody and access reports. Adam and Ruth were trying to counter allegations that they were not in a position to provide a fit home for the child. Dennis Bueckert prepared a Parental Capacity Assessment Report, basically by way of talking to Adam, Ruth and friends they referred him to, as well as making his own observations about their home.

54) Mr. Bueckert’s report fell well short of the value usually obtained though a Custody and Access report, as it simply focussed on a narrative provided by Adam and Ruth as well as their friends’ assessment of them. Mr. Bueckert should not be faulted for this, as under the circumstances, it was all that was available to him during the interlocutory battling.

55) Mr. Bueckert’s conclusion was that their resources for parenting, although largely untried in Adam’s case, appeared adequate to the task and that they had the capacity to successfully provide parental care.

56) Notwithstanding the above endorsement, it was clear during Mr. Bueckert’s testimony, which confirmed my own observations, that each of Adam and Ruth have significant psychological wounds. Mr. Bueckert was of the opinion

that each would benefit from counselling as the dynamics of co-dependency are clearly in evidence in each. It can also be fairly noted that although their relationship appears to be a healthy one, it is untested by time.

Linda and Dave

57) Linda and Dave have been married just under 12 years and have resided for the bulk of that time on a three and one-half acre parcel just outside of Prince Albert. Linda is 37 years of age, originally from England, having immigrated to Canada when she was 21 years old.

58) Linda's family life was stable, with no drug or alcohol abuse and she is in frequent contact with her immediate family members. Linda has a bachelor of arts (Hons.) in psychology and obtained her Masters degree in art therapy in 1994. She has been employed by the Prince Albert Grand Council as a family therapist but is now in private practice servicing the Prince Albert area, including the Muskaday First Nation. Her association with that Band is on a regular basis, so much so that the Band council had a baby shower for Ian.

59) Dave is 47 years of age. He worked as a conductor for a railroad company from 1979 to 1991. He then left to farm and to obtain his diploma in local government in order to do work for the municipality. Since his marriage, Dave has worked in the Prince Albert area as a heavy equipment operator. He testifies that the Prince Albert area offers a great deal of opportunity for work in that field. He is in good health and has no drug or alcohol issues, either currently or in the past.

60) The Turners' combined household income is in the area of $100,000, although that may drop somewhat as they have agreed between them that, at least initially, Ian should benefit from the presence of one of the parents being home on a full-time basis. Dave and Linda have agreed that Dave will address those chores and he has been a stay-at-home parent since they returned to their

acreage with Ian from the hospital. The Turners testified that they were, prior to this litigation, on the cusp of being debt free.

61) The Turners assert that their home is an ideal spot for a young child. In addition to the large yard offered by an acreage, there are animals, including horses. The Turners have good and close relations with their neighbours and testified that the community is a calm and supportive one.

62) Although they reside in the country, the proximity to Prince Albert allows them to take part in events in that community. They do so regularly, including taking part in cultural events such as art shows which are of particular interest to Linda.

63) The Turners knew Rose Swan and her family for a number of years. It was Rose who contacted Linda to ask if she and Dave would be interested in adopting her child. Although the parties may have used the term “adoption” when speaking between themselves, everyone knew that the contract struck did not constitute an adoption, although Linda believes that it is the first step on the road to a formal adoption. That process has become, of course, more complex with the discovery of the biological father.

64) When presented with the opportunity to raise Rose’s child, they addressed the issue thoughtfully. In addition to discussing it between themselves, they sought out the services of a counsellor and a lawyer. After reflecting on all aspects, they resolved to move ahead. Having brought Ian home from the hospital, he has, as is the nature of babies, become the centre of their universe. They love him as if he were their own and petition the Court for the privilege of raising him as their child.

65) Given some of the allegations that have been made through the course of the action, it is appropriate to note that the agreement struck between Rose and the Turners was voluntary in the fullest sense. No money changed hands – no consideration of any type was paid. Rose was looking for a good home for her child and the Turners welcomed that opportunity. Rose cannot be faulted for her choice – the Turners present as educated, mature and well-grounded.

Analysis

66) Counsel for Adam and Ruth urges the Court to give effect to the biological kinship that exists between Adam and baby Ian, in short, to let him raise his son and to recognize the blood ties between them.

67) There is no question that 50 years ago kinship was a pivot point for judicial analysis with respect to custody. The law at that time was summarized by the Supreme Court in *Hepton v. Maat*, [1957] S.C.R. 606, where the Court noted at page 615:

> ... I regard it as settled law that the natural parents of an infant have a right to its custody which, apart from statute, they can lose only by abandoning the child or so misconducting themselves that in the opinion of the Court it would be improper that the child should be allowed to remain with them, and that effect must be given to their wishes unless "very serious and important reasons" require that, having regard to the child's welfare, they must be disregarded.

68) Over time, judicial focus migrated from an emphasis on blood ties which was premised on the “rights” of the parent and focussed on the best interests of the child. An early observation of this changed approached was

articulated by Lord Justice Danckwerts in *Re Adoption Application 41/61*, [1963] Ch. 315, where he opined at page 329:

> ... I would respectfully point out that there can only be one "first and paramount consideration", and other considerations must be subordinate. The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child, and can be effective only if it coincides with the welfare of the child. Consequently, it cannot be correct to talk of the pre-eminent position of parents, or of their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court....

69) The focus on the best interests of the child is now a decades old standard in Canadian jurisprudence. Under Saskatchewan law, the principle is embodied in the relevant sections, being s. 8 and s. 9 of *The Children's Law Act, 1997*, which provide:

> 8 In making, varying or rescinding an order for custody of a child, the court shall:
>
> (a) have regard only for the best interests of the child and for that purpose shall take into account:
>
> (i) the quality of the relationship that the child has with the person who is seeking custody and any other person who may have a close connection with the child;
>
> (ii) the personality, character and emotional needs of the child;
>
> (iii) the physical, psychological, social and economic needs of the child;
>
> (iv) the capacity of the person who is seeking custody to act as legal custodian of the child;
>
> (v) the home environment proposed to be provided for the child;

(vi) the plans that the person who is seeking custody has for the future of the child; and

(vii) the wishes of the child, to the extent the court considers appropriate, having regard to the age and maturity of the child;

(b) not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child; and

(c) make no presumption and draw no inference as between parents that one parent should be preferred over the other on the basis of the person's status as a father or mother.

9(1) In making, varying or rescinding an order for access to a child, the court shall:

(a) have regard only for the best interests of the child and for that purpose shall take into account:

(i) the quality of the relationship that the child has with the person who is seeking access;

(ii) the personality, character and emotional needs of the child;

(iii) the capacity of the person who is seeking access to care for the child during the times that the child is in his or her care; and

(iv) the wishes of the child, to the extent the court considers appropriate, having regard to the age and maturity of the child; and

(b) not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to care for the child during the times that the child is in his or her care.

(2) Unless otherwise ordered by the court, a parent who is granted access to a child has the same right as the custodial parent to make inquiries and be given information concerning the health, education and welfare of the child.

(3) The right of a parent who is granted access described in subsection (2) is not, unless the court orders otherwise, a right to be consulted about or to participate in the making of decisions by the custodial parent.

70) Although the primary imperative for the Court is the best interests of the child, that is not to say that consanguinity is not a serious element of any judicial analysis. The Supreme Court case of *King v. Low*, [1985] 1 S.C.R. 87 involved an unwed mother who gave up her son for adoption a few days after its birth as she feared parental disapproval. The proposed adoptive parents were friends of the mother and she was confident they would provide a good home.

71) The child was born on April 4, 1982 and went to live with the adoptive parents on April 9, 1982. She signed a consent to adoption on April 19. By June, the biological mother had had a complete change of heart and she revoked her consent to the adoption.

72) The contest between the biological mother and the proposed adoptive parents came to the courts and wended its way to the Supreme Court. McIntyre J., in speaking for the Court, set out the test at para. 27, which I understand remains operative today:

> ... I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. **Parental claims must not be**

> **lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.**
>
> [emphasis added]

73) In determining the best interests of the child, it is important to remember that the assessment is not from the parents' perspective but rather the child's. This was succinctly stated by Abella J.A. (as she then was) in *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.), where she opined at para. 38:

> The child's best interests must be assessed not from the perspective of the parent seeking to preserve access, but from that of the child entitled to the best environment possible. It is a mistake to look down at the child as a prize to be distributed, rather than from the child up to the parent as an adult to be accountable. This by no means eliminates the adult's wishes from the equation; it means that those wishes cannot always be accommodated. It is the child's right to see a parent with whom she does not live, rather than the parent's right to insist on access to that child. That access, its duration, and quality, are regulated according to what is best for the child, rather than what is best for the parent seeking access.

74) The difficult weighing of kinship within the matrix of best interests of the child is illustrated in *Re British Columbia Registration No. 99-00733*, 2000 BCCA 109, (2000), 4 R.F.L. (5th) 17 (B.C.C.A.). That case involved a custody battle between a child's biological father and adoptive parents who had been chosen by the child's mother. The adoptive parents took care and charge of the child immediately after birth and in due course the biological father began an application for custody.

75) The British Columbia trial judge found that the adoptive parents would be excellent parents. There was a report from a clinical psychologist that found that they could offer an “ideal parenting, familial, moral, social and economic environment for the subject child”. The expert also found that the biological father had significant family support and a good family background, but less economic and social resources. Further, his romantic, economic and residential future was considerably less certain than that of the adoptive parents.

76) The trial judge concluded that as the environmental factors available to the child were essentially balanced, the blood link tipped the scales in favour of the biological father.

77) The trial judge’s analysis was not embraced by the majority of the British Columbia Court of Appeal in *Re: British Columbia Registration No. 99-00733*, *supra*. Prowse J.A. stated at paras. 116 and 117:

> Based on the uncertainties associated with the care of the child in the birth father's home, I conclude that the trial judge erred in finding that the factors relating to the child's best interests were relatively equal as between the two families. Apart from the biological factor, the balance was clearly in favour of the adoptive parents. That being so, the biological factor did more than tip the balance in favour of the birth father having custody. Rather, the biological factor assumed overriding significance. This is evident from the trial judge's reference to the wishes of the birth parents at para. 24 of his reasons. It is apparent from that reference that the trial judge was reluctant to go against the wishes of the birth parents. The biological factor was uppermost in his mind.
>
> Had all other factors been more or less equal, I agree that it would have been appropriate to look to the biological factor as the decisive factor in the circumstances. As I stated in an earlier decision involving similarly difficult issues *(Re British Columbia Birth Registration Number 030279* (1990), 24 R.F.L. (3d) 437 (B.C.S.C.)), the benefits that flow to a child from blood ties are intangible and not readily put into

> words. In this case, however, for the reasons I have given, the factors relating to the best interests of the child cannot be said to have been relatively equal as between the two families.

78) Similar considerations were addressed in the earlier decision of *J.N.Z. v. J.D.*, [1994] B.C.J. No. 969 (B.C. S.C.) (QL). The biological mother of the child gave the child up for adoption two weeks after birth without the knowledge of the father. The adoptive parents were selected by the mother from a registry of couples interested in adoption. The biological father learned of the child's birth one month after the event and obtained court orders compelling the mother to reveal the identity of the adoptive parents. Upon learning of the whereabouts of the child and the adoptive parents, the biological father commenced an action to retain custody of the child.

79) The biological parents had an unstable and abusive relationship. The biological father's employment was, at best, uneven and the status of his relationship with his new partner was uncertain. The adoptive parents had a solid relationship, lived in a large home, had a good income and ties to extended family and community. The Court concluded that it was in the best interests of the child to remain in the custody of the adoptive parents.

80) The Court's analysis turned on the fact the adoptive parents had significantly more to offer the child in terms of her health, emotional well being, education and training. Further, the child had been with the adoptive parents for nine months and had bonded with them. Although the adoptive parents were not financially well off, they had planned and organized their finances in a way that enabled them to provide a secure and stable environment for the child. The biological father did not appear to have carefully thought through the onerous

responsibility of caring for a child and, on balance, the blood ties that existed between him and the child, although a factor that was considered, was in no way determinative.

81) The Turners called as an expert, Francis Stewart, a registered psychologist with extensive experience with childhood psychological issues in relation to custody, access and related matters.

82) Mr. Stewart testified that bonding and attachment are often referred to synonymously but are, in fact, two different concepts. Bonding is a process, attachment is a result. Bonding is the daily nurturing and interaction that takes place between a child and its caretaker(s). The bonding process leads to attachment which is an established emotional relationship between the child and its caretaker(s).

83) Mr. Stewart was called to caution the Court that to cause a break in the attachment between child and caretaker(s) may lead to a lifelong negative result for the child. Mr. Stewart testified that in his opinion, as well as other learned minds in the psychological field, attachment will most likely take place at five or six months.

84) The position advanced by Mr. Stewart was a significant conclusion as Ian had been with the Turners (at the time of trial) approximately seven and one-half months. Counsel for the Turners pressed the argument that as attachment had occurred, the Court must feel constrained to alter the status quo. As ending a child's attachment relationship could have a deleterious effect on the child's psyche for the balance of its life, it follows that any order separating Ian from the Turners could not be in his best interest.

85) I must respectfully reject that argument. While I accept that terminating a child's relationship from its caregiver(s), with whom it has attached, is likely to have a deleterious effect, there is no definitive position as to when attachment occurs.

86) When I asked Mr. Stewart what the general opinion of one hundred psychologists would have been five years ago as to when attachment occurs, he replied, to his credit, that most would have thought anywhere from 12 to 18 months.

87) In followup examination-in-chief, Mr. Stewart was asked what one hundred psychologists would say today. Mr. Stewart replied that most would be of the view that attachment occurs at least by 12 months.

88) Cliches should be avoided, but I nonetheless observe that the issue of identifying the moment of attachment appears to be, within the psychological world, more art than science. In sum, I am not prepared to accept the proposition that Ian has so irrevocably attached to the Turners that the cessation of that relationship would, *ipso facto*, be contrary to the child's best interests. The issue of attachment is a meaningful consideration, as it is in any case where a change of custody is proposed, but it cannot be the determinate factor in this case, to the exclusion of all others.

89) A recent Saskatchewan case presented a situation where the Court grappled with a debate between the extended family of the biological father (which would provide an excellent home) and the proposed adoptive parents. In *J.J.W. v. R.C.C.B.*, 2006 SKQB 24, (2006), 273 Sask. R. 308 (Q.B.), a birth mother placed her child for adoption and the birth father would not consent. The

adoptive parents of the six-month old child applied for an order dispensing with the birth father's consent.

90) The birth father had the benefit of an extremely supportive mother and family and suggested that the environment he could offer met or exceeded that of the adoptive parents. Rothery J. noted at paras. 18-23:

> [18] The paternal grandmother has pursued her post-secondary education, and is six classes short of a degree in social work. She has worked with mentally handicapped adults and troubled teens. She works full-time, plus additional hours part-time at a video store. She volunteers on her daughter's pre-school board, the art gallery board, and with cadets.
>
> [19] Her husband works as a systems engineer and volunteers with cadets. He is deputy commissioner with the search and rescue operation, CASARA. He and the paternal grandmother have a comfortable home for all their children. Both of these individuals are fine people.
>
> [20] The paternal grandmother supports the birth father in his claim for custody of his baby. She has pursued options with the Department, and has arranged for the birth father's legal counsel. She and her husband ensure the interim access takes place by driving the birth father to collect the baby. The birth father has neither a driver's licence nor a vehicle. The paternal grandmother states their home is open to the birth father and the baby for as long as he requires their assistance.
>
> [21] However, this proceeding is not about the paternal grandmother's ability to help the birth father. What must be decided is whether dispensing with the birth father's consent is in the baby's best interests.
>
> [22] At the age of twenty, the birth father has not removed himself from his own mother's charge. He completed a modified high school programme that prepared him for entry-level employment. He is diagnosed as having attention deficit disorder and formal schooling was difficult. According to the paternal grandmother, the birth father was prescribed Ritalin until he was about age fifteen.

> [23] The birth father earns minimum wage, and pays his mother $100 per month to live at home. He states that he will rely on his younger brothers for child care in the evening when he is working. His future plans for the baby are short-term. He hopes to move to a place of his own.

91) Rothery J. then went on to conclude at para. 33:

> [33] There is no doubt that the adoptive parents can provide for this baby's material needs. As stated in *King v. Low*, *supra*, the best interests of the child cannot be decided merely on material advantage. But, considering all relevant factors including the baby's physical, mental, emotional and psychological needs, the adoptive parents can provide for her "healthy growth, development and education" to equip her for her own adult life. That is the choice that must be made, as the welfare of this baby is paramount. Accordingly, as it is in the best interests of this baby, the court must dispense with the birth father's consent to the adoption.

92) The direction from judicial authorities is crystal clear, namely, that consideration of any single factor, including kinship, must always remain and be subject to the primary consideration, namely, the best interests of the child.

93) In summary, the instruction I draw from the case law is that the critical elements the Court must consider in a debate such as this are:

(i) The paramount consideration is the best interests of the child;

(ii) Blood ties are a factor to be considered in determining the best interests of the child but they are to be considered from the point of view of the significance to the child, rather than the significance to the biological parent;

(iii) The question must be asked which environment can best provide for the health, emotional well being, education, training, intellectual, economic and psychological needs of the child;

(iv) The Court must consider uncertainties associated with transferring custody of a child from a known situation of security and stability to a situation with many unknowns. In the case of an infant, the Court must consider the potential harm to a child in disrupting attachments that have developed or are in the advanced stages of formation.

Conclusion

94) In his petition to seek custody of his child, Adam has displayed the protective instincts of a caring father and shown a willingness to assume the lifelong obligations involved in parenting. Adam and Ruth have forthrightly expressed their desire to care for the child and have demonstrated they are adequate to the task. Nonetheless, it must be said there are many unknowns. More pointedly, “adequate” is not the test for the determination of the best interests of a child.

95) I conclude from all the evidence, without hesitation, that Ian’s best interests are served by granting custody to the Turners. It is clear that they present an environment that will best provide for his health, education, emotional well being, opportunity for training and economic and intellectual pursuits.

96) This conclusion must not be interpreted as a determination that someone is wrong and someone is right. The focus is the best interests, now and in the future, for Ian. I know that each of the parties, in their own way, hopes for the same.

97) Accordingly, I order, pursuant to s. 6(1)(a) of *The Children’s Law Act*, that Dave and Linda are to have joint custody of the child, now known as Ian Turner, born xxx, 2006. Such order encompasses all the usual incidents of parental control. The only proviso I place on the custody order is pursuant to s. 6(5)(b) of the said legislation and require the Turners to give 30 days’ notice to Adam of any intention to change Ian’s place of residence. Such notice shall provide the time at which the change is intended to take place and particulars of the new proposed place of residence.

Epilogue

98) In a custody dispute, normally a judgment would conclude at the above paragraph but the situation before the Court is more complex.

99) Adam's position, as advanced by his counsel, was always that of seeking sole custody but if that could not be obtained then his fallback position was that he should have the ability to maintain a relationship with the child. There would be many circumstances where such a request would not be honoured. Given the history of baby Ian, I am of the view it must be considered.

100) The agreement between Rose and the Turners, at sections 4 and 5, clearly contemplate not only that Rose might have access to Ian but that his "extended family" would have access at an appropriate age and stage of development. The agreement goes on to provide that the conditions of such access are subject to the timing and terms of same being agreeable to the Turners.

101) Given that the Turners knew they would always face the prospect of a potential interaction by Rose and Ian's extended family, should a request for access from the biological father be unacceptable? With caution, I am of the view it should not.

102) The precondition of any access by Adam and Ruth to Ian must be that same is in the best interest of the child. It is reasonable to presume that they are capable of providing a different but nonetheless positive adult presence in Ian's life. As always, it is the specifics of such presence which is problematic.

103) Although concluding that Adam should not be forever barred from seeing Ian, I am certain that all parties, and most particularly Ian, would benefit

from a period of familial calm. Ian is in the final stages of bonding and reaching attachment and same should be accomplished without distractions, including interlocutory applications on the specifics of access.

104) Although it is always available to the parties to agree otherwise, in the absence of agreement, I am of the view that Ian should have a period of one year of familial calm. At the end of the trial the parties agreed to an access schedule covering the period ending January 31, 2007. Failing agreement between the parties, there shall be no further order for access until on or after February 1, 2008.

105) Hopefully the parties will be able to make their own arrangements, but if they cannot, then any party, after February 1, 2008, has the right to apply to chambers to seek an order defining the specifics of access. It must be understood by all the parties that any access order must be premised on the best interests of Ian, not the best interests of Adam and Ruth or the Turners.

106) Adam will complain that the above access protocol is absolutely inconsistent with the normal access provided a parent. Courts typically structure access so as to ensure a continuing involvement of a parent and a child. From that perspective, the complaint is well grounded.

107) The essence of the judgment rendered herein is to place the Turners in the sole parental role in Ian's life. Pursuant to that judgment, by definition, Adam will not have a parental role in the child's life. That is not to say he cannot be a positive adult presence, but it will not be parental.

108) My concern is Ian could have immense difficulty, particularly in the early stages of his development, in reconciling all the complicated adult

relationships in his life. In the interests of Ian's stability, it is best that he have intermittent exposure to Adam, rather than structured continuous access.

Costs

109) Although this case has generated considerable heartache and stress, it cannot, in a fair-minded way, be said that any party has been in the wrong. Although lives have been disrupted, the turmoil arose from the often complex circumstances that flow from the unfolding lives of real people with human frailties. There will be no order as to costs.

_____ J.
R. S. Smith