Court of Queen's Bench of Alberta

Citation: S.L.L. v. L.C., 2010 ABQB 92

Date: 20100216
Docket: FL01 09143
Registry: Calgary

In the Matter of the Guardianship, Custody of and Access to the Child R.S.L.,
Born September, 2002

Between:

S.L.L. and J.S.L.

Appellants

- and -

L.C.

Respondent

Restriction on Publication: No one may publish any information serving to identify a child or guardian of a child who has come to a Minister's or a director's attention under the *Child, Youth and Family Enhancement Act*. See the *Child, Youth and Family Enhancement Act*, s. 126.2.

By Court Order, there is a ban on publishing information that may identify the children or guardians in this matter. See the *Family Law Act*, s. 100.

Reasons for Judgment
of the
Honourable Madam Justice C.A. Kent

Appeal from the Decision by
The Honourable Judge S. Prowse-O'Ferrall
Dated the 26th day of November, 2009
(2009 ABPC 359, Docket: 080368087F1)

[1] R.L. was born on September 16, 2002 to his mother L.C. and father T.L. R.L. was apprehended from his mother's residence on September 18, 2004. R.L. was placed with S.L. and J. L., his paternal grandparents. He has lived with them since that time. R.L. was apprehended because both L.C. and T.L. had a drug addiction problem. The mother has been through addiction therapy and other training. She is drug free. She is in a new relationship with a man and has a 2-year old baby. She seeks return of R.L.

[2] After R.L. was apprehended, a kinship regional home assessment was done. The assessment gave approval for R.L. to live in the L. home. There were two concerns raised by the assessor. First, S. L. had admitted that she used marijuana for medicinal purposes because of severe migraines. Second, T.L., the biological father, continued to visit the L. home and he had not dealt with his addictions. In fact he continues to abuse drugs to this day. The assessor recommended that S.L. and J.L. would need to be reminded of the importance of maintaining vigilance and safety for R.L. which included setting boundaries about T.L.'s access to R.L. and the use by S.L. of marijuana.

[3] A private guardianship order was granted on May 13, 2005 whereby S.L. and J.L. became appointed as guardians for R.L. and the guardianship of his mother was terminated. The maternal grandmother signed an application dated September 26, 2004 indicating that the best home for R.L. was the L. home. There was also an agreement between the four grandparents that access by the mother to the child would be on a supervised basis.

[4] The mother applied for guardianship on March 25, 2008. She argued that she is the appropriate guardian for R.L. and that it is in his best interests that her parenting be fully restored. The respondents S.L. and J.L. opposed the application. A trial occurred in Provincial Court during November, 2009. The Provincial Court judge ordered that L.C. have guardianship of R.L. with some access time to S.L. and J.L. There were other incidental orders made. S.L. and J.L. appeal the order of the Provincial Court judge arguing that the judge displayed a bias during the trial, making the trial unfair. A stay of the Provincial Court Order was granted so that R.L. remains with S.L.

[5] The appellants point to three examples where the trial judge made statements from which one could apprehend bias. To put those statements in context, it is necessary to understand the scope of evidence given at trial. Since guardianship was with the appellant grandmother, the application was by the mother so that she called her evidence first.

The Mother's Case

- D.H., one of the appellant's sisters, testified that at the time of the guardianship order in favour of S.L. she was concerned about drug and alcohol abuse in the appellant's home with respect to the appellant's own children and what that would portend for R.L. She raised this issue with the family at that time. She also gave evidence about the fact that L.C. had successfully rehabilitated and was able to care for the child.

- D.M., another sister of the appellant, gave similar evidence.

- C.S., a friend of L.C.'s sister, gave evidence about L.C.'s relationship with R.L.. They appear to have a loving relationship. C.S. has known L.C. for three or four years.

- T.C. is the maternal grandfather of R.L. He is a special education and behaviour adaptation high school teacher. He gave evidence about his relationship with R.L., his daughter's relationship with R.L. and evidence about concerns that he had with the parenting by S.L. He gave evidence about the access visits that R.L. had with him and his wife and some of the issues that arose at the time the access visits were coming to an end. He also testified about information he had received regarding S.L.'s marijuana use. He gave evidence about attempts that he made to find out how R.L. was doing at school. He admitted that because he was a teacher he was able to obtain information that he would not be entitled to by school policy.

- C.B., L.C.'s current partner, gave evidence describing his relationship with L.C. and R.L. and how R.L. interacts with himself, L.C. and their new baby. He gave evidence about an incident when he and L.C. were in a car with T.L., the biological father, and R.L.. T.L. pulled out a bag of marijuana and allowed R.L. to smell it.

- T.C., the maternal grandmother, gave evidence about how R.L. came to be in the guardianship of S.L. and J.L, concerns that she had with S.L.'s parenting of R.L., and about L.C.'s capacity to parent R.L..

- L.C. gave evidence about her rehabilitation, her access and relationship with R.L., his involvement with her new partner and new baby and also her concerns with respect to the parenting of R.L. by S.L.

The Grandmother's Case

- Dr. Macdonald, a clinical psychologist, gave evidence with respect to some counselling that she performed with R.L. She testified that S.L. contacted her to help R.L. express his feelings about his family and cope with any difficulties he was having with his feelings. Dr. Govender had diagnosed R.L. with attachment disorder. Dr. Macdonald indicated that a child who has an attachment disorder would have significant difficulties in sorting out relationships and knowing how to find a secure base. Consequently moving from one

primary care giver to another would be extremely difficult. She agreed, hypothetically, that if the attachment disorder was created within the first two years of life and a secure attachment had later formed with the child's caregivers between two and seven years old, it would be very difficult and probably traumatic to move the child. She also indicated that if the child had formed a secure attachment, transitions may be easier. She said that she did not find R.L. to be a sad lonely child. She described him as smiling a lot, friendly and curious. She said that he did talk about his other grandparents, his dad, his uncles and there was not a lot of negative emotional components to that.

- Dr. Govender performed a behavioural assessment on R.L. in September, 2009. He testified that he did not find that R.L. was suffering from full fetal alcohol syndrome but he had not ruled out fetal alcohol spectrum disorder. However, his behaviours were also consistent with other possible environmental or medical conditions. He confirmed that it would be appropriate for R.L. to return to see Dr. Macdonald. He concluded that R.L. was exhibiting attachment disorder although he acknowledged that he is not an expert and was unable to give any further evidence on that issue. He indicated that R.L. needed a psycho-educational assessment. In cross-examination he acknowledged that some of the other environmental or health issues that could be at the root of R.L.'s difficulties could include neglect.

- T.L. gave evidence with respect to his relationship with his son and his use of marijuana.

- S.P., who was R.L.'s kindergarten teacher at his elementary school testified about her observations of R.L. and the difficulties that he experienced in kindergarten. She also testified about S.L.'s care of R.L. Her assessment was positive.

- K.K., the principal of the elementary school testified about S.L.'s care of and attention to R.L.'s needs. His assessment was positive.

- M.B., R.L.'s grade 1 teacher testified. He testified about R.L.'s time in his class and about S.L.'s willingness and ability to work with the school. His assessment was positive.

- A.M.R., a social worker, testified. She is a friend of S.L. She gave evidence about S.L.'s relationship with R.L. Her assessment was positive.

- C.P. is a teacher's assistant in the behaviour room with the Calgary Catholic School Board. She worked with R.L. and gave evidence about his time in her classroom. She, likewise, gave positive evidence about S.L.'s relationship with R.L.

- M.P. testified. She was a family support and educational support counsellor to R.L. when he was in kindergarten. She testified about her work with R.L. and her observations about S.L.'s relationship with R.L. She was in the L. household a couple of times and noted nothing unusual.

- D.M., a friend of the L.'s testified. He testified about the times he visited the L. household. He sometimes observed marijuana smoking.

- S.L. testified about her relationship with R.L., how she came to be his guardian and issues regarding access by L.C. to R.L.

- M.L. testified. She is a child welfare worker. She testified about her involvement in the assessment of Mr. and Mrs. L. at the time that R.L. was apprehended from his mother and father. She said that she had no information that S.L.'s use of medicinal marijuana was impacting her parenting.

- B.C. testified. R.L. was in her day home from 2006. She testified positively about S.L.'s parenting. Her evidence will be discussed further below.

- T.C. testified. She was originally a babysitter for S.L. and subsequently became her friend.

- S.F., S.L.'s cousin, testified. She gave evidence about S.L.'s parenting of T.L. and R.L.

- G.W. testified. She testified about how S.L. did not get along with her two sisters.

- G.T., S.L.'s aunt, testified. She also testified about S.L.'s relationship with her sisters.

- J.L. testified.

The Trial

[6] As indicated above, the appellant gives three examples of the court making statements that lead to a reasonable apprehension of bias. The first deals with the issue of drug testing. As indicated above, the first two witnesses gave evidence about S.L.'s marijuana use. That led to the following exchange between the judge and counsel for S.L.:

THE COURT: I..I would assume so. I don't see here any drug tests, but I would assume as part of your case you would be putting in some recent drug tests from your clients - -

MS. GOOLD: No, that - - the only drug - -

THE COURT: - - since that's one of the - -

MS. GOOLD: - - tests that were ever ordered were, as you'll see in the order that I provided with the initial binder, L.C. was supposed to do drug tests - - have clean drug tests for a certain period of time.

THE COURT: Well, I would think you'd have the grandmother since it's alleged that she at one time - -

MS. GOOLD: No, and my - - my client will be giving evidence that she uses therapeutic marijuana so she would not test clean on a drug test, and she'll acknowledge that. She's always acknowledged that. It's never been an issue. She's on the waiting list or in the process of getting a medical use certificate.

[7] The second example occurred during the testimony by the maternal grandfather. As indicated above, one of the areas of evidence of T.C. was how he improperly obtained some information about R.L.'s schooling. Ms. Goold was cross-examining T.C. and the following exchange occurred between Ms. Goold and the Court:

MS. GOOLD: - - gave you information about R.L. You're saying somebody at Wood's Homes gave - - how did Wood's Homes have involvement?

A: Wood's Homes?

Q: Yeah.

THE COURT: How is it - -

A: They worked with R.L.

THE COURT: How is it relevant - -

A. Yeah.

THE COURT: I mean, I know it's interesting, but how is it relevant who - -

MS. GOOLD: Because none of these parties have a legal ability to give information to this gentleman.

THE COURT: Well, that - - then you're going on a fishing trip and we're not going to go there.

MS. GOOLD: No, Your Honour, actually - -

THE COURT: You can - -

MS. GOOLD: - - the reason I am pursuing this line of cross-examination is because it appears that this witness took advantage of his position in the system to

get information he had no right to behind that back of the only legal guardians.

THE COURT: Well, we're not going to go down that road. He's a - - he's a grandfather. He asked certain - - if he got inappropriate information, that will have to go to another proceeding. I'm not going to - -

MS. GOOLD: Well, I would respectfully put on the record, Your Honour - -

THE COURT: The issue here is - -

MS. GOOLD: - - that that of course - -

THE COURT: The issue here is - -

MS. GOOLD: - - speaks to credibility and character of this witness.

THE COURT: The issue here is what's in the best interests of this child, to stay in the home he's in - -

MS. GOOLD: Of course.

THE COURT: - - or to be returned to his parent.

MS. GOOLD: And part of what the Court will have to assess is which witnesses - given there's going to be highly conflicting information - whose evidence you chose to find credible. Credibility in turn often hinges to a great degree on general character. If the character of a witness can be brought into question by virtue of illegal or inappropriate or immoral actions, that might very well taint their evidence partially or completely. Just for the record - -

THE COURT: Okay.

MS. GOOLD: - - that's what I was pursuing. And - - but you're telling me I can't go any further down - -

THE COURT: No.

MS. GOOLD: - - the line of where he got his improper information.

[8] During argument there was also an interchange with respect to that evidence. Ms. Goold raised the issue of credibility with respect to the maternal grandfather because of his manner of getting the information referred to above. The Court said the following:

THE COURT: He placed the welfare of his grandson, I think we've heard, ahead of what the rules were and getting in trouble. He was very concerned - - I think that was following a day when the grand - - when R.L. had run from his care and - - or run from paternal grandfather's care and ran all the way over to his residence. I think that caused him grave concern that - -

MS. GOOLD: And he - -

THE COURT: - - the child had placed himself at risk.

MS. GOOLD: Even if that's the case, why does he need information from the school? He's conveyed to the school before he's bothered to convey it to the guardians, that this child had run away. So now the school has a piece of information he has. And by the way, Your Honour, that's a very troubling comment. If the Court is suggesting that it's okay for a professional to break their own code of conduct, if they think the ends justify the means, that is very troubling because I would submit that is not the case.

THE COURT: I was not condoning that but I can understand it from a grandfather's point of view, where he has such concern about his grandchild. I can understand where he was coming from.

[9] The third exchange occurred just after the mother finished her evidence *in chief*. It was the second day of trial. The Court had planned to take a brief adjournment before cross-examination was to begin and the following occurred:

THE COURT: I'm all - - I'm also contemplating - - I don't know if counsel was thinking of this, but there are many relatives in town right now and I'm wondering if an interim access order while the relatives are in town might be appropriate for R.L. to visit with extended family?

MS. GOOLD: Well, my concern about that would be, Your Honour, you haven't heard any witness from anybody other than mother and her witnesses.

MS. HNATIUK: (counsel for Mr. L.)
And also, my immediate reaction to that, Your Honour, would be that R.L. has not seen any of these people since he was very young. So, I don't know that he would feel comfortable seeing people.

THE COURT: I - - I - -

MS. HNATIUK: Like, I understand - -

THE COURT: - - I will also say I'm very disturbed about this little boy. I realize I've only heard half the story.

MS. GOOLD: Not even.

THE COURT: But at this - - at this point, I'm considering calling in Child Welfare and having the child apprehended.

MS. GOOLD: A wonderful idea. That would be great.

THE COURT: Or - -

MS. GOOLD: That would actually save us all some subpoenas.

THE COURT: Or I'm considering placing him with mother until I've heard the rest of the evidence.

MS. GOOLD: Well, I would be in the appeal court very fast if you did that in the middle of a trial, and I've been very successful in getting those reversed in the past. You have to hear all the witnesses. And it would also be handy if you'd read the expert reports because I'm fairly confident that when Dr. Macdonald testifies - -

THE COURT: Well, I'd be delighted to read.

MS. GOOLD: - - her report doesn't say much.

THE COURT: I haven't been given the report.

MS. GOOLD: Yes, you have. They're in the binder - -

THE COURT: In the binder?

MS. GOOLD: - - I gave you. Yeah. Govender's and - - and Macdonald's. Macdonald's is very short, because again, she was doing counselling not assessing. But I certainly intend to put to her - -

THE COURT: Well - -

MS. GOOLD: - - as I imagine the Court does - -

THE COURT: - - I don't - - I don't - - I don't know if R.L. whether it would be too much of a surprise for R.L. to have a visit with these relatives, but I'm prepared

to consider that application if L.C. thinks it's appropriate to have a visit with the child.

MS. GOOLD: You might want to wait until Dr. Macdonald testifies on Thursday, which I still hope will happen.

THE COURT: This is just a visit I'm talking about.

MS. GOOLD: Yes, but transitions - -

THE COURT: I'm not talking about - -

MS. GOOLD: - - and changes are difficult for this child.

THE COURT: They are and - -

MS. GOOLD: And this is - -

THE COURT: - - that's why I'm asking the mother if she even thinks it's appropriate. I think family is very important for this little boy. There's a number of relatives that are in town now, and perhaps he would benefit from seeing those relatives.

MS. HNATIUK: And again - -

MS. GOOLD: There's only one relative who came in from another province and that would be the one who's sitting in the courtroom still today, D.H.

THE COURT: Are there not - -

MS. GOOLD: Everybody else lives here as I understand it.

THE COURT: I thought there was actually two from

MS. GOOLD: No. I thought there was just the one.

THE COURT: Okay. All right.

MS. GOOLD: And so - -

THE COURT: Then let's leave that then.

The Judgment

[10] The trial judge reserved her decision for about a week. Counsel for the mother notes that during the time that the case was on reserve, she left R.L. with the appellant grandmother, which she argues supports the view that there was no perceived bias in this case.

[11] The written reasons are helpful in deciding this case. The trial judge begins by listing a number of facts not in dispute. While the omissions in that list of findings of fact themselves do not alone exhibit an appearance of bias, they are relevant to the overall assessment of the case. The trial judge notes at paragraph 41 that Dr. Govender ruled out fetal alcohol disorder. She does not comment that he had not ruled out fetal alcohol syndrome. At paragraph 63 she talks about the evidence of B.C., the daycare provider. She does not however relate any of the statements that R.L. made to B.C.

[12] Under the heading 'Findings of Fact' the trial judge cautioned herself about statements alleged to have been made by R.L. She indicated that if the utterances were made to an independent witness such as a teacher she would find them to be more reliable and place more weight on them. In terms of credibility she summarized the evidence of the relatives supporting the mother and some of the evidence supporting the grandmother. She ruled on credibility at paragraph 87 where she says:

> In deciding whether or not to accept the applicant witness' testimony over that of the respondent I consider the spontaneity of the answers of each while on the stand; their honest show of emotion and the amount of detail provided by each of these witnesses. I also considered the lack of any credible ulterior motive that D.M or D.H. might have to falsely accuse S.L. and J.L of this behaviour. Considering all of this I have no hesitation in accepting the applicant's version of events over the respondent's in all areas where there is a conflict.

[13] She then made a finding that the appellant grandmother and her spouse have "a significant history of drug and alcohol abuse." She noted that T.L. continued to have a drug problem. She then engaged in an analysis of the evidence as she has found it. She says at paragraph 139 that, "Although I have heard considerable evidence of how difficult it is for R.L. to transition from one subject to the next at school and to transition from his mother's home back to S.L.'s care, I have heard no evidence of any difficulties he has 'transitioning' into his mother's home."

[14] In the last couple of pages of the judgment she identified statements that R.L. made about living with his mother. I specifically refer to paragraphs 146, 147 and 150. She said at paragraph 151 that she did not consider changing primary care to come within what is usually considered a transition because he goes to the mother's house for access. She also relied upon the mother's statement that R.L. "wants to live in the house he has always considered his home." Finally at paragraph 158 she used an interesting phrase. She said, "I believe there is a small window of opportunity where this child can be saved."

The Law

[15] Counsel for the appellant argued that based upon the test for apprehension of bias, the only reasonable conclusion is that the test is met. He cited *R. v. S.(R.D.)*, 1997 3 S.C.R. 484. In the dissenting reasons of Mr. Justice Major, the case of *R. v. London Rent Assessment Panel Committee* (1968), [1969] 1 QB 577 (Eng. CA) is cited as follows:

> In considering whether there was a real likelihood of bias, the Court does not look at the mind of the Justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. (p. 599)

[16] In the majority decision at paragraph 111 the following is said:

> The manner in which the test for bias should be applied was set out with great clarity by d'Grandpre J. in his dissenting reasons in *Committee for Justice and Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 at page 394:
>
> > The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... [the] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude."

[17] The Court also noted that the standard of review where bias is alleged is not one of appellate deference. At paragraph 99 the Court said that if bias is found then the judge has exceeded his or her jurisdiction in the context of the case they were deciding. They said at paragraph 101:

> Therefore, while the appellant is correct that appellate courts have wisely adopted a deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, it is somewhat misleading to characterize the issue in this appeal as one of credibility alone. If Judge Sparks' findings of credibility were tainted by bias, real or apprehended, they would be made without jurisdiction, and would not warrant appellate deference. On the other hand, if her findings were not tainted by bias, then the case turned entirely on her findings of credibility and an appellate court should not interfere with those findings, unless they were clearly unreasonable and not supported by the evidence.

[18] In a concurring judgment, Justices L'Heureux-Dubé and McLaughlin said two things that I must keep in mind. First of all, they noted at paragraph 32:

> Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith and Whiteway Fisheries Ltd.* (1994) 133 N.S.R. (2d) 50 (N.S.C.A.).

At paragraph 49 they said:

> Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties.

[19] The respondent argued that there was no bias or apprehension of bias in any of the remarks made by the trial judge. Counsel noted and I agree that there was tension between the trial judge and counsel for the appellant grandmother. There were times when the trial judge had to ask counsel to stop being so abrasive in her questioning and to keep her voice down. The exchanges I have cited above also reveal that tension. The respondent's counsel argued that the exchanges that are used as examples of bias by the appellant are really only part of that tense relationship. She also argued that in child welfare cases the standard is high in terms of a finding of bias because it is the obligation of the trial judge to be as informed as possible in arriving at his or her decision.

[20] In *Metis Child, Family and Community Services v. M.(A.J.)* 2008 M.B.C.A. 30, the trial judge was dealing with an application for a permanent order of guardianship. One of three children had died. The issue was the capacity of the parents to parent the remaining two children. An order for permanent guardianship was made and the parents appealed. One of the grounds of appeal was that the judge was biased. There apparently were sixteen interventions and one hundred and seventeen questions asked by the trial judge during eight days of evidence. The parents noted that questions were asked before cross-examination in some instances and that he had "projected himself into the arena" (paragraph 50). The Manitoba Court of Appeal said at paragraph 51:

> Where the welfare of children are concerned, the trial judge may intervene as much as is necessary in order to clarify the facts, confirm his understanding of expert testimony and generally make sure his appreciation of the evidence is

> correct. If necessary, he or she may intervene to keep the proceedings moving along efficiently.

[21] They go on at paragraph 58 to say:

> Thus, an apprehension of bias will not result merely from the active participation of a judge in the trial. There must be something more. There is a point at which judicial intervention becomes interference, the image of impartiality is destroyed and the court is deprived of its jurisdiction.

[22] And finally at paragraph 76 they said:

> Next, while a judge must maintain an open mind, this does not mean that he or she cannot express disbelief of evidence being given by a witness or indicate a tentative view of how he or she is inclined to decide an issue in dispute. True impartiality does not require that the judge have no sympathies or opinions.

[23] Respondent's counsel cited other examples where bias has not been found. In the cases of *Alberta (Director of Child, Youth and Family Enhancement Act) v. S(L)* 2009, ABCA 10 and *Warren v. Warren* 2009, ABCA 370 the Court of Appeal found that there was nothing wrong in a judge making comments about concerns arising from the evidence. In the first it was with respect to a tape a judge had watched where the mother had engaged in internet sex in the presence of the children. In the second what comments were made by the trial judge is unclear.

[24] In *Children's Aid Society of Waterloo (Regional Municipality) v. C.(R.M.)* the trial judge apparently engaged in significant questioning of both the appellant mother and other witnesses. While it is not clear that there was an argument of bias, the comments of the Ontario Court of Appeal are relevant where they say at paragraph 2:

> The paramount consideration in child protection proceedings is always the best interests of the child. Thus, the Court owes a special duty to ensure that the safety and well being of children are protected. In this context and faced with testimony that was unclear, unusual, and which demanded further inquiry, the hearing judge was justified in seeking further information from the witnesses. The hearing itself took twelve days and resulted in the transcript of some twelve hundred pages. While the tone of the hearing judge's questioning of certain witnesses might be viewed as confrontational, we do not find that it reaches the level of showing a reasonable apprehension of bias, nor did she inject herself into the evidence.

[25] Finally in *F.(T.) v. Alberta (Director of Child and Family Services)* 2009, ABCA 290 the parents of children who were the subject of a permanent guardianship order appealed. At the

Court of Appeal, the parents relied on four portions of the transcript. At one point after hearing from a psychologist, the trial judge said: “The issue, as I understand it today, is that the parents do not take responsibility for what has happened.” Secondly, she disallowed an objection to a question put to the mother with respect to the mother’s recall of detail and described it as “phenomenal.” In the third and fourth; while putting questions to the mother she challenged the mother about whether she really understood the nature of the problems and particularly her inability to acknowledge her parenting shortcomings.

[26] The court simply said, “These exchanges do not meet the test for apprehended bias. Rather, they show a concerned trial judge trying to get to the bottom of the difficulties in this family and attempting to balance the various factors before making a very difficult decision.”

Analysis

[27] In my view, a reasonable person informed of all the facts viewing this trial practically and realistically would apprehend bias.

[28] This trial judge was not dealing with a child welfare case like those cited by the Respondent. I understand why courts have permitted, indeed demanded, the judge be particularly vigilant in child welfare cases. When the state applies to take children away from their parents, there are two competing but equally compelling issues. On the one hand, for the state to apply means that there have been allegations of abuse or neglect which must be resolved. On the other hand, one potential outcome is that the parent-child bond is broken forever. In the face of these issues, a judge who is not active in ensuring she has all the evidence is not doing her job.

[29] That is not this case. Here, the dispute is between two potential guardians - the mother and the grandmother. While ensuring that the best interests of the child is paramount in weighing the evidence, the judge must be and appear to be impartial. The more permissive approach to judicial intervention in the trial accepted by the courts in the cases cited by the Respondent in child welfare case does not apply in this case.

[30] Even if I am wrong, there are several factors which have led me to my conclusion. First, there are the examples cited by the Appellant, most particularly on the second day of trial when the judge expressed the view that she was considering calling child welfare authorities or giving interim care to the mother. That was not probing to find out information, that was stating a conclusion. The judge appears to have concluded that the appellant had a serious drug problem and that the child should not be in her care.

[31] Moreover, the discussion which initiated that exchange is troubling. The trial judge, of her own motion, wanted to arrange access between R.L. and one of two great-aunts who he had not seen for some time. In cogitating on that possibility, she only asked what the mother thought about it, not what the grandmother thought. It appears to evidence a bias towards the mother as

the appropriate decision-maker for the child. This all occurs before any evidence is heard from the Appellants.

[32] Next, I consider the judge's reasons. I indicated earlier that B.C., R.L.'s daycare provider testified. Her evidence in terms of what R.L. said to her was not summarized by the trial judge. While the trial judge did rely on statements made by R.L. to parties to this action, she made no comment about either the credibility of B.C. or the statements that R.L. made. B.C. indicated that R.L. often talked about his grandmother and J.L. in a very positive way. He apparently spoke about his mother on three different occasions. On one occasion when B.C. was disciplining him by having a time-out, she tried to talk to him. She said:

> When I tried to talk to him about what had happened he put his hands over his ears and went, "la la la la la la la" and this was something R.L. had never done before. So I said, "R.L., what are you doing? Why are you doing that?" And he said, "My mother told me to do that if I didn't want to listen to somebody."

[33] When B.C. told R.L. that that was rude behaviour, he replied, "My mom is always telling me to do things that get me in trouble."

[34] Another time when R.L. seemed to be deep in thought B.C. asked him what the matter was. Her evidence proceeded as follows:

> And he said, "I don't want to go to my mom's this weekend." And I said, "Well I don't think you are going to your mom's, it's your birthday and I know that papa and grandma have a special birthday celebration for you today." And he goes, "Oh, okay. But I don't want to go to my mom's tomorrow." And I said, "Well I think you have - - grandma - - you have your birthday party tomorrow with all your friends." So I said, "Your mom may be at the party but I don't think - - I am pretty sure you don't have to go to your mom's." And he went, "Oh, okay." And he seemed very relieved.

[35] She says then when R.L. told her that his mother lies to him all the time. B.C. said that when he came back after having spent the weekend at his grandmother's home, he would tell her what they had done on the weekend. When he came back from a weekend with his mother, he never said anything. She testified that when J.L. picked up R.L. from the day home he, "runs up the stairs, gives papa a big hug and kiss, and is very happy - - they're very happy to see each other." She said that she noted that after R.L. had spent time with his mother there was a behavioural difference.

[36] At the beginning of her judgment, the judge cautions herself about relying on statements that family members said R.L. had made. At the end of her judgment, she cites some of those statements, all in favour of the mother. She appears to rely on them. On the other hand, statements by R.L. made to a more dispassionate observer like B.C. are not considered. The trial judge did not follow her own instruction.

[37] Finally, the judge's explanation for finding the Respondent and her witnesses more credible is based only on demeanor and an apparent lack of credible ulterior motive on the part of the two sisters, notwithstanding evidence of bad blood in the family given by G.W. and G.T. As stated in *R. v. S.(R.D.)*, no appellate deference is given to findings of credibility where such findings are tainted by bias. In this case, given the fact that there is no evidence in the reasons that the judge weighed evidence positive to the Appellant from independent parties like teachers and caregivers, it is reasonable to conclude that the credibility finding is tainted by bias.

[38] I have considered the possible remedies and conclude that the only possible outcome is to order a new trial. The trial judge's findings of fact are suspect because they are tainted by an apprehension of bias. On appellate review, I am not able to make findings of fact and weigh evidence.

[39] The appeal is allowed. An new trial is ordered.

Heard on the 27th day of January, 2010.
Dated at the City of Calgary, Alberta this 16th day of February, 2010.

C.A. Kent
J.C.Q.B.A.

Appearances:

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