WARNING

The court hearing this matter directs that the following notice should be attached to the file:

The court has ordered the exclusion of the public from the hearing of this case under subsection 135(2) of the *Courts of Justice Act* and has expressly prohibited the disclosure of any information about the children and parties in this case. This subsection and subsection 135(3) of the *Courts of Justice Act,* which deals with the consequences of failure to comply with subsection 135(2), read as follows:

> **135.**—(2) *Exception.*— The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.
>
> (3) *Disclosure of information.*— Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information.

Subrules 31(5) and 31(6) of the *Family Law Rules* state as follows:

> **31.**—(5) *Contempt orders.*— If the court finds a person in contempt of the court, it may order that the person,
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> (*a*) be imprisoned for any period and on any conditions that are just;
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> (*b*) pay a fine in any amount that is appropriate;
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> (*c*) pay an amount to a party as a penalty;
>
> (*d*) do anything else that the court decides is appropriate;
>
> (*e*) not do what the court forbids;
>
> (*f*) pay costs in an amount decided by the court; and
>
> (*g*) obey any other order.
>
> (6) *Writ of temporary seizure.*— The court may also give permission to issue a writ of temporary seizure (Form 28C) against the person's property.

COURT FILE No.: HALTON A14/26
2015.01.23

ONTARIO COURT OF JUSTICE

B E T W E E N :

J.D.R. and M.L.
APPLICANTS

— AND —

M.K.L. and T.C.
RESPONDENTS

Before Justice Sheilagh O'Connell
Heard on January 9, 2015
Reasons for Decision released on January 23, 2015

Robert Shawyer ..... for the applicants
M.K.L., the respondent mother.....on her own behalf
T.C., the respondent father.....not appearing or participating in these proceedings

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O'CONNELL J.:

Introduction:

[1] The applicants have brought a motion for an order dispensing with the consent of the child's biological parents to the adoption of the child, N.M.L., born June 17, 2009, ("the child" or "N."), pursuant to section 138 of the *Child and Family Services Act,* R.S.O. 1990, c. 11.

[2] The applicants are the maternal aunt and uncle of the child. The respondents are the biological mother and father of the child. The maternal aunt is the mother's sister. She is 33 years of age. The uncle, her spouse, is 52 years of age. The respondent mother is 38 years old. The age of the respondent father is unknown.

[3] The respondent mother opposes the motion. She would like to eventually regain custody of her daughter when she is able to do so.

[4] The child's biological father was personally served with this motion, supporting affidavit and application for adoption on September 2, 2014 in the United States, where he resides. He did not respond or participate in this proceeding. The applicant's lawyer's also attempted to contact him by telephone and he did not respond. The respondent father has had no contact with the child for

approximately 3.5 years, and that contact was by telephone only. He has not seen the child since she was approximately ten months old. The child is now five years old. She will be six years old in June of this year.

[5] On November 14, 2014, I noted the respondent father in default and for oral reasons delivered, I made an order that his consent to the adoption of the child be dispensed with, based on the evidence filed and the submissions heard. The hearing was adjourned to January 9, 2015 to permit the mother a further extension to serve and file her response to the motion. The mother was personally served in Toronto, Ontario, in August of last year (2014).[1] The mother resides in Toronto.

[6] The issue for me to determine is whether it is in the child's best interests to dispense with the mother's consent to her adoption.

Background Facts:

[7] N., the child, was born in the Bronx, New York in the United States. She lived there with the mother for first 10 months of her life. N.'s birth certificate does not contain any identifying information with regard to her biological father. However, the Ontario Court of Justice has recognized T.C. to be the father of the child.

[8] The maternal aunt and uncle have known the child since her birth. When N. was 10 months old, she and her mother entered Canada. During this time, the maternal aunt and uncle visited the mother and child on approximately five different occasions.

[9] On November 27, 2010, N. was removed from the mother's care by the Catholic Children's Aid Society of Toronto and placed in the care of the maternal aunt and uncle. At that time, N. was approximately seventeen months old. According to the evidence of Maula Forbes, a child protection worker with the Catholic Children's Aid Society of Toronto, the child was removed from the mother's care due to child protection concerns relating to the mother's drug addiction, and mental health and transience. A child protection proceeding commenced.

[10] N. has remained continuously in the care of the maternal aunt and uncle while the mother exercised supervised access to the child, supervised by the Catholic Children's Aid Society. On January 27, 2011, the maternal aunt and uncle were formally approved as kinship caregivers to the child by the society. On March 27, 2012, His Honour, Justice Robert Spence made a final order granting the maternal aunt and uncle custody of the child pursuant to s.57.1 of the *CFSA*. Justice Spence further ordered that access to the child by her mother be in the discretion of the maternal aunt and uncle.

[11] The child has lived continuously and exclusively with the maternal aunt and uncle since November 27, 2010. The respondent mother does not dispute this. Although the respondent mother exercised some supervised access during the child protection proceedings, according to the evidence of the maternal aunt and uncle and the evidence of the child protection worker, her access to N. has been sporadic since the final custody order of Justice Spence on March 27, 2012. The mother acknowledged that she has not exercised face to face access with N. for approximately two years and

[1] At the January 9th hearing, the mother had not yet filed any responding materials, five months after she had been served, and after receiving an extension. The applicants requested that she be noted in default. I declined to do so, and gave the mother an opportunity to make submissions and provide evidence from the body of the court.

that her contact with N. has been by telephone only. However, the mother states that this is because the maternal aunt and uncle have denied her access to the child.

The Applicants' Position:

[12] The applicant aunt and uncle submit that it is in N.'s best interest to gain the legal security of being a child adopted by them and being raised by them in a permanent home and family through the adoption process. They submit that for virtually all of her life, she has been raised by them, and that their home is her existing family reality. She identifies the applicants as her parents and calls them "Mummy" and "Daddy". She is thriving in their care. The applicants state that they will ensure that N. continues to have contact with the respondent mother. N. does speak to the respondent mother on the phone and calls her

[13] The Catholic Children's Aid Society supports the adoption of the child by the applicants. Ms. Forbes stated that the maternal aunt and uncle have provided a safe, predictable, and stable home environment in which N. has thrived and bonded with her caregivers. Ms Forbes attended the hearing of this motion. She stated that the applicants have also shown commitment and effort in accommodating access between N. and the respondent mother. However, according to Ms Forbes, the mother continues to struggle greatly with her mental health and addictions.

The Respondent's Position:

[14] Although the mother is grateful for her sister and husband in caring for N. while she addresses her issues, she does not agree that they could adopt her daughter. The mother was very concerned that if her sister and brother in-law adopted the child, then her contact with the child would be completely terminated and that she would no longer have any relationship with the child. She submits that the child misses her and wants to return to her care. She described what she saw perceived to be a pattern of the maternal aunt and uncle obstructing her access to the child and her ability to have a relationship with the child. She stated that she is only able to contact the child by telephone through another sister's home when N. is visiting with her other sister. The mother admitted that currently she does not have a telephone number where she can be reached. It is not disputed that the respondent father has had almost no contact with the child. However, on June 17, 2014 he sent the applicants an email to wish the child a happy birthday.

[15] During her oral submissions at the hearing, the mother indicated that she was not able, at this time, to care for N. She stated that she continued to struggle with health issues, housing issues, and financial issues. She estimated that she would be in a position to regain custody of N. in approximately to 1 to 1.5 years. She also admitted that she is currently on probation for a criminal related matter involving a theft. She is not employed and looking for appropriate housing. She is in the process of obtaining ODSP to address what she described as debilitating issues with her back that will eventually require surgery. She did acknowledge that in the past, she had developed a dependence to pain medication as a result of her chronic back pain. She stated that she no longer has an addiction to those drugs and that during the child protection proceeding, she agreed to go to a drug rehabilitation centre, as directed by Justice Spence. The mother indicated that she was currently taking methadone, clonazepam, and baclofen for the muscle spasms and seizures that she experiences as a result of her back disability.

The Law and the Governing Legal Principles:

[16] Pursuant to subsection 137(2) of the *Child and Family Services Act,* R.S.O. 1990, c. 11. ("*CFSA*"), the written consent of every parent is required before an order for adoption can be made.

[17] However, section 138 of the *CFSA* provides that the court may dispense with a parent's consent as follows:

> **Dispensing with consent**
>
> 138. The court may dispense with a consent required under section 137 for the adoption of a child, except the consent of the child or of a Director, where the court is satisfied that,
>
> (a) it is in the child's best interests to do so; and
>
> (b) the person whose consent is required has received notice of the proposed adoption and of the application to dispense with consent, or a reasonable effort to give the notice has been made. R.S.O. 1990, c. C.11, s. 138.

[18] The onus is on the applicants to show that the dispensing of consent and subsequent adoption is in the child's best interests. In looking at the best interests of the child, the court is directed to the criteria set out in subsection 136(2) of the *CFSA* that may be relevant to the circumstances of the case, which are as follows:

> (2) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:
>
> 1. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.
>
> 2. The child's physical, mental and emotional level of development.
>
> 3. The child's cultural background.
>
> 4. The religious faith, if any, in which the child is being raised.
>
> 5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family.
>
> 6. The child's relationships by blood or through an adoption order.
>
> 7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.
>
> 8. The child's views and wishes, if they can be reasonably ascertained.
>
> 9. The effects on the child of delay in the disposition of the case.
>
> 10. Any other relevant circumstance. R.S.O. 1990, c. C.11, s. 136 (2).

[19] The "best interests" test in the context of an adoption proceeding is not the same best interests test in the context of a custody and access proceedings for obvious reasons. A custody order can always be reviewed upon a material change in circumstances. An adoption order is final and irrevocable. It may not be questioned or reviewed in any court. As Justice Marion Cohen states in *C.(M.A.) v. K(M.),* [2009] O.J. No. 368; 63 R.F.L. (6th) 438:

> "For all purposes of law, as of the date of the making of adoption order, the adopted child becomes the child of the adoptive parent, the adopted child ceas-

> es to be the child of the parent who was his or her parent before the adoption order was made, and ceases to be the relative of the former parent's relatives. For this reasons, adoption has been characterized in many cases as the "statutory guillotine of the biological relationship." Adoption results in the final and irrevocable severance of the biological bond between parent and child."

[20] In *M.A.L. v. R.D.M.*, 2005 CarswellOnt 1069, [2005] W.D.F.L. 1890, [2005] O.J. No. 1060, [2005] O.T.C. 205, 137 A.C.W.S. (3d) 1152005 (Ont. S.C.J.), Justice Robertson sets out the following four principles in considering whether it is in the child's best interests to dispense with the parent's consent to adoption under section 138 of the *CFSA*:

a. the court must consider the best interests factors set out in Section 136(2) of the Act;

b. the court must balance what the child will gain and lose, with an emphasis on what the child will gain;

c. the decision must take into account the child's wishes, as best those can be ascertained;

d. the court must consider the child's existing family reality.

[21] It is no longer necessary to find parental misconduct to dispense with the biological parent's consent to adoption. The exclusive focus is the child's best interest, not the rights of the biological parent. Parental misconduct or abandonment is only relevant if the non-consenting parent continues to engage in conduct that is not beneficial or even harmful to the child: see *S.I.L. v. L.J.L. and L.J.L.* (1985), 51 O.R. (2d) 345, 47 R.F.L. (2d) 155, [1985] O.J. No. 765 (Ont. U.F.C.). See also *M.L. and G.L. v. S.M.* (1989), 13 A.C.W.S. (3d) 259, [1989] W.D.F.L. 486, [1989] O.J. No. 3, 1989 CarswellOnt 1385 (Ont. U.F.C.).

Application of the Law and Governing Principles to the Evidence:

Best Interest Factors:

a. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs:

[22] It is not disputed that the applicants are meeting all of the child's physical, mental and emotional needs. N. is a happy and healthy child and she is very attached to the applicants. They have provided her with a comfortable and stable home and have met all of her material needs. She receives regular dental and medical care. She is enrolled in school.

[23] The applicant uncle is 52 year of age and in good health. He is retired on a full disability pension and is a qualified child and youth worker. He has a yearly income of $42,000.00. He has three adult children of a previous relationship. The applicant aunt is a waitress with an annual income of approximately $12,000.00, for a combined family income of $54,000.00. They live in a comfortable home in Burlington in a child-friendly community.

[24] The evidence demonstrates that N. has become very attached to her home, community, school and school friends. The applicants' deposed that N.'s safety, and her nutritional, emotional and physical needs are always met and always come first.

b. The child's physical, mental and emotional level of development:

[25] The evidence filed demonstrates that N. is thriving. There have been no concerns raised about her level of development.

c. The child's cultural background:

[26] The applicant mother is Polish Canadian, as is the respondent mother. No evidence was provided as to the cultural background of the applicant uncle. However, all are Caucasian and English speaking and the applicant aunt will continue to expose the child to her Polish Canadian heritage.

d. The religious faith, if any:

[27] No evidence was provided as to the religious faith. There was no evidence that this was a significant issue.

e. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family:

[28] It is not disputed that N. has a positive and secure relationship with the applicants. She identifies them as her parents. She is close attached to both of them and she has lived with them exclusively since she was eighteen months old. The Catholic Children's Aid Society worker described a close bond between N. and both of the applicants and that she feels secure and safe in a loving family. The applicants have developed a strong and loving relationship with her and they care for her as a parent would their natural child. The evidence filed demonstrated that N. has developed a strong sense of belonging and she also identifies as having a brother and sisters with the applicant uncle's children from a previous relationship.

[29] N. also continues to have contact, albeit sporadic with her respondent mother, whom she identifies as "Mommy M. [Respondent's name]." Although the respondent mother believes that her contact with N. is being obstructed or denied by the applicants, she acknowledged that she has never brought a motion or application for access in the more than four years that N. has resided with the applicants, when asked by the court. She did not have a good or any explanation for why she had not done so, nor why she has not been able to address the issues that led to N'.s removal from her care in November of 2010.

f. N.'s relationships by blood or through an adoption order:

[30] N. does not have any relationship with her biological father. Therefore, an adoption order will not alter this reality. N. will continue to have a relationship by blood with her biological mother because through the adoption by her maternal aunt. She will continues to have a relationship and with her mother's extended family, including all of her other aunts, cousins and family members. This will continue after the adoption and will be beneficial for N. The applicants have made it clear that they also support continuing contact between N. and her mother so long as it is safe and in her best interests to do so.

g. The importance of continuity in the child's care and the possible effects of disruption of that continuity:

[31] There will be no disruption in the continuity of N.s care if she is adopted by the applicants. They have been her parents, in reality for more than four years. To her credit, the mother candidly acknowledged during the hearing that she was not in a position to care for N. right now and that she would not be in a position to care for N. for at least another 1 to 1.5 years. N. will be 7 years old or even older by that time, and she will have been in the care of the applicants, whom she identifies as her parents, for approximately 5.5 years, almost her entire life. In my view, waiting for the mother to attempt to regain custody of N. at some point in the next one or two years, when she is able to do so, would be very disruptive to N. and the effect of that disruption could be very detrimental to her.

h. The child's views and wishes, if they can be reasonably ascertained:

[32] N. will be 6 years old in June of this year. There was very little evidence of her views and preferences before the court. The respondent mother stated that when she speaks to N. on the phone, N. says that she misses her and cries for her. The applicants deny this. However, it is not disputed that N. is closely attached and bonded to the applicants and that her most important relationships for N. are with the applicants, as they are providing her with continuous care and stability.

Conclusion:

[33] In my view, there is no question that the current family constellation is the only family that N. knows and that adoption will provide her with greater security. There are clear benefits that come with adoption that are not available in a custodial arrangement. As Justice McSorley states in *C. (P.) v. C.-G. (P.C.)*, 2004 ONCJ 130:

> Adoption brings with it similarity in family name, security at home in a family unit, benefit of stability in inheritance situation or upon the death of a biological parent, confirmation of the reality of who is doing the parenting and reaffirmation of sibling relationships. Weighing these advantages against unknown, future and unlikely benefits from the biological father, this factor must be given great weight in these circumstances.

[34] In balancing the gains and losses of an adoption, N. will benefit more than she loses. N. will gain the legal security of being a child of the applicants and a member of their family. The applicants have made it clear that they support a continuing relationship with the respondent mother, who has not been able to care for N. since she was ten months old. N. will not lose her relationship with the respondent mother, as the applicants are not seeking to terminate that relationship. Further, N. will not lose a relationship with her father because she does not have any current relationship with her father, nor has she had a relationship since coming to Canada at the age of ten months old.

[35] N.'s existing family reality is that, for almost all of her life, she has been raised by the applicant aunt and uncle. She considers them to be her parents. She is thriving in their care and in my view, it would not be in her best interests to continue a custodial relationship for an indefinite period of time while waiting for the respondent mother to address her issues and attempt to regain custody of N. in the next one or two years. The effect of this potential disruption to the security that she now has would not be in her best interests.

[36] There is no question that the respondent mother loves N. very much and misses her deeply. It was very clear to the court during the course of the hearing that the respondent mother continues to struggle with many issues, including what appeared to be some mental health issues, as well

as some physical health issues. The court has deep sympathy for the mother, but it is very uncertain when, if ever, the mother will be in a position to parent N. N. deserves to have a permanent and stable home and a secure place in her current family.

[37] Having carefully considered all of the circumstances of this case, I find that it is in the child's best interests to dispense with the biological mother's consent to the proposed adoption of the child by the applicants and I make that order.

[38] I recognise that this order will be very difficult for the biological mother. Once the mother's situation has stabilized, it is hoped that she can continue to play a role in N.'s life. The case law establishes that the mother can make an application for post-adoption access to N. under the *Children's Law Reform Act*, so long as it is in the child's best interests.[2]

[39] There will be no order for costs.

Released: January 23, 2015 Signed: "*Justice Sheilagh O'Connell*"

[2] See J.A. v. J.B. 2011 CarswellOnt 14645, 2011 ONCJ 726, 7 R.F.L. (7th) 483; M.A.R.P. v. Catholic Chidlren's Aid Society of Metropolitan Toronto, [1995] O.J. No. 2277, 15 R.F.L. (4th) 330.