2013 CarswellAlta 2111, 2013 ABQB 643, 234 A.C.W.S. (3d) 933, [2014] A.W.L.D. 355, [2014] W.D.F.L. 192, 92 Alta. L.R. (5th) 373

P. (T.L.) v. H. (K.)

TLP and PHP Applicants and KH Respondent

Alberta Court of Queen's Bench

A.B. Moen J.

Heard: June 24-26, 2013; August 26-29, 2013
Judgment: October 31, 2013
Docket: Ft. McMurray AD13-12001

Counsel: Richard A. **Low** for Applicants

Christopher Skrobot for Respondent

James J. Heelan, Q.C. for Dr. W

Subject: Family; Evidence

Family law --- Adoption — Under statute — Practice and procedure — Consent of parent — Withdrawal of consent

Facilitation — Mother, aged 21 at time of birth, consulted with lawyer and social worker before signing consent for adoption — Mother claimed obstetrician told her that he knew family who wanted to adopt baby — Twenty-nine days after giving birth, birth mother sent e-mail to lawyer indicating change of mind about adoption — Mother claimed lawyer and social worker informed mother there was 30-day appeal period — Mother applied to challenge consent and adoptive parents applied for order that child be adopted child of adoptive family — Mother's application dismissed and adoptive parents' application granted — Technical requirements for consent were met — Mother had capacity to understand nature and consequences of consent and was properly informed of nature and consequences of consent — Mother's consent was not vitiated by duress or undue influence — No medications were given to mother that would have impacted on her capacity to understand consent she was giving for adoption of baby — Mother failed to meet test for unconscionability — There was no facilitation under s. 84 of Child, Youth and Family Enhancement Act — It was in best interests of child to remain with adoptive parents.

Cases considered by *A.B. Moen J.*:

B. (C.S.), Re (1998), 1998 CarswellSask 516, 167 Sask. R. 114 (Sask. Q.B.) — considered

B. (M.L.) v. L. (D.M.) (1990), 1990 CarswellAlta 282, 73 D.L.R. (4th) 361, 109 A.R. 38, 28 R.F.L. (3d) 337 (Alta. C.A.) — referred to

Cain v. Clarica Life Insurance Co. (2005), 2005 CarswellAlta 1871, 2005 ABCA 437, 47 C.C.E.L. (3d) 70, 263 D.L.R. (4th) 368, 384 A.R. 11, 367 W.A.C. 11, [2006] 7 W.W.R. 111, 2006 C.L.L.C. 210-001, 54 Alta. L.R. (4th) 146 (Alta. C.A.) — considered

D. (J.) v. B. (T.D.) (2002), 2002 ABCA 269, 33 R.F.L. (5th) 315, 2002 CarswellAlta 1568, 317 A.R. 231, 284 W.A.C. 231 (Alta. C.A.) — referred to

Dickieson v. Dickieson (2011), 2011 ABQB 202, 2011 CarswellAlta 511 (Alta. Q.B.) — considered

Ellis v. Friedland (2000), 2000 CarswellAlta 1037, 273 A.R. 35, 88 Alta. L.R. (3d) 133, 2000 ABQB 657, [2001] 2 W.W.R. 130 (Alta. Q.B.) — referred to

G. (A.P.) v. A. (K.H.) (1994), 164 A.R. 47, 120 D.L.R. (4th) 511, 1994 CarswellAlta 478 (Alta. Q.B.) — referred to

J. (R.H.), Re (1998), 231 A.R. 56, 1998 CarswellAlta 1363 (Alta. Q.B.) — referred to

K., Re (1998), *(*sub nom. *C., Re)* 236 A.R. 1, 44 R.F.L. (4th) 211, 1998 ABQB 1085, 1998 CarswellAlta 1135 (Alta. Q.B.) — considered

M. (F.) v. S. (S.) (2010), 85 R.F.L. (6th) 73, 2010 ABQB 195, 2010 CarswellAlta 595 (Alta. Q.B.) — referred to

M. (S.K.A.) v. A. (C.) (1995), 11 R.F.L. (4th) 25, 165 A.R. 94, 89 W.A.C. 94, 1995 CarswellAlta 37, 1995 ABCA 62 (Alta. C.A.) — followed

Malton v. Attia (2013), 2013 ABQB 642, 2013 CarswellAlta 2110 (Alta. Q.B.) — referred to

Morrison v. Coast Finance Ltd. (1965), 54 W.W.R. 257, 1965 CarswellBC 140, 55 D.L.R. (2d) 710 (B.C. C.A.) — followed

Orcheski v. Hynes (2007), 2007 CarswellAlta 379, 2007 ABQB 194 (Alta. Q.B.) — followed

Pao On v. Lau Yiu Long (1979), [1980] A.C. 614, [1979] 3 W.L.R. 435, [1979] 3 All E.R. 65 (Hong Kong P.C.) — followed

S. (B.C.) v. J. (C.L.) (2006), 2006 CarswellAlta 1417, 2006 ABQB 793 (Alta. Q.B.) — considered

S. (B.C.) v. J. (C.L.) (2007), 394 W.A.C. 19, 404 A.R. 19, 2007 ABCA 42, 2007 CarswellAlta 152, 71 Alta. L.R. (4th) 105 (Alta. C.A.) — referred to

Statutes considered:

Child Welfare Act, S.A. 1984, c. C-8.1

Generally — referred to

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12

Generally — referred to

s. 58.1 [en. 2003, c. 16, s. 65] — considered

s. 59(1)(a) — considered

s. 61(1) — considered

s. 84 — considered

APPLICATION by mother challenging consent to adoption; APPLICATION by adoptive parents for order declaring child to be adopted child of adoptive family.

***A.B. Moen J.*:**

I. Introduction

1 In December, 2011, the birth mother gave birth to a baby girl. From the outset, the birth mother was adamant that she wanted the baby adopted. Further she wanted to leave the hospital as soon as possible and she did not want *anyone* to find out she had given birth.

2 In the hospital, she signed the necessary consents for the baby to be adopted by the adoptive family. She also consented to the adoptive mother visiting with the baby in the hospital. The birth mother on the second day returned to work where she remained until she went to her home province for the Christmas holiday.

3 After she had been home with her family for a few days and told them about the birth, she changed her mind. It was her father who took action first.

4 Now, the birth mother says that she was under duress, among other things, at the time of signing the consent for the adoption. Further, she claims that the doctor and other hospital staff facilitated the adoption contrary to law.

5 Since January 2012, there have been several court appearances culminating in this trial. This matter was in case management for most of that time and Justice Belzil, the case management justice, made an order setting out the issues to be determined in this trial:

(1) undue influence;

(2) duress;

(3) was there a breach of s 84 of the *Child, Youth and Family Enhancement Act* (the *CYFEA*);[FN1]

(4) did the birth mother have the capacity/capability to understand and appreciate the nature and consequences of the consent form signed on December 6, 2011;

(5) was the birth mother informed/properly informed of the nature and consequences of the consent;

(6) was the birth mothers consent in the circumstances unconscionable or otherwise illegal;

(7) was there any lack of understanding on the part of the birth mother of the time period within which to cancel or revoke her consent;

(8) what was the birth mothers state of mind at the time of signing the Consent Form on December 6, 2011 and did she understand the meaning and significance of the Adoption Consent form; and

(9) were the documents signed by the birth mother subsequent to December 6, 2011 factually accurate and signed in circumstances of duress or non est factum?

6 I have distilled the above issues into the following questions:

A. Did the birth mother consent to the adoption?

B. If yes, did the birth mother properly revoke her consent?

C. If not, was the consent given in circumstances of duress or undue influence?

D. Was the "bargain" unconscionable?

E. Was there facilitation, that is, a breach of s 84 of the *CYFEA*?

F. Was the adoption in the best interests of the child?

II. Discussion

A. Did the birth mother consent to the adoption?

7 The *CYFEA* sets out the requirements for consent in an adoption. Section 59(1) states:

59(1) An adoption order in respect of a child must not be made without the consent in the prescribed form of

(a) all the guardians of the child other than a guardian who is applying to the Court under section 62 for the order, ...

8 The consent form was signed by the birth mother on December 6, 2011. The birth father did not acknowledge parentage and was not a guardian.

9 The technical requirements for the consent were met.

10 Later in these reasons, I set out in detail the circumstances surrounding the birth and taking of consent. I find that the birth mother did have the capacity/capability to understand and appreciate the nature and consequences of the consent form signed on December 6, 2011. The birth mother has grade 12 and some training in commercial cooking from a maritime college. She described herself as a student with average intelligence. At the time that she gave birth she was 21 years old. The hospital notes show that there was no concern with respect to the birth mother's mental health.

11 Further I find that the birth mother was properly informed of the nature and consequences of the consent.

B. Did the birth mother revoke her consent according to law?

12 The *CYFEA* provides protection to birth parents in the form of a grace period to revoke consent for adoption. Section 61(1) of the *CYFEA* states:

> 61(1) A person who has consented to the adoption of a child under section (1)(a) or (2) may, not later than 10 days after the date of the consent, revoke the consent by providing written notice of the revocation to a director.

13 The 10 day revocation period has been strictly applied in Alberta: *B. (M.L.) v. L. (D.M.)* (1990), 73 D.L.R. (4th) 361 (Alta. C.A.), at 363 , (1990), 109 A.R. 38 (Alta. C.A.) 8; *G. (A.P.) v. A. (K.H.)* (1994), 120 D.L.R. (4th) 511 (Alta. Q.B.), at 516 , (1994), 164 A.R. 47 (Alta. Q.B.).

14 If consent is revoked within 10 days, the adopting guardians revert to the status of a stranger: *D. (J.) v. B. (T.D.)*, 2002 ABCA 269 (Alta. C.A.) at para 7, (2002), 317 A.R. 231 (Alta. C.A.).

15 Where a birth parent properly revokes consent, the child will be returned to the birth parent, regardless of whether or not the adoptive parents could have provided a better home: *J. (R.H.), Re*, [1998] A.J. No. 840 (Alta. Q.B.), (in obiter) at 68, para 68.

16 Revocation is required in writing, otherwise someone could impersonate the birth mother or might not have the capacity to revoke consent: *J. (R.H.), Re* at 67-8, para 65.

17 I find the birth mother knew about the 10 day revocation.

18 The birth mother claimed that she was told by the lawyer who saw her in the hospital, and the hospital social worker, SB (the hospital social worker), that she had ten days to revoke her consent and a 30 day appeal period.

19 The birth mother attempted to convince the court that she believed there was a 30 day "appeal period" but the adults involved in this including SB, and the lawyer (JS) who visited her in hospital to give her advice about the adoption were adamant that they had not told her about a 30 day appeal period because none exists.

20 The notes made by SB at the time, reflected that she had clarified who the birth mother could call if the birth mother changed her mind. Further, SB and the lawyer asked the birth mother if she had any questions. SB completely denies that she told the birth mother about a 30 day appeal period, as does the lawyer. The lawyer, gave evidence that he had gone over the document with the birth mother twice. The birth mother said she did not understand it and that the lawyer was lying. I accept the evidence of SB, and the lawyer.

21 On December 13, SB received a phone call from the birth mother stating that she had not been contacted by the adoptive parents' lawyer (Mr. J) with respect to completing the adoption paperwork. The birth mother wanted the paperwork for the adoption completed before she went to her home province for Christmas, leaving on December 17. Further, when SB inquired how she was, the birth mother replied that she was "doing good" and had no concerns. SB followed up the next day providing the birth mother with a phone number for the lawyer. However, the birth mother requested that SB follow up with the lawyer which SB did.

22 On December 17, 2011, the birth mother was on her way home to her home province when she met with the adoptive parent's lawyer at the Calgary airport. On that day the ten day period in which she could withdraw her consent had just expired. I have found above that she knew about the ten day period when she signed the consent. When the birth mother met with the lawyer, Mr. J, she did not suggest in any way that she was reconsidering her decision. She completed all of the paperwork for the adoption to proceed. In that paperwork she indicated that she did not want notice of the adoption proceedings.

23 The birth mother said in evidence that up to Christmas 2011 she was fine with the adoptive parents parenting the child. She changed her mind after she started playing with her nieces and nephews.

24 On January 3, 2012, SB received a phone call from the birth mother's father who was upset regarding the adoption of the baby. On January 5, 2012, SB received a voice message from the birth mother. SB returned that call the next day. The birth mother told her she was not doing very well.

25 JS, the lawyer who prepared the consent forms and met with the birth mother in the hospital, did not hear again from the birth mother until January 3, 2012 when he received faxed documents indicating that she had changed her mind about giving up the child for adoption. Those documents had been sent December 29 as an e-mail. He then had a conversation with the birth mother explaining that her ten-day revocation period had expired. She told him that in her province it was 30 days and it was unreasonable for it to be so short. He suggested that she get another lawyer.

26 I find there was no 30 day appeal period. Further I find that no one told the birth mother that there was a 30 day appeal period. I find that the 10 day limitation period within which a birth mother must withdraw her consent had expired. I find that she knew and understood the ten day period within which she could revoke her consent. Therefore, I find that the birth mother was out of time to withdraw her consent.

27 I find that up until the time she met her family in her home province, the birth mother was unequivocal that she wished to give the baby up for adoption and that she did not want anyone to know about it. She did nothing in that period of time to suggest otherwise to anybody who interacted with her. I find that her intentions were clear, that she did give proper consent for the adoption, and she did not revoke her consent within the time required under the Act.

28 Therefore, I must turn to the next question concerning whether the consent can be vitiated.

C. Was the consent given in circumstances of duress or undue influence?

29 Even though I have found that the birth mother consented to the adoption and that she failed to revoke her consent within the time period set out by law, nevertheless, the birth mother challenges the consent on the basis that the circumstances surrounding her giving that consent amounted to undue influence and duress.

30 I will therefore review the circumstances surrounding the consent to determine whether those circumstances amount to undue influence and duress and whether I can vitiate the consent on that basis.

31 For consent to be valid, it must be given freely, voluntarily, not be induced by fraud or undue influence, and its effect must be fully understood: *G. (A.P.)*. In order to vitiate consent, the court must find that the birth mother was not informed of her rights, or that she was subject to coercion or undue influence. Doubts or uncertainty is not enough to vitiate consent: *G. (A.P.)* at 516.

32 As Veit J put it, for consent in an adoption to be valid:

> (a) the consent must represent the guardian's own will and not be influenced by pressure to give up the child, including economic pressure, pressure from social workers or counsellors, or pressure from other people; and
>
> (b) the birth parent must be informed about the nature of the adoption process and must know that there are other alternatives available.

J. (R.H.), Re, paras 36-52 (QB).

33 The determination of whether or not a birth parent feels pressure to give up a child is fact dependent and contextual. For example, in *J. (R.H.), Re*, Veit J found that the birth mother did face economic pressure because she was living on social assistance. However, Veit J held that any economic pressure did not overpower the birth mothers ability to give valid consent to adoption because she was accustomed to the pressures of living on social assistance (para 38).

34 In this case, the birth mother claims that she was under duress when she gave her consent.

35 The birth mothers counsel relied heavily in their brief on principles taken from general contract law. However, he did not provide case law which would indicate that these principles have been used in the context of an adoption consent. I will nevertheless address the concepts and apply them where appropriate in this context.

36 Where there is a general contract which is entered into under conditions of duress or unconscionability, it is voidable, not void *ab initio*. Therefore, conduct after the contract was entered into can affect the claim: *Ellis v. Friedland*, 2000 ABQB 657 (Alta. Q.B.) at para 68, (2000), 273 A.R. 35 (Alta. Q.B.). Here we do have conduct by the birth mother after the consent was signed when she finalized the adoption documents 11 days after her consent was given.

37 We will review the law relating to duress and the circumstances surrounding the birth mother's consent to determine if it was given in circumstances which could be classified as duress or undue influence. However, given that the evidence many times comes down to a contest of credibility between the birth mother and various staff at the hospital, it is important to outline some evidence which causes me to question the credibility of the birth mother in many respects.

1. Birth mother's credibility

38 I generally prefer the evidence of the staff where it conflicts with the evidence of the birth mother. Generally, the staff had hospital notes made in the course of their work at the hospital from which they could refresh their memory and I find that their evidence is preferable.

39 One example of the birth mother's credibility relates to her changing story about the birth father. The birth mother's story about the identity of the birth father changed several times over the course of the few weeks after the birth and continued up until the trial. That evidence leads me to believe that the birth mother tells stories to suit the circumstances she perceives at the time. This makes it difficult for the court to know when to trust her evidence.

40 When the relationship with the birth father was discussed there were a number of different versions. First, the birth mother did not put his name on the registration of birth.

41 A nurse who looked after the birth mother on December 5 and December 6 was also responsible for completing the Registration of Live Birth Form. There was no birth father listed on that form because the nurse had asked the birth mother if she wanted to list the father. The first time the nurse asked her the birth mother said she didn't know who it was. When she repeated the question, the birth mother said it was a bad situation. I infer from this that the birth mother knew who the birth father was but did not want to disclose it.

42 However, the birth mother tried to blame the nurse because the birth father's name was not on the birth certificate accusing that nurse of lying if she said that the birth mother had told her that she did not know who the father was. She said she had told two of the nurses who the father was but this information did not find its way into the nursing chart. When challenged, in response to a question on cross-examination she said that the nurses' affidavit evidence was inaccurate.

43 Prior to trial, the birth mother said that the birth father wanted to be involved with the child, but when Justice Belzil, the case management justice, gave him an opportunity to appear in court to "step up to the plate" he denied his paternity and he chose not to get involved. His rights were dispensed with by Justice Belzil after formal court process. There was nothing before the court to suggest that he ever wanted to be involved.

44 With respect to the preparation of the documentation around the adoption, the birth mother met with a lawyer, Mr. J, on December 17, 2011 to finalize the documentation for the adoption. Prior to that meeting, the lawyer prepared an affidavit concerning the birth father as was required at law. Before preparing the affidavit, Mr. J gave evidence that he had spoken to the birth mother on the phone about the birth father. At that time the birth mother explained to him that she did not know which of two potential fathers the birth father was. In cross examination she denied she had said this. I do not believe her.

45 Further, she acknowledged in evidence that Mr. J had read all of the paragraphs in the affidavit to her and that she had signed it under oath, but later in her evidence she accused Mr. J of not reading over the paragraphs concerning the child's father. She contradicted herself. Mr. J gave evidence that it was his understanding, and he had prepared the affidavit to this effect, that the birth mother had said there were two possible fathers that could be involved. However, the birth mother, notwithstanding all of this, attempted to blame the lawyer Mr. J for what was in her affidavit.

46 Another example of a difference in evidence between the birth mother and the hospital staff arose when hospital staff stated that the birth mother was clear and consistent that she did not want the baby. Although the evidence is clear from all of the staff at the hospital, in evidence of the birth mother said it was not true. She then equivocates in evidence when confronted with the notes made by the medical staff. She then admitted that it was a better idea to give the baby up for adoption because she was living at work and could not take the baby to that work.

47 She also made the excuse she had no place to go but her work where she also lived. However, a witness called by the birth mother, AB, was quite clear in her evidence that the birth mother could have stayed with her in the City at any time with the baby. Further, the birth mother had stayed with AB prior to her going to assume her duties at work. Her excuse at the hospital was that she had no way to contact AB. This was notwithstanding that the nurses and the social worker were very careful to make sure that they were supportive of the birth mother in any way she needed that support.

48 Her evidence changed throughout when it did not appear to be assisting her.

49 She often blamed other people for her various troubles. For example, she said that the hospital social worker, SB, was lying when she said that the birth mother had given SB the phone number for the adoptive parents. The birth mother in fact asked SB to call the prospective adoptive parents. As set out later in these reasons, the birth mother made this decision on December 5.

50 The birth mother often used the excuse that she did not read the documents. Those documents were not long or complicated. She said that she was not sure what she was signing but she did know, for example, that the papers prepared by Mr. J had something to do with getting the adoption finalized.

51 Throughout her evidence she tried to give the impression of being someone who wasn't very bright and who could not understand. However she acknowledged in evidence that she had an average IQ. She graduated from high school at 17 and her courses earned 70% in many of them. She got 74% in writing in grade 12.

52 I do believe that she was capable of reading the documents and understanding them. Therefore, her evidence in this regard is not credible. It is in this light that I shall first analyse whether the documents were signed under duress or undue influence. Later I address the issue of s. 84 of the *CYFEA* concerning whether the doctors, nurses and social worker in the hospital facilitated the adoption.

53 I could not find any ulterior motive for any of the staff in the hospital that would suggest that they were lying. Rather, I find that the birth mother was not telling the truth.

2. Duress or Undue Influence

54 The birth mother says that she signed the documentation under duress. She points to the circumstances surrounding the birth all taken together as duress.

55 Duress involves the nature of the consent. "A plea of undue influence attacks the sufficiency of consent": *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C. C.A.), at 713, (1965), 54 W.W.R. 257 (B.C. C.A.).

56 The fundamental requirement of duress is that there is coercion of the will so as to vitiate consent: *Ellis* at paras 69-70. This may include physical threats, threat of a lawsuit or criminal prosecution, or economic threats.

57 External pressures on a birth parent to give up a child will not always amount to undue influence or duress. In *B. (C.S.), Re* (1998), 167 Sask. R. 114, 1998 CarswellSask 516 (Sask. Q.B.), a 15 year old birth mother was told by her parents that she must give her child up for adoption. However, the Court at para 10 held that while the birth mother undoubtedly felt coerced by her family, her consent was willingly provided at the time of the adoption and she was given 14 days under the Saskatchewan legislation to reconsider the adoption and revoke her consent.

58 Counsel for the birth mother relies on the general test for economic duress as set out in *Pao On v. Lau Yiu Long*, [1979] 3 All E.R. 65 (Hong Kong P.C.). In *Dickieson v. Dickieson*, 2011 ABQB 202 (Alta. Q.B.), Browne J applied the *Pao On* test in the context of a family law agreement. The test for economic duress is:

(a) whether the person alleged to have been coerced, protested;

(b) whether, at the time he or she was allegedly coerced into making the contract, he or she had an alternative course open to him such as an adequate legal remedy;

(c) whether he or she was independently advised; and

(d) whether after entering the contract, he or she took steps to avoid it.

59 I find, for reasons set out later, that:

(a) the birth mother did not protest at any time in the hospital;

(b) she was given opportunity to follow an alternative course and she did not take it;

(c) she was given independent legal advice; and

(d) she did not take steps within the law to revoke the contract (which I discussed earlier in these reasons).

60 Browne J also held that when applying the test for economic duress in the context of family law, the principles set out in *Orcheski v. Hynes*, 2007 ABQB 194, 156 A.C.W.S. (3d) 867 (Alta. Q.B.) by Moen J must be acknowledged. Moen J held that the test for determining whether a contract is entered into under duress is:

(a) less onerous that the test for unconscionability in common law; and

(b) does not require evidence of a power imbalance between the parties.

Orcheski at para 23, citing ***Miglin v Miglin*** [2003] 1 SCR 303.

61 The birth mother suggests several areas which she says amount to duress. These include her not knowing she was pregnant, being in a strange city, the bewildering circumstances of finding herself in hospital for the first time, and being given drugs at the hospital during the period in which she was considering her consent. I shall discuss in some detail the circumstances alleged by the mother to constitute duress.

a. General background

62 She came to Alberta to work near a Northern Alberta city (the City) at the end of September 2011. The birth mother's mother found her the job at the same location because she too worked there. The baby was born December 5, 2011. The birth mother claims that at the time of the birth she was under considerable emotional pressure. She was on her way to the City in September to meet her mother when her mother had a heart attack. The mother recovered and returned to work.

b. Circumstances surrounding her lack of knowledge that she was pregnant

63 One of the elements the birth mother says put pressure on her amounting to duress was her lack of knowledge that she was pregnant.

64 From all of the evidence, I do not know for sure that she did not know she was pregnant.

65 On December 4, 2011, she woke up at three in the morning in pain which she thought was a back ache.

Nevertheless, she went to work and had a busy day until about seven o'clock that evening. She did not go to supper and could not sleep. At about midnight she asked her supervisor to take her to the hospital in the City. In the emergency, she was seen by a nurse and then she waited. There was some difficulty at the hospital about paying because she was new in Alberta and because she had left her work without her wallet containing her documents. That was sorted out prior to her giving birth.

66 When she was seen by the emergency room doctor, Dr. A, he asked her if she was pregnant. At trial, the birth mother insisted that she had told everybody at the hospital that she was not pregnant. One of her attending obstetricians, Dr. B, made a note that she did not know she was pregnant. Clearly she told some of the medical staff that.

67 However, after being given an ultrasound, it was clear she was pregnant.

68 She explained that she had a period every month although it was lighter than usual. She also claimed she had no symptoms of pregnancy.

69 The doctor's notes at the time of the delivery indicate that there had been frequent vaginal bleeding throughout the pregnancy. With one exception, the records show that she said she was unaware of her pregnancy. Nurses' notes early in the morning of December 5 say that the birth mother was unaware of her pregnancy. Later, the nurses' notes show she admitted she knew she was pregnant. She also admitted to drinking and smoking during pregnancy. This is the only record that did not say she was claiming that she did not know she was pregnant.

70 The nurse that took the birth mother's history in the birthing room was told by the birth mother that she knew who the father was and did not want to make him aware. She also asked that none of the family be told about the situation. She then told the nurse that she did know that she was pregnant and she remembered the date she became pregnant.

71 Dr. W, the obstetrician and gynecologist at the City hospital had assisted her with her birth. During his evidence, he said that from his perspective it would not be possible for the birth mother or any other pregnant female to continue to have a regular menstrual cycle. He did say, however, that one can have vaginal spotting that might be interpreted as menstruation.

72 The birth mother called an expert to give opinion evidence. Dr. M, who was qualified as a medical doctor with a specialty in the field of obstetrics and gynecology, provided evidence on whether bleeding can occur during the period of pregnancy. He was also asked by the birth mother to give evidence about a concealed or denied pregnancy. Dr. M said that was not something that he knew from his work and teaching and that he had to research the subject prior to giving evidence.

73 At trial, I permitted Dr. M to give evidence on both of those subjects subject to my later determining his qualifications. Here I find that he was an expert who could provide evidence on whether bleeding can occur during pregnancy. I am also permitting his evidence about concealed or denied pregnancy. It appeared from his evidence that he had done appropriate research on the subject as would any doctor on a subject they knew little or nothing about. However, his expertise in the area does not permit me to give his evidence in that area much weight.

74 On the issue of bleeding, Dr. M said it's not uncommon to have spotting during pregnancy. The only time

that one would have regular spotting would be if one continued to take birth control during pregnancy but that was not the situation we are facing here. He also said that it would be most unlikely for a regular monthly bleeding pattern to occur during pregnancy.

75 Therefore, all of the medical evidence suggests to me that the birth mother could not have had a regular period during her pregnancy. I find her evidence on this point not credible.

76 With respect to pregnancy denial, Dr. M, the only one to give evidence on this topic, did a literature review of papers on the subject since 2006. It is appropriate for an expert to review literature concerning areas pertaining to their area of expertise. I am comfortable that Dr. M as an obstetrician/gynaecologist would be concerned about this topic. It is usual for professionals to maintain an up-to-date education in their areas of expertise by reviewing literature in acknowledged journals. From that literature review done by Dr. M he pointed out that there are two or three things important to note. The first was that pregnancy denial is a red flag for underlying psychiatric illness and that a psychiatric consultation should be requested. He also gave instances cited in the literature that there is a risk of infanticide where mothers had denied pregnancy. He pointed out that the incidence of psychiatric illness was about 10% of all cases of denial. He said that the theme of the papers he reviewed on this subject was to ensure the safety of the infants.

77 I find, however, that there were no concerns about her mental health reflected in any of the hospital records. The evidence establishes that no one was concerned about her mental health and nothing in the evidence suggests to me that there should have been any concern in that regard.

78 On cross-examination Dr. M was asked: "If you had a birth mother who was in pregnancy denial and after the birth of the child was adamant that she did not want to care for the child and wanted to leave the hospital, then what would you suggest the desired outcome would be?" Dr. M said he would follow her wishes. In this case, of course, I find that the wishes of the birth mother were very clear - she wanted to give up her baby, she did not want to take her baby home and she did not want anyone to know about it.

79 I find that the birth mother may well have known that she was pregnant. Therefore, I cannot say that this concern of hers contributed significantly to her stress in the hospital. Nor am I concerned about any danger to the child from the birth mother.

c. The bewildering circumstances of finding herself in hospital for the first time

80 The birth mother maintains that the bewildering circumstances of finding herself in the hospital for the first time in her life also put pressure on her to the extent that she signed the consent under duress. I will review the circumstances to determine if they are any different than other women giving birth would experience.

81 The birth mother described herself in hospital as being in disbelief, shocked, scared. She said she had never been in hospital before, had never been pregnant before nor had received any treatment before. Further, she was in Alberta away from her home province in a strange city, and a strange province. She could not call her mother because, she said, she was afraid that if she told her mother about the baby she would have another heart attack.

82 One of the issues the birth mother said lead to duress was that she was not able to sleep very well in the hospital after giving birth. There were nurses coming in and out of the room and checking her. This is not unusual circumstances for patients in a hospital. It is certainly annoying, but is it sufficient for duress?

83 I also take into account the circumstances of the birth. As set out in these reasons, her birth was very normal - not particularly difficult.

84 One nurse over the two days in the hospital said that she spent time with the birth mother and checked in on her ensuring that she was okay. The birth mother told her that she was okay.

85 I find that the circumstances in hospital were normal and this did not contribute to duress or undue influence on the birth mother when she signed the consent.

d. Being given drugs in the hospital

86 The birth mother said that another aspect of her confusion was her being drugged. She maintains that she had Tylenol 3s given to her the morning of December 6 before she signed the consent to adoption.

87 As I understand it, it was the contention of the birth mother that the drugs caused her to be confused and not capable of signing a consent. First, she contended that there were drugs given to her during the birth. Then it was her recollection that she had been given ibuprofen and Tylenol 3 the morning of December 6 before she signed the consent to adoption.

88 The birth mother was administered specific drugs during the birth. The doctor who attended the birth of the baby was Dr. W, who is an obstetrician gynecologist who has worked in the City since 1979. He was on call at the hospital when the birth mother arrived. He was called into the labour room at about four o'clock in the morning on December 5, 2011. The delivery went well and the mother and baby were healthy. The only surgical intervention needed was a midline episiotomy and sphincterotomy to help deliver the baby. He also repaired the incision after the baby was delivered. The birth mother was given Xylocaine locally to assist with the pain of the repair. She was also given oxytocin which is a medication to help contract the uterus, that is, stop bleeding after delivery. It is administered through an IV immediately after delivery. There was very little blood loss and no transfusion was given.

89 I find that neither of those medications would have any impact on the mother's mental capacity.

90 With respect to medications given to the mother when she was in recovery, the pain medication prescribed by Dr. W was Tylenol or Tylenol 3, one or two tablets. Tylenol 3 contains a mild narcotic, codeine. She was also prescribed a laxative.

91 The hospital records are kept meticulously to control medications and narcotics. Those medical records show that the birth mother was not given either ibuprofen or Tylenol on the morning of December 6.

92 Further, on December 5 and 6, 2011, in recovery, the birth mother was looked after by one particular nurse. The nurse explained the system used in the hospital for the distribution of medications. She was the one who would have administered medications to the birth mother on the morning of December 6. Her records show and she is absolutely certain that the birth mother was not given any medications on the morning of or any time on December 6.

93 Therefore, I find that no medications were given to the birth mother that would have impacted on her capacity to understand the consent she was giving for the adoption of her baby.

e. Circumstances surrounding the consent

94 I have now reviewed some of the circumstances surrounding the birth mother's hospital stay. The circumstances of her birth, including if she did not know she was pregnant, her stay in hospital and any drugs administered did not amount together to more than average stress for a young woman giving birth who did not want to keep her baby.

95 I turn now to a detailed account of her stay in hospital particularly focussing on the circumstances of her decision to give the baby in a direct adoption to the adoptive parents. Like any young woman who had determined that she could not keep her baby, the birth mother was under stress. The question is whether the circumstances here put her under such great pressure that she could be said to have signed the consent under duress. Given that these circumstances are central to my decision, I will give them in some detail.

96 I have set out above some of the evidence concerning the birth. Later I describe more when I discuss facilitation (s 84 *CYFEA*). However, the mother's behaviour as described by the nurses in the birthing room gives no doubt that the birth mother did not intend to keep the baby.

97 One of the nurses who was present during the birth said that when the baby was born it was placed on the birth mother's abdomen and the birth mother attempted to push the baby away. That same nurse also asked the birth mother if she would like to hold the baby and was told "no". The birth mother also said she did not want the baby at all; she was not ready for this. Finally the birth mother asked that the baby be taken out of the room.

98 Another nurse in the delivery room with the birth mother said that after the baby was born and assessed, the birthmother was asked if she would like to hold the baby. She said "no".

99 All of the hospital records show that the birth mother wanted to give the baby up for adoption. Many show that she wanted privacy and did not what anyone to know she had given birth.

100 On the morning of December 5, 2011, the day of the birth, Dr. B, another obstetrician in the hospital who was on duty, made a note on the chart that the birth mother did not want anyone to know that she had had a baby, her co-workers and supervisors included. She also did not want her parents to know for fear of what they might say about this. It was clear from the evidence that the birth mother had made it clear to hospital staff from the outset that she did not want to keep the baby. The evidence is clear and unequivocal on this point.

101 The hospital staff and Child and Family Services made many efforts to ensure that her decision had been made with all choices put to her and she was given several opportunities to make that decision with sufficient information.

102 On the morning of December 5, one of the nurses told the birth mother that the social worker from the hospital would come in to see her. She saw that worker, SB, a number of times (the birth mother says about a dozen times) that day and the next. She also recalls seeing a social worker from Child and Family Services. Her recollection was that the worker from Child and Family Services did not spend much time with her. The purpose of the meeting was to tell her about different kinds of adoption and give her pamphlets with respect to adoption agencies. She also recalls that social worker telling her that if she wanted the baby to go with Child and Family Services she would have to take the baby out of the hospital. She was also told by the Child and Family Services social worker that the social worker would be back the next day to discuss what she had decided.

103 SB prepared extensive and detailed notes from her interactions with the birth mother at the hospital in the City. Those notes assisted SB to give a detailed account of what happened. I accept those notes were con-

temporaneous and complete. Where her evidence differs from that of the birth mother, I accept the evidence of SB.

104 SB is a registered social worker who at the time in question was the hospital social worker at the City hospital. She is also now qualified as a capacity assessor and designated as such in the province of Alberta. Under that capacity she can determine if somebody lacks capacity, that is whether the person has the ability to understand information relevant to making a decision and to foresee reasonable consequences of not making a decision or making a decision. However, at the time of the birth in this case and during her interaction with the birth mother, she was not so designated.

105 SB had been referred to the birth mother by the maternity child unit in the hospital. She must be involved when any patient in the hospital discusses adoption. She was advised on the morning of December 5, 2011 that the birth mother wanted to give her baby up for adoption and she was considering a direct placement with a family to which she was referred by the physician, Dr. W. SB went to meet with the birth mother immediately that morning at about 9:00 am.

106 SB had been informed that the birth mother was unaware of her pregnancy and wanted to give her baby up for adoption.

107 According to SB, over December 5 and December 6, SB saw the birth mother 7 to 10 times. Those meetings lasted from 5 minutes to an hour.

108 When SB met with the birth mother on the morning of December 5, the birth mother confirmed that she was not aware of adoption processes and options that were available to her. The birth mother also stated she was eager to leave the hospital and return to work. SB advised the birth mother that there were several options for adoption and advised her that Child and Family Services would be contacted to provide the birth mother with further adoption counselling. SB explained that as part of her practice she always contacted Child and Family Services.

109 SB asked the birth mother about her planning for discharge. SB discussed all of the adoption options with her. She also told her that she could choose to keep the baby. The birth mother said no. SB encouraged her to contact a friend or family member to talk to but the birth mother declined.

110 During all of those visits the birth mother was adamant that she wanted the child to be adopted and SB never had any sense of ambivalence on the part of the birth mother about that. Further, SB never sensed that the birth mother was being pressured to do this by anybody else. In fact, the birth mother told SB that she was not prepared for a baby and that she was not willing to try to parent.

111 At approximately 10 in the morning of December 5, SB contacted Child and Family Services leaving a voicemail. She advised them that the birth mother wanted to leave the hospital as soon as possible. She also advised them that the birth mother was considering a direct adoption.

112 The Child and Family Services worker came to the hospital at about 12:30 pm and advised SB that she would meet privately with the birth mother to provide adoption counselling. SB then met with the birth mother and informed her that the Family Services social worker was at the hospital and asked the birth mother's permission for that social worker to see her in the hospital room. The birth mother agreed.

113 The Child and Family Services Social worker gave evidence. In December 2011, she managed adoption files and case management files. She met in the hospital with the birth mother on December 5. She went over all of the options in detail with the birth mother including a government adoption and that she could keep the baby. She discussed private adoption and saw no problem with that at the time.[FN2] The social worker also went into detail about the legal process.

114 Her observation of the birth mother was that her demeanor and state of mind was nothing out of the ordinary. Further, the social worker formed a definite impression that the birth mother was not willing to parent the child. She observed that the birth mother was capable of processing the information about adoption at that time, but the social worker was to meet with the birth mother a second time the next morning. The concern of the social worker at that time was that the birth mother would abandon the baby in the hospital.

115 The social worker told the birth mother she would be back the next morning to determine what her decision was. The social worker then saw the baby and ensured that she was healthy. The Child and Family Services social worker was aware that the birth mother intended to go back to her home province on December 17.

116 After the Child and Family Services social worker left, SB followed up with the birth mother to find how the meeting went. The birth mother said it was fine. SB's notes show that the birth mother told SB that she was going to go with Child and Family Services because it would be easier. However, the birth mother stated that Child and Family Services would have to get the baby the next day, December 6, because she was going to leave the hospital. SB suggested to the birth mother that a direct placement would also make it easy and convenient for her. SB also made it clear to the birth mother that she and the baby could remain in the hospital longer if she wished in order to give her time to plan and consider her options. SB offered to contact a private adoption agency if that was what the birth mother wanted. The birth mother declined. SB informed her that she did not have to make that decision on December 5 and that she had time to consider the decision.

117 The birth mother's main concern was that she wanted to leave the hospital the next day and did not want to pick an adoption option that would require her to remain in the hospital any longer. She did not want anyone to know for what reason she had been in the hospital.

118 SB also explained to the birth mother that for a direct adoption she would have to sign a form releasing the baby to that family. She made it clear to the birth mother that this process would likely require future correspondence and the process would not end when the birth mother left the hospital. At the end of the conversation, at about 3 in the afternoon on December 5, the birth mother was not sure what she would do.

119 Later the afternoon of December 5, the birth mother told SB that she wanted SB to call the family suggested by Dr. W. The birth mother gave SB a piece of paper with the phone number of the prospective adoptive family on it. It also had their name. She did not make the call herself even though she had access to the number because she described herself as "ridiculously shy". She did not know the name of the people and did not want to speak to them. SB called the family at approximately 4 that afternoon (December 5). The adoptive family consented to adopting the baby immediately.

120 The adoptive family told SB that they would arrange for a lawyer to act for the birth mother and indicated that they would be ready to take the baby home right away. SB communicated this to the birth mother who appeared happy and confirmed that she was feeling okay. SB commented to the birth mother that she appeared to be relieved with which the birth mother agreed. SB informed the birth mother that she could change her mind but the birth mother was firm that she wanted to do this. SB provided the birth mother with the necessary paper-

work for the consent to the adoptive parents visiting the baby later in the evening. SB again told the birth mother she could change her mind. The birth mother recalls signing a consent form but did not recall when that happened.

121 Once the consent for the visit was signed, the adoptive mother attended at the hospital on December 5 in the evening and stayed with the baby all night.

122 Every meeting SB had with the birth mother she told her that she had the right to keep the baby.

123 On the following day, December 6, when she first woke up, the first person the birth mother saw was the Child and Family Services Social worker who asked her if she had made a decision. The birth mother told the social worker that she had. The social worker asked her if she was sure. When the birth mother said yes she was placing the baby with the family, the birth mother said that the social worker stormed out of the room.

124 The social worker from Child and Family Services gives a different account. She said she saw the birth mother that morning at about 7:45 because she knew that the birth mother was eager to leave the hospital. At that time, a nurse told the social worker that the birth mother had made a decision to place the baby directly with the family suggested by Dr. W. The social worker understood that the birth mother thought the government process was too complicated. The birth mother told the social worker that she had met the prospective adoptive mother. That was not true. The birth mother told the social worker that the woman seemed like a good person and would have a good job. Also she said that the family was recommended by a professional. The birth mother told the social worker that she would leave at four o'clock that day. It was explained to her by the social worker that the birth mother had to sign papers before she left the hospital because, if she did not, the child would be brought into care. The birth mother explained to the government social worker that the adoptive parents were obtaining legal representation and that she would have the paperwork in order.

125 The social worker estimated that the meeting that second morning with the birth mother and with the nurse took about 40 or 45 minutes. That was her whole involvement with the file.

126 I note that legislation requires that there be a minimum of two meetings with the prospective birth mother. In this case, the birth mother had two meetings with the Children and Family Services social worker who believed that the birth mother had made her decision to arrange with the adoptive parents for the adoption of the baby and there was no need for her to meet with the birth mother any further.

127 The morning of December 6, SB met with the birth mother at about eight o'clock. The birth mother said that she wanted to leave the hospital. She confirmed that the birth mother still wanted the adoptive family to adopt the baby. At the time the birth mother denied to SB that she had any questions or concerns.

128 That morning the birth mother also asked SB if she could see the baby because she was curious. SB brought the baby to the birth mother who asked for about five minutes. SB offered the birth mother as much time as she wanted with the baby but the birth mother refused other than the one brief visit for about five minutes.

129 It was the birth mother's recollection in her evidence that on the morning of December 6, SB told her that a lawyer would be coming in to speak to her. The birth mother remembered that meeting taking place after lunch in her hospital room. She maintained that the lawyer hardly explained anything and that she signed two Consent by Guardian to Adoption forms. Only one was necessary but on the first one her name was misspelled.

She understood that the lawyer was there for the adoptive parents. She does not remember the lawyer taking any background information. She does not remember him explaining anything about adoption or guardianship. She did understand that she was giving the adoptive parents guardianship. She had never signed a legal form before. She said that she was still in shock, tired and confused, clueless, scared and nervous.

130 The birth mother said she was told then by the lawyer that she had 10 days to revoke her consent and she said she was told *that she had 30 days to appeal*.

131 SB and the lawyer, JS, gave evidence about the lawyer's visit and wherever that evidence differs from the birth mother's I prefer their evidence. Their evidence is as follows.

132 SB did tell the birth mother that a lawyer would be coming to visit her in the hospital that day.

133 On the morning of December 6, JS, a lawyer, received a call from the adoptive mother who made arrangements for him to attend at the hospital and speak with the birth mother. The adoptive parents paid the legal fees for all of the lawyers' involvement with the birth mother. This is standard in direct adoptions. JS had been called to the bar earlier that year and had no experience with adoptions.

134 Before JS met with the birth mother he met with the adoptive mother and SB. SB explained to him that it was important that no one know about the birth as she understood this was the birth mother's wish.

135 The birth mother requested that SB be present during that visit.

136 When JS met with the birth mother he explained to her that *she* was his client, and that the process was confidential. He described the birth mother's mood as calm and subdued and coherent. Although she did not ask questions, she was responsive and did not seem distracted. There was no emotion until he asked her for a mailing address and she told him that she did not want her parents to know. Emotion then crept into her voice. They agreed on an address through which they could communicate by mail.

137 The lawyer explained to her that the adoptive parents were seeking an adoption order which would terminate the birth mother's rights to the child. After she signed the forms the adoptive parents would become joint Guardians of the child with her. She indicated to the lawyer that she knew the adoptive parents. This was not true.

138 The lawyer's evidence is that he went through the document line by line twice. He was very clear in his evidence that he had not only read the document to her but that he had paraphrased every aspect of the consent form. When he explained about the 10 days within which she had to change her mind, SB interjected and clarified who the birth mother should contact if she did change her mind.

139 After he had gone through the forms twice, the birth mother confirmed that she was willing to sign and was doing so freely.

140 After he had gone through all of this he went back to the office and swore the contents of the affidavit by another lawyer.

141 SB's recollection of that meeting accords with that of the lawyer, JS, but she did not have an independent memory of the explanation given about consent to guardianship. However, SB did recall that JS was thorough, and that the birth mother appeared to understand the document. As a hospital social worker, SB had no

concerns regarding the birth mother's capacity. The birth mother appeared to sign the consent freely and voluntarily. Further, SB was satisfied that the birth mother knew and understood that she could only change her mind within the 10 days.

142 After JS's visit, SB followed up with the birth mother to assess her psychosocial status. She found that the birth mother was not in crisis and was coping well. She had a conversation with the birth mother about a number of things in her life including attending cooking school and how she enjoyed cooking. The birth mother had a plan for where she was going once she was discharged.

143 JS returned to the hospital that afternoon because there was a potential issue with the adoption having been arranged directly. He spoke to the birth mother again without anyone else present. He asked the birth mother if anyone had pressured her into the adoption and she said no. He gave the birth mother a copy of the consent form. SB was not present during that second visit by JS. Although the birth mother did not remember having another meeting with the lawyer that day, I find that the meeting occurred as the lawyer said it did.

144 JS was satisfied that the birth mother knew that she was giving up the child for adoption, that it would end her rights with the child and that she had 10 days to change her mind.

145 At no time throughout the day did the birth mother display any visible or emotional signs of distress. SB continued to support her. Before she left the hospital on the afternoon of December 6, SB told the birth mother that she could still change her mind and gave her a contact number for the lawyer and encouraged her to contact the social work department of the maternity child unit in the hospital if the birth mother wanted to talk or had any questions or concerns. The birth mother declined when asked if she wanted to see the baby again. She was discharged at approximately 4 o'clock on December 6.

146 One of the issues raised by the birth mother was whether she had been given proper advice by JS in the hospital as to the consent she had given.

147 The birth mother put forward an expert lawyer to give an opinion on whether the advice given to the birth mother was appropriate as to her consent to the adoption, whether the consent was defective and whether the birth mother was fully informed as to the nature and consequences of her consent.

148 In the *voir dire* it became evident that he had been a lawyer for many years in family law, adoption and criminal law. He had an adopted daughter. He has taken consents for adoption. He has not written on adoptions in the province, nor has he done any teaching in the area, nor had he given evidence in court before.

149 In his evidence about whether the mother understood that she is giving the baby up for adoption and whether she was capable of making a decision, his opinion was that it was a "gut call".

150 Although I qualified him as an ordinary lawyer who could give opinions with respect to adoption law, I am not going to consider his evidence because the nature of his evidence was something that would be evident to a judge sitting in a trial on these issues and expert evidence was not necessary.[FN3]

151 After the birth mother was back at work, SB called her to say that if she wanted to change her mind or had any questions that the birth mother could call her. She also told her that the lawyer who was to finalize the adoption documents may call her.

152 The day she returned to work, the birth mother was given time to rest by the supervisor. The birth

mother then worked every day for 12 to 14 hours until she took her flight back to her home province. She said she had no difficulty concentrating from December 8 to December 17.

153 Prior to her returning to her home province, the birth mother called SB to ask about why the adoptive parents' lawyer had not called her. It was the evidence of the birth mother that shortly after that, Mr. J called her to let her know that she would have to fill out a family history and other documents.

154 Mr. J spoke to the birth mother by telephone on about December 14. In the telephone conversation, Mr. J also asked the birth mother a number of questions to prepare the documents for the adoption. He asked her if she knew who the birth father was. I discuss this in more detail above in my discussion on the birth mother's credibility. He said that when she told him that she did not know who the birth father was Mr. J explained to her that they needed to address the birth father issue. He explained to her that the birth father might be a guardian in which case his consent was necessary for the adoption. In that telephone call he also discussed other paperwork necessary to complete the adoption including a discussion about necessary affidavits and the family medical history. He said that the birth mother was reluctant to discuss the birth father but after he "prodded" her, she explained that there were two potential birth fathers, they were both one night stands and that she had no current contact information for either of them. He explained to her that he would put this in an affidavit that she would need to swear.

155 He was under the impression that the birth mother was eager to finalize the adoption as soon as possible.

156 The birth mother wanted to sign the documents before she left. Therefore, they arranged for her to sign the documents on a layover in Calgary where the lawyer would meet her at the airport when she was on her way to her home province for Christmas. That was on December 17. They did meet at the Calgary airport.

157 The birth mother's evidence was that she was not familiar with the documents that Mr. J gave her at the airport. It was her recollection that he filled out the documents and read them to her. She maintains that she did not read the documents before she signed them. Again she reported being nervous and scared. She said she had never been in the Calgary airport before and that was only her second time in an airport. She was afraid to miss her flight.

158 She said that Mr. J gave her his business card at the end of the meeting and took the documents with him. He did not give her any copies.

159 Mr. J gave evidence. I have set out some of his evidence around the issue of the birth father above where I prefer his evidence.

160 He had prepared three documents: one affidavit concerning the birth father; the required affidavit for adoption to be sworn by the birth mother; and family medical history. These documents are short and simple.

161 Mr. J explained to her that he was acting for the adoptive parents. He provided her with the documents and he went over the documents with her. As they went over each of the documents, he held them upside down so she could read them and he read them to her, paragraph by paragraph. At the end of his reading each paragraph he would ask her if that was okay and if that represented what she wanted to say. She agreed and she swore under oath the affidavits in front of Mr. J. He read the affidavit concerning the birth father first, the affidavit concerning the adoption second and then the medical history.

162 The family medical history included questions about the birth father. Mr. J told her that if she did not know anything about the birth father he would put "unknown" in that form. She agreed. By that point she had already sworn the affidavit concerning two possible birth fathers.

163 As to her demeanor while executing the documents at the Calgary airport, Mr. J described the birth mother as having nerves and trepidation but that she seemed eager and anxious to have the issue finished. She expressed to him that she was glad it was done. It was his impression that she was relieved that it was done.

164 He explained to her that given she had not asked for service of the adoption hearing, her involvement in the process was concluded. He did leave her with his card and said she could call him if she had any other questions.

165 I conclude that Mr. J properly went over the affidavits and family medical history with the birth mother, that she understood what was in the documents and that she swore those documents understanding them and agreeing with the contents. Further I find that Mr. J did not put any pressure on her. I do acknowledge that she was in an airport on her way home and that she had not flown more than once before. However, this does not amount to any kind of unusual pressure.

3. Expert evidence called by the birth mother

166 The birth mother called an expert, Dr. Douglas Ginter, as an expert medical doctor specializing in psychiatry to provide opinion evidence on her state of mind at the time of pregnancy and her delivery, and the reasons for that state of mind. He also provided other opinions which I set out below.

167 At the time, I gave a provisional qualification. I will now set out how I will qualify him.

168 Like all other psychiatric students he studied child adolescence among other things. His curriculum vitae are impressive in his area which is clinical psychiatry. In particular, he has worked for many years with adolescents. He had given evidence in an Alberta court several years ago concerning a custody dispute.

169 In this case, he was asked to give an opinion about the state of mind of the birth mother over a year ago. He agreed that "formally and legally [one] would have to see the patient in order to truly give an informed opinion." I take it from this that he meant one would have to see the patient at the time in question. He did meet with the birth mother before offering his opinion. However, that meeting took place a considerable time after the mother gave birth and gave her consent.

170 I qualify him as an expert in the area of clinical psychiatry, particularly with adolescents. With respect to the birth mother's ability to parent, I give his opinion very little weight because the court is capable of drawing its own conclusions based on all the evidence as set out above. Nevertheless, I shall discuss his opinions.

171 In general, I found Dr. Ginter to be "chippy" when he was answering questions by the adoptive family's lawyer. He would not respond directly. It appeared to me that Dr. Ginter was taking the side of the birth mother and was not being as objective as an expert should be in the answers he was giving to the questions posed to him. This did not assist me in considering his opinion seriously.

172 Dr. Ginter met with the birth mother in May 2012 for about two hours. He did not administer any kind of test or assessment. From his review of the documents he came to the conclusion that at the time she gave up her baby she was "quite confused, panicky, and conflicted about having a child...". He concluded that she had

changed her mind because she was "well supported by her family" when she thought she wasn't going to be supported by them.

173 When he saw her in May 2012, he said she was preparing to mother the child. At the time, she had no psychological impairment or pathology. She was not depressed.

174 It was Dr. Ginter's view that the birth mother was conflicted about being pregnant. She had a fear of burdening her family, hurting her mother, and getting disapproval from her family. He said that when her family accepted her and supported her, her conflict was resolved and she was able to go forward with her custody application and her attempt to revoke her consent.

175 He gave an opinion about her capacity to understand the consent that she gave - "she did it out of a sense of fear and confusion and ambivalence about having the pregnancy...". He also said that at the time she gave birth, she was not clear about whether she would be supported by anyone in her capacity to be a mother and that she was helpless. I cannot imagine that any young woman giving up her newly born baby is not conflicted to some extent.

176 He attributed her confused state to a number of things including drugs, hormonal changes, blood loss and other complications. However, the evidence about her birth did not support this. I have considered everything surrounding the birth and her stay in the hospital above. I did not need his expert assistance in coming to my own findings about what had occurred. Further, he apparently did not have all of the underlying evidence necessary for his opinion. He relied most heavily on the birth mother's account of the events.

177 With respect to whether she lacked understanding about the 10 day period within which she could cancel revoke your consent, Dr. Ginter said it wasn't a matter of not understanding, but was highly influenced by her emotional and psychological state. With all of that he did state that she was competent and there was no evidence of any kind of impairment at the time she signed consent.

178 Dr. Ginter was asked in cross-examination to consider the birth mother's level of intelligence, understanding, comprehension and general competency. In response he concluded that she was competent from a cognitive point of view at the time she signed the legal documents. Further, he opined that even if she had Tylenol 3s the morning of December 6, it was unlikely that they would have affected her judgment.

179 This opinion was intended to support the contention of the birth mother that the consent she gave was made with undue influence and was unconscionable. I have discussed the circumstances above. In these circumstances, I did not need an expert's opinion to assist me in this regard. I have no doubt that all young women who give birth to a child in the circumstances such as these, is conflicted and confused. That does not lead to a court finding that the consent is vitiated. Further, Dr. Ginter did give the opinion that she was competent at the time she gave that consent.

180 His opinion about her now being well supported by her family makes me wonder if her attempts to vitiate her consent have been the result of pressure from her family.

181 I did not need Dr. Ginter's opinion on this issue and I did not find that it assisted me in any way to determine if the birth mother's consent was vitiated by undue influence and duress.

4. Conclusion on Duress

182 I have set out the circumstances surrounding her claim that all of this amounted to undue influence and duress.

183 There is no doubt that the situation was stressful as it would be for any young woman. However, no one put pressure on her. She was not exhibiting any evidence of equivocation or uncertainty in her decision. She addressed all of the reasons for her decision.

184 As I set out above she may have not known she was pregnant but I am not convinced of this. Further, she was very certain of the reasons she did not want to mother the baby. She wanted to return to her job, she was not ready to mother and she did not want any family or co-workers to know that she had given birth.

185 Her delivery was healthy and she did not require unusual medical treatment or any medication past the evening of December 5. The medication she was given that evening did not impact on her capacity to make decisions.

186 I find that all of these circumstances taken together do not amount to duress or undue influence. She was not coerced by anyone into giving her consent. She was told about alternatives but chose not to use them. She was independently advised. She did not try to revoke her consent until after the ten day period for revocation of consent to adoption as set out in the law.

187 I conclude that the birth mother's consent was given for the adoption; she did not withdraw her consent in time; her consent was not vitiated by duress or undue influence.

188 Therefore the birth mother is not successful in challenging the consent she gave for her baby girl to be adopted by the adoptive parents. She has not even made a *prima facie* case to vitiate the consent. There is nothing to which the adoptive parent must respond.

D. Was the "bargain" unconscionable?

1. Unconscionability

189 The birth mother also claims that the "bargain" was unconscionable. In a case such as this, the "bargain" is the consent she gave for the adoption of her baby.

190 Unconscionability is an equitable remedy closely related to undue influence but is separate and distinct. The birth mother has not made out her claim for undue influence. However, this does not preclude a claim for unconscionability: *Morrison v Coast Finance Ltd* at 713.

191 An unconscionable bargain occurs where one party has an unfair advantage because of ... an unconscientious use of power by a stronger party against a weaker: *Morrison v. Coast Finance Ltd.* at 713.

192 Two requirements are necessary for a finding of unconscionability:

(a) proof of inequality in the position of the parties; and

(b) proof of substantial unfairness of the bargain obtained by the stronger party.

Morrison at 713.

193 If a party is successful in proving the above two requirements, there is a presumption of fraud. The burden then shifts to the other party to prove that the bargain was fair, just, and reasonable: *Morrison* at 713.

194 In *Morrison* the court was discussing commercial transactions involving a weak older woman. Here, the "bargain" is between the birth mother and the adoptive parents. Here, we are reminded that the adoptive parents did not initiate the consent, nor did they meet with the birth mother. Their lawyer did meet with the birth mother on December 17 to finalize the documents. However at that time, the 10 day limitation period had expired and the consent was *prima facie* given. The "bargain" had been made and had been performed.

195 In *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437, 384 A.R. 11 (Alta. C.A.), the Alberta Court of Appeal held that *Morrison* is Canadas leading case for the test for unconscionability. The Court held that *Morrison*, along with other authorities, discussed four elements which are necessary for unconscionability:

> (a) a grossly unfair and improvident transaction; and
>
> (b) victim's lack of independent legal advice or other suitable advice; and
>
> (c) overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
>
> (d) other party's knowingly taking advantage of this vulnerability.

Cain at para 32.

196 In cross examination, the birth mother had a discussion with counsel about her making her decision to place a child for adoption. She was asked if the decision was free and voluntary and she said somewhat yes and somewhat no. She did not feel pressured to make a decision. She acknowledged that SB had offered her an extended stay in the hospital to assist with making that decision. She understood that she was giving up her parental rights, to some extent. She also acknowledged that her decision was made over a two day period. At trial she first tried to say that it was rushed and that she had to make the decision in one day. She did think the adoptive family would make a good home for the child. It was on the second day in the hospital that the lawyer came to discuss adoption with her and give her advice and get the document signed. She did sign the form. The lawyer and SB were not threatening her at the time. She signed it because it was the best option. The lawyer went over the form she was signing twice with her. That form shows that there is a 10 day revocation. There is no mention about any other period.

197 I also note that the adoptive parents never met the birth mother and were not in a position to influence or put pressure on her.

2. Conclusion on Unconscionablility

198 In the circumstances of this case, the birth mother has not proved that the "bargain" was grossly unfair or improvident. She did have independent legal advice bolstered by the advice and assistance given her by SB. All the circumstances set out in these reasons surrounding the birth and her decision to give the baby up for adoption after she had been provided several times with all the options, did not constitute an overwhelming imbalance in bargaining power. Finally, there is no evidence to suggest that the adoptive parents or any of the staff in the hospital took advantage of a vulnerable person. I do not accept that she was at the time as vulnerable as she tried to make out at trial.

199 Given that the birth mother failed to meet the test for unconscionability, the adoptive parents do not need to answer this allegation.

200 Given that the birth mother has failed to defeat her consent on the basis of undue influence, duress or unconscionability, there is only one other possible argument and that is that there was facilitation of the adoption, that is, a breach of s. 84 of the *CYFEA.*

E. Was there a breach of s 84 of the CYFEA?

201 Section 84 of the *CYFEA* restricts the ability to facilitate an adoption in Alberta:

> 84 No person other than the following shall place or facilitate the placement of a child for the purpose of an adoption:
>
> (a) a parent of the child;
>
> (b) a director;
>
> (c) a licensed adoption agency;
>
> (d) the Minister.

202 Facilitation may include helping to find, introduce, initiate contact, negotiate or act as an intermediary between a birth parent and a prospective adoptive parent, for the purpose of adopting a child: *K., Re*, 1998 ABQB 1085 (Alta. Q.B.) at para 25, (1998), 236 A.R. 1 (Alta. Q.B.).

203 In the case before me, there is no doubt that Dr. W provided a name and a number to the birth mother through the nurse in the event the birth mother wanted to arrange a direct adoption. However, does this amount to facilitation?

204 The birth mother did recall the nurses and doctor asking her about what she wanted to do with respect to the baby. This is a normal procedure in hospitals and one to be expected of the hospital staff when a woman appears and gives birth particularly when she is adamant that she is not pregnant and then, when it is clear she is, is adamant she does not want the baby as was the case here.

205 The birth mother in evidence recalled that the obstetrician, Dr. W told her that he knew a family who wanted to adopt a baby. Her recollection was that he told her about that while he was stitching her up. Dr. W categorically denied this. I accept Dr. W's evidence on this point.

206 The evidence establishes that the maternity nurses knew before Dr W came to deliver the baby that the birth mother did not want to keep the baby and wanted the baby to be adopted.

207 The birth mother told a nurse in the delivery room that she would tell her twin sister about the birth but did not want to tell the birth father, she did not want her co-workers to know, she did not want to keep the baby. When Dr W arrived he was advised of the fact that the birth mother did not want to keep the baby. Dr W told the nurse that he would give the birth mother a contact number for a woman he knew who wanted to adopt a baby.

208 On the hospital notes made by Dr. W, he observed that the birth mother wanted to give up the baby. Dr.

W said that when he attended to the delivery, he was advised by one of the nurses that the birth mother wanted to give the baby up for adoption. He did not recall which nurse told him that. Dr. W had a short conversation with the birth mother in the delivery room after the delivery just before he went to make his notes.

209 He then went back to see her about 10 or 15 minutes later. At that point, Dr. W told the birth mother that he had heard she wanted to give up the baby for adoption and that he knew of a family who was willing to adopt a baby. Dr. W said that he told her that she had to make up her own mind but that he would leave the name and phone number of the family with the nurse and the birth mother could ask for it if she decided to give the baby up for adoption. She said she was interested. He did write the information on a piece of paper and gave it to a nurse. Dr. W knew the adoptive mother who was a nurse at the hospital and he had been her treating physician but at the time of the birth, he was no longer her physician. This was the only communication that Dr. W had with the birth mother.

210 Dr. W never told the birth mother the name of the prospective adoptive parents and never contacted the adoptive parents to tell them about the baby. Nor did he arrange a meeting between the adoptive parents and the birth mother. He did not urge the adoption on the birth mother. Finally, he did not receive any monetary benefit.

211 I find Dr. W to be credible and accept his evidence about the conversation he had with the birth mother.

212 The birth mother made up her mind on December 5, 2011 that she would put the baby with the family Dr. W had suggested and she made arrangements with the social worker, SB, for SB to call the adoptive parents at the number the birth mother provided written on a piece of paper.

213 I find that the actions of Dr. W are not facilitation. He did not call the adoptive parents; he did not arrange any kind of meeting between the adoptive parents and the birth mother. His only action was to leave a telephone number and a name with the nurse. It was up to the birth mother to take the next step and she did so without further intervention by Dr. W.

214 Further, I find that the actions of the nurses also set out above and the actions of the social worker, SB, are not facilitation. It was evident from all of the nursing notes and the evidence given by the nurses that none of them knew the adoptive mother who was a nurse in the hospital.

215 I note that the birth mother has subsequently made complaints to a number of places about the actions of the doctor and the nurses. However, there was no reason for discipline found. Although there was concern by a number of persons on the day the birth mother left the hospital, it appears that those concerns were founded in a misapprehension of what actually happened.

216 Even though I have found no facilitation, I note that facilitation of an adoption in contravention of the *CYFEA* will not always preclude an adoption order. In *K., Re* at para 40, Fruman J held that although the adoptive parents used a lawyer from California to facilitate their adoption, it was in the childs best interests to continue the placement with their adoptive parents. She stated that there was no compelling public policy reason which would outweigh the paramount consideration, the best interests of the child: at para 36.

217 Given my findings on consent and facilitation, it is unnecessary for me to make findings about the best interest of the child in this case. Nevertheless, I shall do so in the event I am wrong about the consent or the facilitation and I need to dispense with the consent of the birth mother.

218 Therefore, I shall consider the best interests of this child.

F. Was the adoption in the best interests of the child?

219 The *CYFEA* states that a Court, who makes any decision relating to the adoption of a child under the Act, must do so in the best interests of the child. Section 58.1 states:

> 58.1 A Court and all persons who exercise any authority or make any decision under this Act relating to the adoption of a child must do so in the best interests of the child, and must consider the following as well as any other relevant matter:
>
> (a) the importance of a positive relationship with a parent, and a secure place as a member of a family, in the childs development;
>
> (b) the benefits to the child of stability and continuity of care and relationships;
>
> (c) the mental, emotional and physical needs of the child and the childs mental, emotional and physical stage of development;
>
> (d) the benefits to the child of maintaining, wherever possible, the childs familial, cultural, social and religious heritage;
>
> (e) the childs views and wishes, if they can be reasonably ascertained;
>
> (f) the effects on the child of a delay in decision-making;
>
> (g) in the case of an aboriginal child, the uniqueness of aboriginal culture, heritage, spirituality and traditions, and the importance of preserving the childs cultural identity.

220 In *M. (S.K.A.) v. A. (C.)* (1995), 165 A.R. 94 (Alta. C.A.) at para 7, (1995), 11 R.F.L. (4th) 25 (Alta. C.A.) Russell JA held that [t]he application of the test of the best interests of the child demands a broad view of past, present and future circumstances and needs of the child.

221 In *M. (F.) v. S. (S.)*, 2010 ABQB 195 (Alta. Q.B.) at para 26 Sanderman J held that the court should consider the following elements when there are competing adoption claims:

> (a) The paramount consideration is the best interests of the child;
>
> (b) 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;
>
> (c) 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;
>
> (d) 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.

222 There was considerable expert evidence given about the best interests of the child. In particular there was evidence from two experts for the birth mother and two for the adoptive parents. I shall give their views on this topic as necessary in my discussion about best interests.

223 The birth mother has had contact with the baby since early 2012 because there have been several orders made providing the birth mother with that access.

224 In February 2012, Justice Gates made an order that provided that the birth mother was granted access from 10:00 am to 3:00 pm every other day until March. Then the birth mother was given overnight access from 6:00 pm on Friday unto 12:00 noon on Saturday and daytime access from 10:00 am to 3:00 pm on Monday and Wednesday.

225 A trial was scheduled in April 2012 but was adjourned on application by the birth mother.

226 In July 2012, an application was made by the adoptive parents to change the access order. Expert evidence was given concerning the effect on the baby of being taken out of the adoptive parents' home. At that time, the birth mother's access time was reduced and the child had to stay in the adoptive parents' home. The access was changed to two hours on Tuesday and Thursday at the adoptive parents place under their supervision. The birth mother said she had not missed any of those access visits.

227 The access she has been given by the court gave the birth mother an opportunity to develop a relationship with the child. The amount of time the birth mother spent with the child was taken into account by the experts.

228 I shall discuss the following with respect to the best interests of this child:

1. security, stability and effects of delay on the best interests of this child;

2. the mental, emotional and physical needs of this child and its development; and

3. familial heritage.

1. Security, stability and effects of delay on the best interests of this child

229 Here we will consider the history of the child to date and the planning on the part of the birth mother.

230 The birth mother returned to the City from her home province in January 2012 and has not worked since that time.

231 The birth mother was asked about her future plans for the child. As time has gone by she has had five different plans for her future. Some of those involved her going back to her home province immediately with the child if the court should order that the child be returned to the birth mother. There have been several different plans with respect to child care; there have been several different plans with respect to her completing her education.

232 When she met with her expert, Dr. Ginter, she told him that she would stay in the City. She denies she said that to Dr. Ginter. Further she says his report is not complete.

233 In the summer of 2012, the birth mother met with Ms. Tamara Austin, another expert called by the birth mother, and told her that she was going to stay in the City. Then in October she changed her mind and told Ms. Austin she was going back to her home province to become a safety officer. Early in 2013 she changed her mind again. She said she would go to her home province and work with her father in a restaurant or pub and that her father would provide child care.

234 Her most recent plan, as she described it at trial was that she would go back to her home province and that her father would have a position for her in his business. She would stay in an apartment that her father had arranged for her and her family would care for her child - her father and her sisters.

235 If the court ruled against her she would stay in the City and go back to her job. She would stay there because most of her family now lives in or near the City. She did *not*, without prompting by counsel, say that she would see the child. That would, of course, depend on any corollary orders made by the court as an adoption order would terminate contact by the birth mother with the child.

236 She will raise the child as a single parent and she will work. At present, she is on welfare and has been since early in 2012.

237 The adoptive parents, on the other hand, have lived at their current address for almost 9 years. They have been married for 11 years. This is the first marriage for both of them. They have lived in or near the City for almost all of their adult lives. Most of the families for both parents live in the City.

238 Children have a real need for stability in their life. Where a child has been in the custody of an adoptive parent for an extended period, this will be a weighty factor in determining the childs best interests: *D. (J.)* at para 8. Also, the longer that the consenting guardian waits before contesting custody of the child, the more likely that the childs best interests are served by maintaining the status quo, in other words by maintaining custody with the adoptive parents: *D. (J.)* at para 9.

239 In this case, the child has been with the adoptive parents for almost 2 years. In the life of the child, that is a long time. In attachment theory, a great deal has gone on in those two years. With respect to any attachment beginning to be formed in utero, given that the mother did not know she was pregnant, if I accept that, she was doing nothing to encourage attachment with her infant.

240 An important consideration is a positive relationship with a parent, and a secure place as a member of a family, in the childs development.

241 From the evidence given by the birth mother and by AB, I have not been given much evidence as to why the child would have a secure place in a family if the child were to go back to the birth mother. As I described above, the birth mother's situation is in flux and has been ever since the baby was born. I have no reason to believe that she would provide a stable home for the child. No evidence was given to me about her background which would suggest this. Her parents are separated, one living in Alberta and one living in her home province. Her siblings are also scattered across Canada. The planning, such as it is, suggested by the birth mother as to a home for the child would not, in my view, provide a secure place for the child.

242 This length of time since she started the process to challenge her consent has in part been the responsibility of the birth mother who adjourned the first trial which was early April 2012. One adjournment from March of 2013 was caused by weather whereby counsel for the adoptive parents could not get to court for three days.

Another adjournment from June this year was caused by illness of the judge. Neither of those things can be put at the feet of the birth mother. However, the most important adjournment, the one from April 2012, is the responsibility of the birth mother.

243 However, none of those adjournments matter in this instance. As I have found above, the birth mother failed to have the consent overturned by reason of undue influence or unconscionability. Therefore, even had the matter been heard in April 2012, she would not have been successful. My analysis here on the best interests is done in the event I am wrong about her consent.

244 In any event, because the vitiation of contract by virtue of undue influence or unconscionability means that the contract is voidable but not void *ab initio*, I must consider the circumstances as they were set out before me in the trial. Therefore, I consider the age of the child now.

245 Given the age of the child, which is almost two, stability of the child weighs in favour of leaving the child with the adoptive parents. The birth mother has not been prejudiced by the delay because she would not have succeeded in her attempts to set aside the consent as I have discussed above. Further, a best interest's analysis in April 2012 would have also favoured the child remaining with the adoptive family.

2. The mental, emotional and physical needs of this child and its development

246 Here we will consider, among other things, the home and upbringing that the birth mother could provide for the child and the home that the adoptive parents are providing.

247 I echo Justice Sanderman's comments when he suggested that we consider which environment can best provide for the health, emotional wellbeing, education, training, intellectual, economic and psychological needs of the child.

248 One of the considerations suggested by Justice Sanderman is the potential harm to a child in disrupting attachments that have developed or are in the advanced stages of formation.

249 Here the child is almost two and has lived with the adoptive parents for all of that time. For a period of five months in that time before the baby was six months old the child spent time with the birth mother outside of the adoptive family's home when the birth mother was given overnight access as set out above.

250 The birth mother has no concerns about taking the child away from the adoptive family. She does not acknowledge the advice of the home study I discuss later in these reasons that there is a risk of causing the child harm by taking the child away from the adoptive family. She acknowledged that the baby would be stressed.

251 As I stated earlier, the birth mother had very scant plans with respect to the child in the event the consent was vitiated and the child was returned to her. Therefore, it is difficult for me to guess what kind of life the child would have.

252 However, I can look at how the child was cared for and the relationship established with the baby by the birth mother when she did have overnight access.

253 There were difficulties with that access.

254 During the period of time in which the birth mother had access to the child and was able to take the

child out of the adoptive family's home, the baby was being called a completely different name than the one given to her by the adoptive family. I note that the birth mother did not name the child in the Registration of Birth. Although the birth mother denies having called the baby by the other name, if I believe her, she did not stop the other people around the baby including AB and the grandmother (the birth mother's mother) from calling the baby another name. It was the responsibility of the birth mother in those situations to set the rules. She appeared incapable of overruling her mother and her friend.

a. The birth mothers "mothering" ability

255 The birth mother called a number of witnesses to attest to her mothering ability.

256 The issue in a best interest's analysis is not her mothering ability. The issue is the best interests of the child. Her mothering ability is only one factor that could be considered but it is not by any means the primary factor. Therefore, the evidence that the mother called on this point is not determinative of best interests. Nevertheless, I will discuss the evidence given by the birth mother's witnesses.

257 One of them was the friend I refer to above, AB. AB had known the birth mother for about 12 years through her relationship with the birth mother's family in the home province. She described the birth mother as being an introvert, hard to make a bond, meek, mild and keeping to herself. AB also said that the birth mother did not deal with conflict very well. She described her as not being a self-starter.

258 AB was the friend with whom the birth mother had stayed for 10 days when she arrived in the City and prior to her going to work. She was also the person that the birth mother did not call from the hospital as a place to go and stay with the baby.

259 When the birth mother was given access to the child in February, 2012, she stayed with AB until July 2012. In that period of time, the birth mother had overnight access to the child. The birth mother did not make the arrangements with the adoptive family, AB did. Further, AB was the one who arranged and was involved in the exchanges. From AB's evidence, I concluded that the birth mother was not capable of planning and executing day-to-day activities.

260 AB was able to observe the birth mother's parenting. AB described a positive relationship between the birth mother and the child. However, since July 2012, AB had not seen the child at all since the change to the access arrangements in that month. The child at the time of the trial was almost 2 years old.

261 AB described herself as the "catalyst in this [legal] process" acting as a translator of the legal processes to the birth mother. She described herself as the only person that the birth mother could trust.

262 I am taking AB's evidence cautiously because she was clearly aligned with the birth mother to such an extent that her evidence was tailored to make the birth mother look as though she could be the only parent in the child's life. Unfortunately, in doing so, AB did not paint a very complementary picture of the birth mother as far as being a mother in the best interest of the child.

263 In fact, from her description of the birth mother, I would have concerns about the mother being able to meet the emotional and physical needs of the baby and the baby's development.

264 The birth mother, however, gave rather a positive description of her relationship with the child, with whom she has had contact every week since February 2012. She said that she was bonded with her child as a

result of the time that she has spent with the child in the adoptive parents' home. She described the child as happy and playful. She said that when she leaves, the baby cries. She described settling the baby when she was crying by taking her in her arms.

265 The only direct evidence I have concerning the relationship of the birth mother with the baby since the birth mother has had access to the baby in the adoptive parents home is that of the adoptive mother. When she was asked about that relationship she appeared to be reluctant to talk about it. She said that at times things went well. However she described the birth mother as spending time on her phone answering text messages rather than engaging the baby in play. Further, when the baby was in pain, she would want the adoptive mother. Recently, the baby did not want to go into the room with the birth mother for the birth mother to put her to sleep.

266 The adoptive mother said that she had encouraged the birth mother. However, in the last six months the baby doesn't usually engage with the birth mother.

b. Expert evidence regarding the birth mother

267 I have discussed above the expert called by the birth mother, Dr. Douglas Ginter. In addition to his evidence on her state of mind at the time of giving her consent, he was asked to provide an opinion as to whether or not she could be considered as a mother/parent/caregiver for the child.

268 Dr. Ginter was not given the home study prepared by Sheila Feehan in March 2012 prior to his meeting with the birth mother. However, he said that her home study was irrelevant to his opinion. His opinion was focused on the birth mother and her ability to mother the child, that is, whether there were any contraindications for her to become a mother or caretaker of the child. He said that there were no psychological or psychiatric contraindications for the birth mother to becoming the mother of the child.

269 Unfortunately, whether the birth mother is capable of mothering a child is not the central issue here. It is certainly a factor that would be considered if this court was considering returning the child to the birth mother. In any event, all I know from Dr. Ginter is that the birth mother could mother the child. He gave no evidence as to the quality of mothering that she could give to this particular child.

270 Dr. Ginter was also asked to provide an opinion on how the child would be affected by being removed from the care of the adoptive parents. The adoptive parents objected to this latter opinion on the basis that Dr. Ginter was not qualified to give it. Dr. Ginter acknowledged that he was not an expert in the area of infant bonding with parents.

271 I do not qualify him as an expert in the area of infant bonding with parents because he has no expertise in this area. He also relied on a very brief, on the phone, consult with another psychiatrist.

272 Apparently, he spoke to a colleague of his who is a specialist in infant attachment disorders and who runs an infant psychiatry program in Edmonton related to children usually younger than five years of age. He described his consultation with her as a "curbside consultation" that took 5 minutes in which he provided her with a scenario over the telephone. The call was short. The scenario was provided in a letter from the birth mother's lawyer to Dr. Ginter. That scenario is rather important because it provides the underlying facts on which she gave him the telephone advice. Dr. Ginter said he had made notes about this conversation but they were not produced and I did not see them. He read some of the notes into the record [he was appearing by videoconference]. I note that Dr. Ginter said that the child psychiatrist said that the baby was going to develop prefer-

ential attachment to the adoptive parents and it was not in the baby's best interest to go back and forth. This opinion by the child psychiatrist was given when the baby was four months old and supports an opinion given in the context of the July 2012 application before the case management justice when the access regime by the birth mother was changed. That latter opinion was not before me but it was referred to in evidence at trial. My point is that the child psychiatrist does not seem to differ from that earlier opinion.

273 As Dr. Ginter pointed out, professionals go to literature sources and colleagues to understand particular problems. However, in this case he had a very short conversation with the expert. He had not studied attachment theory. He did not read the literature about attachment theory before he gave his opinion. In any event, where the opinion is central to a decision the court may give, the real expert should be called.

274 Had she been called and properly qualified, her opinions would have been more relevant to the issues before me.

275 In the result, I have given no weight to his opinions with respect to the child and its attachments.

276 Nevertheless, I entered two reports that Dr. Ginter had authored after counsel for the adoptive parents objected on the basis that there was hearsay evidence in the document which went beyond the usual hearsay we would accept. In particular, it contained the opinions of the doctor that I mentioned above who is apparently the child psychiatry expert.

277 I am giving Dr. Ginter's reports little or no weight where the report is based on hearsay of the expert he consulted.

278 Dr. Ginter also opined that there was a bonding process by the child with the birth mother. With respect to Dr. Ginter's opinion about attachment, I will review that opinion notwithstanding that I will not give it any weight.

279 With respect to the child he admitted that he had not been able to observe the nature of attachment that the child had made to the adoptive parents or to the birth mother. Had he reviewed Ms. Feehan's report, he would have had some evidence of this. Nevertheless he presumed that there were two sets of attachment going on because the child was exposed to two sets of parents which he said would be confusing to the child.

280 Dr. Hindmarch was called by the adoptive parents as an expert in the area of attachment. I shall discuss his opinion below. Dr. Ginter critiqued Dr. Hindmarch's report with respect to attachment theory. I will not set out Dr. Ginter's opinion in this area because he was not qualified to give it and I prefer the evidence of Dr. Hindmarch. In so far as Dr. Ginter criticizes Dr. Hindmarch's report pertaining to attachment issues and the adoptive parents, I will ignore Dr. Ginter's comments.

281 The difficulty with Dr. Ginter's report is that he was basing his opinion on his conversation with the birth mother. As set out earlier in this judgment, I found that she was dishonest in many of the things that she said. Dr. Ginter had assumed that the information provided to him by the birth mother was "correct, accurate and truthful."

282 Finally, when Dr. Ginter addressed the issue of bonding in his report, he refers to the "motherhood constellation". He used words that came straight out of Wikipedia. Nevertheless, Dr. Ginter denied he had copied those words from Wikipedia. He said that the birth mother's lawyer had probably done that research and he used

the Wikipedia references.

283 In short, the lawyer prepared part of his opinion, and he did not review it and put it into his own words, probably because he did not have the expertise.

284 Dr. Ginter's report was of no use to this court in determining any of the issues before it.

285 The other expert called by the birth mother was Tamara Austin, clinical psychologist living in the City. I was asked to qualify her as an expert in psychology to give opinion evidence with respect to the parenting capacity of the birth mother. It was clear from the *voir dire* that she had considerable experience in conducting psychological assessments. She usually did this to determine if there were any mental health issues. She did not have much experience in other kinds of assessments, such as this one, to determine the parenting capacity of the birth mother.

286 As I stated above, the birth mother's parenting capacity is only one consideration in and not the focus of a best interest analysis.

287 She interviewed the birth mother on July 26, 2012, for about 90 minutes and finally in January, 2013.

288 The scope of her assessment was whether the birth mother was capable of parenting. She was not able to view the child with the birth mother because the birth mother was not permitted to take the child out of the adoptive parent's home. Nor did Ms. Austin observe the child with the adoptive parents. Therefore, she was not in a position to give an opinion as to the relative parenting skills of each potential parent.

289 Ms. Austin's report referred to hearsay evidence from other individuals who were not called by the birth mother. Ms. Austin had spoken to collateral witnesses but all of those witnesses had a vested interest in the outcome of this trial. One of them was AB, the other was the birth mother's mother. In giving her opinion, Ms. Austin was not aware of what the child care arrangements would be if the child was returned to the birth mother.

290 Although experts are permitted to consider collateral sources, depending on the nature of those collateral sources I will be careful with this evidence.

291 Ms. Austin treated her assessment as though it were a custody dispute, which it is not. It was Ms. Austin's opinion that the adoptive parents are good parents (notwithstanding that she had not met them before she gave her evidence) but that the birth mother could be a good parent as well. She also said that if the child is given back to the birth mother that an expert should be consulted as to how this should be done. Ms. Austin also recommended an open adoption.

292 Her opinion was that there were no mental health issues to prevent the birth mother from being a parent.

293 In considering her opinion, Ms. Austin did not know that the birth father had declined to participate in the trial and that his rights had been suspended by the court. She had not been told. She was also not concerned about the birth mother not telling the truth about a number of matters.

294 Ms. Austin did say that moving the baby from the adoptive parents to the birth mother would cause distress to the child. When asked why the child should be moved at all she said it was better now than later.

295 Her primary concern appeared to be that the child would suffer damage later in life when it found out that it was not restored to the birth mother when the birth mother had fought for custody and when the child found out that the adoptive parents had kept her from being with the biological mother when the biological mother wanted her. She said she gave this opinion from her common sense and experience. Dr. Hindmarch's response to this is that it is pure conjecture and I agree with him.

296 Further, she did not think there would be irreparable harm in moving the child but rather only distress at the moment. Essentially her response to a number of questions in cross-examination was: "they get over it" referring to a child being moved.

297 The adoptive mother was asked about how she would handle the issue about adoption with the child as the child grew up. The adoptive mother said that there would be no secrets from the little girl. She said that she didn't know exactly how she was going to handle it until it was necessary to discuss it. She said that although the baby grew in the birth mother's tummy, the adoptive mother can love her just as much as the birth mother. She would tell her daughter that the birth mother wanted her back but that the adoptive mother loved her so much that she fought to keep her.

c. Adoptive parent's experts

298 The adoptive parents called two experts. The first was a social worker who prepared a home study with respect to the adoptive parents. The second was a psychologist who gave evidence based on the facts before the court. Neither of them had met with the birth mother and both declined to give expert evidence with respect to her.

299 The adoptive parents called Sheila Feehan, M.S.W., who was qualified as a social worker with an expertise in adoptions and in particular home studies, to give opinion evidence regarding child-parent bonding/attachment.

300 Ms. Feehan conducted a SAFE Home Study with respect to the adoptive parents. It was in two parts: first in March 2012 and a follow-up in October of 2012. The child would have been about three months old for the first home study and nine-months-old for the second.

301 As judges of the Court of Queen's Bench we frequently conduct what we call desk adoptions. Part of those adoptions is a very thorough report about the proposed adoptive home/parents and a post adoption report prepared by a social worker. Therefore, I am familiar with the types of reports that Ms. Feehan writes.

302 I am satisfied that Ms. Feehan's report was properly done. Her report is thorough and sets out in detail a description of each of the adoptive parents, their backgrounds and their home. I have reviewed the report and there is nothing in it which would concern me.

303 She contacted collateral references with respect to the adoptive parents. More importantly she spent time in the adoptive parent's home observing their inter-reactions with the child.

304 Ms. Feehan's report describes in detail the physical home that the child is in, the nature of the family, and an investigation of safety issues. She assessed each of the adoptive parents as to their personality and interests, among other things.

305 With respect to Ms. Feehan's description of the home in which the child has been raised so far, it is a

single family dwelling which is child friendly and safe. The child has her own room.

306 The only outstanding matter identified by Ms. Feehan with respect to both of the adoptive parents was their infertility that had caused them adult trauma. It was the assessment of Ms. Feehan that they had adequately resolved that issue, and that it would not affect their ability to parent.

307 She described their financial situation as strong and from the details given in the report I agree that there are no financial concerns. On this basis, the child will be very well cared for and the SAFE Home Study sets out details of play spaces and toys available to the baby.

308 The references Ms. Feehan contacted were given an opportunity to make their comments confidentially and privately. The parents were not privy to those comments. There were no areas of concern identified by any of the references. As with the birth mother, I would expect those collateral contacts to be positive for the adoptive parents.

309 Ms. Feehan found that the adoptive parents demonstrated an excellent knowledge base regarding child development and appeared to have realistic expectations of child behaviour. They were described as a very high functioning couple.

310 I note that neither of the experts called by the birth mother provided an opinion as to the birth mother's understanding of child development. Nor did the birth mother demonstrate that she had any knowledge in this area at all.

311 At the second evaluation, Ms. Feehan observed the relationship between the child and both of the adoptive parents. She said it was very clear to her that the adoptive parents are providing a very secure, loving and nurturing environment for the child.

312 Ms. Feehan described the nine-month-old as warming to her, beginning to approach her but appropriately looking to the adoptive parents first for assurance that the situation was safe. She clearly knew who her parents were as opposed to Ms. Feehan. It appeared to Ms. Feehan that they were the ones who fulfilled all of her needs and were her safe people. She observed that the adoptive parents interacted with the child in a loving, affectionate and patient manner. Ms. Feehan described the adoptive mother as the primary caregiver.

313 Importantly, the adoptive parents are committed to an honest and open communication with their child about her adoption story.

314 Ms. Feehan said there are no unmitigated concerns for that adoptive family.

315 I also note that when the birth mother did not want to care for the baby over December 5 to 6, and upon the birth mother giving her consent, the adoptive mother went to the hospital the first day and, after shopping for the baby, stayed with the baby overnight. The adoptive father also went to the hospital on the evening of December 5 to meet the baby. The second day, after the birth mother completed her consent documents, the adoptive mother took the baby home at about 7:00 pm. The adoptive mother described the baby as "the most precious little gift ...".

316 Ms. Feehan did not conduct a home study with respect to the birth mother and she said because she had not that she could not comment on the level of attachment or bonding that had occurred between the birth mother and the child.

317 The adoptive parents also called Dr. Brian Hindmarch. He was qualified as a psychologist to give expert testimony regarding the emotional and psychological needs of the child and in particular the impact on the child of being removed from the adoptive parents.

318 Dr. Hindmarch prepared an expert's report dated December 12, 2012, and another expert's report dated June 10, 2013. The first report was to address the issue of how the child would be affected by being removed from the care of the adoptive parents. The second report was a rebuttal report to Dr. Ginter's report of August 29, 2012.

319 Dr. Hindmarch considered the evidence given by Ms. Feehan.

320 Dr. Hindmarch gave an opinion based on evidence before the Court. The purpose of his evidence was to assist the Court in understanding issues related to attachment by a child to its parents which information would not be expected to be within the knowledge of a judge.

321 He reviewed documentation available and in evidence before the Court, but did not do any direct assessment of the adoptive parents or of the birth mother. In this sense, he was in court to assist me to understand the documents and evidence that I had seen and heard. He specifically stated that he was not giving a recommendation as to best interests of the child, because he had not done the appropriate and necessary bilateral assessment. Rather, he explained certain theories to the court.

322 Dr. Hindmarch educated the court with respect to the concept of a psychological versus biological parent. He explained that this was an inherent issue in any contested adoption matter. He explained that the psychological parent is the individual whom the child looks to for nurturance from birth and develops a sense of security based on that primary bond between the infant and the caretaker. He explained that that bond was primary and every other bond was secondary.

323 It was his opinion that when a child is placed with a caregiver from birth that child develops its primary bond with that individual. That person would then be referred to as a psychological parent. He explained that infants bond (or attach) with the individual who is their primary caregiver. A disruption of that primary bond is detrimental to the child. He suggested that it was, therefore, important that a court when disrupting that bond do so for a very good reason.

324 Dr. Hindmarch said that the least detrimental alternative would be a placement for the child "which maximizes, in accord with the child's sense of time, the child's opportunity for being wanted and for maintaining on a continuous, unconditional and permanent basis, a relationship with at least one adult who is or will become the child's psychological parent."

325 Dr. Hindmarch considered and put considerable weight on the home studies completed by Ms. Feehan. His understanding was that her observations were that when the adoptive parents were not in sight, there was distress on the part of the child, that is, separation anxiety. She observed what Dr. Hindmarch called was an obvious sense of security derived from the presence of the adoptive parents. He gave the opinion that this was a clear signal of a primary bond having been formed.

326 Dr. Hindmarch explained that when a child forms a strong primary bond as a child, that child will have the capacity to develop what are called secure attachments in adulthood. Children who lose that primary bond early in their lives will be damaged, manifesting in adulthood insecure attachments with other adults.

327 Dr. Hindmarch also explained that children have an infinite capacity to bond with people who love them. He explained that there are secondary and tertiary bonds. He also explained that if bonds are to be removed from a child's life it is a lot less damaging to lose a secondary or tertiary bond than a primary one. The primary bond is the fundamental building block of attachment.

328 He further went on to explain the opinion of Ms. Austin that there would be a period of grief and stress if the child were removed from the adoptive parents. He said that the grief and distress comes from a disruption of the primary bond.

329 The primary bond or psychological attachment tends to crystallize within the first two years of life. Dr. Hindmarch suggested that if this bond which is close to two years in the case before me, was severed, the psychological consequences would be disastrous. He also suggested on a question in cross-examination that a child beyond one year of age could tolerate a transition between households such as the situation here where the birth mother has seen a child for two hours parenting time twice a week. He qualified his answer by saying that toleration of the transition would depend on what it was, how long that was for, how it occurred. Further, he pointed out that tolerating something is not the same as thriving on it.

330 He said that children can tolerate a lot but that does not mean it's best for them.

331 In this case we must consider the relationship that already exists between the adoptive parents and the child.

332 The birth mother says that the child has not bonded with the adoptive family. The birth mother acknowledges, however, that the adoptive family would be great parents.

333 The adoptive mother described her relationship with the baby. She said that in the last several months, the baby becomes anxious when she cannot see the adoptive mother.

334 During the day, the baby is involved in a number of activities with the adoptive mother including swimming, gymnastics and play dates with other children her own age. There was a document entered with respect to activities with the baby which was quite extensive and which I will not repeat here. Suffice it to say that this family does many things with this little girl and many of those things are done with the extended family. There was also a series of pictures entered into evidence showing both of the adoptive parents and the child and the many activities in which they all participate.

335 The adoptive father also gave evidence. It was clear from his evidence that he loves his baby girl very much and looks forward to her growing up. He said "she is my little girl. She is my star. She is my everything." He was the first person to change her diaper and the first person to bathe her.

336 The adoptive father is well-educated. He owns two companies. He provides well for his family. He described his job as tough. He says that when he goes home, she is there at the door to greet him. She always gives him a hug and a kiss. So once he gets home, his troubles go away. He said he could not get enough of his daughter. He said that his daughter ".... is a gift for sure."

337 The birth mother gave no indication of any activities she had done with the baby. However, she did not have many opportunities to do things with the baby after the baby turned seven months old because she spent only two hours a day for two days during the week. However, from the adoptive mother's description, the birth

mother did very little with the baby when she was there, for example playing music or reading. Further, the birth mother did not describe any of these activities either.

338 From all of this evidence, there is no doubt in my mind that the adoptive parents love the baby very much and include her with their many activities. They will give her every advantage they possibly can, both material and emotional.

d. Familial heritage.

339 One of the considerations of the court pertains to the child's heritage and identity. This most often comes up where there are aboriginal children but can be a factor in other situations. Here, the mother maintains that the child has a right to know her family, probably because she comes from another province in Canada.

340 When the birth mother was asked about the best interests of the child she said that it would be in the best interests of the baby that she succeeds at this trial because she has a big family that wants to get to know the baby. She said that the baby has a right to her blood family.

341 As Justice Sanderman pointed out, 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.

342 In this case, I was given very little evidence about heritage and identity by the birth mother. In this regard, I find that she would provide a very ordinary Canadian upbringing. The adoptive parents can also do so.

343 In *APG*, the child was 1/4 aboriginal. The birth mother argued that it was in the childs best interests to be returned to her, in order to ensure the child could benefit from exposure to the native culture. However, Medhurst J found that the potential harm in separating the child from the adoptive family that she had been with for over three years far outweighed any potential problems that may arise from a future identity crisis: *APG* at para 33.

344 In *S. (B.C.) v. J. (C.L.)*, 2006 ABQB 793 (Alta. Q.B.), affd 2007 ABCA 42 (Alta. C.A.), Marceau J concluded that it would be in the childs best interests to be returned to her birth mother even though the child had been with the adoptive parents for a year and a half. However, *S. (B.C.)* involved very complex facts. The birth mother had substantial difficulties with drugs and alcohol in the past. The birth father placed the child in the prospective adoptive parents home without the consent of the birth mother and without any involvement by Child and Family Services as a way to avoid his child support obligations. In deciding to return the child to her birth mother, Marceau J found a determinative factor was the need of the child to self-identify with her birth mother and the rest of her birth family: at para 154.

345 In this case, I find that this factor does not weigh heavily in my considerations.

e. Conclusion on best interests

346 There is no doubt in my mind from all of the evidence before me that the adoptive parents will provide a wonderful home for the child where she will be loved and where she will be given many advantages.

347 I have heard nothing in the evidence to suggest that her blood ties with her first family are more important. There is nothing particularly significant about those blood ties. I doubt very much that the child as an adult

will look back and wish she had the cultural advantage of her birth family. I heard no evidence to suggest that the birth family would provide any cultural advantage at all.

348 The environment provided by the adoptive parents will be best for the health, emotional well-being, education, intellectual development, economic well-being and psychological needs of child.

349 Further, there is no doubt in my mind that transferring custody of the child from the adoptive family to the birth mother will cause irreparable harm to the child. The child is now in a situation of security and stability. The birth mother was not able to assure this court that she could provide security and stability such as the child experiences with the adoptive family. To move the child now would disrupt its attachments which are in an advanced stage of formation as attested to by the only experts with expertise in this area.

III. Conclusion

350 The birth mother fails in her challenge to the consent she gave for the adoption of her child. She provided a proper legal consent; she did not revoke her consent within the time limited by the statute; she failed to challenge the consent by virtue of undue influence, duress, or unconscionability.

351 There is also no doubt that it is in the best interests of the child for the child to remain with the adoptive family.

352 Therefore, I dismiss the application on behalf of the birth mother.

353 I grant the application of the adoptive parents and order that the child is, from and after the date of this order, the adopted child of the adoptive family as set out in the order which I have granted in this matter.

354 I direct that as of the date of this judgment the birth mother has no further rights with respect to the child and her access to the child is terminated.

355 I direct the adoptive family to provide me immediately with a form of adoption order so that the adoption may be formalized.

356 If the parties cannot agree, they may appear before me again to determine the costs of this action. If they wish to do so, they must arrange to do so within 30 days of the date this judgment.

Mother's application dismissed; adoptive parent's application granted.

FN1 *Note:* The *Child Welfare Act*, RSA 1984, C c-8.1 was renamed in 2003 to the current *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12.

FN2 I do not cover this issue in my reasons because I will make the decision about whether there was a breach of s. 84 of the *CYFEA*. I find later in these reasons that there was not.

FN3 see my decision in *Malton v. Attia*, 2013 ABQB 642 (Alta. Q.B.)

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