Van de Perre v. Edwards

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

2001: June 14 / 2001: September 28.

File No.: 27897

[2001] 2 S.C.R. 1014 | *[2001] 2 R.C.S. 1014* | *[2001] S.C.J. No. 60* | *[2001] A.C.S. no 60* | *2001 SCC 60* | *REJB 2001-25876*

Kimberly Van de Perre, appellant; v. Theodore Edwards and Valerie Cooper Edwards, respondents, and African Canadian Legal Clinic, Association of Black Social Workers and Jamaican Canadian Association, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (52 paras.)

Case Summary

Family law — Custody and access — Standard of appellate review — Custody dispute between unmarried Caucasian mother and African-American father over four-year-old child — Mother awarded sole custody at trial — Father and his wife granted custody on appeal — Whether Court of Appeal applied appropriate standard of appellate review — Whether trial judge made material error or ignored relevant evidence — Importance of race in determining custody of child of mixed racial heritage — Family Relations Act, R.S.B.C. 1996, c. 128, s. 24(1).

Civil procedure — Change of parties — Adding party — Whether Court of Appeal erred in adding father's wife as a party and custodial applicant during appeal hearing — British Columbia Supreme Court Rules, B.C. Reg. 221/90, Rule 15(5).

K is a single Caucasian Canadian citizen living in Vancouver. T is an African American and was a professional basketball player. T has been married to V since 1991 and they have twin daughters, born in 1990. K and [page1015] T met in the spring of 1996 and commenced a sexual relationship shortly thereafter. Their relationship lasted approximately 18 months. In June 1997, E, the son of K and T, was born. At the end of the 1996-1997 basketball season, T and V returned to North Carolina before the birth of E; however, in September 1997, T returned to Vancouver for the new basketball season and his relationship with K continued. When E was 3 months old, K commenced proceedings against T for custody and child support. The trial judge awarded sole custody to K, four one-week access periods per year being granted to T. T appealed. During the hearing, on the Court of Appeal's invitation, V applied for admission as a party and requested joint custody with her husband. The Court of Appeal granted the application and the joint request for custody; K was to receive generous access.

Held: The appeal should be allowed and the trial decision restored.

The principal determination to be made in cases involving custody is the best interests of the child. In making this determination, the trial judge must consider numerous factors, in particular those stated in the pertinent legislation. The narrow power of appellate review does not allow an appellate court to delve into all custody cases in the name of the best interests of the child where there is no material error. The scope of appellate review does not change because of the type of case on appeal. In this case, the Court of Appeal considered the trial judge's decision and decided that it was within the scope of review to examine all the evidence and determine whether the trial judge weighed the evidence improperly. It is in reconsidering the evidence that the Court of Appeal determined that the

trial judge had made manifest errors. When one reconsiders the trial judge's decision in light of the appropriate test for appellate review, it is apparent that there was no basis upon which the Court of Appeal was required to reconsider the evidence.

The first key difficulty the Court of Appeal found in the trial judge's decision related to s. 24(1)(e) of the Family Relations Act and the ability of both K and T to exercise the rights and duties of custody. However, the trial judge's reasons indicate that he did consider T's parenting ability. Nor did he "ignore" K's negative attributes. The mere fact that K contested certain access applications is not evidence that she would not follow a court order. Secondly, the Court of Appeal held that the trial judge failed to consider the bonds that exist between E and V, the twins, and their extended family. [page1016] In fact, the trial judge discussed the bond between E, V and his sisters. There is no material error in this regard which would open the door to appellate intervention. Thirdly, the Court of Appeal found that the trial judge made findings of credibility but was diverted by the arguments made concerning T's extra-marital affairs and the parties' attitudes towards each other. The trial judge's finding that T and V both blame K for the relationship and believe she is a "gold-digger" might be relevant; however, since the parties' attitudes towards and views of each other might impact the emotional well-being of the child and must thus be considered under s. 24(1)(a) of the Act. Moreover, the trial judge did not consider T in isolation from his family. While the negative and positive traits and influences of step-parents must be considered, the objective is to determine the parenting abilities of the specific person who will ultimately receive custody. In this case, it may be said that T's conduct impacts both ss. 24(1)(e) and 24(1)(a), and the trial judge was thus correct in considering it. Finally, it was unclear to the Court of Appeal whether the trial judge considered all s. 24(1) factors or whether he considered the "tender years" doctrine or had a stereotypical view of one or both parties. There is absolutely nothing, however, to give any indication that the trial judge even considered the tender years doctrine. Furthermore, nothing stated by him indicates a bias against Black people in general or Black basketball players in particular.

The question of which parent will best be able to contribute to a healthy racial socialization and overall healthy development of the child is a question of fact to be determined by the courts on a case-by-case basis and weighed by the trial judge with other relevant factors. The weight to be given to all relevant factors is a matter of discretion exercised with regard to the evidence. Racial identity is but one factor that may be considered in determining personal identity; the relevancy of this factor depends on the context. Notwithstanding the role that race may play in custody determinations, the trial judge apparently noted that this issue was not determinative and that, in this case, E would be in a more stable and loving environment if custody was granted to K. He clearly considered the mixed race of E and implied that race may impact s. 24(1)(a) in some cases. By intervening in the consideration of race by the trial judge, the [page1017] Court of Appeal failed to apply the correct standard of review. In this case, there was absolutely no evidence adduced which indicates that race was an important consideration. Without evidence, it is not possible for any court, and certainly not the Court of Appeal, to make a decision based on the importance of race.

Adding a party on the initiative of the Court of Appeal is unfair to other parties and does not fall within the court's supervisory role. Moreover, even if the Court of Appeal had been correct in finding that the trial judge should have added V by reason of the court's parens patriae jurisdiction, it still exceeded its jurisdiction in finding that the trial judge would have awarded custody to T and V jointly had he not made the supposed error.

Cases Cited

Referred to: Hickey v. Hickey, *[1999] 2 S.C.R. 518*; L. (A.) v. K. (D.) *(2000), 190 D.L.R. (4th) 108*, *2000 BCCA 455*; Gordon v. Goertz, *[1996] 2 S.C.R. 27*; Van Mol (Guardian ad Litem of) v. Ashmore *(1999), 168 D.L.R. (4th) 637*, leave to appeal refused, [2000] 1 S.C.R. vi; Tyabji v. Sandana *(1994), 2 R.F.L. (4th) 265*; R. v. Williams, *[1998] 1 S.C.R. 1128*; H. (D.) v. M. (H.), *[1997] B.C.J. No. 2144* (QL), rev'd *(1998), 156 D.L.R. (4th) 548*, rev'd *[1999] 1 S.C.R. 328*; King v. Low, *[1985] 1 S.C.R. 87*; J.R. v. D.W., *[1992] B.C.J. No. 1610* (QL).

Statutes and Regulations Cited

Adoption Act, *R.S.B.C. 1996, c. 5, s. 3*. Child, Family and Community Service Act, *R.S.B.C. 1996, c. 46*. Family Relations Act, R.S.B.C. 1996, c. 128, ss. 15, 24(1), (1.1) [ad. 1998, c. 28, s. 1], (3), (4), 35(1.1) [idem, s. 2]. Family Services Act, *S.N.B. 1980, c. F-2.2, ss. 1*, 129(2). Supreme Court Rules, B.C. Reg. 221/90, Rule 15(5) [am. B.C. Reg. 95/96, s. 4].

Authors Cited

McRoy, Ruth G., and Christine C. Iijima Hall. "Transracial Adoptions: In Whose Best Interest?" in Maria P. P. Root, ed., The Multiracial Experience. Thousand Oaks, California: Sage Publications, 1996, 63.

[page1018]

Perry, Twila L. "The Transactional Adoption Controversy: An Analysis of Discourse and Subordination" (1993-94), 21 N.Y.U. Rev. L. & Soc. Change 33. Pollack, Gayle. "The Role of Race in Child Custody Decisions Between Natural Parents Over Biracial Children" (1997), 23 N.Y.U. Rev. L. & Soc. Change 603.

APPEAL from a judgment of the British Columbia Court of Appeal *(2000), 74 B.C.L.R. (3d) 122*, *136 B.C.A.C. 21*, 222 W.A.C. 21, *184 D.L.R. (4th) 486*, *4 R.F.L. (5th) 436*, *[2000] B.C.J. No. 491* (QL), *2000 BCCA 167*, allowing the respondents' appeal from a decision of the British Columbia Supreme Court, *[1999] B.C.J. No. 434* (QL). Appeal allowed.

Steven N. Mansfield and Kenneth B. Oliver, for the appellant. F. Ean Maxwell, Q.C., and Barbara E. Bulmer, for the respondents. Sheena Scott and Marie Chen, for the interveners the African Canadian Legal Clinic, the Association of Black Social Workers, and the Jamaican Canadian Association.

Solicitors for the appellant: Bayshore Law Group, Vancouver. Solicitors for the respondents: Maxwell, Schuman & Company, Vancouver. Solicitor for the interveners: African Canadian Legal Clinic, Toronto.

The judgment of the Court was delivered by

BASTARACHE J.

1 The appellant is a single Caucasian Canadian citizen living in Vancouver. At the time of trial, she was 24 years of age. She did not finish high school and has a spotty work record. Her upbringing was not ideal due to her parents' divorce and her mother's history of illness and drug use. Presently, however, she has a good relationship with both her mother and her father. She was actively involved in the professional basketball scene in Vancouver; this is how she came to know the respondent, Mr. Edwards.

2 Mr. Edwards is an African American. At the time of trial, he was 34 years of age and living in Vancouver. He was a professional basketball player and, since 1989, was a member of numerous [page1019] National Basketball Association (NBA) teams. At the time of trial and during his relationship with the appellant, Mr. Edwards was a member of the Vancouver Grizzlies NBA team and had been since 1995. Mr. Edwards has been married to the respondent Mrs. Edwards since 1991, one and a half years after the birth of their twin daughters in 1990. Although both had attended university, neither finished their university degrees. During his professional basketball career, Mr. Edwards has played for teams located in several North American cities. While the Edwards' home base is in North Carolina, the family is in the practice of moving with Mr. Edwards at the end of each trade. At the time of trial, the entire family was living in Richmond, British Columbia.

3 The appellant and the respondent Mr. Edwards met in the spring of 1996 and commenced a sexual relationship shortly thereafter. Their relationship lasted approximately 18 months. On June 3, 1997, Elijah Theodore Van de Perre was born. He is the son of the appellant and Mr. Edwards. Although disputed by the parties, it is clear from Mrs. Edwards' testimony that she learned of Mr. Edwards' extramarital affair with the appellant in December 1996 by accident, just as she did with at least two other affairs. Notwithstanding the circumstances, the respondents have remained married. Mrs. Edwards is a stay-at-home mother.

4 At the end of the 1996-1997 basketball season, the respondents returned to North Carolina. This was before the birth of Elijah; however, in September 1997, Mr. Edwards returned to Vancouver for the new basketball season and his relationship with the appellant continued. Mrs. Edwards and the twins had planned to stay in North Carolina, but after a telephone call with Mr. Edwards wherein she learned he had continued to have relations with the appellant, she decided to return to Vancouver.

5 When Elijah was 3 months old, the appellant commenced proceedings against Mr. Edwards for [page1020] custody and child support. Mr. Edwards initially sought joint custody and liberal access, but later amended his pleadings to seek sole custody. The trial lasted 26 days, from October 1998 to January 1999. The trial judge's decision was released on February 25, 1999: *[1999] B.C.J. No. 434* (QL). Warren J. awarded sole custody to the appellant. The order granted Mr. Edwards access to Elijah for four one-week periods quarterly during the calendar year. The order also entitled Mr. Edwards to share the Christmas holidays and Elijah's birthday and, when in Vancouver, to exercise access upon short notice and for periods of no more than 48 hours.

6 Mr. Edwards became a free agent in June 1998 and was then without a contract. After the trial, the family moved to Miami where Mr. Edwards obtained a one-year contract with the city's NBA team. Subsequently, Mr. Edwards signed to play basketball with the European league and moved to Athens, Greece. His wife and daughters returned to North Carolina.

7 Mr. Edwards appealed the trial decision. During the hearing, on the invitation of the Court of Appeal, Mrs. Edwards applied for admission as a party and requested joint custody with her husband. The application and joint request for custody were granted. The court did not state any access provisions except to say that the appellant was to receive generous access: *(2000), 184 D.L.R. (4th) 486*, *2000 BCCA 167*. The decision of the Court of Appeal was stayed pending the appellant's application for leave to this Court.

8 The key issue here is the applicable standard of review to be followed by appellate courts in family law cases involving custody. In the present case, other issues include a determination of whether the Court of Appeal erred in finding that the trial judge erred in his consideration, or lack thereof, of the child's mixed racial heritage, and whether the [page1021] Court of Appeal erred in adding Mrs. Edwards as a party.

I. The Applicable Standard of Review for Appellate Courts in Custody Cases

9 The principal determination to be made in cases involving custody is the best interests of the child. In making this determination, as noted by Warren J., the trial judge must consider numerous factors, in particular those stated in the pertinent legislation, which in this case is the Family Relations Act, *R.S.B.C. 1996, c. 128* ("Act"). Section 24(1) of the Act states:

> 24 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

(a) the health and emotional well being of the child including any special needs for care and treatment;

(b) if appropriate, the views of the child;

(c) the love, affection and similar ties that exist between the child and other persons;

(d) education and training for the child;

(e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

In addition to these factors, the Act authorizes the trial judge to consider the conduct of the parents, but only in so far as it impacts one of the aforementioned factors. Sections 24(3) and (4) state:

(3) If the conduct of a person does not substantially affect a factor set out in subsection (1) or (2), the court must not consider that conduct in a proceeding respecting an order under this Part.

(4) If under subsection (3) the conduct of a person may be considered by a court, the court must consider [page1022] the conduct only to the extent that the conduct affects a factor set out in subsection (1) or (2).

10 In preparing reasons in custody cases, a trial judge is expected to consider each of these factors in light of the evidence adduced at trial; however, this is not to say that he or she is obligated to discuss every piece of evidence in detail, or at all, when explaining his or her reasons for awarding custody to one person over another. This would indeed be an unreasonable requirement at the end of a 26-day trial. Because of this, trial judges might sometimes appear to stress one factor over another and, in fact, it may be said that this is inevitable in custody cases which are heavily dependant on the particular factual circumstances at issue. This situation does not open the door to a redetermination of the facts by the Court of Appeal.

11 In reviewing the decisions of trial judges in all cases, including family law cases involving custody, it is important that the appellate court remind itself of the narrow scope of appellate review. L'Heureux-Dubé J. stated in Hickey v. Hickey, *[1999] 2 S.C.R. 518*, at paras. 10 and 12:

> [Trial judges] must balance the objectives and factors set out in the Divorce Act or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> ...
>
> There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the [page1023] importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently. [Emphasis added.]

12 Hickey involved the appellate review of support orders, but the principles related to appellate review discussed therein are equally applicable to orders concerning child custody. This is where the British Columbia Court of Appeal fell into error. Although Newbury J.A. cited Hickey and discussed the narrow scope of review, at para. 6, she

stated:

> As L'Heureux-Dubé J. observed in Hickey, there are strong reasons for this deferential standard in family law cases: most importantly, it promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Still, the interests of the child, being paramount, must prevail over those of the parties and of society in finality, and appellate courts must do more than "rubber-stamp" trial judgments unless serious errors appear on their face. Otherwise, the possibility for clear injustice exists. As indicated by the passages quoted above, a trial court's ignoring of relevant evidence, or the drawing of incorrect conclusions from the evidence, may also require appellate interference. [Emphasis added.]

This statement seems to imply that Hickey and the basic principles of appellate review are not fully applicable to child custody cases. The approach of the Court of Appeal is wrong. The narrow power of appellate review does not allow an appellate court to delve into all custody cases in the name of the best interests of the child where there is no material error as decided in Hickey. The Court of Appeal is not in a position to determine what it considers to be the correct conclusions from the evidence. This is the role of the trial judge. The Court of Appeal's reasoning in this case is reaffirmed [page1024] in the more recent British Columbia Court of Appeal decision in L. (A.) v. K. (D.) *(2000), 190 D.L.R. (4th) 108*, *2000 BCCA 455*. In her concurring decision, Newbury J.A. writes, at para. 23:

> With respect, I must say that where the custody of a child is concerned, statements of the applicable "standard of review", most of which are imported from cases involving civil damages, seem to me ill-suited. To have a child's future depend on whether an error of law has been shown in a trial judgment, or on whether the trial judge has committed a "palpable and overriding" error in fact-finding, instead of simply being wrong, seems contrary to the principle, which has been stated over and over again by Canadian courts, that the best interests of the child is the primary consideration. I have always understood that this was applicable to appellate as well as to trial courts. At the same time, there is no doubt that in cases such as this, where each "side" has much to offer the child, the trial judge has a great advantage in being able to see all the parties over the period of trial and to make the subtle judgment-calls necessary in determining the child's best interests. [Emphasis added.]

13 As I have stated, the Court of Appeal was incorrect to imply that Hickey, supra, and the narrow scope of appellate review it advocates are not applicable to custodial determinations where the best interests of the child come into play. Its reasoning cannot be accepted. First, finality is not merely a social interest; rather, it is particularly important for the parties and children involved in custodial disputes. A child should not be unsure of his or her home for four years, as in this case. Finality is a significant consideration in child custody cases, maybe more so than in support cases, and reinforces deference to the trial judge's decision. Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits [page1025] courts to respond to the spectrum of factors which can both positively and negatively affect a child.

14 It is clear from this case that it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal. The Court of Appeal discussed, and the respondents relied heavily on, the decision of McLachlin J. (as she then was) in Gordon v. Goertz, *[1996] 2 S.C.R. 27*. In that case, the Court found that the trial judge had only mentioned one factor to be considered in determining the best interests of the child. As noted by McLachlin J., there was no way of knowing if the trial judge had considered the other applicable factors. Further, the Court noted that the trial judge had stated that he was relying heavily upon the findings of another judge. As a result, McLachlin J. stated, at para. 52: "... one may equally infer that the necessary fresh inquiry was not fully undertaken... . [I]t seems clear that the trial judge failed to give sufficient weight to all relevant considerations ... and it is therefore appropriate for this Court to review the decision and, should it find the conclusion unsupported on the evidence, vary the order accordingly." Rather than indicating that appellate review differs when a court must consider the best interests of the child, Gordon is consistent with the narrow scope of

appellate review discussed later in Hickey, supra. The case does not suggest that appellate review is appropriate whenever a trial judge has failed to mention a relevant factor or to discuss a relevant factor in depth.

15 As indicated in both Gordon and Hickey, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate [page1026] court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in Van Mol (Guardian ad Litem of) v. Ashmore *(1999), 168 D.L.R. (4th) 637* (B.C.C.A.), leave to appeal refused *[1999] S.C.C.A. No. 117*, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

16 In the present case, the Court of Appeal considered the decision of the trial judge and decided that it was within the scope of review to examine all the evidence and determine whether the trial judge weighed the evidence improperly. It is in reconsidering the evidence that the Court of Appeal determined that the trial judge had made material errors. As discussed above, this is not the proper method of appellate review. If the Court of Appeal had followed the appropriate method, it would not have reconsidered the evidence and found what it described as material errors in Warren J.'s decision. There was no scope for appellate intervention in this case. This can be illustrated by a review of the key difficulties that the Court of Appeal found in the trial decision. These difficulties can be divided into (i) concerns related to s. 24(1)(e) of the Act, (ii) the failure of the trial judge to consider the bonds that exist between Elijah and his paternal family (s. 24(1)(c)), (iii) an emphasis on the attitudes of the parties towards each other and Mr. Edwards' extra-marital affairs, and (iv) the concern that the trial judge based his decision on stereotypical views including the tender years doctrine.

[page1027]

A. Concerns Related to Section 24(1)(e) of the Act

17 The Court of Appeal found that Warren J. focussed on the negative attributes of Mr. Edwards while ignoring those of Ms. Van de Perre. In addition, it found that he did not properly consider the parenting ability of each biological parent. The Court of Appeal held that the trial judge ignored the appellant's troubling family background which, it stated, would impact her ability to raise a child, and found that Warren J. erred in finding that the appellant's mother provided "some" childcare when, in fact, the appellant relied heavily on her mother. Finally, the Court of Appeal held that, based on the number of court orders related to access, the appellant might thwart access in the future. In essence, the concerns raised by the Court of Appeal relate to s. 24(1)(e) of the Act: the ability of Ms. Van de Perre and Mr. Edwards to exercise the rights and duties of custody.

18 Dealing first with the parenting ability of Mr. Edwards, the reasons of the trial judge indicate that he did consider this factor. Warren J. mentioned that he was a good father to his twin daughters; however, he left the day-to-day childcare with his wife. There appears to have been very little additional evidence concerning Mr. Edwards' parenting abilities. As noted by the trial judge, the respondent focussed on the negative attributes of the appellant and her social life, as well as her perceived interference with access, rather than his actual parenting ability. This was acknowledged by the Court of Appeal, which noted that the respondents' counsel focussed primarily on the negative attributes of the appellant. The Court of Appeal also quoted portions of Dr. Korpach's psychological evaluation, which was completed pursuant to s. 15 of the Act. It is noteworthy that there are several concerns regarding the parenting ability of Mr. Edwards stated therein that were not mentioned by the trial judge; for instance, the psychologist's report states that Mr. Edwards spanks his twin daughters and that it will be difficult for him to learn day-to-day childcare requirements. The [page1028] Court of Appeal attempts to infer positive evidence of Mr. Edwards' parenting abilities from his success in basketball and his community activities. It can however hardly be said that the failure of the trial judge to discuss an inference made by the Court of Appeal was a material error.

19 Second, the trial judge did not "ignore" the negative attributes of the appellant. These negative attributes, although not focussed on in detail, were referred to throughout the trial judge's reasons. As an example, at para. 6, Warren J. stated:

> During the course of this very lengthy trial it became obvious that the plaintiff was doing her very best to minimize the extent of the conflict between the demands of her social life and the demands of her parental responsibilities, certainly during the first year of E.'s life. Further, it was only when she was faced with the probability of evidence of her relationships with other men that she was forthcoming. Finally, I cannot accept her evidence that she has no memory of many of her long distance telephone calls and trips to the United States and I conclude that she was endeavoring to hide evidence which may have been embarrassing.

20 Third, concerning the way in which the appellant was raised and the difficulties she faced during her childhood, the trial judge mentioned these from the outset. He specifically mentioned the appellant's mother's drug problem and the difficulties that the appellant had with her mother before Elijah was born. It is clear that Warren J. considered this evidence; therefore, there is no material error.

21 Finally, the respondents stress the fact that the appellant objected to numerous access orders and argue that this is evidence that she would not follow access provisions. The Court of Appeal agreed. This is very speculative. There was no evidence raised that indicated that the appellant failed to follow the court orders. The only suggestion of this is found in the wording of the June 15, 2000 order; however, this order was granted post-appeal and was therefore not available to the Court of Appeal or the trial judge for consideration. When [page1029] one parent requests an extension of access, the other parent has the right to dispute the application. This does not mean that the appellant would not facilitate access if she were to get custody. Further, this does not imply that a court order will be necessary for all changes in access. The affidavit of Valerie Edwards dated February 14, 2000, almost a month prior to the Court of Appeal decision, supports the view that the appellant has agreed, without court intervention, to some modifications and extensions of access. The mere fact that she contested certain applications with regard to access is not evidence that she would not follow a court order. There is no evidence that the trial judge erred in finding, at para. 45, that "there has been extensive access which, by and large, has been facilitated by the plaintiff rather than thwarted".

B. The Failure of the Trial Judge to Consider the Bonds that Exist Between Elijah and His Paternal Family (Section 24(1)(c))

22 The Court of Appeal held that the trial judge failed to consider the bonds that exist between Elijah and Mrs. Edwards, the twins and the respondents' extended family. In fact, the trial judge discussed the bond between Elijah and Mrs. Edwards and his sisters. In addition, he explicitly stated, at para. 19:

> The defendant's family continues to live in North Carolina and he has contributed to their financial needs. Other than knowing that his mother is alive and that he has two brothers and three sisters, I know very little of their circumstances. Mrs. V.E.'s father, a retired New York policeman, recently died. She testified that he was a very important factor in her life. Again, I know very little about other members of Mrs. V.E.'s family.

The respondents state, at para. 115 of their factum, that there is evidence that the Edwards are "involved with and close to members of their respective extended families and Elijah knows who they are". However, when reviewing the trial transcript at p. 596 of the respondents' record, it is [page1030] clear that Elijah only "knows" who these relatives are through pictures. At the time of trial, he had never met them. There was no evidence that the Edwards presently see or speak to family members mentioned peripherally in their testimony. The respondents simply did not put evidence forward concerning this, and the trial judge mentioned this lack of evidence in his reasons. As such, there is no material error in this regard that would open the door to appellate intervention.

C. An Emphasis on the Attitudes of the Parties Towards Each Other and Mr. Edwards' Extra-marital Affairs

23 Aside from the above findings, which implicate ss. 24(1)(e) and 24(1)(c) of the Act, the Court of Appeal found that the trial judge made findings of credibility but was diverted by the arguments made concerning Mr. Edwards' extra-marital affairs and the parties' attitudes towards each other. The Court of Appeal remarked that the trial judge criticized Mrs. Edwards for blaming the appellant for the relationship with Mr. Edwards. It stated that the appellant was in part to blame but, in any event, this had nothing to do with the best interests of the child. I disagree with this conclusion. First, it is irrelevant who is to blame for the extra-marital affair. However, the parties' attitudes towards and views of each other are important. These attitudes might impact the emotional well-being of the child and, as such, must be considered pursuant to s. 24(1)(a) of the Act. A child should be with someone who fosters the relationship between him or her and the non-custodial parent. The trial judge's finding that the respondents both blame the appellant for the relationship and both believe that she is a "gold digger" might be relevant in this respect. This discussion by the trial judge does not justify appellate intervention.

24 With respect to the discussion of Mr. Edwards' extra-marital affairs, the Court of Appeal found that Warren J. incorrectly considered the impact of these relationships on the marriage of the respondents. [page1031] It held that a marriage breakdown was speculative and that the trial judge considered Mr. Edwards in isolation from his family. It found that this was a material error of law. Again, I disagree. Warren J. did not consider Mr. Edwards in isolation from his family. Rather, he considered both biological parents as individuals as well as in conjunction with their support network. This is consistent with ss. 24(1)(a), 24(1)(c) and 24(1)(e).

25 I agree with the Court of Appeal that a trial judge cannot consider a parent completely in isolation from his or her support network. Step-parents and siblings are important in a child's life (s. 24(1)(c)). These individuals play an important role in the child's emotional well-being (s. 24(1)(a)) since they are a part of the family unit in which the child might end up living. The negative and the positive traits and influences of step-parents must be considered. This being said, there is a distinction between taking a step-parent into consideration to determine the family unit in which the child would live if that biological parent were awarded custody and taking a step-parent into consideration to determine if his or her positive qualities are sufficient to override the negative qualities of his or her custody-seeking spouse. Section 24(1)(e) is clear and requires the trial judge to consider the ability of the person who can exercise custody to actually exercise the right and duties adequately. As will be discussed later in this case, this refers to Mr. Edwards and Ms. Van de Perre.

26 Section 24(1)(e) requires that the trial judge consider the merits of each applicant with regard to the whole context. In most families, the biological parent is not completely alone. He or she will have support networks to help him or her in times of need. In many cases, there is also an actual family unit that must be considered in determining if the parent applying for custody is capable of adequately parenting the child. In some cases, the family unit will assist the custodial parent; in others, it may hinder good parenting. Support networks and family units are, however, only two of [page1032] many factors to be considered. Pursuant to the specific wording of s. 24(1)(e), the objective in every case is to determine the parenting abilities of the specific person who will ultimately receive custody.

27 In the present case, Mrs. Edwards and her daughters are important in determining the best interests of the child because of the bond that might exist between them and Elijah. This is stated in s. 24(1)(c) and, as discussed earlier, was noted by the trial judge.

28 With respect to s. 24(1)(e), the trial judge considered the family unit when he discussed the stability of Mr. Edwards' marriage. He considered the factual circumstances brought out in evidence and possible problems that might arise. Pursuant to s. 24(3) of the Act, the conduct of a parent cannot generally be considered; however, if this conduct impacts a factor stated in s. 24(1), such as the emotional well-being of Elijah or the ability of Mr. Edwards to exercise custody with and without Mrs. Edwards, it is relevant. When considering the family unit, the trial judge found that Mr. Edwards has a weak and unstable marriage. As such, this might impact the parenting support he

receives both during the marriage and following a possible marriage breakdown. The appellant, on the other hand, will likely have her parents' support and assistance until their death.

29 Warren J. was also obligated to consider whether Mr. Edwards' conduct might impact his individual ability to exercise the duties and rights of custody. The trial judge and Court of Appeal both found that Mr. Edwards worked long periods of time away from home. He travelled extensively and Dr. Korpach stated that he was unlikely to terminate his work to care for his children. This said, it is important to add that many fathers and mothers work long hours; many are also required to travel extensively. Work commitments do not always have a negative effect on parenting. This is a circumstance which must be considered in light [page1033] of all other relevant facts. In this particular case, Mr. Edwards not only has extremely long periods away from home, but it was also found by the trial judge that while at home, he is very active in the professional basketball social scene and has had several extra-marital affairs. This, combined with the findings that he leaves all the day-to-day childcare activities to his wife, and the evidence of Dr. Korpach, which indicates that he might not learn this role, raises doubt as to his ability to parent on his own.

30 A trial judge cannot give custody to a father merely because his wife is a good mother. Her presence is a factor but, overall, the court must consider if the applicant would make a good father in her absence. Even if the family were stable, this would not be determinative in a s. 24(1)(e) analysis. Here, it is Mr. Edwards' personal capacity to exercise custody that must be considered, and the support provided by his wife is but a factor to be weighed in assessing these parental abilities.

31 As a final note, s. 24(1)(a) might also be affected by the extra-marital affairs. The trial judge found that the daughters of Mr. and Mrs. Edwards were very upset when Mr. Edwards' affair with the appellant was discovered. It is probable that Elijah would be affected in the same way if Mr. Edwards were to have another affair.

32 In this case, it may be said that Mr. Edwards' conduct impacts both ss. 24(1)(e) and 24(1)(a), and, as such, the trial judge was correct in considering his conduct. The Court of Appeal criticized Warren J. for not considering similar conduct of the appellant. It is clear from Warren J.'s reasons that he was aware of the appellant's social behaviour; yet, he did not discuss any impact that this might have on her ability to parent Elijah. Instead, he found that the appellant was a good mother. This finding is supported by the evidence of Dr. Korpach who stated that the appellant has acquired good parenting skills since learning of her pregnancy. [page1034] It is unclear how her behaviour might affect her ability to exercise custody pursuant to s. 24(1)(e) either by negatively impacting the family unit or her individual ability. In addition, it is unclear how this behaviour might impact Elijah's emotional well-being. Without an impact on one of the factors in s. 24(1), her conduct is irrelevant and, pursuant to s. 24(3), should not be considered. Past or present conduct by a parent that does not, in the words of the Act, "substantially affect" the best interests of the child has no bearing on a custody determination and does not require comment.

33 Returning to the test for appellate intervention, there is no indication that Warren J. erred materially in considering the attitudes of the parties towards each other or in considering the extra-marital affairs of Mr. Edwards. He noted s. 24(3) which provides that conduct cannot be considered unless it impacts a factor listed in s. 24(1) and, although he did not explicitly refer to the factors in question, he did discuss this conduct with reference to Mr. Edwards' parenting abilities and Elijah's emotional well-being.

D. The Concern that the Trial Judge Based his Decision on Stereotypical Views Including the Tender Years Doctrine

34 The Court of Appeal stated that it was unclear whether the trial judge considered all the factors in s. 24(1) or whether he considered the "tender years" doctrine or had a stereotypical view of one or both parties. First, as noted above, the trial judge clearly stated and discussed all factors listed in s. 24(1). With respect to the tender years doctrine, the trial judge, quoting from the case of Tyabji v. Sandana *(1994), 2 R.F.L. (4th) 265* (B.C.S.C.), specifically stated that stereotypical gender views have no place in custody determinations. Nowhere in his reasons does the trial judge mention this doctrine or state that it is important for the child to be with the mother during his

early [page1035] years. In other words, there is absolutely nothing to give any indication that the trial judge even considered the tender years doctrine. As for other stereotypical views, the respondents argue that the trial judge incorrectly relied upon stereotypical views of Mr. Edwards as a Black man or as a Black basketball player. It is important to stress that nothing stated by Warren J. indicates a bias against Black people in general or Black basketball players in particular. The respondents rely upon Warren J.'s statements at trial during the cross examination of Dr. Korpach and argue that these indicate that he looked at Mr. Edwards only as a Black athlete. However, as noted by counsel for the appellant in reply, these statements were made as a result of the witness's reference to the influences that the respondents' culture had on his parenting abilities. As a result of this testimony, the court asked several questions related to this cultural impact.

35 When one reconsiders the decision of Warren J. in light of the appropriate test for appellate review, there is no indication from his reasons that he made any material error or ignored any relevant evidence. Warren J. discussed all factors listed in s. 24 of the Act. It was not the role of the Court of Appeal to reconsider the evidence and determine if the trial judge properly weighed the evidence discussed in his reasons.

II. The Importance of Race in the Custody Determination of a Child of Mixed Racial Heritage

36 The Court of Appeal found that the trial judge gave "no consideration" to issues of race and interracial problems that Elijah might face. In fact, the trial judge noted that there had been some testimony at trial related to the race of Elijah and the importance of being exposed to his heritage and culture as the son of an African-American father. Rather than discussing the child's race in detail, however, the trial judge noted that this child is of [page1036] mixed race and, as such, his Caucasian Canadian heritage must also be considered.

37 The interveners, the African Canadian Legal Clinic, the Association of Black Social Workers and the Jamaican Canadian Association, submit that race is a critical factor in custody and access cases. In my view, the importance of this factor will depend greatly on many factual considerations. The interveners state that there are key tools a Canadian biracial child will need in order to foster racial identity and pride: the need to develop a means to deal with racism and the need to develop a positive racial identity. The corollary to these needs is the parental ability to meet them. The interveners do not state that the minority parent should necessarily be granted custody; rather, the question is which parent will best be able to contribute to a healthy racial socialization and overall healthy development of the child. This question is one of fact to be determined by the courts on a case-by-case basis and weighed by the trial judge with other relevant factors.

38 The interveners submit that, although some studies show that Black parents are more likely to be aware of the need to prepare their children to cope with racism, the main issue is which parent will facilitate contact and the development of racial identity in a manner that avoids conflict, discord and disharmony. But again, this is only one factor to be considered by the trial judge. I would also add that evidence of race relations in the relevant communities may be important to define the context in which the child and his parents will function. It is not always possible to address these sensitive issues by judicial notice, even though some notice of racial facts can be taken; see R. v. Williams, *[1998] 1 S.C.R. 1128*. The weight to be given to all relevant factors is a matter of discretion, but discretion must be exercised with regard to the evidence. In essence, the interveners argue that race is always a crucial factor and that it should never be ignored, even if not addressed by the parties. They favour forced judicial consideration of race because it is essential in deciding [page1037] which parent is best able to cope with difficulties biracial children may face. This approach is based on the conclusions reached concerning the present state of race relations in Canada. As I have said, racial identity is but one factor that may be considered in determining personal identity; the relevancy of this factor depends on the context. Other factors are more directly related to primary needs and must be considered in priority (see R. G. McRoy and C. C. Iijima Hall, "Transracial Adoptions: In Whose Best Interest?", in Maria P. P. Root, ed., The Multicultural Experience (1996), 63, at pp. 71-73). All factors must be considered pragmatically. Different situations and different philosophies require an individual analysis on the basis of reliable evidence.

39 There is also a distinction between the role of race in adoption cases and those cases involving two biological

parents desiring custody; see G. Pollack, "The Role of Race in Child Custody Decisions Between Natural Parents Over Biracial Children" (1997), 23 N.Y.U. Rev. L. & Soc. Change 603, at p. 617. In adoption cases, the situation might arise whereby the court must make an either/or decision; in other words, the child is either granted or denied exposure to his or her own heritage. Here, however, we have two biological parents, each of whom shares a part of the race and culture of the child. Of these two biological parents, one will be granted custody and one will be granted access. The result here is that Elijah will have exposure to both sides of his racial and cultural heritage. There was no evidence introduced to suggest that greater exposure to one's racial background through custody as opposed to access is in the better interests of the child in every case. Consequently, cultural concerns are not the same as those involving prospective adoptive parents who do not share the same race and culture as the child. This said, I wish to note that the approach taken in this case is not new. In H. (D.) v. M. (H.), *[1997] B.C.J. No. 2144* (QL) [page1038] (S.C.), (subsequently conf'd by *[1999] 1 S.C.R. 328*), Bauman J. considered a case involving an adoption dispute between two sets of grandparents: the mother's biological father and her adoptive parents. The mother of the child was aboriginal and the father was African American. The mother's adoptive parents were Caucasian and her biological father was aboriginal. In that case, counsel for the child's biological grandfather argued that the child's aboriginal heritage should be given great weight especially in light of the Child, Family and Community Service Act, *R.S.B.C. 1996, c. 46*, which notes the importance of cultural identity of aboriginal children in consideration of their well-being. Bauman J. stated, at paras. 46 and 47, that the child's

> aboriginal heritage and the ability of his biological grandfather to preserve and enhance it are important considerations, but we must not overlook the obvious fact that Ishmael has an African-American background and American citizenship. That heritage is also of importance and it is equally deserving of preservation and nurturing. This is not a case of taking an aboriginal child and placing him with a non-aboriginal family in complete disregard for his culture and heritage... .
>
> ... The submission that Ishmael's aboriginal heritage is virtually a determining factor here, oversimplifies a very complex case. [Emphasis added.]

He next proceeded to consider all factors which impact the best interests of the child, including his aboriginal heritage and, having weighed all these factors, decided that the parenting and family environment of the mother's adoptive parents was superior and better served the child's best interests. This Court upheld this decision. It is therefore clear that, even in adoption cases where it might play a more important role, race is not a determinative factor and its importance will depend greatly on the facts.

40 Race can be a factor in determining the best interests of the child because it is connected to the culture, identity and emotional well-being of the [page1039] child. New Brunswick, for example, has adopted legislation prescribing mandatory consideration of "cultural and religious heritage" for all custody determinations (Family Services Act, *S.N.B. 1980, c. F-2.2, ss. 1* and 129(2)). British Columbia has included similar language in its provisions regarding adoption, but not in those found in the Family Relations Act applicable in this case (Adoption Act, *R.S.B.C. 1996, c. 5, s. 3*). The adoption and custody contexts may differ because the adopted child will generally cease to have contact with the biological parent while custody will generally favour contact with both parents. Nevertheless, it is generally understood that biracial children should be encouraged to positively identify with both racial heritages. This suggests the possibility of a biracial identity (i.e. "forming an identity that incorporates ... multiple racial heritages", see Pollack, supra, at p. 619). It is important that the custodial parent recognize the child's need of cultural identity and foster its development accordingly. I would therefore agree that evidence regarding the so-called "cultural dilemma" of biracial children (i.e. the conflict that arises from belonging to two races where one may be dominant for one reason or another) is relevant and should always be accepted. But the significance of evidence relating to race in any given custody case must be carefully considered by the trial judge. Although general public information is useful, it appears to be often contradictory (T. L. Perry, "The Transracial Adoption Controversy: An Analysis of Discourse and Subordination" (1993-94), 21 N.Y.U. Rev. L. & Soc. Change 33, at p. 59), and may not be sufficient to inform the judge about the current status of race relations in a particular community or the ability of either applicant to deal with these issues.

41 For the Court of Appeal to intervene, it would have to find a material error. Although Warren J. did not discuss in

detail the role that race plays in determining the best interests of the child, he did [page1040] state that there is an overarching need for the child to be in a stable and loving environment. The limited findings of the trial judge on this issue reflected the minimal weight that the parties themselves placed on the issue at trial. Therefore, notwithstanding the role that race may play in custody determinations, it appears that the trial judge noted that this issue was not determinative and that, in this case, Elijah would be in a more stable and loving environment if custody was granted to the appellant. He clearly considered the mixed race of Elijah and implied that race may impact s. 24(1)(a) in some cases; however, the trial judge obviously was of the view that, even if the biological father provided some benefits as regards fostering a positive racial identity, these benefits did not outweigh the negative findings related to him. By intervening in the consideration of race by the trial judge, the Court of Appeal failed to apply the correct standard of review. It should not have intervened; this issue was given disproportionate emphasis at the initiative of the Court of Appeal.

42 In this case, there was absolutely no evidence adduced which indicates that race was an important consideration. As noted by the appellant in her factum, there was essentially no evidence of racial identity by reason of skin colour or of race relations in Vancouver or North Carolina; there was no evidence of the racial awareness of the applicants or of their attitudes concerning the needs of the child with regard to racial and cultural identity. The issues of race and ethnicity were not argued at trial, nor were written submissions provided in the appeal. The sole evidence relied upon by the respondents in this Court was a blanket statement by Mrs. Edwards that the appellant could not teach Elijah what it was to be Black and the testimony of Dr. Korpach that Elijah would likely be considered to be of Black colour. The Court of Appeal acknowledged this, at para. 48, where it stated:

> Perhaps because of the sensitivity of racial and cultural factors, counsel made very little reference to these matters, although Mrs. Edwards was asked in cross-examination [page1041] whether she agreed that Elijah's "heritage" was a "complicating issue" between the two parents.

43 In fact, in this Court, counsel for the respondents stated that "neither of the parties wanted to touch it, because it's so politically incorrect to say that race has any bearing" (emphasis added). This is an unacceptable reason for counsel to fail to raise evidence on a factor that he or she believes may impact the best interests of the child. Without evidence, it is not possible for any court, and certainly not the Court of Appeal, to make a decision based on the importance of race. Unfortunately, this is what the Court of Appeal did when Newbury J.A. stated, at para. 50: "If it is correct that Elijah will be seen by the world at large as 'being black', it would obviously be in his interests to live with a parent or family who can nurture his identity... ." She further stated, at para. 51:

> ... it seems to me likely that being raised in an Afro-American family in a part of the world where the black population is proportionately greater than it is here, would to some extent be less difficult than it would be in Canada. Elijah would in this event have a greater chance of achieving a sense of cultural belonging and identity and would in his father have a strong role model who has succeeded in the world of professional sports.

III. The Addition of Mrs. Edwards as a Custodial Applicant at the Court of Appeal

44 The trial was conducted from October 1998 to January 1999. The Family Relations Act was amended to add ss. 24(1.1) and 35(1.1) on December 8, 1998. The respondent Mrs. Edwards did not apply to become a custodial parent at this time. The trial judge mentioned that Mrs. Edwards had no custody rights to Elijah and made his order accordingly.

45 During the Court of Appeal hearing, the Court of Appeal itself invited counsel to make a custody application on behalf of Mrs. Edwards. The Court of Appeal later found that the trial judge had erred in stating that Mrs. Edwards had no custody rights. [page1042] It found that the amended legislation allowed for her to request and be granted custody, and that procedural requirements were not an important impediment since Mrs. Edwards had been questioned at length at trial and the court had parens patriae jurisdiction to act in the best interests of the child.

46 When faced with a custody determination, the role of the Court of Appeal is to analyse the trial decision in its

proper context. In other words, in making its decision, it must take notice of the persons who are the actual parties before the court. Mrs. Edwards did not apply for custody during the trial. As a result, it can hardly be said that Warren J. erred in not awarding joint custody to her and Mr. Edwards.

47 The Court of Appeal relied upon its parens patriae jurisdiction to award custody to a new party together with Mr. Edwards; in my view, adding a party on the initiative of the Court of Appeal is unfair to other parties and does not fall within the court's supervisory role. Parens patriae jurisdiction does not justify the avoidance of the rules of civil procedure. The respondents rely on Rule 15(5) of the British Columbia Supreme Court Rules, Reg. 221/90, which states:

Rule 15 -- Change of Parties

...

(5) (a) At any stage of a proceeding, the court on application by any person may

...

(ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and

[page1043]

(iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected

(A) with any relief claimed in the proceeding, or

(B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party.

48 For Mrs. Edwards to be added in accordance with Rule 15, the court must find that she "ought to have been joined" or "is necessary". I do not believe that it can be said that it was "necessary" that she become a party to the proceedings or that she "ought to have been joined" as a party. Rule 15(5)(a) is meant to cover situations where it is practically necessary for a person to be added as a party for the proper determination of the case; in a custody case, where the trial judge finds that both biological parents are suitable, even though they might not be perfect parents, it is not necessary for others to be added as parties, and the court should not try to find on its own a better party to whom custody should be granted. There is no indication that the trial judge in the case at bar erred in this regard, and there is therefore no reason for appellate intervention.

49 In this case, Mrs. Edwards, who was not a party, did not apply for custody at trial, and it was wrong for the Court of Appeal to initiate this process. The parties were Mr. Edwards and Ms. Van de Perre. In suggesting that Mrs. Edwards apply for custody, the Court of Appeal essentially added a party to a custody dispute on its own initiative. If Mrs. Edwards was to be considered, it would have to be by the trial judge, and a decision would have to be taken in light of all relevant evidence and pursuant to a satisfactory cross-examination on that basis. In the circumstances, since Mrs. Edwards was the cornerstone of her husband's case, she had little choice but to apply for custody after the intervention by the appellate court; otherwise, she would have risked irreparable damage to her husband's case. The Court of Appeal had no power to intervene [page1044] in such a manner and, as a result, exceeded its jurisdiction.

50 It should also be noted that, even if the Court of Appeal had been correct in finding that the trial judge should have added Mrs. Edwards by reason of the court's parens patriae jurisdiction, it still exceeded its jurisdiction in finding that the trial judge would have awarded custody to Mr. and Mrs. Edwards jointly, had Warren J. not made this supposed error. Custody determinations are necessarily decisions of mixed law and fact. Even if it were possible in law to allow the pleadings to be amended and award custody to Mrs. Edwards jointly with her husband, this consideration is only the legal aspect of a custody decision; it does not deal with the findings of fact. The only statement made by the trial judge as to Mrs. Edwards' ability to parent Elijah was that if left to her alone, she would fulfill Elijah's best interests. The Court of Appeal inferred from this statement that if the trial judge believed he could grant custody to Mr. and Mrs. Edwards, he would have. The Court of Appeal stated, at para. 44:

> ... I do not believe the procedural deficiency should preclude a custody award in favour of Mr. and Mrs. Edwards jointly. As I read the trial judge's Reasons, this was the outcome he would have preferred, from the viewpoint of Elijah's best interests, had he thought that option was available. [Emphasis added.]

51 Although the trial judge thought very highly of Mrs. Edwards and her parenting ability, he never stated that he would prefer to grant custody to Mrs. Edwards along with Mr. Edwards. Rather, the trial judge said that Mrs. Edwards alone satisfies Elijah's best interests. The trial judge did not think highly of Mr. Edwards, nor did he think his unstable family unit was in the best interests of the child. The Court of Appeal erred in making this finding of fact, which is contrary to the actual findings of the trial judge. If it was open to the Court of Appeal to add Mrs. Edwards as a party, which it was not, this should have been returned to trial for [page1045] a determination of the best interests of the child. Upon return to trial, evidence should have been adduced concerning the impact of such a decision. As noted by the appellant, at para. 119 of her factum, the Court of Appeal heard and allowed no argument on this issue. I also note in passing that a contest between biological parents and non-parents gives rise to special considerations which were not addressed here; see King v. Low, *[1985] 1 S.C.R. 87*; J.R. v. D.W., *[1992] B.C.J. No. 1610* (QL) (S.C.); L. (A.) v. K. (D.), supra, at para. 25.

52 Given the above conclusions, the appeal is allowed. The judgment of the British Columbia Court of Appeal is set aside with costs throughout and the decision of Warren J. is restored.

End of Document