Citation: *Re Matter of E.G.*, 2009 YKTC 69 Date: 20090706
Docket: 09-T0003
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

IN THE MATTER OF the *Children's Act*, R.S.Y.T. 2002, c. 31, as amended, and in particular, section 123.

AND IN THE MATTER OF E.G.

Publication of the name of a child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act*.

Appearances:
Tara Marchuk — Appearing for the Director
Fia Jampolsky — Appearing for the mother F.G.
David Christie — Appearing for the father B.G.

REASONS FOR DECISION

Introduction

[1] At the end of a hearing under s. 123(5) of the *Children's Act,* R.S.Y. 2002 c. 31 (the "*Act*"), I held that reasonable and probable grounds did not exist for the Director of Family and Children's Services (the "Director") to take E.G. into care, and ordered that he be returned to his parents. These are my reasons for that decision.

Overview

[2] E.G. was born prematurely on December 6, 2008 at approximately 26 - 27 weeks gestation. His parents are F.G., who according to affidavit material filed by B.G., is "a citizen of the Southern Tutchone T'lingit First Nation and a member

of the Ta'an Kwach'an First Nation", and B.G., who is a member of the Tahltan First Nation.

[3] E.G. is F.G. and B.G.'s second child. Their first child, M.G. was born prematurely on December 30, 2007. A Permanent Care and Custody Order was made concerning M.G. on August 28, 2008.

[4] As a result of E.G.'s premature birth and associated medical problems, he was immediately medivac'ed to Stollery Hospital in Edmonton, Alberta. He subsequently was transferred to Grey Nuns Community Hospital in early March, where he remained until his return by medivac to Whitehorse General Hospital on March 27, 2009. He was discharged from Whitehorse General Hospital on April 15, 2009.

[5] F.G. followed E.G. to Edmonton after her discharge from Whitehorse General Hospital on December 8, 2008. B.G. also went to Edmonton. During the time E.G. was at Stollery Hospital, B.G. and F.G. had short visits with him. Once E.G. was transferred to Grey Nuns, F.G. stayed in the same room with him. F.G.'s mother and B.G. were with her and E.G. for part of that time. B.G. returned first to Whitehorse in order to prepare for E.G.'s return. F.G. subsequently accompanied E.G. from Edmonton to Whitehorse.

[6] While in Whitehorse General Hospital, B.G. and F.G. provided the day-to-day care for E.G. This included feeding him, providing him his medications and conducting his physiotherapy exercises four times daily. F.G. stayed with E.G. full time and B.G. would come in the evenings when he was finished work.

[7] F.G. and B.G. agreed to work with Family and Children's Services ("F.C.S.") in regard to E.G. As a result of positive observations about the level of parenting skills demonstrated by B.G. and F.G., their commitment to parenting, and the number of supports available, a decision was made by the Director that

E.G. could be discharged from Whitehorse General Hospital into B.G. and F.G.'s care. Planning meetings were held and a letter of agreement was signed by B.G. and F.G. The letter of agreement was not filed in these proceedings.

[8] B.G., F.G. and E.G. reside at the Raven's Nest unit at the Sundog Retreat (the "Retreat"). This is a fully furnished living unit. B.G. is a participant in cultural and traditional activities at the Retreat, as well as being a carver.

[9] On April 21, 2009, F.C.S. supervisor Vicki Stoddart learned that F.G. was going to go to Carcross for several days, and that B.G. would be caring for E.G. until she returned. Ms. Stoddart expressed her concerns about this to F.G. and B.G.

[10] Later that day B.G. contacted social worker Ed McLean and discussed F.G.'s intended trip to Carcross, explaining why he felt it was important for F.G. to go. Mr. McLean expressed some concern about this and his file note for April 21 indicates the following "If [F.] leaves house to go to Carcross, then on call goes out tonight. If [B.] is not able to look after [E.G.] then we need to look into having [E.G.] removed".

[11] The following morning, Jeremy Locke, who has been a family support worker with F.C.S. for approximately two years, came to the F.G. and B.G. residence. As a result of his observation that E.G. was sleeping with a soother in his mouth, had a garment wrapped tightly around his face and a blanket covering him from his waist to the top of his head, coupled with his perception of B.G.'s generally disinterested response to the situation, Mr. Locke, who had no authority to apprehend a child on his own, advised social worker Ed McLean of his concerns. Mr. McLean attended the F.G. and B.G. residence early that afternoon and apprehended E.G., without seeking prior judicial authorization for the apprehension.

Witnesses at the Hearing

[12] The Director filed the affidavit of Mr. McLean. Mr. McLean and Jeremy Locke also testified.

[13] Counsel for the parents provided affidavits from B.G., F.G., Heather and Andrew Finton, both of whom were support persons and employers of B.G. at the Retreat, Karin Thornton, a support worker and staff member of the Retreat, and registered nurse Christine Nemeth. B.G., Mr. Finton and Ms. Nemeth also testified at the hearing. Counsel for the Director did not seek to cross-examine the other witnesses who provided affidavit evidence.

Statutory Framework

[14] As authority for the apprehension of E.G., the Director relies on s. 121(1)(a) and 121(2) of the *Act*. Section 121 reads, in part:

> **121(1)** If the director, an agent or a peace officer has reasonable and probable grounds to believe and does believe that a child is in immediate danger to their life, safety or health, the director, agent, or peace officer may, without a warrant,
>
> (a) take the child into care and begin proceedings before a judge under this part;
>
> (b) take the child to a place of safety and then, without taking proceedings before a judge under this Part, return the child to a concerned parent, or other person entitled to the child's care and custody, on the request of that concerned parent or other person;…
>
> **(2)** For the purpose of taking a child into care or to a place of safety under subsection (1), the director, an agent or a peace officer may, without a warrant,
>
> (a) enter at any time any place where on reasonable and probable grounds he believes the child to be; and
> (b) use any reasonable force that is necessary.

[15] This hearing is governed by s. 123 of the *Act* which reads, in part:

> **123(5)** The judge shall hold a hearing as soon as reasonably practicable after being asked to do so for the purpose of
>
> (a) determining the identity of the child and concerned parents or other persons entitled to the child's care or custody; and
> (b) determining whether reasonable and probable grounds exist for taking the child into care.
>
> **(6)** If, at the conclusion of the hearing under subsection (5), the judge finds that reasonable and probable grounds do exist for taking the child into care, the judge shall
>
> (a) subject to subsection (9), set a date and place for a hearing before a judge to determine, within two months, whether the child is in need of protection and what order ought to be made in consequence of that determination;
> (b) order that the child remain in the temporary care and custody of the director until the outcome of the hearing referred to in paragraph (a)…
>
> **(7)** If, at the conclusion of the hearing under subsection (5), the judge finds that there are no reasonable and probable grounds for taking the child into care, the director shall return the child to the concerned parent, or other person entitled to the child's care, in whose care and custody the child was when taken into care.

Evidence

Jeremy Locke

[16] Mr. Locke testified that he arrived at the F.G. and B.G. residence at approximately 9:30 a.m. on April 22. He received no answer after he had knocked on the first of two doors and had called out B.G.'s name several times, so he entered the loft residence. He knocked on the bedroom door and B.G. responded, indicating that he was "catching up on some sleep". Mr. Locke waited approximately one minute for B.G. to get up. When he did not, Mr. Locke entered the bedroom. He heard E.G. "grunting" in his crib, which was approximately five feet away from the bed where B.G. was lying.

[17] Mr. Locke saw E.G. sleeping with a blanket covering him from his waist to over his head. Mr. Locke pulled the blanket back and observed a second garment or towel covering E.G.'s head, face and shoulders. Mr. Locke testified that the garment was wrapped so tightly that he could barely slip a finger in between it and E.G.'s face. A soother was in E.G.'s mouth. Mr. Locke was concerned that if E.G. did not have the garment removed from his nose he could suffocate. In his opinion, this was a high risk situation.

[18] He testified that E.G. was breathing "laboriously" and had his neck and back arched, in what Mr. Locke considered to be an attempt to get air. Mr. Locke used his finger to loosen the garment and bring it down from E.G.'s nose, after which he felt E.G. was breathing easier. Mr. Locke did not remove the soother from E.G.'s mouth, in part, he testified, because he was in "shock" at what he was observing.

[19] Mr. Locke testified that he then said to B.G.: "Why is this blanket around E.G.'s head? Oh, I see you are trying to keep the soother in E.G.'s mouth". Mr. Locke stated that B.G. responded by agreeing and then elaborated that both he and E.G. needed to get some sleep. Mr. Locke stated that he explained to B.G. the dangers of choking and suffocation, and that B.G. seemed indifferent.

[20] B.G. then asked Mr. Locke to watch E.G. while he had a shower. B.G. took a baby monitor with him into the bathroom, without looking at E.G. Shortly after, E.G. began to fuss, at which time B.G. immediately got out of the shower. B.G. then came into the kitchen with E.G., gave him his medications and fed him.

[21] Mr. Locke stated that he again attempted to engage B.G. in a conversation about the danger of wrapping E.G. in this manner. He testified that his overall impression was that B.G. did not appreciate the potential consequences of his actions and that B.G. was generally indifferent to Mr. Locke's concerns. He felt that B.G.'s response gave rise to a concern because

of the “unknown factor” and that the same circumstance could therefore happen again.

[22] Mr. Locke described his reaction to seeing E.G. wrapped as he was as “shock, panic and being scared for E.G.’s safety”. He testified that he considered himself to be in “crisis mode”, and operating out of his usual “supportive” element. Mr. Locke testified that he was in this state for much, if not all, of the remainder of the visit with B.G. and E.G.

[23] Mr. Locke used his cell phone to take photographs of E.G. in order to capture some markings that he thought may have been connected to the tight wrapping of the garment. These photographs were filed during the hearing, although I will say at this point that, due in large part to their poor quality, they provide little, if any, assistance in resolving the issue before me.

[24] Mr. Locke testified that during his previous four or five visits since E.G. had been discharged from Whitehorse General Hospital, he had not observed B.G. or F.G. acting or parenting in any manner which caused him concern. He agreed that they had generally followed his suggestions.

[25] At the time of his visits with B.G. and F.G., Mr. Locke had been made aware of the historical child protection concerns that the Director had about B.G. and F.G., in regard to the previously poor parenting skills they had demonstrated in relation to M.G.

Ed McLean

[26] Mr. McLean and social worker Cleo Smith arrived at B.G.’s residence at approximately 10:30 a.m. on April 22, apparently very shortly after Mr. Locke had left. This visit was not connected to Mr. Locke’s visit. While visiting with B.G. and E.G. they had no concerns about what they saw, and, during a brief

conversation with Ms. Finton on their way out, they commented that B.G. was doing a great job of caring for E.G.

[27] At approximately 11:40 a.m., Mr. McLean met with Mr. Locke to discuss Mr. Locke's concerns about E.G.'s safety arising from his earlier visit that day. As a result of what Mr. McLean was told by Mr. Locke, and after some internal F.C.S. discussions, Mr. McLean and Ms. Smith returned to the F.G. and B.G. residence that afternoon and took E.G. into care. This action was premised on the belief that "…there was an immediate risk of harm and danger to E.G. staying in the home given B.G.'s actions of placing the soother in E.G.'s mouth and tying the garment around his head tightly so to keep it in place". (Affidavit of Ed McLean).

[28] Mr. McLean further testified that the relevant factors in deciding to apprehend E.G. were:

- history
- medical concerns
- immediate risk
- young age of E.G.

[29] The decision was made to proceed to apprehend E.G. without prior judicial authorization because of the above concerns and because, given B.G.'s inability to make safe choices, the time required to obtain a warrant would be too long.

[30] Mr. McLean testified that F.C.S. had residual concerns about the parenting abilities of B.G. and F.G., based upon F.C.S. historical involvement with them and the pre-existing concerns.

[31] He stated that he had noted great improvement in B.G. and F.G., including the following:

- no drugs and alcohol
- a stable residency

- numerous supports
- an understanding of E.G.'s medical needs
- they presented very well

[32] Mr. McLean agreed that B.G. and F.G.'s circumstances were much different with E.G. than they had been with M.G.

[33] Mr. McLean testified that both Heather Finton and her husband, Andrew Finton, were present during the apprehension of E.G. B.G., who was crying, packed clothes, medication and toys for E.G. as he turned him over to Mr. McLean and Ms. Smith. Mr. McLean agreed that B.G.'s actions at the time of the apprehension were very appropriate.

The father, B.G.

[34] B.G.'s evidence as to what occurred the morning of April 22 differed in some aspects to that of Mr. Locke. His evidence was that Mr. Locke first mentioned a concern about the soother being held in E.G.'s mouth by the blanket after they were all in the kitchen, not while they were in the bedroom.

[35] B.G. stated that in response to Mr. Locke's concern in this regard, he agreed not to place the soother in E.G.'s mouth the same way in future. He stated that Mr. Locke expressed no other concern to him during the visit that morning, and that they were both watching television while he fed E.G.

[36] B.G. testified that after E.G.'s 5:30 a.m. – 6:30 a.m. feeding and exercises, he had swaddled E.G. as he and F.G. had been taught, and as had been observed and approved by nurses at Grey Nuns and at Whitehorse General Hospital. As E.G.'s regular blanket was in the laundry, B.G. used a towel to swaddle him instead. This towel did not reach to E.G.'s feet.

[37] B.G. said that he did not tuck in the blanket that covered E.G., as he had noticed at the earlier feeding that E.G. had been sweating. He left the blanket loose as a result. He stated that E.G. moves a lot when he is sleeping and that the blanket had moved up on E.G. from where he had originally placed it. He said that E.G. showed no signs of having difficulty breathing that morning. E.G. would sometimes “gargle” while breathing as a result of a throat problem not uncommon in infants born prematurely. B.G. stated that he had not tied a garment around E.G.’s head to hold the soother in place.

[38] B.G. stated that after E.G. had been apprehended he had asked F.C.S. workers to ensure that the foster parents caring for E.G. performed the required physiotherapy with E.G. every day. He said that when he and F.G. met with the foster parents on April 24, 2009, they were advised by the foster parents that they had not received any instructions regarding physiotherapy for E.G., so none had been done with him. F.G. then showed the foster parents how to do the exercises.

[39] B.G. also provided evidence concerning the numerous supports he and F.G. had pro-actively engaged to help them learn to properly parent E.G.

Christine Nemeth

[40] Ms. Nemeth has 31 years experience as a nurse, with a background in maternity and children’s health. She is currently the Healthy Mom and Healthy Babies Co-ordinator for the Teen Parent Center.

[41] Ms. Nemeth became involved with F.G. and B.G. in the fall of 2008, after they contacted her at the Canada Prenatal Nutrition Program at the Teen Parent Center to request assistance with F.G.’s pregnancy. F.G. participated in a number of workshops and programs at or through the Center.

[42] Ms. Nemeth stated that she has "…been very impressed with the care that [B.] and [F.] have both provided for E.G. prior to his birth and since he was released from the hospital with them". (Affidavit of Christine Nemeth). She states that she has been very involved with the family, apart from when they were in Edmonton. She testified that she rarely hears from fathers as often as B.G. contacts her.

[43] In her experience, it is not uncommon to see babies who have been bundled in a way that is intended to help hold a soother in place. As she does not consider that this is necessarily the best method for keeping a soother in a baby's mouth, her approach in some instances is to suggest alternatives.

[44] She also stated that she would have a concern about an infant having his or her nose covered, and she would encourage parents to find a different method that did not cause this to occur. She stated that she would consider it an emergency situation if a baby could not breathe because of how they were wrapped. She agreed it could be dangerous for an infant who vomits to have a soother wrapped tightly in its mouth, although it would be less of a concern if the parent was nearby and could do something about it.

[45] She also stated that she did not consider it to be a choking hazard for a sleeping infant to have a soother in its mouth.

The mother, F.G.

[46] F.G. provided evidence by way of affidavit. This evidence related to the background surrounding E.G.'s birth, travel to Edmonton and return to Whitehorse.

[47] She also described the reason why she intended to go to Carcross for a few days to visit her family, indicating that no important appointments would be

missed as a result and that she had no concerns for E.G.'s well-being given B.G.'s positive parenting abilities and the supports that were in place to assist him.

[48] She described the positive efforts she and B.G. have made to improve their parenting skills, and also detailed the day-to-day support they receive from others.

[49] F.G. stated that she and B.G. have followed through with their agreement with F.C.S. in every way required.

Andrew and Heather Finton

[50] Andrew and Heather Finton live at the Retreat and are Managers/Owners of the Retreat. Mr. Finton has a B.A. in psychology from Carleton University, as well as extensive experience working with youth. Ms. Finton has a B.A. in philosophy from University of King's College in Halifax, Nova Scotia. She has worked as a consultant for the Yukon government, various N.G.O.'s and First Nations.

[51] The Fintons have known B.G. and F.G. for approximately two years. During this time they have observed B.G. and F.G. grow through their experiences and, as a result of their observations, were prepared to offer their support to them. They saw B.G., F.G. and E.G. on a daily basis. They considered B.G. and F.G. to be "very good parents who have at all times cared for E.G. properly" (Affidavit of Andrew Finton). At no time did they see B.G. or F.G. act inappropriately with E.G.

[52] Mr. Finton testified that between April 15 and 22 he thought that F.G. and B.G. had done exceptionally well in taking care of E.G. He provided his opinion

that B.G. was incredibly conscientious and trying to be careful to do everything right, and that B.G. was open to advice and redirection.

[53] He also provided evidence that he and B.G. had discussed F.G. going to Carcross to visit her family for a few days. He was supportive of the idea and told B.G. that he, Heather Finton and Karen Thornton would help him out during this short period.

Karen Thornton

[54] Karen Thornton had known B.G. for approximately one and one-half years. She is a mother of three grown children and lives with her husband at the Retreat. She had agreed with F.C.S. to check in on B.G., F.G. and E.G. every day for an hour. From her observations, she considered B.G. and F.G. to be doing everything right with respect to parenting E.G.

Law and Analysis

Positions of Counsel

[55] Counsel for the Director submits that the situation at the time Mr. Locke observed it posed an immediate danger to E.G. She submits that, as such, I should find that reasonable and probable grounds existed for the Director to take E.G. into care, and should exercise my jurisdiction under s. 123(6)(b) of the *Act* to order that the Director be given temporary care and custody of E.G. until the hearing is held to determine whether he is a child in need of protection. She submits that there exists a reasonably based probability that E.G. is in need of protection. The focus of her argument is on what the apparent circumstances were at the time Mr. Locke made his observations.

[56] Counsel for the parents submit that there is no such reasonably based probability that E.G. is in need of protection, and that, as a result, he should be

returned to his parents. Without conceding the point, at this hearing counsel is not challenging the apprehension of E.G. on the basis of the lack of prior judicial authorization for the apprehension. Counsel's submissions, rather, are directed at the return of E.G. to his parents based upon a consideration of all the circumstances that are in evidence at this hearing.

Caselaw

[57] In ***J.C.*** v. ***Yukon (Director of Child and Family Services),*** 2006 YKSC 55, Justice Veale summarized the principles of ***Winnipeg Child and Family Services*** v. ***K.L.W.*** 2000 SCC 48, as follows at his para. 24:

1. the mutual bond of love and support between parents and their children deserves the greatest respect (paragraph 72);
2. parents must be accorded a large measure of freedom from state interference to raise their children as they see fit (paragraph 72);
3. it must also be recognized that children are vulnerable and require protection from harm (paragraph 73);
4. as children cannot exercise their rights independently in circumstances of abuse and neglect, the state has the statutory duty and power to intervene to protect children (paragraph 75);
5. despite the fact that apprehension is an interim child protection measure, it involves the physical removal of the child from the parents and potentially leads to a lengthy separation from the parents (paragraph 79);
6. in balancing these potentially conflicting objectives, the majority agreed with the observation of the Alberta Court of Appeal that child protection legislation is a child welfare statute not a parent's right statute (paragraph 80);
7. the majority was reluctant to import procedural protections from the criminal context as the state's protective purpose in apprehending a child is clearly distinguishable from the state's punitive and protective purpose in the criminal context of seeing justice done with respect to a criminal act. (paragraph 98).

[58] ***K.L.W.*** dealt with the issue of apprehension of a child without prior judicial authorization in non-emergency cases. The majority of the Supreme Court identified three factors between which a balance must be struck:

1. the seriousness of the interests at stake;

2. the difficulties associated with distinguishing emergency and non-emergency child protection situations; and
3. an assessment of the risks to children associated with adopting an "emergency" threshold, as opposed to the benefits of prior judicial authorization. (para. 93)

[59] In ***K.L.W.***, the majority of the court, after considering the various child protection legislation across Canada, concluded that "…adopting an "emergency" threshold as the constitutional minimum threshold for apprehension without prior judicial authorization risks allowing significant danger to children's lives and health." (para. 106)

[60] The majority in ***K.L.W.*** held that the state must be able to intervene quickly when it felt that the circumstances warranted it, without necessarily having to delineate between whether a situation was truly an emergency or not. L'Heureux-Dubé, writing for the majority stated:

> Given the state's duty to protect a child at risk of serious harm, as well as the child's compelling interest in being so protected, immediate apprehension may be appropriate in such circumstances, even though there might be some dispute as to whether the harm is "imminent". (para. 103)

[61] Justice L'Heureux-Dubé found that, in balancing the risks between the harm caused by a wrongful apprehension and the potential harm of non-apprehension, the state needs to be granted some leeway in regard to making a decision to apprehend a child.

> It is also clear that a wrongful apprehension does not give rise to the same risk of serious, and potentially even fatal, harm to a child, as would an inability on the part of the state to intervene promptly when a child is at risk of serious harm. (para. 111)

[62] In ***T.K. (Re)***, [1992] Y.J. No. 73 (T.C.), Faulkner J. stated that "…the intent in this hearing [s. 125(5)] is to determine in a summary way whether sufficient

grounds exist to warrant the continued holding of the child pending hearing and determination of the need of protection issue." (para. 3)

[63] The determination of whether reasonable and probable grounds exist for taking a child into care are those grounds which exist at the date of the hearing, and not the grounds that existed as of the date of the apprehension. Therefore the "…information in the Director's hands at the time of the apprehension [must] be scrutinized together with any facts which come to light subsequent to the apprehension" (***T.K.,*** para. 2)

Findings

[64] In order to make a determination, I must consider the subjective belief of the Director at the time of the apprehension of E.G., the objective reasonableness of that belief, and any additional evidence that was presented at this hearing. In this case there was some additional evidence beyond that on-hand at the time of the apprehension. This came primarily from Ms. Nemeth, and was with respect to the appropriate ways to swaddle an infant who has a soother in his or her mouth. This evidence, however, was somewhat limited.

[65] While my decision as to whether there exists a reasonable basis for taking E.G. into care is based upon an assessment of all the evidence that is before me today, for the most part, almost all the relevant evidence existed at the time of the apprehension. I consider that the evidence of Andrew and Heather Finton, F.G. and Karen Thornton to have been readily available at the time of the apprehension.

[66] After the hearing and reviewing the evidence, I found that reasonable and probable grounds did not exist for taking E.G. into care, and ordered that he be returned to his parents within 48 hours.

[67] I recognize that the Director has a task that is often difficult, and that finding the balance between protecting a vulnerable child while yet allowing parents the freedom to raise the child can be a hard task. When tragedy occurs, decisions not to intervene earlier are scrutinized after-the-fact, and the Director is publicly criticized for not acting fast enough. When the Director chooses to apprehend a child before that point is reached, perhaps erring on the side of caution, the effects are not as open to public criticism, other than those cases where the subsequent placement turns out to be the source of further tragedy. As L'Heureux-Dubé J. stated in ***K.L.W.*** at para 100:

> …child protection workers are inevitably called upon to make highly time-sensitive decisions in situations in which it is often difficult, if not impossible, to determine whether a child is at risk of imminent harm, or at risk of non-imminent but serious harm, while the child remains in the parents' care.

[68] While I recognize that the leeway given to the Director in making a decision regarding apprehension will properly tip the balance more in the direction of ensuring the immediate safety of the child, care must be taken by the Director not to push the boundaries of that leeway too far. It must also be kept in mind that Justice L'Heureux-Dubé stated the following:

> The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child. (para. 72)

[69] The decision-making process about whether to intervene and apprehend a child requires taking a principled approach, in which every action or decision is based upon a reasoned assessment of the unique circumstances and evidence of each case. Inevitably, while even such a principled approach will not preclude errors being made, these errors will likely be fewer and will also be defensible.

[70] Given the potentially significant and damaging impacts of the decision to apprehend a child or not, the Director must always diligently strive to find the necessary balance and make the best efforts possible not to err at all, even if on the side of caution.

[71] I consider that the following comment of Quinn J. in ***Children's Aid Society of the Niagara Region*** v. ***C.B.*** (2005), 20 R.F.L. (6th) 50 (Ont. S.C.), is applicable to the case before me, subject to my reservations as to the reality of the risk in this case:

> The risks here, although real, were low and the harm non-imminent and all protection concerns could have been satisfied, and satisfied easily, by means of an approach far less intrusive and heavy-handed than apprehension. (para. 39)

[72] The circumstances described by Mr. Locke, while perhaps sufficient to raise concerns or a question as to whether there was a safety risk to E.G. created by an apparently not-unheard-of parenting practice, were highly distinguishable from those situations in which there is direct evidence of physical abuse or neglect. The environment surrounding E.G. when viewed in the context of the larger picture, including the historical antecedents of the parents as measured against their present situation, could have, and likely should have resulted in a less intrusive and heavy-handed approach than the immediate apprehension of E.G.

[73] I will say at this point, that I am not persuaded by the evidence of Mr. Locke that E.G. was in the type of immediate danger contemplated by s. 121(1) of the *Act*, in respect both of how E.G. was swaddled and B.G.'s apparent indifference to the situation. I have considered the evidence of B.G. in particular, which is contrary to Mr. Locke's in some significant aspects, and the other generally positive evidence regarding how B.G. and F.G. were parenting E.G.

[74] By his own admission, Mr. Locke's state of mind was elevated by panic, shock and his state of crisis, and, as such, his perceptions of the inappropriateness of B.G.'s responses may have been affected. B.G. did not consider anything to be out of the ordinary so he likely would not have acted any differently than normal. I am aware that Mr. Locke must have observed something that caused him concern in order to provoke such a reaction in him, and that B.G. did not observe E.G. before Mr. Locke loosened the garment; I can not say, however, whether Mr. Locke's reaction was the same as what any other person in his position would have had.

[75] Regardless, Mr. Locke's observations did not necessarily have to lead to an apprehension of E.G. by the Director.

[76] The evidence is clear and undisputed that B.G. and F.G., on their own initiative, were pro-active in accessing numerous supports to assist them in parenting E.G., both before and after E.G.'s birth. These supports included both individuals and agencies. They were, by all accounts, meeting and even surpassing the expectations placed upon them as parents.

[77] The immediate danger, to the extent that this danger may have existed at all, had passed by the time E.G. was apprehended. Given the triggering event being the initial observations of Mr. Locke, from the Director's perspective the risk of "immediate danger" to E.G. would only be that at sometime in the near future B.G. might similarly swaddle E.G. This would arguably create a "continuous" risk of immediate danger to E.G. due to the likelihood of a repetition of this act.

[78] Mr. McLean was candid in his admission that the Director's considerations in apprehending E.G. included the history of B.G. and F.G., and E.G.'s overall medical circumstances and young age. Put together, it would be reasonable to conclude that the Director is operating with an underlying assumption that this

one act of B.G. is indicative of his, and F.G., still lacking basic parenting skills to the extent that E.G. may well be in “immediate danger”, creating a situation somewhat analogous to a “ticking time bomb”.

[79] It seems, however, on the evidence I have before me, that the Director would have been better advised to exercise a less intrusive option than taking the most extreme action of all by apprehending E.G. The Director has “…an obligation to pursue the least intrusive means of ensuring the protection and safety of children”. (***J.C.*** at para. 59)

[80] In the present case, a more logical and less heavy-handed approach would have been to firstly sit down that afternoon with B.G. and a support person, such as Andrew or Heather Finton or Ms. Thornton, and talk about what Mr. Locke had observed. Ms. Nemeth could also have been included as part of this discussion. B.G. would then have been made fully aware of what Mr. Locke’s observations were, and been given an opportunity to explain what he had done and why.

[81] Based upon B.G.’s recent track record, it appears to me that he would have in all likelihood been receptive to any suggestions. The same would be true for F.G. In the event that B.G. was disinterested and apparently unwilling to modify his approach to soothing E.G., and it remained apparent that his approach was potentially dangerous, perhaps taking steps to confirm this to be the case, the Director could have taken E.G. to a place of safety in order to impress upon B.G. the seriousness of the situation, before hopefully returning E.G. home after B.G. understood the issue and agreed to act differently in future. The Director could have sought a supervision order if the concerns warranted it.

[82] By taking the more minimally intrusive actions available to them, the Director could have continued to build trust and rapport with B.G. and F.G., and thus created or maintained an “open door” relationship. By choosing instead to

apprehend E.G., it would seem to me that the Director's actions have likely damaged the relationship and both parties will have to work towards restoring it. At the end of the day, E.G. will benefit from a good relationship between his parents and F.C.S., and likely suffer if the relationship is not good.

[83] What is the message most likely to have been impressed upon F.G. and B.G. by the actions of the Director in apprehending E.G.? I believe it could easily be that "no matter what you do, or what efforts you make to be the best parents you can for E.G., we do not believe you will ever be good enough and are waiting, looking over your shoulders, for the first opportunity to take him away from you".

[84] I am not saying that was necessarily the message that was intended to be sent, but it is quite likely that this was the message that was received. These are young parents, struggling to do their best to raise a child. They have already, through their own limitations at the time, "lost" a child to the Director through a Permanent Care and Custody Order. As a result of what happened with M.G., F.G. and B.G. proactively made significant efforts in order to be better parents this time, under a shadow of one "failure" to properly parent a child.

[85] In this case they barely had E.G. at home for any time when, in fairly minimal circumstances, the Director stepped in and took E.G. away. I suspect that the damage that such an apprehension could do to the confidence and hopefulness of F.G. and B.G., and hence potentially to E.G., would be significant. To some extent, F.G. and B.G. have been primed for failure.

[86] I am not saying that the actions of the Director in apprehending E.G. should be seen as anything less than well-intended to ensure E.G.'s safety and protection. I am saying, however, that such drastic action should be reserved for the cases that clearly warrant it and when there is no other reasonable and safe course of action for the Director to take. This was not such a case.

Cozens T.C.J.