COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

FAMILY DIVISION

2012/FAM/ADN/FP0007

IN THE MATTER OF EJ, an Infant

AND IN THE MATTER Of the Adoption of Children Act
(chapter 131)

BETWEEN

SB

and

CB

Applicants

AND

EJ

Respondent

BEFORE:	The Honourable Mrs Justice Estelle Gray Evans
APPEARANCES:	Mrs Petra Hanna Weekes for the applicants
	Mrs Jethlyn A. Burrows for the biological father of the infant
Hearing dates:	2013: 17 June; 27 June; 26 July
Submissions:	2013: 17 July

JUDGMENT

Gray Evans, J.

1. By an originating summons filed 30 January 2012 the applicants, SB and CB, apply, inter alia, for authorization to adopt the infant, EJ, and for the consent of EVS, the biological father, to be dispensed with, if unreasonably withheld. The originating summons was supported by an affidavit and a statement by the applicants, also filed 30 January 2012.

2. Mrs Lillian Quant Forbes, Deputy Director of the Department of Social Services, was initially appointed as Guardian ad Litem to safeguard the interest of the infant. However, in an affidavit filed 19 March 2013, Mrs Quant Forbes averred that due to the "multitude of pressing and urgent matters" which required her attention at the Department of Social Services she would be unable to perform the duties of a Guardian ad Litem. She indicated that Mrs Sheila Johnson-Smith, a former Social Worker, had consented to being appointed as Guardian ad Litem and that she, Mrs Quant Forbes, had no objection to such appointment. By an order made and filed on 21 March 2013, Mrs Sheila Johnson-Smith was substituted as the Guardian ad Litem ("GAL") in place of Mrs Quant Forbes.

3. The applicants are the maternal grandparents of the infant.

4. The evidence is that EVS and the infant's mother, the late CCB,met while both were still in high school. Their relationship resulted in CCB becoming pregnant. EJ was born out of wedlock on 19 May 2010, in West Palm Beach Florida, U.S.A. When CCB and EJ returned to The Bahamas they lived with the applicants. EVS and CCB continued their relationship and he was a part of EJ's life. He provided some financial assistance, but not as much, it seems, as the applicants and or CCB thought he ought to have. CCB put him before the Magistrate's court for child support and he was ordered to pay $45.00 per week. EVS and CCB eventually ended their intimate relationship and started seeing other people. CCB, by a deed of appointment appointed the applicants as temporary guardians of the infant until his 18th birthday. The female applicant's evidence is that that was done because CCB did not want EVS's girlfriend at the time "to have anything to do with EJ". EVS challenges the authenticity of the document and says that at the time the document was alleged to have been executed by the deceased, he and she were in a good relationship and he does not think she would have executed the document without discussing the same with him.

5. However, EVS has provided no evidence that would cause me to doubt the authenticity of the deed of appointment and I find that prior to her death the deceased by deed of appointment of guardianship dated 15 October 2010did appoint the applicants as joint guardians of the infant until his 18th birthday.

6. Notwithstanding such appointment, EVS continued to be a part of EJ's life.

7. CCB died tragically on 7 October 2011. After her death, EJ continued to reside with the applicants but also spent time, usually weekends, with EVS and his family.

8. There was conflicting evidence as to the level of financial assistance EVS has provided toward EJ's maintenance since birth, but the evidence is that he has provided some assistance and he says that he accepts full financial and other responsibility for EJ when he stays with him on weekends.

9. The male applicant is 58 years old and is a self-employed businessman. The female applicant is a 50-year old accountant. They have been married for 23 years and have a son, S, twin to the deceased, who is now 21 years old. The applicants, S, and the infant, reside in a 3-bedroom, 3-bathroom home, which is said to be in good structural condition and in which "housekeeping standards are excellent." Both applicants have diabetes and hypertension, in

addition to which the male applicant has a "heart condition". However, the evidence is that the applicants manage their conditions very well.

10. In her report dated 30 April 2013, the GAL writes, inter alia:

> "The applicants have proven that they have the best interest of the infant at heart. They have taken care of both the infant's deceased mother during her pregnancy and then both of them after his birth. The infant has only resided with his maternal grandparents and the family home environment caters to his needs. He appears to be very happy and well cared for. He seems to enjoy a very loving relationship with his maternal grandparents and his mother's twin who resides at home as well.
>
> The applicants are well able to care for the infant in a safe and healthy environment. It would not be in the best interest of the infant to be removed from the only home he knows and the stable and safe environment."

11. The GAL supports the adoption of the infant by the applicants and reports that she is satisfied that an order authorizing them to adopt the infant would be in his interest and welfare.

12. It is not intended that the infant's name be changed if the adoption order is granted.

13. Section 6(b) of the Adoption of Children Act, chapter 131 Statute Laws of The Bahamas ("the Adoption Act") empowers the court to make an adoption order in favour of a relative of an infant if pursuant to section 8(b) such an order would be for the welfare of the infant. Grandparents are included in the definition of "relative" (See section 2 of the Adoption Act).

14. Section 7 of the Adoption Act requires that the consent to such adoption, of everyone who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant,be obtained unless leave is given by the court dispensing with such consent. One of the grounds for dispensing with such consent is that the person whose consent is required is unreasonably withholding the same.

15. Section 2 of the Child Protection Act, chapter 132,defines "parent" as, inter alia, "the biological mother or father of a child and includes any person liable by law to maintain a child or entitled to his custody".

16. As the biological father of the infant and, therefore, a parent, as well as a person liable to pay maintenance for the infant by virtue of a Magistrate Court order, EVS's consent is necessary for an adoption order unless such consent is dispensed with.EVS does not consent to the adoption.Instead he asksthat the application therefor be refused and that, in the alternative, this Court make an order appointing the applicants and EVSas joint guardians of the infant with terms for maintenance and access.

17. The test to be applied when determining whether or not a parent's consent to an adoption order is being unreasonably withheld is set out in the case of Re W [1971] 2 All ER 49 at 55, [1971] AC 682 at 699 where by Lord Hailsham LC said:

> "From this it is clear that the test is reasonableness and not anything else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness, and reasonableness in the context of the totality of the circumstances. But, although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it."

18. The issues for determination are:

a. Whether the consent of the father should be dispensed with on the ground that it is being unreasonably withheld?

b. Whether the order for adoption ought to be made in favour of the applicants? Or

c. Whether an order for joint guardianship with terms as to maintenance and access is appropriate in the circumstances?

19. Counsel for the applicants makes, inter alia, the following observations and or submissions on their behalf:

a. The applicants co-parented EJ along with his deceased mother from birth. They have a stable and suitable home environment and are in a position to maintain him financially.

b. They have produced stellar references as to their characters. They have health issues but are managing them as do thousands of functioning Bahamians.

c. They are not so old to be considered too old to adopt.

d. Prior to the applicants making their intention known and even before CCB's death, EVS chose to exercise very little access to EJ and that his mother only started to make contact concerning access when the adoption was proposed by the applicants who, despite their better judgment facilitated access at EVS's home.

e. There is no doubt that the applicants and EVS love EJ. The applicants have stated over and repeatedly that EVS's access to EJ will not be affected and that his name will not be changed. In short, his relationship will be supported.

f. The applicants who have been the primary care givers are desirous of security for themselves and EJ and do not wish to be vulnerable to a custody application by EVS in the future; they want to be in a position to control access should it become necessary to do so, and to appoint testamentary guardians for EJ in their Wills.

g. The parties to this action are all "relatives" and have no stronger position in law than the other. The case law supports this adoption and while the court has the power to make such order, there is no advantage to EJ in making of a custody or guardianship order.

h. The putative father is young and immature and has not embraced his full responsibilities as a parent. And yet is about to become a father again, another questionable decision.

20. Counsel for the father makes, inter alia, the following observations and or submissions on his behalf:

a. The rights of the applicants as maternal grandparents are no greater than the rights of the father of the infant and their application should be rejected as not being in the infant's best interests.

b. There is no valid reason for the court to extinguish EVS's paternal rights to EJ.

c. The fact that the applicants are married and jointly out-earn the father is insufficient ground to grant an adoption order.

d. EJ has developed and enjoys a good relationship with his father and his paternal relatives and it is highly unlikely that it would be for the benefit of EJ to have those connections severed.

e. As the effect of an adoption order is to permanently deprive EVS of any legal right to his son, the order should be refused as not being in EJ's welfare.

21. The effect of an adoption order will be to deprive EVS "of all rights in respect of the maintenance and upbringing of EJ".

22. Now I note counsel for the applicants' submission that EVS's relationship with his son will be supported by the applicants. However, just as the applicants are concerned that EVS may seek custody of EJ in the future if the adoption order is not made, there is no guarantee to him that if the adoption order is made, the applicants will not, at some time in the future, in exercise of their parental rights, curtail his access to EJ. In that regard, I note that the applicants and the GAL have expressed concerns about the environment in which EVS and his family reside and they have suggested that visitations be restricted to day visits.

23. As regards that suggestion, I confirm having viewed the DVD of a news report showing the Urban Renewal team and EJ's paternal grandmother talking about the assistance with repairs to her home which she was receiving from Urban Renewal. I also note the GAL's updated report, prepared at this Court's request, as well as a letter from Rev Kermit Saunders, Jr., JP, that some renovations had been completed and that there was some improvement to the living conditions.

24. Counsel on each side referred to a number of cases in support of their respective client's position and counsel on each side was of the view that the other side's cases were distinguishable from the case at the bar.

25. In the case of the applicants, their counsel referred to a number of cases in which the court granted adoption orders to grandparents over the objections of the biological parents, holding that the biological parents' consent was being unreasonably withheld, while counsel for the father referred to cases with the opposite decision or in which it was determined that a custody order was more appropriate than an adoption order.

26. In that regard, the applicants rely on the cases ofRe W [1988] FLR 175, Re M [1985] FLR 664 and Re H and another (minors) (adoption: Putative father's rights) (No 3), while the father relies on: Re S (infants) (Adoption by parent), Re B [1976] LR (Fam) and Re V [1985] LR (Fam).

27. However, as is usually the case in matters of this nature, cases tend to turn on their own peculiar facts.

28. For example in Re W [1988] FLR 175 – the infant had been with the maternal grandparents since birth and at the time of the application for adoption was three years old. As in this case, the grandparents in Re W were desirous of adopting the infant to provide security for themselves and for him, to control access to the parents and to be able to appoint testamentary guardians for the infant on their death. The parents refused to consent to the proposed adoption, but the court nevertheless granted the order, on the ground that the parents' consent was being unreasonably withheld. The court, however, made an order for access to the parents. On appeal, the parents argued that an order for custodianship pursuant to the provisions of the Children Act 1975 was the more appropriate order, but the court did not agree. The court dismissed the appeal and pointed out that Re W was a case where,although he was aware of his natural parents,the child had since birth looked upon his grandparents as his parents.

29. It is worth noting that in Re W, although the parents were married, the mother was mentally handicapped and unable to take full responsibility for the child.

30. Mrs Burrows on behalf of the father submits, and I agree, that in the case at the bar, there is no allegation that the father is suffering from any kind of disability or incapacity; that unlike the parents in Re W, who had only limited access to the infant, the father in this case has from birth been a part of the infant's life and there is no evidence that the infant has ever looked upon the applicants as his parents. Indeed, the evidence is that EJ knows that EVS is his father and that they have a close relationship.

31. The infant in Re M [1985] FLR 664was also three years old. He had been in his grandparents' care since he was 11 weeks old and had not seen his mother. He knew his grandparents as mother and father. On an application by the grandparents to adopt the infant, the mother refused to consent and instead applied via summons for an order granting custody to the grandparents and access to her. In granting an adoption order to the maternal grandparents over the objections of the biological mother, the court found that there would be considerable disturbance to the child if he was removed from the grandparents. The court also refused to allow the mother access, holding that it was likely to lead to a disruption of the child's bond with the grandparents. In this case, there is no question of removing the child from his grandparents and in any event, the applicants have said that they do not intend to prevent the father's access to the infant.

32. Then in Re H and another (minors) (adoption: Putative father's rights) (No 3), the court dispensed with the consent of the putative father of two illegitimate children on the ground that it was being unreasonably withheld as he could not provide the type of home that the children needed. In that case, the mother of the children had given the children and her parental rights up to the local authority who eventually put the children in the care of the adoptive parents. The father was unable to offer a proper home to the children, but wanted to have continued access to them. The court held that the father should be given parental rights but found that his consent to the adoption was being unreasonably withheld since neither parent was willing or able to offer the children a settled home which was what they urgently needed. However, as counsel for the father pointed out, the choices in that case included placing the children in foster home or placing them with adoptive parents and in those circumstances the court, rightly held that the father's consent was being unreasonably withheld. She pointed out further that although EVS is able to offer EJ a stable and settled home, he is not making any attempts to remove EJ from the stable and settled home currently provided by his grandparents. In her submission, the issue for EVS is that he simply does not wish to have his parental rights terminated.

33. In Re S (infants) (Adoption by parent) relied on by the father, the biological parents of two children were divorced and a custody order given in favour of the mother who later remarried. She and her new husband applied for an adoption order to confer parental rights on the husband/stepfather. The court,in refusing to grant the adoption order, decided that adoption held no advantage for the children over custody orders as a custody order would give the step-father parental rights without stripping the father of his parental rights. On appeal, the Court of Appeal decided that even in a case where adoption would safeguard and promote the welfare of a child, the court was required to consider the specific questions whether, even so, the case might be better dealt with by a joint custody order in favour of the natural parent and the step parent or by leaving the child in the custody of the natural parent and the court upheld the decision of the lower court that adoption held no advantage to the children over custody orders and that it was for the GAL to draw to the attention of the court the disadvantages as well as the advantages of adoption.

34. Re V [1985] LR (Fam) is another case in which the court held that a mother's consent to the adoption was not unreasonably withheld. The head note in that case is set out hereunder:

> D.'s mother was married at 17 and D. was born a year later in August 1980. The marriage broke down in December and D.'s mother and D. went to live with the applicants. In May

1981 D.'s mother was able to return to the former matrimonial home taking D. with her. The applicants maintained regular contact with D. D.'s mother formed a relationship with M. and in May 1982 moved to a caravan which she thought was unsuitable for a young child so she left D. with the applicants. In June 1982 the mother married M. and thereafter saw little of D. but her parents maintained regular contact with him. In October 1982 the mother gave written consent to D.'s adoption and the applicants gave notice of intention to adopt D. By February 1983 the mother wanted D. back but on 21 February D.'s father gave consent to D.'s adoption and on 22 February the applicants made D. a ward of court. The following day they refused to hand D. back to his mother. In March D.'s mother was allocated a council house and in June she gave birth to a daughter. In July she signed an unconditional form of consent to D.'s adoption but she understood that she was to be allowed access to D. Her marriage with M. finally broke up in August 1984 and she gave birth to a second daughter in November. By the time of the hearing in February 1985 she wanted D. to live with her and his two sisters and refused her consent to his adoption. Sir John Arnold P. held that under section 3 of the Children Act 1975 1 the primary consideration was the need to safeguard and promote the child's welfare; that that consideration would best be served by making an adoption order but the mother, and her parents, should be at liberty to make an application to the court for access. On that basis he concluded that the mother was unreasonable in withholding her consent and that it should be dispensed with under section 12(2)(*b*) of the Act of 1975.

On appeal by the mother: -

Held, allowing the appeal, that it was doubtful whether an adoption order was appropriate where the maintenance and strengthening of family ties was so conducive to a child's welfare that the underlying basis of the order had to provide for regular and frequent access by the natural parent, since the avowed purpose of an adoption order was to extinguish the rights and duties of the natural parent; that the basis of the mother's refusal was not the fact that the order might result in her being deprived of access but that she wanted her child back so that he could be brought up by her with his siblings and since the evidence demonstrated that she was a capable mother able to provide reasonable accommodation for herself with her three children she was not acting unreasonably in refusing consent; that the fact that the provision for access by the natural parent was so critical to the making of the adoption order, which vested all future decisions relating to the child in the adopters, indicated that an adoption order was not a reasonable order to make in the circumstances; that, accordingly, the mother's consent to the adoption order was not unreasonably withheld within section 12(2)(*b*) of the Children Act 1975 and ought not to have been dispensed with under section 12(1)(*b*)(ii) and the adoption order should be discharged and the wardship order restored.

35. As I understand the father's position, he is not seeking to adopt the infant, nor is he asking for custody or that the infant be removed from the care and control of the applicants. He is merely asking that the status quo be maintained, that is, that the infant be allowed to remain in the care and control of the applicants and that he be allowed continued access and involvement in his son's life; that he be allowed to have a say in his son's upbringing and be given the opportunity to participate in decisions relating to him. In short, he does not wish to deprive the applicants, the legally appointed guardians, of a relationship with their grandchild, but he also does not wish to be deprived of his parental rights over EJ, which, of course, would be the effect of an adoption order.

36. Notwithstanding the criticisms levied against the father by the applicants, the fact is, he is EJ's father. He is willing to participate in his life. He has the support of his mother and his siblings in helping to take care of EJ while EJ is with him.

37. In the circumstances of this case, I agree with counsel for the father that when applying the test of reasonableness, it cannot be said that the father is being unreasonable in withholding his consent to the proposed adoption.

38. Moreover, by their expressed willingness, if the adoption orderis granted, to allow EVS to continue his relationship with EJ, leads me to believe that the applicants appreciate that EVS's continued involvement in EJ's life is important for the maintenance and strengthening of the bond between them and, therefore, conducive to EJ's welfare.

39. In this day and age when the involvement of fathers in their children's lives, particularly fathers of children born out of wedlock, is badly needed but woefully lacking, I think it is commendable that the father does not wish to relinquish his parental rights.

40. I am not unsympathetic to the applicants. I have no doubt that they honestly believe that their adopting EJ is in his best interest and for his welfare. However, in my view, they need not adopt EJ in order to provide for him. They have been doing so since he was born and there is nothing to prevent them from continuing to do so.

41. I am also mindful of the ages and medical conditions of the parties. The applicants are in their mid to late 50s, by no means old, but they suffer from the chronic conditions of diabetes and hypertension, common within The Bahamas, which they say they are managing; the male applicant also has heart problems. On the other hand, the father is 23 years, no known medical conditions, energetic and still resides with his mother and siblings.

42. While I understand the applicants' desire to adopt EJ to provide them some form of security against EVS one day coming and taking EJ from them, I also understand EVS'sfear that, notwithstanding their promises to permit him to maintain a relationship with EJ, there is nothing to stop the applicants, once an adoption order is granted in their favour, from severing that relationship.

43. Moreover, although they say that they will support EJ's continued involvement with his father, the stance taken by the applicants and the GAL with regard to the father's home environment, their allegation that EVS and his family do not take very good care of EJ when he visits with them and their suggestion that EVS should not have overnight access, may very well be construed as evincing an intention on their part to deprive the father of access to his son because of his surroundings and may fuel the father's fear that he will be deprived of his parental rights.

44. I also note the applicants' complaint that EVS is immature. However, he is 23 years old, and, in my view, if all parents were deprived of their parental rights because they were immature, then few children would still be with their parents. I have no doubt that EVS will mature. He will have to; and I hope that the applicants will help him by keeping him accountable for EJ'S wellbeing while in his care, since EVS's maturing can only inure to EJ's benefit.

45. I, therefore, accept the submission of counsel for the father that there is no valid legal reason to extinguish his paternal rights to EJ by dispensing with his consent to the granting of an adoption order in favour of the applicants, and in the circumstances, I cannot say that the father's consent is being unreasonably withheld.

46. The application to dispense with the biological father's consent on the ground that the same is being unreasonably withheld is refused.

47. In the result, the father of the infant not consenting to the adoption, the application for the applicants to be authorized to adopt the infant is refused.

48. The applicants, however, remain the legal guardians pursuant to the aforesaid deed of appointment of guardianship and, as such, will continue to have care and control of the infant, while the father continues to have access as arranged and agreed between the parties.

49. As regards the father's application that,in the alternative, he be appointed joint guardian of EJ along with the applicants, it seems to me that in light of my decision refusing the adoption

order as prayed by the applicants, as well as the provisions of the Child Protection Act, such an order may not be necessary.

50. If, however, the parties are of a different view, they have liberty to apply.

51. The parties also have liberty to apply for orders with respect to access and maintenance.

52. Each side will pay their own costs.

53. I am grateful to counsel on both sides for their assistance in this matter and although I may not have referred specifically to the contents of all of the evidence, including the GAL's reports, and the submissions of counsel, I confirm having read and considered all of them.

54. I also wish the parties well.

DELIVERED this 13th day of September A.D. 2013

Estelle G. Gray Evans
Justice