

1993 CarswellAlta 836, 147 A.R. 69

L. (T.A.V.), Re

In the Matter of L. (T.A.V.) and L. (T.A.), Children Within The Meaning of the Child Welfare Act

Alberta Provincial Court

Fitch Prov. J.

Judgment: October 8, 1993

Docket: Calgary CW10640, CW11194

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Counsel: *J. Nicholson*, for Director under the Child Welfare Act.*D. Castle*, for Mother.

Subject: Family

Family Law --- Children in need of protection — Status review hearing — Access by parents

Termination of access — Grounds.

Due to mother's alcoholism, her two children, aged 2 and 3, were the subject of permanent guardianship orders. Mother was granted weekly access to the children. During one access visit, mother took part in a drinking party which resulted in a representative of the Child Welfare authorities being threatened. On other access visits, the older child displayed uncharacteristically aggressive behaviour towards her sibling. Director applied to terminate mother's access. Held, the application was dismissed. No expert evidence was called and no assessment of the children was made to assist the Court to decide whether the older child's aggressive episodes were more than just a passing phase. The evidence did not merit the cancellation of mother's access. Mother's weekly access was changed to monthly unsupervised access in a public place.

***The Honourable Judge Fitch:***

1 The issue is access between a mother with an alcohol abuse problem and two small girls who are permanent wards and will probably remain as wards in their present foster home throughout their minority.

2 On November 19, 1992, the Court granted Permanent Guardianship Orders concerning L.T.S. (T.A.V.), born June 4, 1990, and L.T.S. (T.A.), born June 11, 1991, to D.F., an individual designated by the Minister as a director for the purposes of the Child Welfare Act, pursuant to s. 94/1 of the Act. The mother was granted access to the children by a consent order pursuant to s.32/6 of the Act "as mutually agreed or as fixed by further order." D.W. a second individual designated as a director, now applies to terminate that access order.

3 The relevant statutory provisions are found in the appendix.

4 A preliminary issue concerns the parties to the application. Contrary to popular understanding, as evidenced by the styles of cause in several cases cited in the annotated Child Welfare Act in Butterworth's Family Law Statutes, in Alberta, unlike most if not all other provinces, there is no statutory continuing public office responsible to the Minister of Family and Social Services for child welfare matters. There was such an office, the "Director of Child Welfare", under the former Child Welfare Act, but that office ceased to exist when the former Child Welfare Act was repealed on July 1, 1985. Under the former Act, the incumbent of the office was known as the "Director of Child Welfare", or "Acting Director of Child Welfare", but in law the office continued as a legal entity, with all its rights and obligations, even in the absence of an incumbent in the event of death or resignation, and pending a fresh appointment. (Interpretation Act, s. 21/3).

5 Under the present Act, there are one or more individuals designated by the Minister as directors who are authorized to do various things under the Act. At present, D.F. the director who was appointed permanent guardian of these children on November 19, 1992, is apparently the incumbent of a higher office in the Alberta Department of Family and Social Services, and may no longer be an individual designated as a director. The question arises as to who if anyone is at present the guardian of these children, since there does not appear to be any provision in law to assign outright the continuing authority of one director as guardian, to a second director. Under s. 77, the guardian of these children should be a party to these proceedings; only D.W., the 2<sup>nd</sup> second director who brought the application on for hearing, and the mother, are parties. S.87 of the Act provides for delegation, meaning appointment of an agent or sub-agent, but that does not solve the problem in situations where the guardian is no longer a director or is deceased: one cannot be an agent of either a non-existent principal, or of an individual who no longer has the powers of a director to delegate to an agent. S.87 could be amended to provide for absolute assignment or deemed assignment from one director or former director to another, but that does not seem to be contemplated by the present s.87, or by sections 20 and 21 of the Interpretation Act. D.F. acted as director everywhere in Alberta except on some Indian Reserves who have other individuals designated as directors. D.W. is one of six directors that act in various parts of the Province in place of D.F., so no one director is his successor appointing six in place of one does not come within s.20/1/e, even assuming "directors" under the present Act occupy an "office" like the Director of Child Welfare did under the former Act.<sup>56</sup>

6 Without the permanent guardian as a party, the Court has some doubt whether the present application is properly before the Court, but since the matter was not argued, it is presumed the application is in order and is being dealt with on its merits, and the larger question left for another day.

7 Turning to the merits, the evidence discloses that the children reside together in a foster home where they were placed after coming into care some time before permanent guardianship was granted. Unless the mother succeeds in controlling her alcohol abuse problem and the children returned to her care by the permanent guardian, or return there as adolescents on their own volition, the children will probably remain in this same foster home throughout their minority. It is however not unknown for permanent wards upon reaching adolescence, to return to the unsatisfactory home of a natural parent, with or without the concurrence of the Child Welfare authorities. The Court recalls granting a Permanent Guardianship Order some time ago concerning a six year old daughter whose parents both had a severe alcohol abuse problem. Her 19 and 16 year old brothers, a former permanent ward and present permanent ward respectively, were, at the time the 6 year old was made a permanent ward, living and drinking with the parents. The Child Welfare authorities are sometimes faced with the hard decision knowingly to permit such a situation, when the alternatives may be a furtive relationship between the parents and the child, or the child running from the care of the Child Welfare authorities to the street or to some

other unsatisfactory place unknown to the Child Welfare authorities. The point is that while this mother is not presently competent to take direct care of these young children, they might be living with the mother sometime in the future while they are still wards, or as young adults.

8 The children and their mother are members of one of the First Nations; the foster parents are members of a second First Nation, with a different language and other different cultural attributes. The foster mother, who greatly impressed the Court in all respects both on the permanent guardianship hearing and at the present hearing, to her credit has taken steps to learn something of the children's language, and they attend dance and other activities at the Calgary Indian Friendship Centre, a place that is cross-cultural and international in the sense that members of different First Nations share the facilities.

9 After permanent guardianship was granted, the Child Welfare authorities tried to put in place weekly visits with the mother. Some of these visits were unsatisfactory, including at least one occasion on which the visit at the mother's home apparently interfered with a drinking party there, and a representative of the Child Welfare authorities was threatened. After the initial settling-in period in the foster home while the children were in temporary care, the children have been well behaved, with the exception of the older child after some of the visits with the mother. The foster mother gave evidence, and I accept her evidence, that the older child, after some visits, displayed aggressive tendencies toward her younger sister that have not been exhibited at any other time. The Child Welfare authorities unilaterally terminated access early in 1993, and launched the present review to legally terminate access. The mother asks for monthly access.

10 Apart from two visits in the summer of 1993, shortly before this hearing, which visits did not go well and exhibited further acting out behaviour by the older child, there have been no further visits.

11 While the behaviour of the three year old on these few occasions has been inappropriate, the evidence did not impress the Court as describing a situation worse than often occurs in families when some event occurs such as a new baby displacing an older sibling as the centre of attention, or one parent or surrogate parent leaving, or a new one arriving. No expert evidence was called, and no assessment of the children has been made to assist either the Child Welfare authorities, the foster mother or the Court, to decide whether this is more than just a passing phase. On this slender evidence, the Child Welfare authorities ask the Court to terminate all access.

12 Neither s.32/6 nor s.32/9, the sections of the Act that authorize the Court to make access orders to permanent wards, and on review to continue, vary or terminate such orders, gives any guidance to the Court. That guidance is found in s.2; all court and other decisions are to be made "in the best interests of the child" and in doing so, the Court is required, among other things, under s.2/c, to consider that

2 /c the family has the right to the least invasion of its privacy and interference with its freedom that is compatible with its own interest, the interest of the individual family members and society.

13 Even in a case such as the present case, where the children are young and for the indefinite future will live separate from the mother, terminating access would be a further interference, and should not be imposed unless the Court is satisfied that it is in the best interests of the children to do so. While the foster parents are the psychological parents, occasional access with the natural mother can maintain and nurture an important relationship, just as occasional visits with grandparents, aunts and uncles, can maintain and nurture important relationships. Access orders for children with separated parents have the same purpose. The difficulties here are no

greater than in many of the latter kind, where the shortcomings of the non-custodial parent ordinarily do not result in the children losing their right to some relationship with that parent.

14 I am not persuaded on the present evidence, during the short term that access has been attempted, that termination of access should be ordered. I agree with the submission of counsel for the mother that monthly access instead of weekly access would be appropriate. In my view, access should further be upon clear terms that provide that there will be a "paper trail" to document any non-compliance with the access order and any child management problems, that can be available if a further review is someday required, and to ensure better communication.

15 By way of illustration, the Child Welfare authorities on the present hearing took exception to the mother on one occasion leaving the Calgary Indian Friendship Centre, without knowledge of the representative of Child Welfare. The Child Welfare authorities insist that the access was to be supervised, a condition supposedly laid down by the Child Welfare authorities. Their representative let the mother take the children out of sight, apparently assuming they would stay in the grounds of the Centre. A few minutes later, they were not there. The mother and the children were found a few blocks away, walking towards the Centre, having taken a walk in a nearby riverbank park. I am not at all satisfied the Child Welfare authorities made it clear to the mother that there was to be continual supervision, or that access was restricted to the property of the Centre. In any event, it was the representative of the Child Welfare authorities, not the mother, who stopped continual supervision.

16 I am further not satisfied that supervision of day access is warranted. If the mother got drunk during access, or failed to return the children on time, or said or did things that resulted in the children acting out, those problems can be taken into account in terms of future access, but at present, the mother and the children should have some uninterrupted and unsupervised visits together.

17 The application to terminate access is dismissed.

18 I am satisfied that unless the Child Welfare authorities and the mother agree in writing to do otherwise, and with that agreement to be in writing and in the possession of both the Child Welfare authorities and the mother, that detailed specified access spelled out by Court order, is in the best interests of the children.

19 To ensure that the mother takes seriously the priority to be given to access, the access should be exercised primarily in a public place such as the Calgary Indian Friendship Centre. The necessity for the mother to go to a public place to exercise access should prevent repetition of the outrageous incident at the mother's home previously mentioned. Other conditions can ensure there is a "paper trail", and matters can be addressed as they occur, not stored unmentioned until there is another court application.

20 Until otherwise ordered, the present terms of access will be terminated and access will be as follows:

(a) Monthly unsupervised day access on the 2nd Saturday of each month, commencing November 13, 1993, from 12:30 p.m. to 3:30 p.m., by the applicant director (which term includes the guardian, delegates or representatives), and the mother meeting at the Calgary Indian Friendship Centre, at the beginning and the end of the access period, within 15 minutes of the appointed time;

(b) On condition that if the mother does not attend within 15 minutes of the beginning of the access period, or is under the influence of alcohol or a drug, that access for that day be cancelled;

(c) on the further condition that access be exercised in appropriate public places, or in private places approved in writing by the director,

(d) on the further condition that the director give reasonable notice if access should not proceed for a bona fide medical, social, or other reason, with the mother receiving equivalent alternative access;

(e) on the further condition that the mother give reasonable notice if access will not be exercised;

(f) on the further condition that the mother and any other person having contact with the children during access abstain from the consumption of alcohol and all other controlled substances except duly prescribed drugs for a reasonable period before and throughout the period of access;

(g) on the further condition that the mother and any other person in contact with the children during access refrain from any words or action that might upset the children or undermine the parenting being provided by the director;

(h) on the further condition that if the mother breaches any of these conditions, or permits someone else to do so, that the director may during the following week request in writing an explanation for such breach; if no reasonable written explanation for such breach is received by the director by the beginning of the following month, the director may give written notice cancelling the next access period;

(i) if misbehaviour of one of the children after access warrants, the director may in writing postpone the next period of access for one of the two children to the third Saturday of the month; if the misbehaviour is gross, the director may in writing cancel the next period of access for that one child; (separate access for each child with the mother is probably a good thing from time to time, regardless of their behaviour);

(j) if access has been cancelled twice in a 6 month period because of the gross misbehaviour of one or both of the children, the mother may request a special period of access at the offices of a chartered psychologist, social worker, or other appropriate professional, independent of the director.

(k) on the further condition that the director and the mother may vary these terms of access by writing signed by both parties, with the signature of the mother witnessed by counsel, a member of the staff of the Calgary Indian Friendship Centre, a leader of the mother's First Nation, or some other responsible person independent of the director.

21 Consideration should be given to any future application herein being made before some other member of the Court.

### **Appendix**

CW10640

CW11194

#### **In the Provincial Court of Alberta Youth Division**

In The Matter Of L.T.S. (T.A.V.) and L.T.S.(T.A.) Children Within The Meaning Of The Child Welfare Act

**Appendix to Reasons for Judgment of the Honourable Judge Fitch*****Child Welfare Act SA 1984 c.C-8.1***

## 1. Interpretation (1) in this Act,...

- (i) "director" means a person designated by the Minister as a director for the purposes of this Act;...

**Matters to be considered**

2 A Court and all persons shall exercise any authority or make any decision relating to a child who is in need of protective services under this Act in the best interests of the child and in doing so shall consider the following as well as any other relevant matter:

- (a) the family is the basic unit of society and its well-being should be supported and preserved;
- (b) the interests of a child should be recognized and protected;
- (c) the family has the right to the least invasion of its privacy and interference with its freedom that is compatible with its own interest, the interest of the individual family members and society;
- (d) a child, if the child is capable of forming an opinion, is entitled to an opportunity to express that opinion on matters affecting the child and the child's opinion should be considered by those making decisions that affect the child;
- (e) the family is responsible for the care and supervision of its children and every child should have an opportunity to be a wanted and valued member of a family, and to that end
  - (i) if protective services are necessary to assist the family in providing for the care of a child, those services should be supplied to the family in so far as it is reasonably practicable to do so in order to support the family unit and to prevent the need to remove the child from the family, and
  - (ii) a child should be removed from the family only when other less intrusive measures are not sufficient to protect the survival, security or development of the child;
- (f) any decision concerning the removal of a child from the child's family should take into account
  - (i) the benefits to the child of maintaining, wherever possible, the child's familial, cultural, social and religious heritage.
  - (ii) the benefits to the child of stability and continuity of care and relationships.
  - (iii) the risks to the child if the child remains with the family, is removed from the family or is returned to the family, and
  - (iv) the merits of allowing the child to remain with the family compared to the merits of removing the child from the family;

(g) if it is not inconsistent with the protection of a child who may be in need of protective services, the child's family should be referred to community resources for services that would support and preserve the family and prevent the need for any other intervention under this Act;

(h) any decision concerning the placement of a child outside the child's family should take into account

(i) the benefits to the child of a placement that respects the child's familial, cultural, social and religious heritage,

(ii) the benefits to the child of stability and continuity of care and relationships,

(iii) the benefits to the child of a placement within or as close as possible to the child's home community,

(iv) the mental, emotional and physical needs of the child and the child's mental, emotional and physical stage of development, and

(v) whether or not the proposed placement is suitable for the child;

(i) the provision of protective services is intended to remedy or alleviate the condition that caused the child to be in need of protective services;

(j) if a child is being provided with care under this Act, the child should be provided with a level of care that is adequate to meet the needs of the child and consistent with community standards and available resources;

(k) if a child is being provided with care under this Act, a plan for the care of a child should be developed that will address the child's need for stability and continuity of care and relationships;

(l) a person who assumes responsibility for the care of a child under this Act should endeavour to make the child aware of the child's familial, cultural, social and religious heritage;

(m) there should be no unreasonable delay in making or implementing a decision affecting a child.

1984 cC-9.1 a2;1988 c15 a3

### **Permanent guardianship order**

32(1) The Court, on application pursuant to this Part by a director, may make a permanent guardianship order appointing the director as guardian of the child if it is satisfied that

(a) the child is in need of protective services or is the subject of a temporary guardianship order,

(b) the survival, security or development of the child cannot be adequately protected if the child remains with or is returned to his guardian, and

(c) it cannot be anticipated that the child could or should be returned to the custody of his guardian within a reasonable time.

(2) The Court on application pursuant to this Part by a guardian of a child, may make a permanent guardianship order appointing a director as guardian of the child if

(a) the guardian wishes to relinquish his guardianship, and

(b) the child consents to the order, if the child is 12 years of age or over.

(2.1) The Court may make an order dispensing with a consent required under subsection (2)(b) if the Court is satisfied that it is in the best interests of the child to do so.

(3) If the Court makes a permanent guardianship order, the director is the sole guardian of the person of the child and the Public Trustee is the sole trustee of the estate of the child.

(4) A director shall, on request, send the Public Trustee a copy of the permanent guardianship order.

(5) If the Court makes a permanent guardianship order it may, on the application of a director, order that financial contributions be made to the maintenance of the child

(a) by a person other than the director who is legally responsible for the maintenance of the child, or

(b) by a trustee from property or an estate held in trust for the child.

(5.1) If an order is made under subsection (5), a director or the person ordered to make financial contributions may apply to the Court for a review of the order.

(6) On making a permanent guardianship order C at any time during its term, the Court, on the application of a director, a former guardian of the child, the child if the child is 12 years of age or older or any other person with whom the child has a significant relationship, may make an order prescribing the access to be provided between the child and the former guardian or that other person.

(6.1) No order under subsection (6) relating to a child who is 12 years of age or over shall be made without the consent of the child.

(6.2) A director may enter into an agreement in the prescribed form with

(a) a former guardian of a child who is the subject of a permanent guardianship order, or

(b) any person who has a significant relationship with a child who is the subject of a permanent guardianship order

providing for visits or other access to be provided between the child and the former guardian or other person.

(6.3) No agreement under subsection (6.2)(b) relating to a child who is 12 years of age or over shall be made without the consent of the child.

(7) The Court shall not make an order under subsection (6) unless it is satisfied that the access provided by the order will not interfere with the adoption of the child.

(8) If an order is made under subsection (6), a director, the child, if the child is 12 years of age or over, or the person to whom access he provided in the order may apply to the Court for a review of the order.

(9) On hearing an application under subsection (8), the Court may continue, vary or terminate the original order.

1984 cC-3.1 s32:1985 c16 s10:1988 c19

## **Court Proceedings**

### ***Right to appeal***

77(1) In any proceedings before the Court under Part 3 or 4,

(a) a foster parent or any other person who has had continuous care and custody of the child for not less than 6 months, and

(b) any other person, with the consent of the Court,

may appear and make representations to the Court.

(2) Notwithstanding subsection (1), the only parties to a proceeding under Part 3 or 4 or an appeal from that proceeding are the child, the child's guardian, the director and, in the case of an application under section 34, the applicant.

(3)...

### ***Child Welfare Act RSA 1980 c.C-8.1***

1. Definitions (1) in this Act, ...

(d) "Director" means the Director of Child Welfare appointed under Part 6;

...

### ***Appointment and duties of Director***

94 (1) In accordance with the *Public Service Act* there may be appointed a Director of Child Welfare who shall administer this Act under the direction of the Minister and with the assistance and advice of the Commission.

.....

## **Interpretation Act RSA 1980 c. 1-7**

### **Appointment of person**

20(1) Words in an enactment authorizing the appointment of a person include the power of

(a) fixing his term of office;

- (b) terminating his appointment or removing or suspending him;
  - (c) reappointing or reinstating him;
  - (d) fixing his remuneration and varying or terminating it;
  - (e) appointing another in his place or to act in his place whether or not the office is vacant;
  - (f) appointing a person as his deputy.
- (2) If a person is appointed by or under the authority of an enactment to an office effective on a specified day, the appointment shall be deemed to be effective immediately on the beginning of that day.
- (3) If the appointment of a person by or under the authority of an enactment is terminated effective on a specified day, the termination shall be deemed to be effective immediately on the beginning of that day.

RSA 1980c1-7 s20

**Powers in name of office**

21(1) Words in an enactment directing or empowering a Minister of the Crown to do something, or otherwise applying to him by his name of office, include

- (a) a Minister designated to act in the office, and
- (b) the deputy of the Minister or a person appointed as acting deputy,

but nothing in this subsection authorizes a deputy or acting deputy to exercise any authority conferred on a Minister to enact a regulation as defined in the Regulations Act.

(2) Words in an enactment directing or empowering a person to do something, or otherwise applying to him by his name of office, include

- (a) a person acting for him or appointed to act in the office, and
- (b) his deputy or a person appointed as his acting deputy.

(3) This section applies whether or not the office of a Minister or other person is vacant.

RSA 1989 d-7 s21:1981 c90 s2

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