

2006 CarswellAlta 1058, 2006 ABPC 217, [2007] A.W.L.D. 107, [2007] W.D.F.L. 129

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W. (M.), Re .

In the Matter of The Child, Youth and Family Enhancement Act, R.S.A. (2000) Chap. C-12

And In the Matter of M.W.

Alberta Provincial Court

N.A. Flatters Prov. J.

Heard: May 19-August 11, 2006

Judgment: August 14, 2006

Docket: Calgary 041170291W101001

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Counsel: T. Larochelle for Director

D. **Castle** for Aunt by agents, R. Scott, K. Medora

Subject: Family; Civil Practice and Procedure

Family law --- Children in need of protection — General principles — Jurisdiction of courts — Jurisdiction to make orders — Access order

Child's aunt successfully appealed decision granting child welfare director's application for permanent guardianship, dismissing aunt's application for private guardianship, and terminating aunt's access to child — Court of Queen's Bench ordered new trial in Provincial Court and restored aunt's access pending trial — Director brought application to terminate aunt's access — Issue arose as to jurisdiction of Provincial Court to hear interlocutory matters dealing with access — Provincial Court had jurisdiction to hear interlocutory matters — Court of Queen's Bench was appellate court in child welfare matters — Once Court of Queen's Bench reached its decision on appeal, its role as appellate court with its scope and function of appellate review was complete — When matter returned to Provincial Court for rehearing, Provincial Court assumed jurisdiction over whole of matter related to rehearing, including newly arisen matters regarding aunt's access.

Statutes considered:

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

Pt. 1, Div. 3 — referred to

s. 40(2) — considered

s. 114 — considered

ss. 114-117 — considered

s. 115 — considered

s. 116 — considered

s. 117(1) — considered

HEARING to determine jurisdiction of Provincial Court over interlocutory matters pending rehearing of child welfare matter.

N.A. Flatters Prov. J.:

Introduction

1 The child welfare Director was successful in obtaining a permanent guardianship order in this Court for the child M.W. The maternal aunt, whose application for private guardianship was dismissed and her 1.5 hour weekly access to M.W. terminated on the granting of the order of permanent guardianship, successfully appealed these matters to the Court of Queen's Bench. A new trial was ordered on the Director's application for permanent guardianship and the dismissal of the aunt's application for private guardianship. Pending the rehearing, the appellate Justice restored the aunt's access to its previous schedule, and the matter returned to this Court for a rehearing. Now a dispute has arisen between the Director and the aunt as to whether this Court has the jurisdiction to hear interlocutory matters, and particularly those relating to the aunt's continuing access pending the rehearing.

2 When the matter returned to this Court on May 19, 2006, I held that this Court assumed jurisdiction over the whole of the matter. I indicated I would issue written reasons. These are those written reasons.

Background

3 On the hearing of the appeal, the presiding appellate Court of Queen's Bench Justice gave written reasons for allowing the appeal. No other relief is referenced apart from an invitation to the parties to meet with the appellate Justice in the event of an absence of agreement as to costs. A meeting has been set with the appellate Justice on September 12, 2006 to discuss at least that matter. As to the aunt's access, counsel advised that the appellate Justice restored her access on the same schedule it had been prior to its termination on the granting of the permanent order, that is, 1.5 hours weekly. The aunt has since appealed the Court of Queen's Bench decision to the Alberta Court of Appeal with an appearance initially set for August 23, 2006. In the meantime, and on the basis of new information from the child's therapist regarding the effect of the aunt's restored visits on the child, a substantial matter has arisen as to the continuation of the aunt's access pending the rehearing scheduled for November, 2006. The Director has applied now in this Court to terminate the aunt's access, which she opposes.

4 The Director's position is that once the matter is returned to this Court for a rehearing, the jurisdiction of the Court is reinstated over all matters, including those interlocutory. Counsel for the Director additionally submits that must be so, at least from the perspective of efficacy, so that the immediacy of arising issues may be addressed without delay.

5 The aunt's position is that on the return of the matter to this Court, this Court only has jurisdiction over the rehearing proper and lacks jurisdiction to hear any matters arising including interim access. Counsel for the aunt submits that for the Director to bring the issues of interim access to this Court, generally or specifically, when it was the appellate Justice who reinstated the access, amounts to a variation application or an appeal of that order when the remedy is a further appeal to the Court of Appeal. It is further submitted the issue of the aunt's access should rather be included for discussion at the meeting with the appellate Justice.

Issue

6 Does this Court have jurisdiction to determine newly arising interlocutory matters, including access, once the Court of Queen's Bench, in its capacity as an appellate court, has returned the matter to this Court for a rehearing, together with an access order?

7 In my opinion the answer to the question is yes.

Discussion

8 In child welfare matters the Court of Queen's Bench is the appellate court under section 114-117 of the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 (*CYFEA*). The time for appeal is set out in section 114, stay procedure in section 115, procedure on appeal in section 116, and the scope of decision in section 117 as follows:

117 (1) On hearing an appeal, the Court of Queen's Bench shall determine the appeal on the material filed with or forwarded to the Court of Queen's Bench and any further evidence that the Court of Queen's Bench may require or permit to be given.

(2) The Court of Queen's Bench may

(a) confirm the order or refusal,

(b) revoke or vary the order made, or

(c) make any order the Court could have made in the hearing before it.

9 In this case, as noted, the appellate Justice ordered a new trial and as part of completing the appeal, varied the termination of the aunt's access in the permanent guardianship access order to restore her previous access schedule of 1.5 hours weekly pending the rehearing (the status order). The appellate Justice did not terminate the order of permanent guardianship. Accordingly, it remains in effect until terminated by a court or a private guardianship or adoption order is made (amongst other provisions of section 40(2), *CYFEA*).

10 Having reached its decision on the appeal, the role of the Court of Queen's Bench, as an appellate court with its scope and function that of appellate review, was complete. It is an axiom that once an appellate court has ruled on an appeal then its function ends. In this respect, the Court of Queen's Bench, as an appeal court, is in no different position than any other appeal court.

11 Applying that reasoning to this case, once the appeal was allowed and the status order made, then the appeal, and the function of the appellate Justice, was completed (apart from the appellate Justice making a final de-

termination as to costs). In this respect then, the Court of Queen's Bench, as a appellate court, does not continue to hear interim applications regarding its status order. Accordingly, when the matter was returned to this Court for a rehearing, then this Court, as a court of exclusive jurisdiction under Division 3 of the *CYFEA* for making supervision, temporary or permanent guardianship orders (including incidentally related matters such as access), again assumed jurisdiction over the whole of the matter related to the rehearing. This includes newly arising interim matters regarding the aunt's access, or any other matter, pending the rehearing.

12 In the result, on July 14, 2006 respecting an emergent access issue, I made an interim access order allowing M.W.'s holiday travel with the foster family for a two-week period with the aunt's missed access to be made up on a schedule to be agreed upon between the parties. I subsequently set an access hearing for August 25, 2006 on the Director's application to terminate the aunt's access pending the rehearing.

Order accordingly.

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