

2007 CarswellAlta 213, 2007 ABPC 44, [2007] A.W.L.D. 2117, [2007] W.D.F.L. 2358

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M. (F.), Re

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

And in the Matter of the Family Law Act, Statutes of Alberta, 2003 Chap. F-4.5

And F.M. born 2004, and D.M. born 2005

Alberta Provincial Court

S.E. Lipton Prov. J.

Heard: January 15-17, 2007; February 6-7, 2007

Judgment: February 7, 2007

Docket: 060902624W101001, 060902624W102001, 060908233F101001. 060908233F102001.  
060703907F101001. 060703907F102001. 060948072F101001. 060948072F102001. 060382587F101001

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Counsel: Ms R. Muto for Director under the Child, Youth, and Family Enhancement Act

Ms K. Checkland for Mother, S.M.

Ms E. **Logie** for Children, F.M. and D.M.

F. Gordon for L.C., Father of D.M.

S.R.--Father of F.M. and a guardianship applicant for the child F.M.

R. Joshi for K.M., Maternal Grandmother and a guardianship applicant for the Children

Ms E.H.--D.M.'s Paternal Grandmother and a guardianship applicant for the Children

W.R., Ms P.R.--F.M.'s Paternal Grandparents and guardianship applicants for the child F.M.

Subject: Family

Family law --- Children in need of protection — Application for permanent custody — Relation to third party's application for custody.

**Cases considered by S.E. Lipton Prov. J.:**

*Alberta (Director of Child & Family Services) v. S. (L.)* (2006), (sub nom. *S. (L.) v. Alberta (Director of Child & Family Services)*) 384 W.A.C. 270, (sub nom. *S. (L.) v. Alberta (Director of Child & Family Services)*) 397 A.R. 270, 2006 ABCA 319, 2006 CarswellAlta 1423, 68 Alta. L.R. (4th) 110, 33 R.F.L. (6th) 1 (Alta. C.A.) — considered

*W. (K.V.) v. Alberta (Director of Child Welfare)* (2006), 2006 CarswellAlta 1773, 2006 ABCA 404, [2007] 3 W.W.R. 626 (Alta. C.A.) — not followed

#### **Statutes considered:**

*Child Welfare Act*, R.S.A. 2000, c. C-12

Generally — referred to

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

Generally — referred to

s. 33 — referred to

s. 52(1) — referred to

s. 52(1.1) [en. 2003, c. 16, s. 55] — referred to

s. 52(1.2) [en. 2003, c. 16, s. 55] — referred to

s. 52(2) — referred to

*Family Law Act*, S.A. 2003, c. F-4.5

Generally — referred to

s. 23 — considered

s. 23(1) — referred to

s. 23(3) — referred to

s. 23(5) — referred to

s. 23(6) — referred to

#### ***S.E. Lipton Prov. J.:***

1 This is a hearing as to the merits of granting the Director of Child Welfare's (the "Director") request for a permanent guardianship order ("PGO") on each of F.M. and D.M. (together, the "Children"). The hearing commenced January 15<sup>th</sup>, 2007. It was continued on the 16<sup>th</sup> and 17<sup>th</sup> of January and on the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> of February, 2007.

2 The hearing is still ongoing.

3 On February 7<sup>th</sup>, 2007, I gave an oral decision in reference to an interlocutory matter which arose in the present case. The following written reasons are now issued in response to counsel's request. I have added supplementary reasons for my decision as well.

4 This decision deals with the status of guardianship applications filed pursuant to section 23 of the *Family Law Act*, Statutes of Alberta, 2003 chap. F-4.5 (the "*FLA*").

5 At the start of this hearing, the guardianship applicants were granted permission to ask questions but not granted standing pending a determination of the status of their guardianship applications. It has been difficult to proceed with all of the participants. Having received argument as to status and having reviewed the decision of the Alberta Court of Appeal in *W. (K.V.) v. Alberta (Director of Child Welfare)*, 2006 ABCA 404 (Alta. C.A.) ("*KVW*"), I am now in a position to issue a ruling.

6 A brief chronological history is necessary to clearly set out the issues.

7 The Director apprehended the Children on March 24<sup>th</sup>, 2006 pursuant to the provisions of *The Child, Youth and Family Enhancement Act*, R.S.A. (2000) Chap. C-12 (the "*CYFEA*"). Interim custody was granted to the Director on April 3<sup>rd</sup>, 2006 and initial custody was granted to the Director on May 4<sup>th</sup>, 2006.

8 S.M. is the mother (the "Mother") of the Children. S.R. is the father of F.M. ("Father of F.M."). L.C. is the father of D.M. ("Father of D.M."). The Father of F.M. is not a guardian at law. It is not clear whether the Father of D.M. is a guardian at law. The Father of F.M. has previously indicated that he will consent to a PGO on F.M. The Father of D.M. has indicated that he is prepared to consent to a PGO on D.M.

9 On the dates indicated, the following individuals filed guardianship applications pursuant to the *FLA*:

- a) the Father of F.M., for F.M. only on March 31<sup>st</sup>, 2006;
- b) E.H., the paternal grandmother of D.M. ("D.M.'s Paternal Grandmother"), for the Children on June 8<sup>th</sup>, 2006;
- c) K.M., the maternal grandmother ("Maternal Grandmother"), for the Children on July 27<sup>th</sup>, 2006; and
- d) W.R. and P.R., the paternal grandparents of F.M. ("F.M.'s Paternal Grandparents"), for F.M. only on August 3<sup>rd</sup>, 2006.

10 It is clear that the Director had custody of the Children prior to any of the *FLA* guardianship applications being filed.

11 Section 23 of the *FLA* states:

- (1) The court may, on application by a person who
  - (a) is an adult and has had the care and control of a child for a period of more than 6 months, or
  - (b) is a parent other than a guardian of a child,

make an order appointing the person as a guardian of the child.

(3) The court on hearing an application for a guardianship order shall consider, and may require the applicant to provide the court with a report prepared by a qualified person respecting,

(a) the suitability of the proposed guardian as a guardian,

(b) the ability and willingness of the proposed guardian to exercise the powers, responsibilities and entitlements of guardianship in respect of the child, and

(c) whether it is in the best interests of the child that the applicant be appointed as a guardian of the child.

(5) If it is satisfied that there are good and sufficient reasons for doing so, the court may waive the requirement

(a) that the child or proposed guardian reside in Alberta, or

(b) in the case of an application under subsection (1)(a), that the applicant has had the care and control of the child for a period of more than 6 months.

(6) Subject to the regulations, the court may at any time on its own motion make a guardianship order appointing a guardian of a child, other than a director under the Child, Youth, and Family Enhancement Act, to act jointly with another guardian of the child.

12 Section 52 of the *CYFEA* (the "Amendment") became effective October 1<sup>st</sup>, 2005. It states:

(1) Any adult who for a period of at least one month has had the continuous care of a child who is in the custody of a director or is the subject of a temporary guardianship order or a permanent guardianship agreement or order may apply to the Court in the prescribed form for a private guardianship order in respect of the child.

(1.1) An application under subsection (1) must include a report in the prescribed form prepared by a qualified person respecting

(a) the suitability of the applicant as a guardian,

(b) the ability and willingness of the applicant to assume the responsibility of a guardian with respect to the child, and

(c) whether it is in the best interests of the child that the applicant be appointed as a guardian of the child.

(1.2) If the child is the subject of a permanent guardianship agreement or order, the report required under subsection (1.1) must be prepared by a director.

(2) A director may, on behalf of an applicant, make an application under subsection (1) if

(a) the applicant consents in writing, and

(b) the director is satisfied that it is in the best interests of the child for the child to be placed under the

guardianship of the applicant.

13 Prior to the Amendment, any adult who had continuous care of a child for a period of more than 6 months could apply for guardianship; however, this requirement could be waived by the Court.

14 In the present case, all of the guardianship applications post-date the Amendment, and could only have been filed pursuant to section 23 of the *FLA* and not pursuant to the Amendment because there is no statutory provision in the Amendment permitting the Court to waive the one month of continuous care requirement.

15 In *W. (K.V.)*, the Court of Appeal dealt with the following fact situation.

16 A baby girl was apprehended at birth by the Director. This apprehension was followed by a PGO application. Both the apprehension and PGO application were filed pursuant to *The Child Welfare Act*, R.S.A. 2000, c. C-12 (the "CWA"). The girl's aunt filed for private guardianship pursuant to the *CYFEA* shortly after the Director filed its PGO application.

17 The Director had undertaken to assess the aunt as a kinship placement for the baby girl. Notwithstanding this decision, the Director placed the girl in a foster-to-adopt home that had previously adopted the girl's biological brother. This placement occurred five days after the aunt had filed her private guardianship application.

18 The aunt was eventually approved as a kinship placement after a considerable delay due to the Director changing its mind as to the kind of assessment it sought to do on the aunt. Due to attachment concerns with the girl, the question of where she should be placed was left to the Court. The Court was asked to choose between the PGO application and the aunt's private guardianship application.

19 In paragraph 19 of *W. (K.V.)*, Fraser C.J.A makes it clear that the private guardianship application of the aunt pre-dated the Amendment. That is not the situation here.

20 It is also clear from *W. (K.V.)* that the Court of Appeal recognized that the mother had made proper and satisfactory arrangements for the custody, care, and supervision of the baby girl (see paragraph 23).

21 Following apprehension of the Children and the decision by the Director to seek a PGO, the assigned caseworker in this hearing, Ms Harkin, testified that she approached extended family members at a meeting in July of 2006 about placement of the Children in light of the Director's PGO applications. Kinship care assessments were discussed at this meeting.

22 I note here that the Director offered to pay for the assessments on the guardianship applicants despite having no legal obligation to do so pursuant to the *FLA*. These assessments have not yet been completed.

23 The Maternal Grandmother and D.M.'s Paternal Grandmother are the only two applicants seeking guardianship of the Children. The other two guardianship applications, if granted, would involve splitting the Children.

24 When the Maternal Grandmother initially filed her guardianship application, she was advised by the Director that her application would not be supported by the Director as she was then living with an alcoholic person. This Court would later hear evidence that it was not until December 12th, 2006 that the Maternal Grandmother's application was reconsidered by the Director because of her separation from this individual.

25 After filing her guardianship application, D.M.'s Paternal Grandmother advised the Director to put her application on hold as she was then living in unsuitable housing. It was not until November 23<sup>rd</sup>, 2006 that D.M.'s Paternal Grandmother advised the Director she had located suitable housing and wanted to take the Children.

26 In one of the hearing dates, counsel for the Mother advised me that the Mother 'might' reconsider her opposition to the Director's application for a PGO if the Maternal Grandmother's application under the *FLA* were to be given favourable consideration by the Director.

27 The Father of D.M. supports the guardianship application of D.M.'s Paternal Grandmother under the *FLA*.

28 I have not yet heard any evidence upon which I can conclude that the guardianship application of F.M.'s Paternal Grandparents has been approved of by either the Mother or the Father of F.M.

29 It has long been the practice of the Family and Youth Division to suspend all family related orders for so long as the Director has care of the children of a family. This inherently makes sense as the *CYFEA* is a child protection statute.

30 In *Alberta (Director of Child & Family Services) v. S. (L.)*, 2006 ABCA 319 (Alta. C.A.), the Alberta Court of Appeal held that the appeal sections of the *CYFEA* create a complete code. In my opinion, this reasoning ought to extend to the entire *CYFEA*. That is to say, it is my opinion that the *CYFEA* is a complete code with respect to children who are in need of protection.

31 I do not see how this Court can ignore custody/access (now parenting/contact) orders while at the same time being compelled to address guardianship applications which have been filed subsequent to the Children going into the care of the Director, long after the Director has met the threshold test of "need for protective services" as set out in paragraph 24 of *W. (K.V.)* supra.

32 From the moment the Director is granted custody of the Children, the reasoning in *W. (K.V.)* would not be applicable. That is to say, the Director has met the test of "need for protective services." Only guardianship applications which meet the requirements set out in the Amendment under the *CYFEA* may be considered by this Court in lieu of a PGO or a temporary guardianship order.

33 The restriction on use of this approach may be one of time in care under section 33 of the *CYFEA*. This is a live issue. As the facts of this case have demonstrated to date, the Director's caseworker approached family members approximately six months before this hearing began. However, and due to no fault on the part of the Director, the two applications which provide for keeping the Children together were delayed either at the request of, or due to noncompliance by the guardianship applicants.

34 It is not uncommon for family members to step forward and offer to take responsibility for children, very late into the proceedings. Two examples immediately come to mind. Firstly, the parents may come to the realization during the hearing that they will likely lose their children and then decide to put forth the name of a family member for consideration. Secondly, many parents simply refuse to cooperate with the caseworker and provide the names of extended family members as possible alternate care givers. The Director is not entitled to seek out such family members without parental consent.

35 It can thus be argued that the Amendment, coupled with a suspension of the *FLA* guardianship applications filed after the Director has become involved, was specifically and intentionally designed to prevent a plethora of applications flooding this Court, the effect of which would be to delay proceedings and possibly challenge the ability of the Director and this Court to comply with the strict time constraints contained in section 33 of the *CYFEA*.

36 *W. (K.V.)* is clear authority for the proposition that where a suitable guardian selected by a parent steps forward at the outset, pre Amendment, the Director ought to withdraw. It is not at that point a competition between the Director and an applicant for guardianship. Such a position intuitively makes sense. The *CWA* was amended in 1985 to include private guardianship provisions as an alternative to a PGO.

37 In my opinion, however, the reasoning in *W. (K.V.)* cannot apply to this case. We now have two pieces of legislation to deal with, the *FLA* and the *CYFEA*, unlike the situation in *W. (K.V.)*.

38 I have therefore concluded that the *FLA* guardianship applications must be suspended for so long as the Director has custody of the Children. As such, this hearing must proceed on the merits of the PGO applications only.

39 There is a possibility that the kinship assessments may be completed prior to this hearing being concluded. In the event such occurs, the Court may be provided with sufficient evidence to allow a determination to be made as to which claimant should become the Children's guardians as an alternative to the PGO applications. The Director would then be in a position to withdraw its PGO applications and thereafter support one of the *FLA* guardianship applications. Alternatively, the Director could seek the Court's approval of a guardianship applicant pursuant to the Amendment to the *CYFEA* after ensuring that the one month of continuous care requirement has been satisfied. On the facts of this case, the time constraints imposed by section 33 of the *CYFEA* would not cause a difficulty, attachment issues notwithstanding.

40 The issues raised by this ruling are, however, very real. There are a number of questions that still require clarification.

41 Firstly, if a parent does not consent to the *FLA* guardianship application by a family member, does this make a difference?

42 Secondly, if an *FLA* guardianship application is filed followed shortly thereafter by an apprehension by the Director, should the *FLA* application be considered ahead of the Director's application on the basis of the *W. (K.V.)* decision, or should it too be suspended once the Director has custody?

43 Thirdly, if my decision above is in error and this Court must consider the *FLA* applications, with or without parental consent, how late may applications be filed and considered by the Court having regard to the time constraints imposed by section 33 of the *CYFEA* and the best interests of the children?

44 Fourthly, to what extent do the principles in *W. (K.V.)* still apply given the facts of this case?

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