

2008 CarswellAlta 510, 2008 ABPC 101, [2008] A.W.L.D. 3956, [2008] W.D.F.L. 4666

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M. (S.) v. Alberta (Director, Child, Youth & Family Enhancement Act)

S.M. (Applicant) and Alberta (Child, Youth and Family Enhancement Act, Director) and C.H., S.M.
(Respondents)

Alberta Provincial Court

S.E. Lipton Prov. J.

Heard: March 26-27, 2008

Judgment: March 27, 2008

Docket: Calgary 080307366W1, 080307382W1

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Counsel: Ms S. Maxwell for Maternal Grandmother, S.M.

R. Joshi for Mother, C.H.

D. Hamilton for Father, S.M.

Ms E. **Logie** for Child, D.H.

K. Hoag for Director under the Child, Youth and Family Enhancement Act

Subject: Family

Family law --- Children in need of protection — Application for permanent custody — Factors to be considered — Particular factors — Miscellaneous factors

Child was born in May 2007 and was apprehended and under care of Director under Child, Youth and Family Enhancement Act (CYFEA) — Since permanent guardianship application did not conclude within six months as required by CYFEA, maternal grandmother was able to bring application for guardianship under Family Law Act — Child's mother had serious drug dependency problem — Mother's older child had provisional diagnosis of fetal alcohol spectrum disorder and attention deficient hyperactive disorder, had acted out sexually at school, and was under guardianship of maternal grandmother — Supervision order was in place on maternal grandmother when older child was first placed in her care in 2005, pursuant to which maternal grandmother was not to permit mother any access to older child — Evidence showed that maternal grandmother had permitted mother to temporarily stay in her home where older child resided shortly after expiration of supervision order, and that mother and father had exposed older child to pornography while child had been left in care of maternal grandmother's other daughter — Maternal grandmother brought application for guardianship of child — Application

dismissed — Evidence suggested that maternal grandmother was naïve as to how challenging her life was to become as older child grows older — Placing another child in grandmother's care could overwhelm her parenting abilities to detriment of both children, expose child to risk of sexual abuse or harm by older child, and require that grandmother have constant and ongoing external support — Maternal grandmother was culpable in that she allowed older child to be truant at school, allowed older child to be exposed to mother and her former partner who was evicted for cocaine problems, and because she allowed older child to be exposed to pornography — Maternal grandmother was not suitable guardian for child, and it was not in child's best interests that she be appointed guardian.

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

M. (F.), Re (2007), 2007 ABPC 44, 2007 CarswellAlta 213 (Alta. Prov. Ct.) — referred to

M. (F.), Re (2008), 2008 ABQB 94, 2008 CarswellAlta 457 (Alta. Q.B.) — referred to

W. (K.V.) v. Alberta (Director of Child Welfare) (2006), 2006 CarswellAlta 1773, 2006 ABCA 404, [2007] 3 W.W.R. 626, (sub nom. *K.W. v. Director of Child Welfare (Alta.)*) 391 W.A.C. 175, (sub nom. *K.W. v. Director of Child Welfare (Alta.)*) 401 A.R. 175, 69 Alta. L.R. (4th) 215 (Alta. C.A.) — considered

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(1)(a) — referred to

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

Generally — referred to

APPLICATION by maternal grandmother for guardianship of child.

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

1 This is my ruling on the guardianship application filed by S. M. (the "Maternal Grandmother") pursuant to the *Family Law Act, 2003*, Chapter F-4.5 (the "*FLA*") on the child D.H. (the "Child" or "DH") born May, 2007.

2 At the outset, I wish to state that if a copy of the transcript of this decision is ordered, or if this decision is published on the Judicial Internet, I reserve the right to edit this transcript prior to publication in order to ensure privacy.

3 The Child had, *de jure*, been in the care of the Director under the *Child, Youth and Family Enhancement Act* (the "Director") prior to the filing of the guardianship application by the Maternal Grandmother. As such, and in accordance with Justice J.D.B. McDonald's ruling in the *M. (F.), Re*, 2008 ABQB 94 (Alta. Q.B.), which upheld

my ruling at trial reported at [2007 ABPC 44](#) (Alta. Prov. Ct.), I would have been unable to grant the Maternal Grandmother's guardianship application under the *FLA*.

4 However, it was brought to my attention by counsel for the Maternal Grandmother at an earlier docket appearance, and not contested by counsel for the Director, that the permanent guardianship application on the Child did not proceed and conclude within six months as required by section 33(1)(a) of the *Child Youth and Family Enhancement Act*, R.S.A. 2000 Chapter C-12 (the "*CYFEA*"). I ruled that because of such a failure, although the Director had *de facto* care of the Child, the Director did not have the legal right to keep the Child in his care.

5 The Director then re-apprehended the Child under the *CYFEA* but after the filing of the Maternal Grandmother's *FLA* guardianship application. This sequence of events, in my opinion, brought the decision of our Court of Appeal in *W. (K.V.) v. Alberta (Director of Child Welfare)*, [2006 ABCA 404](#) (Alta. C.A.) into consideration. Per paragraph 37 of this decision, I ruled at the docket appearance that I had to consider the merits of the Maternal Grandmother's guardianship application first in order to determine whether DH was in need of protective services.

6 Thus, my need for a ruling on the guardianship application today.

7 Finally, I also issued an interim ruling, prior to hearing any evidence, on the Maternal Grandmother's objection to the Director being allowed to present evidence at this hearing or, indeed, cross-examine.

8 Noteworthy is the fact that under the *Child Welfare Act* R.S.A. 2000 Chapter C-12 (the "*CWA*"), prior to it being amended to include, *inter alia*, a name change to its current name, the *CYFEA*, there was a provision allowing the Director to intervene when individuals applied for guardianship under the *CWA*. The *FLA* did not exist at that time and guardianship could only be applied for under the *CWA*. The right of the Director to intervene disappeared in the amendments.

9 Notwithstanding the amendments, I granted the Director intervener status in this *FLA* guardianship hearing. In essence, I ruled that given the Director's prior involvement with the family, I could not ignore the information they could present to the Court which went to the issue of whether the Child might be exposed to risk of harm or neglect if placed into the care of the Maternal Grandmother.

10 The first witness for the Maternal Grandmother was Mr. Peter Choate. He is a well known expert witness in the Family and Youth Courts, typically testifying on behalf of the Director. He was recognized as an expert in clinical social work with a sub-specialty in assessments dealing with parenting, domestic violence and addictions.

11 Mr. Choate believed the Child could be safely placed into the hands of the Maternal Grandmother, who had previously been granted guardianship of DH's older sibling, D.H. (the "Sister"), born June, 2000.

12 The Sister, as this Court would hear, has a provisional diagnosis of fetal alcohol spectrum disorder ("FASD"), together with attention deficient hyperactive disorder. While some additional testing is still required, it is believed, at this point in time, that the neurological effects are moderate in nature.

13 The issue in this hearing is whether placing the Child into the care of the Maternal Grandmother would overwhelm her to the point that not only would the Child be at risk but the Sister as well. The Director took the

position that the Maternal Grandmother is not a suitable guardian for the Child and it is not in the Child's best interests that the Maternal Grandmother be made a guardian of the Child.

14 The Maternal Grandmother is supported in her application by the father, S.M. (the "Father"), and the mother, C.H. (the "Mother") (who was not in attendance for this decision but was for this hearing) and is represented by counsel, as well as supported by counsel for the Child.

15 Mr. Choate supported placement of the Child with the Maternal Grandmother. He was of the opinion that the Maternal Grandmother, while not an optimal parent, could provide "good enough" parenting in order to adequately meet the physical, emotional and social developmental needs of the Child and provide a safe and stimulating environment. In formulating his conclusion, Mr. Choate said that he has never believed that the Maternal Grandmother has lied to him.

16 This Court later heard from one of the Director's witnesses that in fact, the Maternal Grandmother did temporarily allow the Mother to live with the Sister and her. The Mother suffers from a severe drug dependency problem. The Maternal Grandmother had told Mr. Choate that she would never allow this to happen which was not true. Mr. Choate testified that either the Mother or Father showing up to see the Sister unannounced would be a problem.

17 This Court also heard that the Sister's sexual acting out at school was, according to the Maternal Grandmother's evidence, and as told by her to Mr. Choate, due to exposure to pornography while the Sister was in the care of the Mother and Father. As this Court would later hear from Dr. Carol Brewis, one of the Director's witnesses, this pornography included exposure to scenes involving a menage a trois, oral sex, lesbian sex and forced sex which included violent behaviour. Furthermore, this exposure in fact happened while the Sister was being supervised by the Maternal Grandmother's older daughter, L.H.("LH"). LH, who is unable to work due to a car accident, is the individual who, at times, was charged with the responsibility of babysitting the Sister.

18 Mr. Choate said that he met LH and believed that she was cognitively capable of watching the Sister. He was not, however, aware of the fact that LH had allowed the Sister to view pornography while in her care or of the fact that the Maternal Grandmother had not been truthful with him on this issue as well.

19 The Director had a Supervision Order in place on the Maternal Grandmother when the Sister was first placed into her care on August 29th, 2005. This Order expired October 3, 2006. Pursuant to this Supervision Order, the Maternal Grandmother was not to allow the Mother any access to the Sister, and yet, shortly after this Order expired, this Court heard evidence that the Maternal Grandmother allowed the Mother to temporarily stay in her home where the Sister then resided.

20 Mr. Choate acknowledged that, and in agreement with the Director's experts, the Maternal Grandmother is likely too optimistic regarding the Sister's potential and that the Sister's behaviour will become more complicated as she grows older. Nevertheless, Mr. Choate said the Maternal Grandmother facilitated the FASD diagnosis and has worked with the Sister's school. As a good enough parent, Mr. Choate said that refusing to grant the guardianship application opens up a Pandora's Box with respect to the morality of not allowing parents to keep a normal child if they already have a challenged child in their care. And yet, Mr. Choate acknowledged that the Child has been exposed, at least once, prenatally, to cocaine by the Mother and that the Child's prognosis would not be known for at least four to five more years.

21 Mr. Choate believed the Maternal Grandmother was on top of following through with school issues on the

Sister, and yet this Court heard evidence that the Sister was truant from school on a number of occasions, which was allowed by the Maternal Grandmother until she was told to ensure the Sister went to school. Mr. Choate said that Dr. Brewis, who testified on behalf of the Director, had been able to successfully challenge the Maternal Grandmother and had gotten her to change her parenting style.

22 Written testing done on the Maternal Grandmother by Mr. Choate did not disclose any issues that caused him concern, other than the Maternal Grandmother's tendency to minimize some issues. Mr. Choate opined that as the Sister and DH were siblings, the literature suggests that they ought to be kept together, and this is the preferable option. He said that the Maternal Grandmother was an adequate parent to the Sister and that any challenges posed by the Sister would not overwhelm her capacity to parent the Child.

23 I contrast Mr. Choate's opinion to that of the Director's two expert witnesses, Dr. Carol Brewis, who was recognized as an expert in clinical child psychology, and to that of Dr. John Pearce, who was qualified as an expert in child clinical psychology/child abuse.

24 Dr. Brewis, who works in child abuse services at the Alberta Children's Hospital, assessed the Sister at the request of the Director. At the time of her report in June, 2006, the Mother was not to have any contact with the Sister.

25 After her assessment of the Sister, Dr. Brewis continued to provide assistance to the Maternal Grandmother and the Sister. Dr. Brewis said the Sister had told her that she knows her Mother is dangerous, yet such contact occurred. The Maternal Grandmother said such contact was initiated by the Mother unannounced. The evidence indicates some contact, including the Mother temporarily staying with the Sister and Maternal Grandmother, was, in fact, planned.

26 Furthermore, the Maternal Grandmother's former common law partner, Mr. C., who was evicted from her home due to his own cocaine use, continues to have limited contact with the Maternal Grandmother. The Sister told Dr. Brewis that she is fearful of Mr. C. Dr. Brewis said that while the Maternal Grandmother has responded well to parenting suggestions, *while coached by Dr. Brewis (emphasis added)*, she nevertheless has concerns with respect to the Maternal Grandmother's judgment. She said that the Maternal Grandmother has a former partner with a drug problem, one daughter, the Mother, with a severe drug addiction, another daughter, LH, who is unable to work and the Sister with FASD all in her life at the present time.

27 Dr. Brewis said that the Maternal Grandmother only kept 36 of her 60 appointments with her and there were a number of cancellations and no shows.

28 Dr. Brewis said that although the Sister was feeling safe with the Maternal Grandmother in December, 2007, and regularly attending school since the start of the school year in September, 2007, she was of the opinion that the Maternal Grandmother does not fully comprehend the Sister's FASD issues. That is to say, these are lifetime issues that will increase as the Sister gets older.

29 Dr. Brewis was of the opinion that placing the Child into the Maternal Grandmother's care would result in the Maternal Grandmother juggling issues which would give rise to concerns for the Maternal Grandmother in meeting the needs of both the Sister and the Child.

30 While acknowledging that the current risk of sexual issues is low in the Sister, Dr. Brewis stressed that the Sister would need constant monitoring. It was the Sister that told Dr. Brewis about the exposure to pornography

while being cared for by LH. Dr. Brewis was of the opinion that the Sister knew far too much about sex for a child of her age.

31 While having trained the Maternal Grandmother to deal with the Sister's problems, Dr. Brewis was of the opinion that the Maternal Grandmother sometimes didn't understand.

32 Dr. Brewis also said that she believed the Maternal Grandmother was hiding stuff from her and believed that the Sister was told by the Maternal Grandmother that if she disclosed anything to Dr. Brewis, she might be taken away by the Director. As such, Dr. Brewis was of the view that she could not always trust the Maternal Grandmother.

33 While Dr. Pearce was ethically prohibited from opining on Mr. Choate's assessment, because his involvement was limited to reviewing Mr. Choate's reports, he was still in a position to raise queries. One of his queries was whether the Maternal Grandmother has a full comprehension of the Sister's FASD diagnosis and its implications.

34 Dr. Pearce queried the sexual acting out by the Sister and whether the Maternal Grandmother understood the implications.

35 Dr. Pearce queried whether the Maternal Grandmother understood the effect on the Sister of continued exposure to the Maternal Grandmother's former common law partner, Mr. C.

36 Dr. Pearce queried the ability of the Maternal Grandmother to follow through with recommendations.

37 Dr. Pearce queried the ability of the Maternal Grandmother to care for the Child if placed with her and any effects on the Sister if that were to occur.

38 Dr. Pearce queried LH's ability to help care for the Sister and said that this was, in fact, a large red flag, given that she had permitted the Sister to view pornography while in her charge.

39 Dr. Pearce opined that just because a parent can look after a high needs child, one cannot necessarily conclude that such a parent could also look after another child who was considered to be normal.

40 As for the Maternal Grandmother; yes, she has her own home. She has maintained employment for the past eight years with the same employer. She has done work with the Sister's school and with Dr. Brewis. But she is culpable in that she allowed the Sister to be truant in the '06-'07 school term. She is culpable because she allowed the Sister to be exposed to the Mother and Mr. C., knowing full well that a Supervision Order, which had expired just before the contact occurred, prohibited contact with the Mother. Neither the Mother's nor Mr. C.'s life at that time would have warranted such exposure then beginning again. And finally, she is culpable because she allowed the Sister to be exposed to pornography.

41 The Maternal Grandmother denied that the Sister had ever lived with the Mother which is, in fact, not true.

42 The Maternal Grandmother missed many appointments with Dr. Brewis. She functioned, but only when there were strong supports in place to "coach her" into doing what needed to be done, in order to stop the sexual exposure to pornography, to make the Sister go to school and not to allow contact to either the Mother or Mr. C.

43 The evidence presented does, in my opinion, overwhelmingly suggest that the Maternal Grandmother is still

rather naive as to how challenging her life will become as the Sister grows older. The evidence also suggested that the Maternal Grandmother functions best as a parent when there are outside figures or authorities that continually prompt her as to what to do.

44 When coupled with the Maternal Grandmother's lack of frankness with Mr. Choate in those areas aforementioned, it is my opinion that placing the Child into her care would, firstly, overwhelm her parenting abilities to the detriment of both children; secondly, expose the Child to risk of sexual abuse or harm by the Sister; and thirdly, require that the Maternal Grandmother have constant and ongoing external support, with such support having the ability to impose consequences if she fails to follow through with advice as directed.

45 I do not find the Maternal Grandmother to be a suitable guardian to the Child, nor do I believe that it is in the Child's best interest to appoint her as the Child's guardian. I therefore dismiss her application for guardianship under the *FLA* and ask the Director to now present their case for a permanent guardianship order under the *CYFEA*.

46 I would be remiss if I didn't also state on the record that I believe involvement with the Maternal Grandmother and the Sister in the form of an enhancement agreement by the Director is warranted at this time, based on the evidence I have heard today.

Application dismissed.

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