2001 CarswellAlta 1771, 2001 ABQB 869, 25 R.F.L. (5th) 380

R. (W.) v. Alberta (Director of Child Welfare)

In the Matter of the Child Welfare Act, S.A. 1984, C-8.1; And In the Matter of A.S.R.; D.A.R.; and H.M.R.; W.R. and R.R. (Appellants) and The Director of Child Welfare (Respondent)

Alberta Court of Queen's Bench

Chrumka J.

Heard: September 13, 2001
Judgment: October 15, 2001
Docket: Calgary 9901-07508

Counsel: *Diann P. **Castle***, for Appellants

Todd LaRochelle, for Director of Child Welfare

Subject: Family

Family law --- Children in need of protection — General principles — Factors determining whether in need of protection — General principles

Parents' three children were apprehended pursuant to Child Welfare Act — Director of Child Welfare applied for permanent guardianship of children — Applications judge found that oldest child's problems were combination of environmental and developmental factors — Applications judge concluded that although it could not be established how oldest child's problems occurred, parents' inability to provide structure, safety, guidance, supervision, boundaries and stimulating environment was indication that oldest child was in need of protective services — Applications judge held that as middle child was with oldest child when issues affecting oldest child were ongoing, middle child was in need of protective services — Applications judge held that risks to youngest child were same as to other children and prior history of family should have been sufficient to provide legal basis upon which to apprehend youngest child — Applications judge granted application for permanent guardianship order — Parents appealed — Appeal dismissed — Applications judge was mindful of overriding principle that welfare and best interest of child were paramount — Apprehension of youngest child was not premature — Applications judge was correct in holding that Director did not need to wait for provable damage before apprehending child — In circumstances, granting of permanent guardianship order was properly and correctly made — Child Welfare Act, S.A. 1984, c. C-8.1.

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

Parents' three children were apprehended pursuant to Child Welfare Act — Director of Child Welfare applied for permanent guardianship of children — Applications judge found that children were in need of protective services — Applications judge found that evidence suggested mother had potential to parent children as single parent with proper in-home support but that permanent separation between parents would never occur — Applications judge found that even if father was living in separate accommodation, he would not stay out of mother and children's lives and restraining order would not be obeyed by parents — Applications judge held that children should not be returned to parents within reasonable time — Applications judge granted application for permanent guardianship order — Parents appealed on basis that mother's rights under s. 7 of Charter was violated by permanent guardianship order while applications judge recognized that mother could provide adequate care — Appeal dismissed — Alleged violation of s. 7 of Charter was never argued before applications judge — Applications judge had in mind rights of mother, father and children as well as best interests of children — No violation of s. 7 of Charter — Child Welfare Act, S.A. 1984, c. C-8.1 — Canadian Charter of Rights and Freedoms, s. 7.

Family law --- Children in need of protection — Application for permanent custody — Factors to be considered — Particular factors — Physical or mental illness of parent

Parents' three children were apprehended pursuant to Child Welfare Act — Director of Child Welfare applied for permanent guardianship of children — Applications judge found that children were in need of protective services — Applications judge noted witness's opinion that father's disorder did not account for father's other behaviours even if controlled by medication and that witness detailed risk to children if father was involved with them — Applications judge observed that father admitted not taking his medication as prescribed — Applications judge granted application for permanent guardianship order — Parents appealed on basis that applications judge violated father's rights under s. 15 of Charter by not considering father's illness as treatable — Appeal dismissed — Applications judge considered father's illness and whether it was treatable implicitly if not expressly — Evidence of father's disorder, other difficulties relevant to father's behaviour and attempts to address problems were before applications judge — Father's rights under s. 15 of Charter were not violated — Canadian Charter of Rights and Freedoms, s. 15.

Cases considered by *Chrumka J.*:

> *Alberta (Regional Director of Child Welfare) v. R. (R.)*, 99 A.R. 67, 23 R.F.L. (3d) 68, 1989 CarswellAlta 391 (Alta. Q.B.) — followed
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> *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, 1999 CarswellNB 305, 1999 CarswellNB 306, 26 C.R. (5th) 203, 244 N.R. 276, 177 D.L.R. (4th) 124, 50 R.F.L. (4th) 63, 66 C.R.R. (2d) 267, 216 N.B.R. (2d) 25, 552 A.P.R. 25, [1999] 3 S.C.R. 46, 7 B.H.R.C. 615 (S.C.C.) — considered
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> *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816 (S.C.C.) — considered
>
> *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, 2000 SCC 48, 2000 CarswellMan 469, 2000 CarswellMan 470, 191 D.L.R. (4th) 1, [2001] 1 W.W.R. 1, 260 N.R. 203, 10 R.F.L. (5th) 122, 78 C.R.R. (2d) 1, [2000] 2 S.C.R. 519, 150 Man. R. (2d) 161, 230 W.A.C. 161 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 7 — referred to

s. 15 — referred to

Child Welfare Act, S.A. 1984, c. C-8.1

Generally — referred to

s. 1(1)(s) "protective services" — referred to

s. 1(2)(d) — considered

s. 1(2)(e) — considered

s. 1(2)(g) — considered

s. 15 — referred to

s. 29 — referred to

s. 32(6) — considered

s. 32(7) — referred to

s. 82 — referred to

s. 83 — referred to

APPEAL by parents from order granting Director of Child Welfare permanent guardianship of children.

***Chrumka J.*:**

1 This is an appeal by R.R. and W.R. from the Order of his Honour Judge S.E. Lipton made on the 24th of June, 1998 wherein the Director of Child Welfare was granted a permanent guardianship order with respect to the Appellants' three children. A.S.R., born in 1993, and D.A.R., born in 1995, were apprehended on the 6th of November, 1996, pursuant to s. 15 of the **Child Welfare Act** c-8.1. The Director applied for a temporary guardianship order with respect to the two children under s. 29 of the **Child Welfare Act**. The hearing commenced on the 6th of October, and continued on the 7th and 8th day of October, 1997. It was then adjourned to 5th of December, 1997 and then adjourned to the 23rd of February, 1998.

2 H.M.R. was born in 1997 and was apprehended on the 14th of January, 1998. Following this apprehension the Director consolidated the applications with respect to each child and sought a permanent guardianship order with respect to each of the three children. The hearing then continued on the 23rd and 27th day of February, 1998, the 9th and 10th of March, 1998, the 1st of April, and the 22nd of May, 1998. The matter was adjourned to the 24th of June, 1998 for judgment. On the 24th of June, 1998 his Honour Judge Lipton granted the Director's application for a permanent guardianship order with respect to each of the three children. The judgment is

found in Volume 9 of the Appeal Books beginning at p. 1059 and continuing through to p. 1147. Judge Lipton reviewed the evidence of each of the witnesses called at the hearing and also reviewed the relevant sections of the **Child Welfare Act**. Additionally, Judge Lipton set out the issues in the case and dealt with each of them separately.

3 The hearing was very lengthy and for the purposes of this appeal counsel for R.R. and W.R. set out the facts in considerable detail in the Factum of the Appellants and these facts, as set out, were agreed to by counsel for the Director of Child Welfare. The facts, as set out in the Factum, are not in narrative form but are a summary of the evidence given by each witness with references to page and line numbers.

4 Judge Lipton determined that the four issues to be decided in the hearing were:

> 1. Are A.S.R., D.A.R. and H.M.R. in need of "protective services" as the term is defined under the **Child Welfare Act**?
>
> 2. If any or all of the children are in need of protective services, can their survival, security or development be adequately protected by their guardians, R.R. and W.R. or adequately protected in the custody of the Director?
>
> 3. If the survival, security or development of any or all of the children can only be adequately protected in the custody of the Director, should it be by way of a temporary guardianship order or a permanent guardianship order?
>
> 4. If found that a permanent guardianship order should issue for any or all of the children, what access, if any, should be granted each of R.R. or W.R. and the respective families pursuant to s. 32(6) of the **Act**.

5 Each of these four issues was addressed separately by Judge Lipton who decided as follows, and I quote:

> First Issue
>
> [228] The Act requires that I must first determine whether any or all of the children are in need of protective services. If such a finding is not made with respect to any child, that child must be returned to their guardians. The circumstances of each of the three children must be examined in light of their individual situation.
>
> [229] Dealing first with the situation involving A.S.R., it is my opinion that the evidence overwhelmingly supports the conclusion that he is in need of protective services and that the criteria set out in section 1(2)(d) through (i) of the Act have been met.
>
> [230] The expert evidence presented at this hearing leads one to the conclusion that A.S.R.'s problems are a combination of both environmental and developmental factors. While it cannot be said how A.S.R.'s global delays were caused, the inability of his parents to provide him with the structure, safety, guidance, supervision, consistent and continuous boundaries, and stimulating environment that Mr. Lalonde, Dr. Prince, Ms. Mayes and Ms. Pittman said he should have had is in my opinion a clear indication that A.S.R. was and is in need of protective services.
>
> [231] While Ms. Mayes and Ms. Pittman were not able to conclude that A.S.R. had been sexually abused or

why he acted in the manner that he did, they both were able to conclude that A.S.R.'s negative behaviour began while in the care of his parents. The circumstantial evidence is overwhelming. Physical aggression between the parents. A lack of sexual boundaries. Open use of marijuana. Rampant name calling and profanity. Cruelty to animals. At one point in time, atrocious living conditions coupled with a refusal to relocate the children until an apprehension was threatened. A lack of knowledge on how to properly discipline. A lack of knowledge on children's developmental needs. A lack of knowledge on safety issues. And these are just the issues easily observable by A.S.R. and D.A.R. This is further evidence that A.S.R. was and is in need of protective services.

[232] Fortunately, D.A.R. has not been exposed to the same level of deprivation as A.S.R.. She was apprehended just prior to her first birthday. For H.M.R., she has every chance of never being exposed because she was apprehended at around five months of age. Both D.A.R. and H.M.R. were described by Dr. Prince as doing well and developmentally normal. The only problem noted by Dr. Prince related to the fact that H.M.R. had spent too much time on her back. However, the fact that no overt harm had yet occurred to either of these children at the time of their apprehension does not make their apprehension wrong in law.

[233] With respect to D.A.R., she was with A.S.R. when all the issues affecting A.S.R. were going on. I am satisfied that she too is in need of protective services and that the criteria set out in section 1(2)(d)(e) and (g) of the Act have been met. In my opinion, it was only a question of time before D.A.R. would have been negatively impacted.

[234] I fail to understand why Child Welfare did not act sooner in apprehending H.M.R. The evidence is unequivocal in pointing out the risks that A.S.R. and D.A.R. were being exposed to on a daily basis soon after the involvement of Ms. Nokleby. The risks to the two children increased as more information was obtained by Child Welfare through their involvement with the R. family. Furthermore, after expert evidence was presented by the Director at the start of this hearing in October of 1997, there was plenty of "ammunition" upon which Child Welfare could have acted to apprehend H.M.R.

[235] In my opinion, the risks to H.M.R. are the same as the other two children, and she should have been apprehended outside of the delivery room at the hospital. A support agreement would not have provided H.M.R. with the protection she required. The prior history of the R. family should have been sufficient to provide Child Welfare with a legal basis upon which to apprehend H.M.R. relying upon sections 1(2)(d)(e) and (g) of the Act.

[236] It is a matter of settled law in this Province that Child Welfare does not need to wait for provable damage before entering a home to apprehend a child. Sections 1(2)(d) and (e) of the Act clearly contemplate the Director acting to intervene "before" physical injury or sexual abuse has occurred. The decision of Berger J. in *Alberta (Regional Director of Child Welfare) v. R. (R.)* (1989), 23 R.F.L. (3d) 68 (Alta. Q.B.), at 70 is authority for the proposition that section 1(2)(g) of the Act "contemplates emotional injury as a future event...One cannot "protect" a child from an injury which has already occurred."

[237] In his decision in Regional Director of Child Welfare v. R.(R.), the learned Justice cites with approval the famous quote of Dennistoun J.A. from the case of *Newton v. Newton*, [1924] 2 W.W.R. 840, at 849 as follows: "The courts are never called upon to wait until physical injuries have been received or minds unhinged. It is sufficient if there be a reasonable apprehension that such things will happen, and the Courts should interfere before they have happened if that be possible." I concur with this reasoning. I also concur

with the reasoning of my colleague Cook-Stanhope J. in *Re: Daniel Norman Evans,* [1993] A.J. No. 421 cited by Mr. Larochelle in his argument. The needs of the parents must be balanced against the needs of the children, not overemphasized to the point where one waits for damage to occur to a child before intervening, especially where such damage is predictable.

[238] I wish to conclude the issue involving H.M.R. with the following observation. The role of a child welfare worker is most difficult and emotionally draining. Often, these workers find themselves in a conundrum; to act or wait. Act too soon and these workers risk the wrath of the courts, the public or their employer. Wait too long and these same workers risk the wrath of the courts, the public, their employer, and criminal sanctions if something happens to the child they were supposed to apprehend. I do not criticize Child Welfare for what happened in this case. They fulfilled their mandate. Fortunately, everything went well. However, if I were placed in such a position, I would tend to ensure the safety of the child as being paramount by at least requesting an apprehension order from a judge.

Second Issue

[239] Little need be said about this issue. The reasons for apprehending all three children are, in my opinion, more than sufficient to justify that their survival, security, or development be ensured in the custody of the Director. These reasons, discussed above, were present and ongoing with W.R. and R.R.

[240] It should be pointed out again that with respect to A.S.R. and D.A.R., my concerns were such that W.R.'s access to these two children was cut off in December of 1997. It goes without saying that if a Court cuts off access to one parent because of concerns, it would not have been possible to return the children home, absent the involvement of that parent with the family.

Third Issue

[241] Mr. Barclay has argued in his written submission that "It is trite law to say that prior conduct is not admissible in evidence." With respect, I disagree. The entire foundation of a hearing under the Act depends on an examination of the prior conduct of a child and his guardians and whether, based on the totality of the evidence presented, the Court can anticipate a change and whether that change will occur within a reasonable time.

[242] In the absence of anything to change the way W.R. and R.R. behave, the evidence in this hearing leads one to the inescapable conclusion that they will consistently follow their past behaviour. Thus, an examination of their past behaviour is critical to making a decision in this matter.

[243] While the evidence in this hearing suggests that R.R. as a single mother has the "potential" to parent the children to a minimum standard with proper in-home support, there is every reason to believe and I am convinced from the testimony of all the witnesses, including W.R. and R.R., that a permanent marital separation will never occur. I am also convinced that W.R. will not stay out of the lives of R.R. and the children, even if he is living in separate accommodation. I am also convinced that a restraining order would not be obeyed by either W.R. or R.R.

[244] Mr. Barr supported a PGO. In his opinion, W.R.'s ADD would not account for his other behaviours, even if controlled with medication. By his own admission, W.R. does not take his medication as prescribed. Mr. Barr detailed the risks to the children if W.R. was involved with his children's lives.

[245] Ms. Dolan stated that R.R. had "potential" as a parent. However, her prognosis was poor because of numerous issues she had. Furthermore, it would be unlikely R.R. would ever leave W.R.

[246] Mr. McKeague stated quite frankly that he saw little evidence that change would come with respect to W.R. He was quite emphatic in stating that the children should be made permanent wards because of W.R.'s involvement in their lives.

[247] Ms. Mayes described the R. environment as being unsafe. More importantly, she talked about that small seven year window of opportunity in which parents have an opportunity to make a positive and lasting impression on children.

[248] W.R. and R.R. told Mr. Marsh they would not separate.

[249] Ms. Pittman told the Court what effect the R.'s behaviour had on A.S.R. and what his future needs would be.

[250] W.R. told the Court about life, from his point of view. He also told the Court that he honestly didn't know if he could leave R.R. permanently if it meant her getting back the children.

[251] R.R. talked about that "bond" between W.R. and her and how, despite several attempts to change W.R., she always took him back. She stated that she would leave W.R. permanently. I would envision two residences with W.R. cohabiting at R.R.'s residence most of the time. The evidence is clear. R.R. dearly loves W.R. She said so in a letter to the Court which included a statement that she did not see it as being beneficial for W.R. to separate from her.

[252] Ms. Thunderchild confirmed that W.R. and R.R. had not discussed a separation. Ms. Thunderchild's comment that R.R. said she would leave W.R. if a choice had to be made was the same statement heard throughout this hearing. Ms. Thunderchild said that such a separation would likely be a prelude to a reconciliation.

[253] In my opinion, the evidence supports the conclusion that W.R. and R.R. together as parents is a lethal combination. W.R.'s parenting skills and his ability to positively teach by example are non-existent. The stress his behaviour places on R.R. is significant and the effect this stress had on A.S.R. is demonstrable. Given the evidence heard by the Court, I have come to the conclusion there is no possibility the three children could or should be returned to W.R. and R.R. within a reasonable time.

[254] The evidence is also clear that W.R. and R.R. love their children. However, in terms of ensuring their children's security and development being met, "love is not enough". To quote that often used phrase, "one more chance for the parents is one less chance for the children."

Fourth Issue

[255] With respect to the issue as to what access should be granted to each of W.R. and R.R. and their respective families after a PGO pursuant to section 32(6) of the Act, I note from page 376 of the transcript that Mr. Larochelle advised the Court that an expert opinion as to such access should be sought. In closing argument, Mr. Larochelle argued for one final supervised termination visit for all three children.

[256] Mr. Bentley-Fisher has argued that because a restriction on access is a further invasion of a family's

right to the least invasion of its privacy pursuant to section 2(c) of the Act, I should allow access to continue.

[257] There are only two legal principles to apply in the circumstances of this case. The first principle is that access cannot interfere with the adoption of the child pursuant to section 32(7) of the Act. The second principle is that such access must be in the best interests of the child. It is my opinion that the second principle incorporates the issue of privacy outlined in section 2(c) of the Act. That is, where continued access visits are not in the best interests of the child, the Court should feel free to restrict or cut off access entirely.

[258] Access must be determined according to the best interests of each child. Thus, a court will be justified in ordering different access terms for each child even where there is more than one child in a family that is subject to a TGO or PGO.

[259] With respect to A.S.R. and D.A.R., W.R. has not been granted access since December of 1997 as a result of the evidence presented to this Court, and in particular, the evidence of Ms. Mayes. According to Ms. Mayes, access visits have had a very negative effect on A.S.R. His anxiety level increases around access visits. Ms. Pittman testified that A.S.R. perceives his parent's home as being filled with anger. His masturbatory behaviour could be an attempt to soothe himself. She also concluded that A.S.R.'s behaviour is not due to separation anxiety. Marg, the foster mother, has spent the last twenty months attempting to impose structures and boundaries for these two children. These two children have always gone to the access visits together. To allow D.A.R. to continue to attend access visits and not A.S.R. would cause further problems in that D.A.R. is now old enough to relate to A.S.R. the events at these visits. As A.S.R. perceives his parent's home being filled with anger, it is logical to assume that continued visits by D.A.R. will have a negative effect on A.S.R. Accordingly, I have concluded there should be one final supervised access visit with A.S.R. and D.A.R., the details of which are outlined below.

[260] With respect to H.M.R., the situation is different. The basis for her apprehension related to the outstanding issues concerning the older two children. She has been in foster care for only six months. Furthermore, she was apprehended at around five months of age; therefore, the impact of any deprivation of being in her parent's care has been minimized, if not entirely negated. While I expect H.M.R. will likely be adopted within the near future, I am not opposed to continued access as I have not heard any evidence in this hearing that access has caused her any distress. Accordingly, I have concluded that there should be continued access with H.M.R., the details of which are outlined below.

DECISION

[261] Having regard to the evidence presented at this hearing and the conclusions to which I have come based on this evidence, I am exercising my authority under section 25 of the Act and granting the Director's request for a PGO on all three children. In my opinion, a PGO is the only order justified by the evidence. In doing so, I am satisfied that the requirements of section 32 of the Act have been met; namely (i) these three children are in need of protective services, (ii) their survival, security or development cannot be adequately protected if they are returned to their parents, W.R. and R.R., and (iii) it cannot be anticipated that these three children could or should be returned home to their parents within a reasonable time. In coming to this conclusion, I have carefully weighed the matters set out in section 2 of the Act.

[262] I have also come to the following conclusions regarding the issue of access after a PGO.

6 Thereafter, Judge Lipton set out the terms of access. R.R. was granted a farewell access visit of three hours duration to A.S.R. and D.A.R. No final access visit was granted to W.R. to these two children.

7 With respect to H.M.R., R.R. was granted two supervised visits per week of two hour duration each visit subject to s. 32(7) of the **Act**. W.R. was allowed to attend the supervised visits with R.R. to see H.M.R. but at the sole discretion of the Director.

8 On the 31st of March, 1999 his Honour Judge Leveque of the Provincial Court granted an application, brought by the Director of Child Welfare, to terminate the access of R.R. to her child, H.M.R. This application was granted and the effect of which was that neither appellant had further access to any of the three children. The order of Judge Leveque was not appealed until the 4th of May, 1999. A Notice of Appeal was not filed within the time period required by the **Child Welfare Act**. Accordingly, on the 30th of July, 1999 the appeal was held to be of no force and effect and was struck. The three children have remained in the custody of the Director continuously since the dates of their apprehension.

9 The appeal from the order of Judge Lipton made on the 24th of June, 1998 was filed on the 23rd of July, 1998. The Notice of Appeal does not set out any grounds of appeal. Counsel for the appellants W.R. and R.R., who was not counsel at the hearing before Judge Lipton nor counsel who filed the Notice of Appeal, sets out three grounds of appeal in her factum. The first issue is stated as

> Did the Honourable Judge violate R.R.'s s. 7 **Charter** right to security of the person not in accordance with the principles of fundamental justice by granting a permanent guardianship order while recognizing that she could provide adequate care?

10 The **Canadian Charter of Rights and Freedoms** provides in s. 7,

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11 The Supreme Court of Canada in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.) considered whether a parent's right to security of person is engaged in custody proceedings. At p. 78, Lamer, C.J. wrote

> I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as LaForest, J. held in *B.(R) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 83:
>
> > an individual interest of fundamental importance in our society
>
> Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

12 His Lordship further discusses the principles of fundamental justice at p. 80:

> While relieving a parent of custody of his or her child restricts the parent's right to security of the person, this restriction may nevertheless be in accordance with the principles of fundament justice. The principles of fundamental justice "are to be found in the basis tenets of our legal system: re *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.) at p. 503. It is a time honoured principle that the state may relieve a parent of custody when necessary to protect a child's health and safety.

13 Of particular relevance to the within appeal are the words of Lamer, C.J. at para. 73 on p 82:

> For the hearing to be fair the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. The best interests of the child are presumed to lie within the parental home. However, when the state makes an application for custody it does so because there are grounds to believe that that is not the case. A judge must then determine whether the parent should retain custody. In order to make this determination, the judge must be presented with evidence of the child's home life and the quality of parenting it has been receiving and is expected to receive. The parent is in a unique position to provide this information to the Court. If denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child's best interests. There is a risk that the parent will lose custody of the child when in actual fact it might have been in the child's best interests to remain in his or her care.

14 In the within appeal, each parent was represented by counsel. Each parent testified and called witnesses and accordingly participated effectively at the hearing.

15 An alleged violation of s. 7 of the **Charter** was never argued before his Honour Judge Lipton. I am satisfied that his complete and careful reasons demonstrate that he was fully cognizant and had in mind the rights of W.R. and R.R. and the rights of the three children as well as the best interests of the children. Therefore, in my view, there was no denial of the constitutional rights granted by the **Charter** to either of the parents. There was no violation of s. 7 of the **Charter**.

16 Even though s. 82 of the **Child Welfare Act** was not complied with, in that the Notice of Appeal did not set out the grounds of appeal, this appeal proceeded to hearing on the basis set out in s. 83 of the **Act**. It proceeded on the basis of all of the material filed and the submissions of counsel and not solely on the transcript of the hearing. S. 83 provides:

> On hearing an appeal, the Court of Appeal shall determine the appeal on the material filed with or forwarded to the Court of Queen's Bench and such further evidence as the Court of Queen's Bench may require or permit to be filed.

17 Counsel for the appellants posed the second issue as:

> Did the Honourable Judge violate the s. 7 rights of the children by granting a permanent guardianship order when there was no reliable evidence as to the etymology of A.S.R.'s difficulties and no evidence of harm to

D.A.R. and H.M.R.?

18 Judge Lipton was led to conclude that A.S.R.'s problems were a combination of both environmental and developmental factors. Although it could not be said how A.S.R.'s global delays were caused, "the inability of the parents to provide him with the structure, safety, guidance and supervision, consistent and continuous boundaries, and a stimulating environment" was a clear indication that A.S.R. was in need of protective services. His Honour considered the negative behaviour of A.S.R. while in the care of his parents. He considered also and described, in paragraph 231, the relationship between the two parents. As submitted by counsel for the Director, Judge Lipton was mindful of the principle, of which a Court must be cognizant in all child welfare proceedings namely the welfare and best interests of the child. In all of the circumstances, I am of the view that the granting of the permanent guardianship order, with respect to all of the children, was properly and correctly made.

19 With respect to D.A.R. and H.M.R., and their apprehension and the granting of the permanent guardianship order, regard must be had to s. 1(2) of the **Child Welfare Act** wherein legislation provides:

> 1.(2) For the purposes of this Act a child is in need of protective services if there are reasonable and probable grounds to believe that the survival, security or development of the child is endangered because of any of the following:
>
> ...
>
> (d) the child has been or there is substantial risk that the child will be physically injured or sexually abused by the guardian of the child,
>
> (e) the guardian of the child is unable or unwilling to protect the child from physical injury or sexual abuse, and
>
> ...
>
> (g) the guardian of the child is unable or unwilling to protect the child from emotional injury.

20 Ss. 1(2)(d) and (e) concern physical injuries and sexual abuse. S. 1(2)(g) deals with protecting the child from emotional injury. Judge Lipton, concerned with the environment, which includes not only the physical but emotional, and the relationship of the parents with each other, with the children and with the community, concluded that there was unlikely to be any improvement and therefore determined that each of the children was in need of protective services. The apprehension of H.M.R. was not premature as his Honour was mindful of the overriding principle in all child welfare proceedings that the welfare and best interests of the child are paramount. His Honour was also correct when he held that it was a matter of settled law in the Province of Alberta that the Director need not wait for provable damage before apprehending a child and that pursuant to ss. 1(2)(d), (e) and (g) the Director may intervene before physical injury or sexual abuse or emotional injury has occurred.

21 Berger, J. (as he then was) considered each of these subsections in *Alberta (Regional Director of Child Welfare) v. R. (R.)* (1989), 23 R.F.L. (3d) 68 (Alta. Q.B.), at 70 stated:

> In my opinion, s. 1(2)(g) clearly contemplates emotional injury as a future event. If cogent evidence persuades the trier of fact that the guardian is unable or unwilling to protect the child from emotional injury it

follows that the Court is bound to intervene. One cannot "protect" a child from an injury that has already occurred. It is the very essence of protection that measures be taken in a timely fashion to avert injury. If the guardian is unable or unwilling to take such measure, the Court is mandated by s. 1(2)(g) of the Statute to declare that the child is in need of protective services.

22 Specifically referring to H.M.R., his Honour Judge Lipton stated:

In my opinion, the risks to H.M.R. are the same as the other two children and she should have been apprehended outside of the delivery room at the hospital. A support agreement would not have provided H.M.R. with the protection she required. The prior history of the R. family should have been sufficient to provide Child Welfare with the legal basis upon which to apprehend H.M.R. relying upon ss. 1(2)(d), (e) and (g) of the Act. (See also *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519 (S.C.C.))

23 The third issue addressed was:

Did the Honourable Judge violate W.R.'s s. 15 **Charter** rights in not considering W.R.'s illness as being treatable before granting a permanent guardianship order for the children?

24 In my view, Judge Lipton did consider W.R.'s illness and whether it was treatable implicitly if not expressly. The evidence that W.R. suffered from a disorder and other difficulties and problems relevant to W.R.'s behaviour were before the Court as well as the attempts made to address those matters. In my view, W.R.'s s. 15 rights were not violated.

25 With respect to the hearing of an appeal the **Child Welfare Act** provides:

83(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 such further evidence as 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 a hearing before it.

26 This appeal must be decided on the material filed with the Court of Queen's Bench. No new material or further evidence was presented to the Court of Appeal. The three children have remained in the custody of the Director since the dates of their apprehension.

27 In my view, his Honour Judge Lipton gave full and fair consideration to all of the material evidence. He made no error in principle or in law in granting the order of permanent guardianship with respect to each of the three children. I confirm the order made and dismiss the appeals of both W.R. and R.R.

Appeal dismissed.

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