2005 CarswellAlta 362, 2005 ABCA 125, [2005] A.W.L.D. 1611, [2005] A.W.L.D. 1612, [2005] A.W.L.D. 1613, [2005] A.W.L.D. 1614, [2005] A.W.L.D. 1615, [2005] W.D.F.L. 1902, [2005] W.D.F.L. 1896, [2005] W.D.F.L. 1895, [2005] W.D.F.L. 1894, [2005] W.D.F.L. 1891, 363 A.R. 306, 343 W.A.C. 306, 42 Alta. L.R. (4th) 99

2005 CarswellAlta 362, 2005 ABCA 125, [2005] A.W.L.D. 1611, [2005] A.W.L.D. 1612, [2005] A.W.L.D. 1613, [2005] A.W.L.D. 1614, [2005] A.W.L.D. 1615, [2005] W.D.F.L. 1902, [2005] W.D.F.L. 1896, [2005] W.D.F.L. 1895, [2005] W.D.F.L. 1894, [2005] W.D.F.L. 1891, 363 A.R. 306, 343 W.A.C. 306, 42 Alta. L.R. (4th) 99

T. (M.) v. Alberta (Director of Child Welfare)

M.T. (Appellant / Applicant) and The Director of Child Welfare (Respondent / Respondent)

Alberta Court of Appeal

Conrad, McFadyen, Hunt JJ.A.

Heard: February 24, 2005
Judgment: March 24, 2005
Docket: Calgary Appeal 0401-0366-AC

Counsel: D.P. **Castle**, S.M. Hudson for Appellant

T.J. Jones for Respondent

Subject: Family

Family law --- Children in need of protection — Application for permanent custody — Factors to be considered — Best interests of child

Twenty-two-year-old single mother was only 18 in 2001 when daughter was born — Mother came from troubled home and could not rely on own family for help with baby — Father was 16-year-old unemployed youth who was not in position to assist with child — Mother did try to care for baby but was forced to attend to child's needs without stable residence or regular source of income — Mother finally placed child in foster care for three months through consent agreement with Director of Child Welfare — Social worker's report at time stated that mother and child were bonded and that child was typically developed for her age — When mother could not find work, she agreed to further three months of foster care and then to six-month temporary care order ("TGO") — Finally, in 2003, Director applied for and obtained permanent guardianship order ("PGO") on basis that mother was unable or unwilling to provide evidence that she could meet needs of child — Evidence at time showed that mother had been attending weekly counselling sessions and parenting courses and had been steadily employed for some time at new job that did not involve evening work — Also, there were two positive reports from in-home support worker noting mother's punctuality and spirit of co-operation — Mother appealed — Appeal was allowed — Guidelines under Child Welfare Act for PGO set out that child's best interests are usually served by maintaining family unit where possible — Trial judge made decision to grant PGO on basis that child had been in custody too long — In doing so, trial judge erred in law in failing to consider s. 34(1)(c) of Act under which

PGO must fail unless Director proves that it cannot be anticipated that child could or should be returned to mother within reasonable time — Effect of trial judge's conclusion was to place onus on mother to show why PGO should not issue — Accordingly, trial judge did not apply proper legal test — Also, trial judge failed to consider importance of other factors set out in Act and fact that best interests of child include recognition of importance of family — Therefore, PGO was to be terminated and TGO granted for six months with liberal and generous access to mother.

Family law --- Children in need of protection — Application for permanent custody — Factors to be considered — Particular factors — Parents' ability to provide stable environment

Twenty-two-year-old single mother was only 18 in 2001 when daughter was born — Mother came from troubled home and could not rely on own family for help with baby — Father was 16-year-old unemployed youth who was not in position to assist with child — Mother did try to care for baby but was forced to attend to child's needs without stable residence or regular source of income — Mother finally placed child in foster care for three months through consent agreement with Director of Child Welfare — Social worker's report at time stated that mother and child were bonded and that child was typically developed for her age — When mother could not find work, she agreed to further three months of foster care and then to six-month temporary care order ("TGO") — Finally, in 2003, Director applied for and obtained permanent guardianship order ("PGO") on basis that mother was unable or unwilling to provide evidence that she could meet needs of child — Evidence at time showed that mother had been attending weekly counselling sessions and parenting courses and had been steadily employed for some time at new job that did not involve evening work — Also, there were two positive reports from in-home support worker noting mother's punctuality and spirit of co-operation — Mother appealed — Appeal was allowed — Guidelines under Child Welfare Act for PGO set out that child's best interests are usually served by maintaining family unit where possible — Trial judge made decision to grant PGO on basis that child had been in custody too long — In doing so, trial judge erred in law in failing to consider s. 34(1)(c) of Act under which PGO must fail unless Director proves that it cannot be anticipated that child could or should be returned to mother within reasonable time — Effect of trial judge's conclusion was to place onus on mother to show why PGO should not issue — Accordingly, trial judge did not apply proper legal test — Also, trial judge failed to consider importance of other factors set out in Act and fact that best interests of child include recognition of importance of family — Therefore, PGO was to be terminated and TGO granted for six months with liberal and generous access to mother.

Family law --- Children in need of protection — Application for permanent custody — Making temporary order permanent — General principles

Twenty-two-year-old single mother was only 18 in 2001 when daughter was born — Mother came from troubled home and could not rely on own family for help with baby — Father was 16-year-old unemployed youth who was not in position to assist with child — Mother did try to care for baby but was forced to attend to child's needs without stable residence or regular source of income — Mother finally placed child in foster care for three months through consent agreement with Director of Child Welfare — Social worker's report at time stated that mother and child were bonded and that child was typically developed for her age — When mother could not find work, she agreed to further three months of foster care and then to six-month temporary care order ("TGO") — Finally, in 2003, Director applied for and obtained permanent guardianship order ("PGO") on basis that mother was unable or unwilling to provide evidence that she could meet needs of child — Evidence at time showed that mother had been attending weekly counselling sessions and parenting courses and had been steadily employed for some time at new job that did not involve evening work — Also, there were two positive reports from in-

home support worker noting mother's punctuality and spirit of co-operation — Mother appealed — Appeal was allowed — Guidelines under Child Welfare Act for PGO set out that child's best interests are usually served by maintaining family unit where possible — Trial judge made decision to grant PGO on basis that child had been in custody too long — In doing so, trial judge erred in law in failing to consider s. 34(1)(c) of Act under which PGO must fail unless Director proves that it cannot be anticipated that child could or should be returned to mother within reasonable time — Effect of trial judge's conclusion was to place onus on mother to show why PGO should not issue — Accordingly, trial judge did not apply proper legal test — Also, trial judge failed to consider importance of other factors set out in Act and fact that best interests of child include recognition of importance of family — Therefore, PGO was to be terminated and TGO granted for six months with liberal and generous access to mother.

Cases considered:

M. (R.E.D.) v. Alberta (Director of Child Welfare) (1986), 47 Alta. L.R. (2d) 380, [1987] 1 W.W.R. 327, 4 R.F.L. (3d) 363, *(*sub nom. *S.E.M., Re)* 74 A.R. 23, *(*sub nom. *M. v. Dir., Child Welfare Act)* 32 D.L.R. (4th) 394, 1986 CarswellAlta 209 (Alta. Q.B.) — referred to

O. (T.L.) v. Alberta (Director of Child Welfare) (1995), 34 Alta. L.R. (3d) 194, 175 A.R. 194, 1995 CarswellAlta 431 (Alta. Q.B.) — referred to

P. (T.) v. Alberta (Director of Child Welfare) (1998), 1998 CarswellAlta 973, 231 A.R. 115 (Alta. Q.B.) — referred to

S. (T.) v. Alberta (Director of Child Welfare) (2002), 2002 ABCA 46, 2002 CarswellAlta 321, 299 A.R. 290, 266 W.A.C. 290, 100 Alta. L.R. (3d) 205, 26 R.F.L. (5th) 415 (Alta. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 2 — considered

s. 2(a) — considered

s. 2(c) — considered

s. 2(e) — considered

s. 2(i) — considered

s. 33 — considered

s. 34(1) — considered

s. 34(1)(a) — considered

s. 34(1)(b) — considered

s. 34(1)(c) — considered

s. 117 — referred to

Child Welfare Amendment Act, 2003, S.A. 2003, c. 16

Generally — referred to

s. 116(5) — considered

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

Generally — referred to

s. 33 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 518 — referred to

R. 518(e) — considered

APPEAL by mother from judgment dismissing appeal of order granting application of Director of Child Welfare for permanent guardianship order of child.

***Per curiam*:**

I. Introduction

1 The appellant, M.T., was in high school, unmarried, and only 18 years old when she gave birth to her daughter, L.T. Despite these obstacles, M.T. retained custody of her daughter and raised her for 20 months. Eventually, finding herself without financial and social support, she turned to child welfare officials ("the Director") for help. She entered into two custody agreements with the Director and then consented to a temporary guardianship order (a "TGO") for a period of six months.

2 At the end of this period, the Director applied for, and obtained, a permanent guardianship order (a "PGO"). M.T. appealed the granting of this order to the Court of Queen's Bench. That appeal was unsuccessful. The appellant now appeals that decision to this court.

II. Grounds of Appeal

3 The appellant advances three grounds of appeal. She submits the learned trial judge and the learned justice of appeal erred by:

1. failing to take into account the effort and progress made by the appellant during the three-month trial adjournment;

2. failing to take the court's obligations under section 2 of the *Child Welfare Act*, R.S.A. 2000, c. C-12

("the *Act*") into account; and

3. applying the wrong legal test.

4 During the hearing of the appeal, appellant's counsel suggested that grounds one and three were really different ways of approaching the same issue. We accept that submission and will deal with those two grounds together in these reasons.

III. Decision

5 In our view, the trial judge made three errors of law in coming to her decision. First, she erred in law by incorrectly applying the "spirit" of an inapplicable statute. Second, she erred in law by failing to consider section 34(1)(c) of the applicable statute — the *Child Welfare Act*. Third, she failed to consider the "best interests of the child" as that phrase is described in section 2 of the *Act*. In the end, these errors allowed her to base her decision on the fact that the child had been in custody too long rather than on the correct legal criteria and the evidence before her. These various legal errors were fundamental to the trial judge's decision and were not corrected on appeal to the Court of Queen's Bench.

6 We allow the appeal, adjourn the trial and grant a TGO for six months from the date this decision is filed, with generous and liberal access to the child during this period.

IV. Background

7 The appellant, M.T., is a 22-year-old single mother. She has one child, a daughter, L.T., who was born on January 28, 2001, when the appellant was only 18 years of age. The appellant came from a troubled home, described by an expert witness at trial as "pathogenic", with the result that she could not rely on her immediate family for assistance when the baby was born. The natural father, who was young (16) and unemployed, was also not in a position to assist in raising a small child in the months following the baby's birth, although his parents were a source of support.

8 In the months following the baby's birth, and with the help of the paternal grandparents, the appellant completed grade 12 and began looking for a place to live with her baby. She also began looking for a steady means of financial support. It appears she applied for social assistance but was turned down (A.B. Vol.7:E40). She struggled finding work. She lived with a young man for about a year but that relationship became abusive and she had leave. In the end, M.T. was forced to attend to the needs of a new baby without a stable residence or a regular source of income. On October 19, 2002, at the suggestion of the paternal grandparents, she turned to the Director for help and placed her daughter in foster care for three months through a consent agreement.

9 Initial reports from the attending social worker, after L.T. entered foster care, showed that mother and child were bonded and that L.T. was "typically developed for her age". (A.B. Vol. 7: E43).

10 The appellant was not able to find a steady job or a consistent place to live while her daughter was in care under the consent agreement. She attempted to live with her parents but they would not allow her to stay. As a result, M.T. consented to a further custody agreement on January 19, 2003, which called for L.T. to remain in foster care while M.T. lived with relatives in Lethbridge. When that consent agreement expired, M.T. was still unable to take her daughter back. She agreed to a six-month TGO so that the Director could continue to provide care for L.T.

11 On August 28, 2003, the Director applied for a PGO because, in the Director's view, the appellant was still unable or unwilling to "provide evidence to child welfare that she can meet the needs of her daughter." (A.B. Vol. 7:E57) By this time, several other parties, including the natural father, and the appellant's current living companion, had applied for private guardianship of L.T. The paternal grandparents also applied for guardianship but withdrew their application in support of their son's.

12 During the time that L.T. was in the Director's care by consent, she was placed in four different foster homes. One of those homes belonged to the paternal grandparents. While M.T. had gotten along very well with the paternal grandparents initially, and the grandmother testified at trial that she originally viewed M.T. as "the daughter she had never had," problems arose over access once the paternal grandparents became foster parents. This resulted, on one occasion, in a physical confrontation between M.T. and the paternal grandfather.

13 To assess the merit of the various applications brought for guardianship, including its own, the Director asked Dr. F. Patrick Clarke, Ph.D, to prepare parenting assessments of the appellant and the other applicants for guardianship. Dr. Clarke produced a report that was sent to the appellant on February 13, 2004, just four days before the PGO hearing was set to commence. In it he noted that the appellant had a history of "pathogenic care" that resulted in "a deep mistrust and general suspiciousness of others...". Because of this she was "not inclined to neglect her daughter but is impeded significantly in her ability to care by these patterns in personal and interpersonal functioning." (A.B. Vol. 8:E164-65) He did not find that L.T. could not be returned to her mother, but he made the following recommendations if L.T. was to be returned to her mother's care:

> 1. That consideration of M.T. as the primary guardian of her child be contingent upon entering a program of therapy focused upon the identification and resolution of personal issues associated with her experience of pathogenic care.
>
> 2. That M.T.'s involvement with her daughter be supervised and that she accepts In-Home Support in the context of educating her regarding the development of a healthy relationship with her child.
>
> 3. That M.T. continue to participate in parenting programs which provide a framework for parenting involving principles and values as well as skills and strategies. (A.B. Vol. 8:E188-89)

14 The applications for guardianship were heard in Provincial Court over three days commencing on February 17, 2004. After hearing evidence, the trial judge decided she needed further assessments of the natural father, and his companion, with the result that she adjourned the hearing for three months. While up to this point the trial judge was frustrated by the appellant's inability to admit to her deficiencies as a parent, she invited her to take advantage of the adjournment and "prove her wrong". She said to appellant's counsel:

> This is going to require an adjournment, and Miss Hudson, because of that, not because I have any faith in your client, because I do not. Now, she is quite welcome to prove me wrong, but as a result of the adjournment I require in order to be satisfied about the other issue, your client will get the benefit of that too, and if she arrives with some astounding evidence about progress she has made, I am more than prepared to listen, and I would welcome that because L. deserves that. (A.B. Vol. 4:417)

15 When the trial reconvened three months later, on June 2, 2004, the appellant presented a letter from a psychologist at the Calgary Counselling Centre indicating that in response to Dr. Clarke's first recommendation the appellant had been attending weekly counselling sessions since March 31, 2004. The psychologist did not testify, but appellant's counsel advised the judge that she had been assured that the counsellor had a copy of Dr.

Clarke's report and was addressing the issues raised in it with the appellant.

16 The appellant also produced two positive reports from in-home support worker, Najwa Zahr, to show that she was complying with Dr. Clarke's second recommendation. The reports indicate, on any reading, that the appellant was finally committed to the process of learning proper parenting. In the first report, covering the period from March 18 to April 18, 2004, the support worker noted:

> M. is responding well to the in-home support worker's suggestions and she is showing positive attitude towards receiving support around parenting L.
>
> . . . . .
>
> The in-home support worker noticed that M. is becoming more consistent in her discipline to L. although L. tries to manipulate her way especially when L. refuses to eat her lunch or pick up her toys.
>
> The in-home support worker observed M.'s behaviour during the visits that she does not use any fowl [sic] language, and does not yelling, use name calling, or swearing at any one. M. present herself a calm and caring mother and she is very patient with L. M. talks to L. in a calm voice and she learned from the in-home support worker to give L. choices when she acts out. M.'s house is very clean and tidy. She washes L.'s hands before and after meals. L.'s clothes are kept clean at all times.
>
> . . . . .
>
> In regards to M.'s parenting strengths and weaknesses and her ability to parent L. It is clear that M. has some good parenting skills and she is doing her best to meet L.'s basic needs. (A.B. Vol. 7:E85-86)

17 It is significant that due to an administrative error the judge did not have this report in her possession until minutes before rendering judgment. It was handed up to her by the clerk during the hearing with the result that she did not have the chance to review it prior to making a decision.

18 The second report, dealing with the reporting period from April 19 to May 26, 2004, is worth extensive review. We quote from the worker's Progress Notes:

> Skills M. learned since the in home support worker involvement are:
>
> Positive discipline techniques such as choices and 123 Magic
>
> Routines and structure during L.'s visits
>
> Child development
>
> Quality time one-on-one with L.
>
> Healthy eating habits
>
> At the time the in-home support worker started the visits with M., she did not believe in disciplining children due to the inconsistent parenting she received during her childhood and she was against disciplining L.

> The in-home support worker helped M. understand the difference between positive consequence and discipline from negative cruel punishment. M. started applying consequence strategies when L. chooses not to listen or throw a tantrum and she was surprised with the effects of the positive discipline on L. M. does not have to repeat herself several times before L. responds. M. also adapted the Routine and structure style during L.'s visits. M. learned to keep L. busy during the visits some times She walks with L. and the worker to the park, meet at the Zoo, or in the Mall to practice her parenting skills with L. in public. Other times M. stays home and spends quality time with L. plays house/school, put puzzles together, watch cartoon movies, and read stories. The strategy worked well for L. and M. and gave L. some control and opportunity to choose what she would like to do during the visits and helped M. to understand L.'s needs.
>
> The interaction between L. and M. was minimal at the beginning of the visits because L. liked to watch cartoon most of the visit.
>
> L. enjoys her visits with M. and she seems very eager to reach her mother's residence. Every time the worker picks up L. she asks questions such as "are we there yet" "are we going to mom's house" " is mom waiting for me at home". L. also says to the worker that she wants to ride her bicycle and she wants to play with her mother. Most of the times L. cries at the end of the visit not wanting to leave her mother. M. kisses her and tells her that she loves her and she would see her the following day or the following week.
>
> M. learned to offer L. good healthy food during the visits. She also learned to sit next to L. while she is eating her lunch, encourage her to finish her meal and ensure that L. had a good lunch or dinner.
>
> M. showed her ability in parenting and nurturing L. well in public. She does not let L. out of her sight or far from her reach. M. talks to L. in a calm voice and warn her of the consequence when L. tries to manipulate her way. M. packs healthy food and drinks for L. when the visits take place outside the home. She also learned not to offer L. lots of sugar or treats and L. does not get a treat before she finishes her meal.
>
> M. completed three parenting courses and she is in the process of completing the fourth course. M. gained knowledge about children's development positive and negative behavior and the causes. M. is looking forward to learn more about children to understand and meet her daughter's needs.
>
> M. was consistent in her appointment and she did not miss or be late for any of her scheduled appointments. M. rescheduled couple of the visits due to personal appointment that could not miss. She went for a day surgery On May 13th. M. showed her ability to parent L. and proved that she has basic parenting skills and she is eager to learn more to better parent L.
>
> M. will benefit from the in-home support and the follow up to guide and support her if L. is placed back into her care. (A.B. Vol. 7:E88-89)

It is noteworthy that the in-home support worker comments on the appellant's punctuality, and spirit of co-operation, given that the absence of these qualities was one of the reasons advanced by the Director for the PGO. It is also apparent that the appellant was learning how to use consequences, rather than threats, as a means of discipline.

19 Finally, the appellant was able to advise the court that she had begun taking parenting courses — Dr. Clarke's third recommendation. By the time of her return to court she had completed three such courses and was intending to enroll in a ten-week parenting course being offered by the Sheriff King Home. To make this pos-

sible she had found a new job that did not involve evening work. If this was not enough to indicate that the appellant was taking positive steps to provide a proper environment for raising her child, the appellant pointed out that since the adjournment she had been steadily employed and had maintained the same address.

V. The Legal Requirements for Granting a Permanent Guardianship Order

20 A court, hearing an application for permanent guardianship under the *Act*, must consider the requirements of both sections 2 and 34(1). Section 2 sets out the guidelines for determining what is in the "best interests of the child." These guidelines indicate, among other things, that a child's best interests are usually served by maintaining the family unit where that is possible. The section reads, in its entirety:

> 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 the opportunity to be a wanted and valued member of a family, and to the 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 insofar 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 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.

21 The other statutory requirements the court must consider are set out in section 34(1) and describe what the Director must prove to obtain a PGO. That section reads:

Permanent Guardianship Order

34(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 adequately be protected if the child remains with or is returned to the child's guardian, and

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

VI. The Trial Judge's Decision

22 The trial judge's decision is brief and does not refer to either section 2 or section 34(1) of the *Act*. Instead, the trial judge focussed on whether she should extend the existing temporary order given new time-in-care guidelines that had yet to be proclaimed. Thus, she held, at A.B. Vol. 4:450-51:

> Since that time [the commencement of the trial], it is quite clear, in the evidence, that she [the mother M.T.] has made some progress. However, it is limited progress. And if we were going to test that progress, this child has to remain in care because there is no way on earth that anybody would contemplate returning the child to her care at this point. The child has been in care for two years. Well, just short of two years. Now with — I could certainly at law extend that period. However, if I did that I would be ignoring the very clear direction of the legislature as they set out the new time-in-care limits for children. Those dates will be proclaimed as of November 1st this year. Now what am I going to do? Look at the letter of the law or look at the spirit of the law. I think what a child requires is that I look at the spirit of the law. This child has been in care two years, she needs a decision made for her life and she needs it made now. She has been in care too long. This decision should have been made a year ago. Perhaps eighteen months ago. She should have an opportunity to get on with her life. It is unfortunate that M. has not — did not have the ability to make better choices at an earlier time because my decision might have been different at that point.

23 The trial judge did go on to say that the future was not clear, but she did so by asking herself whether she should extend the existing temporary order. She concluded, at A.B. Vol. 4:451:

> We have little information — well, we have no information from the Calgary Counseling Centre about prognosis, about what we can expect of M., whether she will be adequately able to continue with these matters. There is just too much that is unknown. It is on the basis of too much that is unknown that I am being asked to extend the time in care. I cannot do that. The Director's application for a Permanent Guardianship Order is granted.

VII. The Standard of Review

24 The scope for appellate review of a permanent guardianship order is the same as for an order for custody. Only where the judge has acted on a wrong principle or disregarded material evidence, or where the decision is otherwise clearly wrong, will the appellate court interfere: *M. (R.E.D.) v. Alberta (Director of Child Welfare)* (1986), 74 A.R. 23 (Alta. Q.B.); *O. (T.L.) v. Alberta (Director of Child Welfare)* (1995), 175 A.R. 194 (Alta. Q.B.); *P. (T.) v. Alberta (Director of Child Welfare)* (1998), 231 A.R. 115 (Alta. Q.B.). That standard of review, applicable at the Court of Queen's Bench, was stated correctly by the chambers justice at A.B. Vol. 1:F5/14-19 of her decision.

25 The errors alleged by the appellant are all errors of law. Thus, the standard of review to be applied by this court to the decision of the learned chambers justice is correctness: *S. (T.) v. Alberta (Director of Child Welfare)* (2002), 299 A.R. 290, 2002 ABCA 46 (Alta. C.A.).

VIII. Analysis

2005 CarswellAlta 362, 2005 ABCA 125, [2005] A.W.L.D. 1611, [2005] A.W.L.D. 1612, [2005] A.W.L.D. 1613, [2005] A.W.L.D. 1614, [2005] A.W.L.D. 1615, [2005] W.D.F.L. 1902, [2005] W.D.F.L. 1896, [2005] W.D.F.L. 1895, [2005] W.D.F.L. 1894, [2005] W.D.F.L. 1891, 363 A.R. 306, 343 W.A.C. 306, 42 Alta. L.R. (4th) 99

A. Grounds One and Three-Did the Trial Judge Apply the Correct Legal Test?

26 The appellant submits that in granting the PGO the trial judge failed to apply the proper statutory test set out in section 34(1) of the *Act*. Specifically, the appellant submits that the trial judge failed to consider and apply subsections 34(1)(b) and 34(1)(c). By making this mistake, the trial judge failed to give proper credit to the steps taken by the appellant during the adjournment.

27 Before dealing with the appellant's submissions on this point, it is necessary to discuss the trial judge's purported application of the "spirit" of the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, ("the new *Act*"). This was the amended *Child Welfare Act* proclaimed on November 1, 2004, some five months after judgment was rendered in this case. Section 33 of the new *Act* shortens the time that a child can remain in care before a decision is made to either seek a PGO or return a child to his or her parent(s). Although the trial judge recognized that the new *Act* was not in force, she felt bound by the "spirit" of the new *Act* to grant the PGO because of the length of time that L.T. had been in care — even though she recognized that under the *Child Welfare Act* she was entitled to extend the existing temporary order.

28 In our view, the trial judge erred in law by even considering the new *Act*. The statute had not yet been proclaimed and it was not the statute she was bound to apply. But, even if she was entitled to consider the new *Act*, she failed to consider relevant statutory provisions intended to guide its application, and describe its spirit, with respect to children already in care under temporary orders. The amendments creating the new *Act* are found in the *Child Welfare Amendment Act, 2003*, c. C-16. Subsection 116(5) of that *Act* describes the approach the court should take to children in care under TGOs when the new legislation comes into force. It reads:

> (5) If, on the coming into force of this Act, a child is in the custody of a director or is the subject of a temporary guardianship order, section 33 of the Child Welfare Act, as it read immediately before the coming into force of this Act, continues to apply to the child as if this Act had not come into force until the child ceases to be in the custody of a director or ceases to be the subject of the temporary guardianship order.

29 Thus, the Legislature never intended that the new child-in-care guidelines should by applied to children, like L.T., who were already in care under a TGO. Both the spirit and wording of the new legislation indicate that for children already in care under temporary orders, such as the appellant's daughter, the guidelines under the old *Act* continue to apply. The trial judge erred in law, therefore, by concluding that the spirit of the new legislation required her to make a PGO because of the length of time L.T. had been in care.

30 Dealing with the appellant's submissions regarding section 34(1) of the *Act*, the appellant concedes, and we agree, that requirements of subsection 34(1)(a) were met because there was an existing TGO. With respect to 34(1)(b), the court must be satisfied that "the survival, security or development of the child cannot adequately be protected if the child remains with or is returned to the child's guardian." We have some difficulty accepting that the Director has established the onus of this subsection. This is not the usual case of child neglect. L.T. was not apprehended, nor did abuse or neglect lead to her coming into care. She came into care, and remained in custody, by consent because her mother did not have the economic and social resources to survive with a young baby. The two custody agreements, and the TGO, came about with the appellant's consent because she recognized she could not provide economically and she needed help. There is evidence that the appellant did not cooperate fully with child welfare authorities, or follow treatment plans, but she was a young immature woman, without external support, who did not really realize the seriousness of her situation until trial. When she finally came to grips with the need to demonstrate her abilities as a parent, she was able to produce evidence that she

was attempting, with some success, to meet the requirements set out by Dr. Clarke in his report. Moreover, by the time of trial she had met the two conditions that were required by the service plans, namely, she had a job and a home. Finally, we note, there was no evidence of alcohol or drug abuse.

31 Nonetheless, the trial judge found that L.T. could not be immediately returned to her mother's care, implicitly finding that the Director had met the requirements of section 34(1)(b). While we might not have come to this conclusion, we are mindful of the standard of review on matters of mixed fact and law, and would not interfere.

32 We are satisfied, however, that the trial judge erred by failing to consider section 34(1)(c). That section requires the Director to show, and the court to find, that "it *cannot* be anticipated that the child *could* or *should* be returned to the custody of the child's guardian within a reasonable time." (Emphasis added). In our view, the trial judge did not address whether this requirement had been met. Moreover, she did not recognize that unless the Director proves that it cannot be anticipated that the child could or should be returned within a reasonable time, the application for a PGO must fail.

33 The trial judge simply made her decision on the basis the child had been in custody too long. The error is set out in the following passage from her reasons which we repeat:

> This child has been in care two years, she needs a decision made for her life and she needs it made now. She has been in care too long. This decision should have been made a year ago. Perhaps eighteen months ago. She should have an opportunity to get on with her life. It is unfortunate that M. has not — did not have the ability to make better choices at an earlier time because my decision might have been different at that point. (A.B. Vol. 4:451)

34 The trial judge acknowledged, in this passage, that if the appellant had come to court earlier, with similar evidence of improvement, the trial judge might not have granted the PGO. She recognized, therefore, that the evidence before her supported the possibility of the child's return to her mother. She just felt it was too late. Her findings, however, imply that the Director had not satisfied the onus of showing, on a balance of probabilities, that "it cannot be anticipated that the child could or should be returned to the custody of the child's guardian within a reasonable time."

35 The trial judge did go on to say that much about the future was unknown. But uncertainty cannot form the basis for a PGO because the obligation falls on the Director to show that return of the child is not possible within a reasonable time. This is a serious order, severing a child's relationship with her natural parent, and it is fundamental that the requirements set out in section 34(1) be proven according to the proper standard. The effect of the trial judge's conclusion was to place the onus on the appellant to show why the PGO should not issue when the onus properly fell to the Director to show that it cannot be anticipated that the child could or should be returned within a reasonable time.

36 It follows that the trial judge did not apply the proper legal test, found in section 34(1)(c) of the *Act*, when she granted the PGO.

B. Ground Two — Did the Trial Judge Fail to Consider the Best Interests of the Child as set out in Section 2 of the Act?

37 The appellant submits that the trial judge also erred by failing to consider the best interests of the child

as that phrase is described in section 2 of the *Act*. She points, in particular, to subsections 2(e) and 2(i) which focus on the purpose of intervention and the importance of maintaining the family unit where that is possible. These subsections read:

> (e) the family is responsible for the care and supervision of its children and every child should have the opportunity to be a wanted and valued member of a family, and to the 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 insofar 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 it family only when other less intrusive measures are not sufficient to protect the survival, security or development of 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;

38 According to the appellant, if the learned trial judge had considered these subsections, in light of the evidence before her when the trial reconvened, she might have returned the child to her mother, with the appropriate supports, or extended the temporary order.

39 We agree with the appellant. Section 2 sets out the overarching principle that a court must consider the best interests of a child when making orders related to protective services. It also sets out the criteria for making such a determination. A number of the considerations set out in section 2 indicate that the ultimate goal of intervention is the rehabilitation of the family, where that is possible, because this is in the best interests of the child. We note that subsections 2(a) and 2(c) of the *Act* also support this argument. These subsections read:

> 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;
>
> . . . . .
>
> (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;

40 Here the appellant was L.T.'s guardian and family. There was evidence of bonding. Special consideration should have been given, therefore, to the importance of the mother-daughter relationship and the legislative recognition of the importance of the family. The trial judge acknowledged the appellant's improvement, recognizing that she had taken concrete and positive steps to meet the Director's requirements. She based her order, however, on a finding that the child has been in custody too long — as though this was the sole determinant of

the child's best interests. It follows that she failed to consider the importance of the factors set out in section 2, and the fact that the best interests of the child include the recognition of the importance of family. In the end, the trial judge erred in law by not conducting the proper legal analysis.

C. Were the Legal Errors Fundamental to the Decision?

41 It remains to be asked whether these various legal errors were so fundamental to the trial judge's decision that it must be overturned. We conclude that by failing to apply the proper tests the trial judge failed to give adequate consideration to the evidence — much of which favoured the dismissal of the application.

42 First, the evidence showed that by the time the trial resumed the appellant had done everything she could to follow the recommendations made by Dr. Clarke. She had started a program of personal counselling to address the issues arising from her upbringing. She had begun a program of in-home support care, with positive results. Finally, and in accordance with Dr. Clarke's third recommendation, she had begun taking parenting courses designed to make her more effective as a parent. In addition to taking these various steps, it is clear from the support worker's reports, filed with the court, that the appellant was making a sincere effort to learn and apply the principles she was being taught with the result that she was actually becoming a better parent.

43 Second, much of the Director's concern was based on the appellant's alleged inability to co-operate with the department's social workers and foster parents. It is clear that by the time the PGO hearing resumed, however, the appellant had shown herself willing to accept in-home support and assistance. Not only that, she was punctual, attentive and responsive to the assistance being offered to her, and the application of the principles she was being taught showed results.

44 It is worth noting, on this point, that the Director's service plans typically required the appellant to arrange daycare, establish routines, attend parenting after separation courses, and seek counselling for unresolved issues related to her upbringing in an abusive household, while at the same time requiring her to obtain employment and establish a permanent residence. This is a daunting list of requirements, particularly when one considers that the appellant was young, immature, and not receiving any appreciable help from her immediate family. Moreover, as section 2 of the *Act* indicates, there was an obligation on the Director to provide services to keep the family together.

45 Third, the Director's initial concern was that the appellant did not have a sufficiently stable lifestyle to provide the necessities of life for her daughter. In particular, she did not have a steady means of support and a consistent residence. By the time the PGO hearing resumed in June 2004, however, the appellant had both.

46 Fourth, there was never any evidence that the appellant was guilty of physical abuse or neglect. Earlier investigations by child abuse authorities failed to reveal any issues of sufficient concern to warrant intervention. Furthermore, Dr. Clarke noted in his report that the appellant did not believe in corporal punishment and that she "was not inclined to neglect her daughter." The evidence indicated that the appellant did not abuse either alcohol or drugs. It is worth remembering, at this point, that the reason L.T. came into care in the first place was because her mother came to the Director seeking help.

47 Finally, this child has bonded with her mother. This was clear in the initial social worker's report, prepared at the end of the first three-month custody agreement, and it was apparent at the time the trial resumed through the in-home support worker's reports. This relationship is relevant to whether, in the words of section 34(1)(c) "it cannot be anticipated that the child...*should* be returned to the custody of the child's guardian."

48 The onus in this application was on the Director to show, along with the first two requirements of section 34(1), that "it *cannot* be anticipated that the child *could* or *should* be returned to the custody of the child's guardian within a reasonable time." We are not satisfied, on a full review of the evidence available at the time the trial reconvened, that a proper consideration of the requirements of section 34(1)(c), and the best interests of the child as set out in section 2, would have resulted in a PGO. The PGO, therefore, cannot be upheld. The learned justice of the Court of Queen's Bench also erred in law by failing to recognize these errors.

IX. Remedy

49 Our remedial authority in this appeal is governed by section 117 of the *Child Welfare Act*, and by r. 518 of the *Alberta Rules of Court*. Section 117 of the *Act* sets out the appellate powers of the Court of Queen's Bench. It reads:

> 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.

50 Rule 518 of the *Rules of Court* describes this court's power when there is a further appeal. It reads:

> 518 The Court may
>
> (a) direct amendment of any proceeding before it;
>
> (b) receive further evidence either by oral examination, by affidavit, upon commission or otherwise;
>
> (c) draw inferences of fact;
>
> (d) direct a new trial;
>
> (e) **give any judgment and make any order which ought to have been made and make such further or other order as the case may require**;
>
> (f) make such order as to costs as to it seems just, but where the court is equally divided, the costs shall follow the event of the appeal. (emphasis added)

51 These provisions indicate, as the parties suggested during the hearing, that this court has considerable latitude in crafting a just remedy. Generally, where the error is a failure to apply the correct test this court directs a new trial. We are reluctant to do so in the circumstances of this case, given the time that has passed since the

PGO was granted. During this time, the appellant has not seen her daughter. Thus, we terminate the PGO. Having regard to the existing finding that the child could not be returned to her mother at the time the PGO was granted, we grant a TGO for a term of six months from the date this memorandum of judgment is filed. Given the positive in-home reports, the mother's access should be liberal and generous.

52 It is possible the Director may still wish to pursue a PGO at the end of this six-month period. We do not think that conducting a second PGO hearing is in the best interests of this child, given the further delay that this would cause. As a result, we adjourn the current PGO application. In the event that the Director decides to proceed with its application, when the TGO expires, the adjournment will give the appellant time to acquire and adduce more complete evidence concerning the effect of psychological counselling. As a result of the adjournment, both parties may adduce further evidence relevant to the tests under section 34(1), and the trial judge will make her findings anew based on all of the evidence.

53 If the trial judge is unable, or prefers not to continue, the matter can proceed in front of another judge of the provincial court. In that event, we recommend the parties agree to the admission of evidence from the first trial where that is possible.

54 The time that L.T. has been in care under the terminated PGO is not to be considered in calculating the time limits set out in section 33 of the *Act*.

55 We retain jurisdiction to clarify the meaning of these orders if this becomes necessary.

Appeal allowed.

END OF DOCUMENT