2009 CarswellAlta 33, 2009 ABCA 25, 99 Alta. L.R. (4th) 28, [2009] A.W.L.D. 548, [2009] A.W.L.D. 549, [2009] A.W.L.D. 547, [2009] W.D.F.L. 604, [2009] W.D.F.L. 605, [2009] W.D.F.L. 607, 61 R.F.L. (6th) 64, 446 A.R. 333, 442 W.A.C. 333, 307 D.L.R. (4th) 140

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F. (A.), Re

T.W. and R.W. (Appellants / Plaintiffs) and The Director of the Alberta Child, Youth and Family Enhancement Act and Anne Marie Kingston (Respondents / Defendants)

Alberta Court of Appeal

C. Conrad, M. Paperny, K. Ritter JJ.A.

Heard: December 1, 2008
Judgment: January 20, 2009
Docket: Calgary Appeal 0801-0060-AC

Proceedings: reversing *F. (A.), Re* (2008), 2008 ABQB 97, 2008 CarswellAlta 458 (Alta. Q.B.); affirming *F. (A.), Re* (2006), 2006 ABPC 225, 2006 CarswellAlta 1779 (Alta. Prov. Ct.)

Counsel: K.A. **Medora** for Appellant

C.R. Ford for Respondent

Subject: Family

Family law --- Children in need of protection — Practice and procedure in custody hearings — Commencement of proceedings — Parties — Grandparents

Standing to bring application for guardianship — Parents' five children were apprehended from their care in 2005 — Director of Children's Services applied for permanent guardianship order under Child, Youth and Family Enhancement Act ("CYFEA") — Grandparents brought cross-application for private guardianship under Family Law Act ("FLA") — Director's application was granted and grandparents' cross-application was dismissed — Grandparents' appeal of decision was dismissed — Appeal judge ruled that grandparents had no standing to bring application for private guardianship pursuant to provisions of FLA — Appeal judge found that under s. 39 of CYFEA, permanent guardianship order took precedence over orders made under other legislation — Appeal judge held that CYFEA created complete code in situations where child was in care of Director — Grandparents appealed — Appeal allowed; new trial ordered — Grandparents were not precluded from making guardianship application under FLA — Given grandparents were not able to present evidence in support of their application at trial, only appropriate remedy was new trial — Guardianship provisions of CYFEA do not form complete code with respect to private guardianship applications for children in care — Plain language of legislation does not express clear intention to oust jurisdiction of FLA once Director becomes involved — It appeared

that legislature intended two Acts to work together, particularly given fact that they came into force on same day — Ultimate purpose behind legislation is best interests of children and CYFEA emphasizes importance of preserving family wherever possible — Child is entitled to have court consider all persons who may be able and willing to provide proper care.

Cases considered by *M. Paperny J.A.*:

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

Eve, Re (1986), 13 C.P.C. (2d) 6, (sub nom. *E. v. Eve)* [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1, 71 N.R. 1, 61 Nfld. & P.E.I.R. 273, 185 A.P.R. 273, 8 C.H.R.R. D/3773, 1986 CarswellPEI 37, 1986 CarswellPEI 22 (S.C.C.) — referred to

K. (R.) v. Alberta (Director, Child, Youth & Family Enhancement Act) (2008), 2008 ABPC 25, 2008 CarswellAlta 91, 87 Alta. L.R. (4th) 377, 49 R.F.L. (6th) 434, 438 A.R. 238 (Alta. Prov. Ct.) — considered

M. (F.), Re (2008), 2008 ABQB 94, 2008 CarswellAlta 457, 53 R.F.L. (6th) 342 (Alta. Q.B.) — referred to

T. (M.) v. Alberta (Director of Child Welfare) (2005), 42 Alta. L.R. (4th) 99, 2005 CarswellAlta 362, 2005 ABCA 125, 363 A.R. 306, 343 W.A.C. 306 (Alta. C.A.) — followed

U. (J.) v. Alberta (Regional Director of Child Welfare) (2001), 83 C.R.R. (2d) 359, 281 A.R. 396, 248 W.A.C. 396, 2001 CarswellAlta 661, 2001 ABCA 125 (Alta. C.A.) — 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.) — referred to

W. (O.T.), Re (2008), 52 R.F.L. (6th) 149, 2008 ABQB 93, 2008 CarswellAlta 466 (Alta. Q.B.) — referred to

Statutes considered:

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

Generally — referred to

Pt. 1, Div. 5 — referred to

s. 2 — considered

s. 2(i)(i) — considered

s. 2(o) — considered

s. 34(4) — considered

2009 CarswellAlta 33, 2009 ABCA 25, 99 Alta. L.R. (4th) 28, [2009] A.W.L.D. 548, [2009] A.W.L.D. 549, [2009] A.W.L.D. 547, [2009] W.D.F.L. 604, [2009] W.D.F.L. 605, [2009] W.D.F.L. 607, 61 R.F.L. (6th) 64, 446 A.R. 333, 442 W.A.C. 333, 307 D.L.R. (4th) 140

s. 39 — considered

s. 52 — considered

s. 56 — considered

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

Generally — referred to

Pt. 2 — referred to

s. 6 — referred to

s. 17(1)(c) — considered

s. 18 — referred to

s. 21(8) — referred to

s. 23 — considered

s. 23(5) — considered

s. 30(3) — referred to

s. 38(1)(g) "time with a child clause" — referred to

APPEAL by grandparents from judgment reported at *F. (A.), Re* (2008), 2008 ABQB 97, 2008 CarswellAlta 458 (Alta. Q.B.), dismissing their appeal concerning permanent guardianship order.

***M. Paperny J.A.*:**

Introduction

1 This appeal concerns the interaction of two pieces of child-centred legislation: the *Family Law Act*, S.A. 2003, c. F-4.5 ("FLA") and the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 ("CYFEA"). Both statutes contain provisions dealing with applications for private guardianship of children; the current versions in both statutes came into effect on the same day, October 1, 2005.

2 The question on the appeal is whether, as the Director urges and the courts below concluded, the guardianship provisions under the CYFEA form a complete code with respect to the guardianship of children in care and preclude private applications for guardianship of such children under the FLA.

Background and Decisions Below

3 The appellants, T.W. and R.W. (the "grandparents"), are the maternal grandparents of five children who, at the time of the appeal, ranged in age between 8 and 13 years.

4 The children were apprehended from the care of their parents on May 19, 2005. The Director applied for a

permanent guardianship order ("PGO") on May 27, 2005, pursuant to the CYFEA. A trial to determine the PGO application commenced on December 12, 2005.

5 The appellants filed for private guardianship under the provisions of the CYFEA. The trial judge dismissed this application three days into the trial, as the appellants did not meet the requirements for private guardianship under that *Act*. The trial judge allowed the appellants to refile for guardianship under the FLA, which has less restrictive guardianship provisions.

6 The appellants attended the trial and were represented by counsel. Their counsel was permitted to cross-examine witnesses during the trial, but the trial judge did not permit the appellants to testify or to present any evidence.

7 The trial concluded on July 31, 2006. In written reasons issued on November 21, 2006, the trial judge granted the PGO. She dismissed the appellants' FLA application, essentially holding that they had no standing to apply for guardianship under the FLA in the circumstances of the case. She stated at para. 65:

> Once a Court is satisfied that three conditions under section 34(1) of the *Child, Youth and Family Enhancement Act* have been met by the case brought by the Director, no order under the *Family Law Act* can override the permanent guardianship order except with the consent of the Director.

8 The appellants appealed this decision to the Court of Queen's Bench, where the appeal justice addressed the following issue: can the Court grant a private guardianship application pursuant to provisions of the FLA when the children who are the subject of that application are in the custody of the Director pursuant to the provisions of the CYFEA?[FN1]

9 The appeal justice answered that question in the negative, ruling that the appellants had no standing to bring an application for private guardianship pursuant to the provisions of the FLA. In reaching this conclusion, he reviewed the provisions of the CYFEA, formerly the *Child Welfare Act*, R.S.A. 2000, c. C-12, including amendments to the private guardianship provisions in Division 5 of that *Act* that were proclaimed in force on October 1, 2005, the same date on which the new FLA came into force.

10 The appeal justice was of the view that s. 39 of the CYFEA makes it clear that a PGO will take precedence over orders made under other legislation regarding custody, access, contact, parenting time or place of residence. He also referred to the decision of this Court in *Alberta (Director of Child & Family Services) v. S. (L.)*, 2006 ABCA 319, 68 Alta. L.R. (4th) 110 (Alta. C.A.), which held that the CYFEA creates a complete code concerning appeal procedures. He concluded that the same reasoning should apply to the private guardianship provisions of the CYFEA, holding at para. 35 (of 2008 ABQB 94 (Alta. Q.B.)) that: "Division 5 of the CYFEA creates a complete code with respect to guardianships in those situations where the child is in the care of the Director and that the private guardianship provisions contained in the FLA do not apply."

Issue on Appeal and Standard of Review

11 The issue on this appeal is the same as in the court below: does Division 5 of the CYFEA create a complete code with respect to private guardianship for children in the care of the Director, thereby precluding applications for guardianship under the FLA for such children?

12 The parties agree that this is a question of law and the standard of review to be applied by this Court is

correctness: *T. (M.) v. Alberta (Director of Child Welfare)*, 2005 ABCA 125 at para. 25, 42 Alta. L.R. (4th) 99 (Alta. C.A.) ("*T. (M.)*").

Analysis

13 Division 5 of the CYFEA and Part 2 of the FLA each contain provisions permitting applications for the private guardianship of children. The relevant provisions are as follows:

CYFEA

Private guardianship

52(1) Any adult who for a period of at least one month has had the continuous care of a child who is in the custody of a director or is the subject of a temporary guardianship order or a permanent guardianship agreement or order may apply to the Court in the prescribed form for a private guardianship order in respect of the child.

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

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

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

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

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

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

(a) the applicant consents in writing, and

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

Private guardianship order

56(1) If the Court is satisfied that

(a) the applicant is able and willing to assume the responsibility of a guardian toward the child,

(b) it is in the best interests of the child, and

(c) the child has been in the continuous care of the applicant for a period of at least 3 months immediately prior to the hearing,

the Court may make a private guardianship order appointing the applicant as a guardian of the child.

(1.1) On making an order under subsection (1), the Court may include terms respecting custody of and contact with the child.

(2) The clerk of the Court shall provide a certified copy of an order made under subsection (1) to

(a) the applicant,

(b) any person who was a guardian of the child immediately before the making of the order,

(c) the child, if the child is 12 years of age or older, and

(d) a director, if a director was not the guardian of the child immediately before the making of the order.

FLA

Guardianship order

23(1) The court may, on application by a person who

(a) is an adult and has had the care and control of a child for a period of more than 6 months, or

(b) is a parent other than a guardian of a child,

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

(2) The court may, on application by a child, make an order appointing a person as a guardian of the child if

(a) the child has no guardian, or

(b) none of the child's guardians is able or willing to exercise the powers, responsibilities and entitlements of guardianship in respect of the child.

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

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

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

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

(4) Subject to subsection (5), a person may not apply for a guardianship order unless the child or proposed guardian resides in Alberta.

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

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

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

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

(7) The court may, in making a guardianship order under this section or terminating the guardianship of a guardian under section 25, make a parenting order on its own motion or on application by one or more of the parties.

(8) No order may be made under subsection (1) or (2) if the purpose of the application is to facilitate the adoption of the child.

14 There are significant differences between the application requirements under the two statutes: the time requirements for care of the child, the ability of a court to waive those requirements, and the information required to make the decision. Section 52 of the CYFEA requires that an applicant for private guardianship must have had care of the child for at least *one* month; s. 56 provides that the court may make a private guardianship order only if the applicant has had the continuous care of the child for the *three* months immediately prior to the hearing and most significantly, there is no provision for these requirements to be waived by the court. In contrast, s. 23 of the FLA requires that the applicant have had the care and control of the child for a period of more than *six* months, but that requirement may be waived by the court: s. 23(5). Moreover, an application under the CYFEA *must* include a report regarding the suitability of the applicant for guardianship; the FLA provides that the court *may* require such a report.

15 The Director argues that the CYFEA applies specifically to children in need of intervention and that any guardianship applications in respect of such children must be made under that *Act*. The FLA, he says, applies in the context of family disputes and has no application to children in care.

16 Given the stringent timing requirements under ss. 52 and 56 of the CYFEA, the practical effect of this position is that only those guardianship applicants who meet with the approval of the Director, and who therefore have had care of the children in the period leading up to the hearing, will ever meet the requirements for private guardianship under the CYFEA. Persons, like the appellants, members of the child's extended family who wish to apply for guardianship without having had the children placed with them, would have no opportunity to make an application under the CYFEA.

17 The position taken by the Director and accepted in the courts below is straightforward: once the Director becomes involved, the jurisdiction of the FLA is ousted and the CYFEA governs all guardianship applications. I cannot accept that position. Neither statute expresses a clear intention to achieve that result.

18 As the appellants point out, several provisions in the FLA include statements that the provision does not apply to the Director, or to decisions or orders made under the CYFEA: see ss. 6, 21(8), 30(3), 38(g). Section 23, pursuant to which the appellants made their guardianship application, contains no such language. The application of the legal maxim *expressio unius est exclusio alterius* (the implied exclusion rule) suggests that, by ex-

pressly rendering certain parts of the FLA subordinate to the CYFEA, the legislature's silence on the point in s. 23 should be interpreted as an intention to have s. 23 continue to apply notwithstanding the applicability of the guardianship provisions of the CYFEA. It would have been a simple matter for the legislature to provide that the guardianship provisions of the FLA do not apply to children in the custody of the Director. That it did not do so is telling, particularly given the coincidence in timing in the proclamation of the two *Acts*.

19 Moreover, s. 17(1)(c) of the FLA indicates an intention that the FLA's guardianship provisions will continue to apply to children in care. It provides:

> **17(1)** Unless the court directs otherwise, the following persons must, in accordance with the regulations, be served with notice of an application under this Part:
>
> ...
>
> (c) in the case of an application for a guardianship order, each proposed guardian, and a director under the *Child, Youth and Family Enhancement Act* if the child is in or comes into the custody of a director at any time after the application is commenced;

20 The Director urges us to interpret this merely as a notice provision; that notice is to be given to the Director of an FLA guardianship application primarily for the purpose of allowing the Director to intervene in those proceedings, in order to advise the court that the child is in custody and must be dealt with in accordance with the requirements of the CYFEA. This seems a most circuitous method for the legislature to choose to oust the court's jurisdiction under the FLA. It is more logical to conclude that s. 17(1)(c) anticipates that a guardianship application under the FLA may be made even following the Director's involvement.

21 I am also guided by the absence of an express statement in Division 5 of the CYFEA to the effect that the guardianship provisions under that *Act* operate to the exclusion of applications under the FLA. The appeal justice in the court below relied on s. 39 of the CYFEA, which provides that the right of a director to custody of a child who is in custody, or is the subject of a temporary guardianship order or a permanent guardianship order ("PGO"), takes precedence over the rights given by any order under other legislation respecting "custody, access, contact, parenting time or the child's place of residence." The appeal justice held that this section "makes it clear that a PGO will take precedence over other orders" (*T. (M.)* at para. 34). However, s. 39 deals with the right to custody and makes no mention of private guardianship applications. It does not assist the Director's interpretation of the CYFEA.

22 The Director also points to s. 34(4) of the CYFEA, which provides that, if the court makes a PGO, the Director is the sole guardian of the child. Given the nature of a PGO, different considerations may arise in a case where a PGO has been granted before a guardianship application under the FLA is filed. I do not need to address that question in this case, as the appellants' application pre-dated the granting of the PGO.

23 It is not clear from the plain language of the two statutes that the legislature intended the guardianship provisions of the CYFEA to prevail in the case of children in need of protection. Nor do the Hansard debates from the time the two provisions were enacted shed much light on the matter. It seems from those debates, combined with the fact that Division 5 of the CYFEA and the FLA came into force on the same day, that the legislature intended them to work together.

24 The Director argues that the legislature, in enacting the new ss. 52 and 56 of the CYFEA, intended to

give the Director more authority to deal with the guardianship of children in need of protection. He points out that the requirements for applications for guardianship under the FLA are less stringent, and that the CYFEA allows for the Director to expedite the process when it is in the best interests of the child to do so.

25 I do not find this argument persuasive. The Director's reading of the legislation would certainly place great authority to determine the guardianship of children in need of protection in the hands of the Director while removing that authority from the courts. It is not possible to discern an intention to make such a shift from the legislation as drafted. If that is what the legislature intended, it could have said so.

26 The second point, the ability of the Director to expedite matters, has been used by some courts as a rationale for finding that the CYFEA's guardianship provisions constitute a complete code: see, eg. *K. (R.) v. Alberta (Director, Child, Youth & Family Enhancement Act)*, 2008 ABPC 25 at paras. 70-72, 87 Alta. L.R. (4th) 377 (Alta. Prov. Ct.). In that case, McLellan P.C.J. concluded that the intention of the CYFEA was to achieve permanency as quickly as possible for children in need of protection, and that the result of permitting FLA guardianship applications to proceed in such cases might be a "never ending court process."

27 I cannot agree that an interest in expediting guardianship applications for children in care can oust the provisions of the FLA. I see no reason why the timing concerns raised by the Director cannot be addressed in the court process. In this case, the applicants for private guardianship under the FLA were present in court during the trial to determine the Director's PGO application. In this case, and no doubt many others, it would have been a simple matter to have both applications addressed together.

28 Such an approach was contemplated by this Court's decision in *W. (K.V.) v. Alberta (Director of Child Welfare)*, 2006 ABCA 404, [2007] 3 W.W.R. 626 (Alta. C.A.) ("*W. (K.V.)*"). In *W. (K.V.)*, the Court recognized that an FLA guardianship application and an application by the Director can often be most expeditiously heard together. The Court went on to hold that the merits of an application for private guardianship by a relative of the child should be considered before the Director's application for a PGO, as only then can the court properly assess whether the child is in need of protective services. The appeal justice below considered *W. (K.V.)* to be of limited assistance, as it dealt with the legislation as it existed before October 1, 2005. However, I see nothing in the new guardianship provisions of the CYFEA that renders *W. (K.V.)* and the reasoning in it unauthoritative.

29 Moreover, there are compelling policy reasons that support this conclusion. Both pieces of legislation explicitly mandate consideration of a child's best interests in any decision or proceeding under them (see: s. 18 of the FLA, and s. 2 of the CYFEA) and the ultimate purpose behind both pieces of legislation is the best interests of children. However the CYFEA goes to considerable lengths to emphasize that the legislation is premised on enhancing, supporting, and preserving the family whenever possible, keeping children with their families, developing involvement, and encouraging responsibility for the care of their children. Section 2 of the CYFEA is explicit in the values it supports:

> **Matters to be considered**
>
> 2. If a child is in need of intervention, a Court, an Appeal Panel and all persons who exercise any authority or make any decision under this Act relating to the child must do so in the best interests of the child and must 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 importance of stable, permanent and nurturing relationships for the child;

(c) the intervention services needed by the child should be provided in a manner that ensures the least disruption to the child;

(d) a child who 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, supervision and maintenance of its children and every child should have an opportunity to be a wanted and valued member of a family, and to that end

(i) if intervention services are necessary to assist the child's family in providing for the care of a child, those services should be provided to the family, insofar as it is reasonably practicable, in a manner that supports the family unit and prevents the need to remove the child from the family, and

(ii) a child should be removed from the child's family only when other less disruptive measures are not sufficient to protect the survival, security or development of the child;

(f) subject to clauses (e) and (g), if a child has been exposed to domestic violence within the child's family, intervention services should be provided to the family in a manner that supports the abused family members and prevents the need to remove the child from the custody of an abused family member;

(g) any decision concerning the removal of a child from the child's family should take into account the risk to the child if the child remains with the family, is removed from the family or is returned to the family;

(h) if it is not inconsistent with protecting the survival, security or development of a child who is in need of intervention, and appropriate community services are available, the child or the child's family should be referred to the community for services to support and preserve the family and to prevent the need for any other intervention under this Act;

(i) 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 within the child's extended family;

(ii) the benefits to the child of a placement within or as close as possible to the child's home community,

(iii) the benefits to the child of a placement that respects the child's familial, cultural, social and religious heritage,

(iv) the benefits to the child of stability and continuity of care and relationships,

(v) the mental, emotional and physical needs of the child and the child's mental, emotional and

> physical stage of development, and
>
> (vi) whether the proposed placement is suitable for the child;
>
> (j) the provision of intervention services is intended to remedy or alleviate the condition that caused the child to be in need of intervention;
>
> (k) intervention services are most effective when they are provided through a collaborative and multi-disciplinary approach;
>
> (l) 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;
>
> (m) if a child is being provided with care under this Act, a plan for the care of that child should be developed that
>
> (i) addresses the child's need for stability, permanence and continuity of care and relationships, and
>
> (ii) in the case of a youth, addresses the youth's need for preparation for the transition to independence and adulthood;
>
> (n) 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;
>
> (o) there should be no unreasonable delay in making or implementing a decision affecting a child;
>
> (p) if the child is an aboriginal child, the uniqueness of aboriginal culture, heritage, spirituality and traditions should be respected and consideration should be given to the importance of preserving the child's cultural identity.

30 In a list of 15 specific statutory considerations at least 11 speak directly to the preservation of the family, broadly understood. These statutory considerations inform all decisions under the CYFEA and their importance is not diminished when a child is in care of the Director. Arguably that is when they become of greatest significance. This Court has previously affirmed this proposition in both *T. (M.)*, at paras. 37-40, and *W. (K.V.)*, at paras. 31-32.

31 Further, in *W. (K.V.)*, this Court concluded, at para. 31, that the concept of keeping a child within the "family" must necessarily include the extended family. The Court noted that s.2(i)(i) of the CYFEA provides expressly that any decision concerning the placement of a child outside the child's family takes into account the benefits to the *child* of a placement within the child's extended family.

32 A purposive interpretation accords with these goals. The Director's suggested interpretation focusses only on one factor, s. 2(o), and undermines the rest. It effectively excludes potential family members from being materially involved and considered for guardianship unless the Director agrees. The goal of achieving permanency as quickly as possible, while legitimate, is hardly the determining factor, given the other considerations

mandated in the legislation. Any concern about delay in process could be handled by the Director and the Courts, if necessary, by ensuring interested family members are involved early and are kept informed.

33 Further, the Director's interpretation has the effect of removing the Court's authority and discretion to consider and decide what is in the best interests of the child, both under the legislation at issue and under its inherent and broad *parens patriae* jurisdiction. While the Court's *parens patriae* jurisdiction cannot override express statutory authority (see: *U. (J.) v. Alberta (Regional Director of Child Welfare)*, 2001 ABCA 125 at para 7, 281 A.R. 396 (Alta. C.A.); and *Eve, Re*, [1986] 2 S.C.R. 388, at 426, 31 D.L.R. (4th) 1 (S.C.C.)), there is no such express statement in this legislation. There is no indication that the legislature wished to constrain the Court's choice of guardian in the manner suggested by the Director, or to substitute the Director's view for that of the Court's simply because a child has come into his care. A child is entitled to have the Court consider all persons who may be able and willing to provide proper care, particularly members of the child's extended family, and not just the person selected by the Director. It could also be suggested that the Court's supervisory role is heightened when a child has come into care.

Conclusion

34 Given the language of the FLA and CYFEA, and the policy considerations identified above, I do not agree that the guardianship provisions of the CYFEA form a complete code with respect to private guardianship applications for children in care. The appellants were not precluded from making a guardianship application under the FLA and their appeal is allowed.

35 Unfortunately, given the way the trial proceeded, the appellants were not given an opportunity to present evidence in support of their application. It is always preferable to have all evidence heard and all relevant findings made by the trial court at once. That did not happen in this case. The only appropriate remedy is to order a new trial and I so order.

***C. Conrad J.A.*:**

I concur.

***K. Ritter J.A.*:**

I concur.

Appeal allowed.

FN1 The Queen's Bench appeal in this case (2008 ABQB 97 (Alta. Q.B.)) was heard together with two others: *M. (F.), Re*, 2008 ABQB 94, [2008] A.J. No. 381 (Alta. Q.B.) and *W. (O.T.), Re*, 2008 ABQB 93, [2008] A.J. No. 380 (Alta. Q.B.). The bulk of the reasons for all three appeals may be found in 2008 ABQB 94 (Alta. Q.B.).

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