

2001 CarswellAlta 80, 2001 ABPC 27, 283 A.R. 169

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T. (J.), Re

IN THE MATTER OF: The Child Welfare Act, S.A., C-8.1, as amended; and The Provincial Court Act, S.A., P-20, as amended

AND IN THE MATTER OF: J.T. born August 6, 1993; and K.T. born January 12, 1995; and J.R. born January 11, 2000 CHILDREN WITHIN THE MEANING OF THE CHILD WELFARE ACT

Alberta Provincial Court

Lipton Prov. J.

Judgment: February 12, 2001

Docket: Doc. Calgary 15167612W10101, 15167612W10201, 15167612W10301, CFC122721, CFC123908

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Counsel: *J. Nicholson*, for Director of Child Welfare

Ms D. Castle, for Mother

Ms S. Hendricks, for Father, T.R.

K. Sparks, for Father, M.T.

D. Kobylnyk, for Maternal Grandparents

Subject: Family

Family law --- Children in need of protection — Application by parent for return of child — Under temporary order — General

Three children apprehended from mother's care by Director of Child Welfare — Maternal grandparents had filed private guardianship application under Child Welfare Act as well as custody application — Father of one child wanted children to remain in temporary care pending completion of Child Welfare investigation — Father of other two children wanted them returned to care of maternal grandparents — Mother brought application for return of children to her care, arguing that apprehension could be set aside pursuant to s. 19(8)(a) of Act because she had acknowledged she was not currently capable of looking after children by moving in with maternal grandparents — Counsel for mother asked court to grant guardianship and custody to maternal grandparents if concerned about placing children with maternal grandparents after setting aside apprehension — Application dismissed — Effect of granting of private guardianship order after apprehension would be to exclude any further Child Welfare investigation — Such procedure fraught with danger, absent cogent evidence that children would

no longer be at risk — Custody of children granted to Child Welfare until end of proceedings — Maternal grandparents' application adjourned — Child Welfare Act, S.A. 1984, c. C-8.1, ss. 19(8)(a).

Cases considered by *Lipton Prov. J.*:

C., Re, 64 A.R. 182, 1985 CarswellAlta 543 (Alta. Prov. Ct.) — considered

R. (A.S.), Re (1998), 218 A.R. 276 (Alta. Prov. Ct.) — considered

Statutes considered:

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

Generally — considered

Pt. 3 — referred to

Pt. 4 — referred to

Pt. 5 — referred to

s. 1(2) — referred to

s. 17 — referred to

s. 19 — pursuant to

s. 19(8)(a) — considered

s. 19(8)(b) — considered

s. 24(2) — considered

s. 25 — considered

Provincial Court Act, R.S.A. 1980, c. P-20

Generally — considered

APPLICATION by mother for return of children to her care.

***Lipton Prov. J.*:**

INTRODUCTION

1 S.R. who is the mother (the "Mother") of J.T., K.T., and J.R. (collectively referred to as the "Children") brought an application pursuant to section 19 of the *Child Welfare Act* (the "Act") for the return of the Children to her care. The Children had earlier been apprehended from her care by a Director of Child Welfare ("Child Welfare").

2 [1]

3 T.R., the father of J.R., has requested the Children remain in temporary care pending the completion of an investigation by Child Welfare.

4 L.E. and P.E., the maternal grandparents (collectively referred to as the "Maternal Grandparents") have filed a private guardianship application pursuant to the *Act* as well as a custody application pursuant to The *Provincial Court Act* (the "PCA") in order that they be allowed to look after the Children.

5 M.T., the father of J.T. and K.T., has requested the Children be returned to the care of the Maternal Grandparents pending Child Welfare completing a home assessment on the Maternal Grandparents. He consents to their private guardianship application.

6 At the outset, I issued a ruling to the effect that the Maternal Grandparents did not have any standing to directly advance their case at this hearing. However, the Maternal Grandparents and their counsel were allowed to attend the hearing.

7 It was conceded by participating counsel that because of the Mother's current mental state, she does not have the ability at this time to look after the Children by herself.

8 It was also conceded by the Mother's counsel on a without prejudice basis that she was not opposed to J.R. remain in temporary foster care pending the completion of Child Welfare's investigation. This was done as a tactical manoeuvre by the Mother's counsel in order to allow for completion of this hearing without adjournment.

9 Concurrent with this hearing, there is also a bitter custody and access dispute being waged at the Court of Queen's Bench involving most of the same parties to this hearing.

LEGAL ISSUES AND ARGUMENTS

10 Counsel for the Mother advances a number of arguments. Firstly, it is argued that the apprehension can be set aside pursuant to section 19(8)(a) of the *Act*. The basis for this argument is that the Mother, in moving in with the Maternal Grandparents, clearly acknowledges she is not currently capable of looking after the Children. That is, by having the Maternal Grandparents assist her in looking after the Children, the Mother has made proper arrangements for the care of the Children. Therefore, there were not any grounds under section 1(2) of the *Act* to apprehend the Children as they were not and are not in need of protective services.

11 Secondly, counsel for the Mother argues that if I have a concern with placing the Children with the Maternal Grandparents after setting aside the apprehension, then I should grant their applications for private guardianship and custody of the Children.

12 [1]

13 The Mother's counsel next argues that if I still have concerns with respect to setting aside the apprehension, then I should exercise my authority under section 19(8)(b) of the *Act* and grant a 24(2) order pursuant to the *Act*, placing J.T. and K.T. with the Maternal Grandparents subject to whatever conditions I may wish to impose. That is, Child Welfare would have interim custody, but the Maternal Grandparents would have twenty-four a day care of J.T. and K.T. pending the completion of Child Welfare's assessment of the Maternal Grandparents.

14 Finally, the Mother's counsel argues that if I do not agree to placing J.T. and K.T. with the Maternal Grandparents pursuant to a 24(2) order, then I should grant the Maternal Grandparents generous access. The sugges-

tion made is that I allow the Maternal Grandparents to care for J.T. and K.T. from Friday night through to Sunday night each week.

15 Counsel for Child Welfare first argues that if I find the Mother as legal guardian cannot look after the Children, then the provisions of Parts III and IV of the *Act* require that I issue a 24(2) order pending the outcome of proceedings. That is, the Maternal Grandparents' application for private guardianship is under Part V of the *Act* and therefore, they do not have any status to be involved in these proceedings. In practicality, the Maternal Grandparents could only be appointed as temporary caretakers of the Children if Child Welfare so decides. Furthermore, the Maternal Grandparents' application under the *PCA* is superseded by child protection legislation.

16 Counsel for Child Welfare next argues that the evidence strongly suggests that I should grant a 24(2) order giving custody of the Children to Child Welfare. The basis for this argument is that given the evidence heard in this hearing, there are enough 'red flags' that justify this Court ensuring the Children remain in foster care until the assessment of the Maternal Grandparents by Child Welfare has been completed. The estimated time to complete this assessment would be one month. Furthermore, given the Children are currently doing well in foster care, there is no urgency in returning the Children at this time.

17 Although not stated, I presume that Child Welfare also wants this Court to specify that access to the Children be at the discretion of Child Welfare.

18 There was some initial confusion as to whether I was being asked to redefine 'guardian' under the *Act* to include other family members. That is, guardianship in today's society should be examined from a family unit perspective. Ms Castle agreed with Mr. Nicholson in argument that as a statutory court, I did not have the authority to redefine this term. I agree.

19 Finally, there was argument as to whether certain correspondence involving the Mother and The Workers' Compensation Board of Alberta was privileged and therefore not admissible into evidence in this hearing. I find that I am able to reach a decision in this matter without reference to this correspondence. Accordingly, I make no ruling on its admissibility in this hearing.

EVIDENCE

20 The need for an expeditious decision does not allow time for a review of the evidence presented at this hearing. Reference should be made to the Analysis section of this decision for the conclusions that I have reached based on the evidence heard.

ANALYSIS

21 I believe it to be important to state at the outset that Child Welfare does not apprehend in every situation where the guardians are unable to care for their children. Indeed, the Family & Youth Division often hears applications for private guardianship brought by individuals who wish to care for children. Many of these applications are brought by family members. As a matter of law, such applications must have the prior approval of Child Welfare under the *Act*.

22 It is also a common practice in this Division to have Child Welfare withdraw from proceedings once an individual, with Child Welfare's approval, obtains private guardianship.

23 Even after an apprehension, Child Welfare will look to see if family members are available as a temporary

foster placement until matters are sorted out.

24 I therefore disagree with any assertion that implies Child Welfare arbitrarily 'rips families apart' without first examining other alternatives to an apprehension. I also disagree with any assertion that foster care is inherently bad for children. There are good foster homes and bad foster homes. Often, the removal of children from a guardian and placing them in foster care necessitates choosing between the lesser of two evils. I do not believe anyone has ever claimed foster care to be the panacea for protecting children.

25 Dealing with the first argument advanced by counsel for the Mother, I believe I have addressed this issue in paragraph 19 above. Had Child Welfare not been in possession of information regarding the Maternal Grandparents' ability to look after the Children prior to the apprehension, I expect placement with them may have occurred vis-a-vis approval of their private guardianship application. Given Child Welfare's concerns about the Maternal Grandparents, and given the acknowledgment by counsel that the Mother is not currently capable of looking after the Children's needs, the apprehension under the *Act* is clearly justified. Quick approval of the Maternal Grandparents' private guardianship application would not have been forthcoming. Any suggestion that Child Welfare should have conducted an in-depth check of the Maternal Grandparents before deciding whether to apprehend or to approve the private guardianship application is a non sequitur given the evidence heard as to the Mother's mental and physical health, and the emergent nature of an apprehension under section 17 of the *Act*.

26 The decision as to how detailed an investigation Child Welfare should conduct prior to an apprehension typifies a Catch-22 situation. As I stated in *R. (A.S.), Re (1998), 218 A.R. 276* (Alta. Prov. Ct.), paragraph 238;

"...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 and 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...".

27 With respect to the second argument, I wish to point out the following. As a matter of law, I believe that I do have the authority to grant an application for private guardianship subsequent to an apprehension. As Fitch, J. pointed out in *C., Re , [1985] A.J. No. 460* (Alta. Prov. Ct.), the 1984 amendments to the *Act* allowed the Court to use private guardianship as an alternative to a permanent guardianship order. In order to get around the impediment placed on such a procedure pursuant to section 25 of the *Act*, it would first be necessary to strike down the apprehension or dismiss Child Welfare's application under Part III, as the case may be, before granting a private guardianship order under the *Act* and a custody order under the *PCA*. It must be remembered, however, that the efficacy of granting a private guardianship order after an apprehension is to effectively exclude any further Child Welfare investigation. Such a procedure is fraught with danger absent cogent evidence that the Children will no longer be at risk and without Child Welfare's prior approval of this arrangement.

28 The third argument advanced by counsel for the Mother is that should I decide to grant a 24(2) order, then I should order that J.T. and K.T. be placed with the Maternal Grandparents pursuant to section 19(8)(b) of the *Act*. Given their concerns, Child Welfare was not in a position to immediately decide upon placement of the Children with the Maternal Grandparents either before or after the apprehension. The issue of placement with the Maternal Grandparents pursuant to a 24(2) order must therefore be decided based on the evidence that I have heard at this hearing.

29 Dr. C., the Children's pediatrician, acknowledged the Maternal Grandparents had contacted her on many oc-

casions regarding the Children's health. They had done so because of their concern that the Mother might have some difficulties in following medical instructions due to memory lapses. During some of these conversations, the Maternal Grandparents vented their anger about alleged physical and sexual abuse perpetrated on the Children by T.R. as well as the ongoing custody battle. It should be noted here that after separating from T.R., the Mother moved in with her Children to live with the Maternal Grandparents.

30 Dr. C. testified that T.R. had contacted her and, inter alia, advised her that the Mother had been sexually abused by a male family friend of the Maternal Grandparents while growing up, that P.E. was told of this abuse and did not do anything, and that this abuse continued for a number of years. He also told Dr. C. that the Maternal Grandparents were estranged from their eldest daughter.

31 With respect to the Mother, Dr. C. testified the Mother had, inter alia, disclosed to her that she had gone to the Food Bank while living at the Maternal Grandparents, had told P.E. that she had been sexually abused as a child and was not supported by P.E., and that the Maternal Grandparents were overwhelming and hypocritical. Dr. C. testified that she had a concern as to why the Mother was going to the Food Bank while she was living with the Children at the Maternal Grandparents.

32 Although the Children's physical needs were being attended to by the Mother, Dr. C. supported the removal of the Children after the fact from the Mother's care by Child Welfare. Dr. C. testified that she hoped the apprehension would allow Child Welfare to assess the Mother, to ensure the Children's emotional needs were being addressed because of the Mother's ongoing health issues, to mitigate the effects of the custody battle on the Children, and to deal with the allegations of abuse by T.R. She was at a loss to recommend where the Children should reside.

33 Dr. S., a clinical psychologist retained by Child Welfare to assess the Mother and T.R., testified that although she had not completed her assessment on the Mother, she was in a position to offer some initial observations. In Dr. S.'s opinion, the Mother shows signs of borderline personality disorder, self-destructive behaviour, mood swings, possible depression, and relationship issues. The Mother also reported suicide attempts. In her opinion, the Mother's difficulties preceded the bus accident in 1998 which caused the Mother to suffer from post traumatic stress disorder. The Maternal Grandparents, however, are of the belief all of the Mother's troubles originated from the 1998 accident.

34 Given the above, Dr. S. testified that it was not surprising to see the Maternal Grandparents take over much of the parenting role of the Children as the Mother was preoccupied full-time with looking after her own needs. Of bigger concern to Dr. S., however, was whether the Mother's issues arose out of her childhood and the manner in which she had been parented and continues to be parented by the Maternal Grandparents.

35 Dr. S. also testified the Mother had told her about being sexually abused as a child and not being protected by the Maternal Grandparents. She also told Dr. S. about the Maternal Grandparents overwhelming style of parenting. Finally, Dr. S. testified she had been told the Children were doing well in foster care which she stated is an indicia of negative activities that had been affecting the Children prior to the apprehension.

36 Given the above, Dr. S. was of the opinion that an assessment should be completed on the Maternal Grandparents before the Children are placed with them. Although the Children's physical needs were being met and they were apparently comfortable with the Maternal Grandparents, she was not certain their emotional needs were being properly addressed given the Mother's difficulties.

37 C.T., a Child Welfare supervisor and case manager of this file, testified L.E. told her that the Mother was a better parent than his wife P.E. She also told the Court that Child Welfare in another province has an extensive file on another of the Maternal Grandparent's daughters who was adopted. I note here that a third daughter is estranged from the Maternal Grandparents and is a drug addict.

38 C.T. also testified the Mother told her that L.E. was a domineering father.

39 C.T. concluded by stating that given the family history, the allegations of sexual abuse against the Children by T.R. and their own health problems, the Mother's difficulties, and the failure by the Maternal Grandparents to recognize that some of the Mother's difficulties likely arose before the bus accident, the apprehension was justified. C.T. denied that she had contacted the wrong people before she decided to apprehend the Children. Furthermore, placement of the Children with the Maternal Grandparents at this time was premature. C.T. told the Court that a psychologist had been retained to assess the Maternal Grandparents and that her report would be sent to Child Welfare in one month's time.

40 Dr. N., the Mother's family physician, testified that she had received a copy of a psychiatric assessment done on the Mother in 1998. This assessment indicated the Mother had, inter alia, acute stress disorder and borderline personality disorder. In addition, the psychiatrist's report indicated the Mother told him (a) she had stabbed herself in order to get attention for her problems arising out of the bus accident, (b) she had left a prior abusive relationship with M.T. before she met and married T.R., and (c) she came from a dysfunctional background where her parents were religious fundamentalists, and that she had been sexually assaulted as a child by a friend of L.E.

41 L.E. presented himself as a stable individual, married for forty-four years, and employed with the same company for the past thirty-two years. He said the family is religious but that all decisions are reached by mutual agreement with his wife, and that all family members are equal.

42 He acknowledged that of his five children, his three daughters had difficulties. The eldest daughter's problems were blamed on associating with the wrong crowd and drug abuse. Another daughter whom he adopted, and who is the eldest daughter's child, also became involved in drugs because of influence by her mother. However, L.E. alleged she has turned her life around. I note here to restate C.T.'s evidence wherein she said this daughter has an extensive history with Child Welfare in another province. L.E. testified the Mother, who is his third daughter, was an excellent mother to the Children until the bus accident, and that her first bad decision had been to marry M.T. Of his two sons, L.E. said one is a truck driver and the other is a teacher.

43 L.E. was of the opinion the Children were more relaxed since being in his care, and that the two oldest Children's bed wetting and vulgar language was attributable to T.R. He stated he had room in his home to accommodate the Children, that arrangements have been made to care for the Children, and that the Mother has agreed to stay out of his home until Child Welfare otherwise agrees.

44 L.E. acknowledged that today, the Mother is not capable of raising the Children by herself. Given time, however, she could do so again. He insisted the Mother had no mental health issues prior to the accident in 1998. Furthermore, the abuse she suffered at T.R.'s hands made her condition worse.

45 L.E. attributed the Mother's statement to the psychiatrist in 1998 about her background (see paragraph 38 above) to the 1998 bus accident. However, he did acknowledge now being aware of M.T.'s abuse of his daughter as well the sexual abuse perpetrated on her by a family friend. He testified his wife P.E. never did tell him about

the latter matter because P.E. had difficulty accepting that the assault had ever occurred.

46 L.E. promised to co-operate with Child Welfare if the Children were placed with him.

47 Are the above issues outlined by these witnesses 'red flags' or 'red herrings'? In my opinion, these issues are 'red flags' and are serious enough to warrant further investigation prior to placement of the Children with the Maternal Grandparents. The fact the Maternal Grandparents have three daughters, all of whom have difficulties, is suspicious. The fact that P.E. did not deal with the Mother's sexual abuse as a child may well account for some of the mental health issues the Mother suffers from today, including the issue of the Mother allegedly selecting two abusive mates. When coupled with the Mother's own negative views of her childhood, one has to wonder what did go on in the Maternal Grandparents' home when they were raising a family. L.E.'s refusal to recognize the Mother likely had mental health issues preceding the 1998 accident may well impede the Mother's ability to recover, given that she relies upon them to such an extent.

48 In my opinion, the extra month that will be required to complete a full assessment on the Maternal Grandparents is justified. It will certainly be quite traumatic for the Children if I were to return them to the Maternal Grandparents today only to have to remove them one month later if the assessment indicates the Children will be at risk. The Children have nicely settled into their foster homes. By declining to move the Children right now, I am eliminating the possibility of one further move in the future.

49 Given the conclusions I have come to regarding placement of the Children with the Maternal Grandparents at this time, I cannot agree with the suggestion that I give the Maternal Grandparents generous access time pursuant to a 24(2) order.

CONCLUSION

50 For the reasons stated above, I am of the opinion that a 24(2) order is in the best interests of J.T. and K.T. at this time. Accordingly, custody of J.T. and K.T. is granted to Child Welfare until the end of proceedings under the *Act*. Furthermore, access to them by the Mother, Maternal Grandparents, M.T., and T.R. should each be at the discretion of Child Welfare. I also leave the issue of supervision at access visits between each of the aforementioned and J.T. and K.T. to the discretion of Child Welfare.

51 Had Ms Castle not conceded the validity of the apprehension of J.R. and his continued placement in foster care, I would have made an identical finding. The 24(2) order on J.R. shall mirror the wording above.

52 The Maternal Grandparents' applications for private guardianship and custody are adjourned. These applications should track Child Welfare proceedings under the *Act*. I have deliberately refrained from making any comment on T.R. or M.T. as primary caregivers of the Children. In the event Child Welfare withdraws from this matter at some point in the future, then the Grandparents' applications should be heard concurrently with but subject to the custody and access applications currently before The Court of Queen's Bench.

Application dismissed.

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