2010 CarswellAlta 438, 2010 ABCA 83, [2010] A.W.L.D. 1614, [2010] W.D.F.L. 1647, 78 R.F.L. (6th) 13, 317 D.L.R. (4th) 299

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D. (A.) v. Alberta (Director of Child Welfare)

A.D. (Appellant / Appellant) and The Director of Child Welfare (Respondent / Respondent) and J.B. (Respondent / Respondent) and Child and Youth Advocate (Intervener) and Children's Legal & Educational Resource Centre Society (CLERC) (Intervener)

A. D. (Respondent / Appellant) and The Director of Child Welfare (Respondent / Respondent) and J. B. (Appellant / Applicant) and Child and Youth Advocate (Intervener) and Children's Legal & Educational Resource Centre Society (CLERC) (Intervener)

Alberta Court of Appeal

Elizabeth McFadyen, Clifton O'Brien, J.D. Bruce McDonald JJ.A.

Heard: March 8, 2010
Judgment: March 12, 2010
Docket: Calgary Appeal 0901-0279-AC, 0901-0281-AC

Counsel: D.P. **Castle** for Mother

S. Channan for Child

J. Lawson for Director of Child Welfare

A. Loparco for Intervener, Child & Youth Advocate

D. Hensley, Q.C., J.R. Lamb for Intervener, Children.s Legal & Educational Resource Centre Society

Subject: Family

Family law --- Children in need of protection — Miscellaneous issues

Director was sole guardian of child pursuant to Permanent Guardianship Order — Mother's application for access to child pursuant to s. 34(8) of Child, Youth and Family Enhancement Act was dismissed — Child was 14 years of age at time of application — Child wanted no contact with mother — Mother sought to have court determine if it was in best interests of child that access be granted, notwithstanding lack of consent — Mother appealed — Appeal dismissed — Mother's requested inquiry would have undermined s. 9 of Act and disregard mandatory legislative direction — Capacity of child 12 years or older to make decision is presumed by legisla-

tion.

Cases considered:

A. (A.) v. Alberta (Director of Child Welfare) (2008), 2008 ABCA 24, 2008 CarswellAlta 67, 47 R.F.L. (6th) 274, 425 A.R. 170, 418 W.A.C. 170 (Alta. C.A.) — followed

Alberta (Director of Child Welfare) v. R. (M.) (2003), 2005 ABQB 641, 2003 CarswellAlta 2020, 386 A.R. 182 (Alta. Q.B.) — considered

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.) — considered

Statutes considered:

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

Generally — referred to

s. 2 — considered

s. 34(8) — considered

s. 34(9) — considered

s. 114(1) — referred to

s. 116(1) — considered

s. 116(3) — considered

s. 116(4) — considered

s. 116(5) — considered

APPEAL by mother from judgment dismissing her application for access to child.

***Per curiam*:**

Introduction

1 These consolidated appeals arise from an application made by the mother for access to her son, for whom the Director of Child Welfare was sole guardian.

Facts

2 B.J. (the child) was born July 4, 1994. The Director of Child Welfare (the Director) is guardian of the child pursuant to a Permanent Guardianship Order made in November 2001.

3 D.A., the child's biological mother (the mother) made application for access to the child pursuant to sec-

tion 34(8) of the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 (the *Act*). The mother was the former legal guardian of the child.

4 On February 5, 2009, a Provincial Court judge denied the mother's application, as the child, who was 14 years of age at the time, had not consented to access being granted to his mother. The child was represented by counsel at the application. The child's counsel, at the outset of the application, presented a letter written by the child saying that he wanted no contact whatsoever with his mother. The judge denied the mother's request to enter into an investigation of the competency of the child to have made the decision not to see his mother.

5 On March 2, 2009, the mother filed an appeal to the Court of Queen's Bench and, on that date, served the Director with the Notice of Appeal. The child was not named as a party nor served at that time. Nevertheless, the appeal was set for a hearing scheduled September 24, 2009.

6 On August 24, 2009 the mother's counsel advised the child's counsel that the hearing was set for September 24, and on September 4, 2009, the child's counsel received the Notice of Appeal, a transcript of the hearing conducted in Provincial Court, and the mother's written argument in support of the appeal.

7 On September 11, 2009, the child's counsel made application to a judge of the Court of Queen's Bench to strike the appeal on the grounds that the child had not been served with the Notice of Appeal in a timely manner and the appeal should not have been set down for hearing prior to service upon him. This application was adjourned to the date of the hearing of the mother's appeal from the order denying her application for access.

8 On September 24, 2009, a judge of the Court of Queen's Bench dismissed the child's application to strike the mother's appeal, and subsequently also dismissed the mother's appeal.

9 Both the child and mother have appealed from the order of the Queen's Bench judge. We will deal first with the child's appeal, and then the mother's.

Child's Appeal

10 The *Act*, which has since been amended, provided at the relevant time that a Provincial Court order could be appealed to the Court of Queen's Bench not more than 30 days after the date on which the order was made (s. 114(1)). Section 116 further provided:

> 116(1) An appeal to the Court of Queen's Bench under this Act is to be commenced by
>
> (a) filing a notice of appeal setting out the grounds of the appeal with the clerk of the Court, and
>
> (b) filing a copy of the notice of appeal in the Court of Queen's Bench.
>
> . . . . .
>
> (3) The appellant shall serve the notice of appeal on
>
> (a) the guardian of the child other than a director,
>
> (b) the child, if the child is 12 years of age or older,
>
> (c) the child, if the child is the subject of a secure services order, and

(d) a director.

(4) On a notice of appeal being filed with the clerk of the Court, the clerk shall forward to the clerk of the Court of Queen's Bench the record of the evidence taken and all other material in the possession of the Court that pertains to the matter being appealed not more than 7 days from the time that the notice of appeal is filed with the clerk of the Court.

(5) On subsections (3) and (4) being complied with, the Court of Queen's Bench shall set down the appeal for hearing.

11 The child's counsel argued that the mother's appeal was a nullity, for failure to comply with the procedure on appeal. Counsel pointed out that service of the Notice of Appeal upon the child was mandatory, pursuant to section 116(3), and that the clerk erred in setting down the appeal for hearing, as subsection (3) had not been complied with.

12 The Queen's Bench judge held that the complaints of the child's counsel were deficiencies that had been cured by the date of the hearing conducted by her. The child's counsel had been offered an adjournment if she required additional time for preparation. She did not want an adjournment.

13 The judgment of this Court in *A. (A.) v. Alberta (Director of Child Welfare)*, 2008 ABCA 24, 425 A.R. 170 (Alta. C.A.), is dispositive of the issue. In dismissing an argument in that case, similar to the one made here on behalf of the child, Conrad J.A. stated at paras. 27-28:

> In my view, section 116.(3) does not incorporate the 30-day time limit for filing a notice of appeal into the service requirements. The section merely says a notice of appeal must be served on various enumerated people, including the Director. It does not set out a time within which the notice of appeal must be served, and in particular, it does not incorporate the 30-day limit in section 114 which applies to the filing of the notice of appeal. Other statutes clearly specify the time in which documents must be both filed and served and the Legislature could have done so in this case. While the absence of a time limit for service may amount to a legislative oversight, this is not a reason to impose the 30-day time limit on the appellant.
>
> Thus, if the chambers judge concluded that the failure to serve the Notice within 30 days was substantive in nature, and fatal to the appeal, then in this respect she was in error. Not serving the Notice was a procedural defect that could have been remedied.

14 In this instance, the appeal had been filed within 30 days and could not be treated as a nullity. The clerk of the court erred, of course, in setting down the appeal prior to proof that the child had been served, but this could have been remedied by resetting the appeal for a hearing after the child was served. In fact, the child's counsel was not interested in an adjournment, but rather chose to participate on behalf of the child in the hearing that had earlier been set down for September 24, 2009. The child suffered no prejudice thereby, and the Queen's Bench judge reasonably exercised her discretion in dismissing the child's application to strike the appeal.

15 The child's appeal is dismissed.

Mother's Appeal

16 The *Act* requires the consent of a child who is 12 years or older, prior to making any order prescribing access. The relevant subsections of section 34 provide:

> (8) On making a permanent guardianship order or at any time during its term, the Court, on the application of a director, a former guardian of the child, the child if the child is 12 years of age or older or any other person with whom the child has a significant relationship, may make an order prescribing the access to be provided between the child and the former guardian or that other person.
>
> (9) No order under subsection (8) relating to a child who is 12 years of age or older shall be made without the consent of the child.

17 The Queen's Bench judge, in denying the mother's appeal, affirmed the decision of the Provincial Court judge that subsection (9) is mandatory in its application. She held that the consent of the child was required before any access order could be made, and no further inquiry was required to determine if it was in the best interests of the child.

18 In reaching her conclusion, the Queen's Bench judge relied upon *Alberta (Director of Child Welfare) v. R. (M.)* (2003), 2005 ABQB 641, 386 A.R. 182 (Alta. Q.B.). In that case, Hughes J. held that section 34(9) was mandatory and a threshold matter, i.e., consent is a prerequisite to be established at the outset of an application for an access order pursuant to subsection (8).

19 The mother submits that the courts below erred in:

> (1) not granting access because they did not consider the child's best interests;
>
> (2) failing to enter into an inquiry into the child's capacity to instruct counsel and capacity to consent, or not to consent, to access; and
>
> (3) not requiring the child, or other persons with relevant information, to give evidence at the hearing.

20 The principal thrust of the mother's application is that section 2 of the *Act* requires that any decision thereunder must be made in the best interests of the child. She cites the decision of this Court in *T. (M.) v. Alberta (Director of Child Welfare)*, 2005 ABCA 125, 363 A.R. 306 (Alta. C.A.), which states at para. 39: "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".

21 The mother submits that section 34(9) is in conflict with section 2 because no inquiry is permitted to determine whether it is in the best interests of the child that access be granted. She urges that this Court disregard the plain meaning of the subsection on the basis of this alleged conflict.

22 As a matter of statutory interpretation, the words of an Act are to read in context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 1. That text also sets forth the governing principle of the presumption of coherence, which presumes that the parts of a statute fit together. This principle is explained at 168:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal. This presumption is the basis for analyzing legislative schemes, which is often the most persuasive from [sic] of

> analysis. The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other.

23 In our view, section 2 and subsection 34(9) can and should be read harmoniously. The Legislature, by making consent mandatory, has determined that it is not in the best interests of a child who is 12 years of age or older to force access upon the child if he or she has not consented to the access. Consent is a threshold criterion, and without it the court has no decision to make, nor any discretion to exercise.

24 Further, the Legislature has created an age-based standard. The capacity of a child 12 years or older to make the decision is presumed by the legislation. No additional inquiry was required to be made by the court hearing the application.

25 The mother seeks to have the court embark upon an inquiry to determine if it is in the best interests of the child that access be granted, notwithstanding that the child has not given his consent. Such an inquiry would undermine subsection 9 and disregard the mandatory legislative direction. Any order made on the basis that access is in the best interest of the child, notwithstanding his failure to consent for whatever reason, would fly in face of the express provision. The capacity of a child 12 years or older to make the decision is presumed by the legislation. No further inquiry was required to be made by the court hearing the application for access in this case.

26 The mother submits that this interpretation of the *Act* yields an unfair result. Since she has no access to the child, she is unable to contact him to explain why it is in his best interest to give consent, nor is she able to determine whether or not he has the capacity to understand the reasons for it being in his best interest to grant consent.

27 In our view, these are legitimate concerns on the part of the mother. However, they do not override the plain meaning of the words of the statute. The mother's complaint is with the legislation, and any recourse in that regard must be obtained through the legislative process.

28 The mother's appeal is dismissed.

Costs

29 We are of the view that no party should either pay or recover costs in the circumstances of these appeals.

Appeal dismissed.

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