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O. (T.L.) v. Alberta (Director of Child Welfare)

O. (T.L.) v. DIRECTOR OF CHILD WELFARE

Alberta Court of Queen's Bench

Fruman J.

Judgment: October 3, 1995
Docket: Doc. Calgary 9401-10077

Counsel: *D.P.* ***Castle*** and *J. Anquist*, for appellant.

K. Tottrup, for respondent.

Subject: Family

Family Law --- Children in need of protection — Practice and procedure in custody hearings — Appeal of order — Evidence on appeal.

Family Law --- Children in need of protection — Jurisdiction of courts — Jurisdiction to make orders — Discretion of court.

Family Law --- Children in need of protection — Factors determining whether in need of protection.

Family Law --- Children in need of protection — Practice and procedure in custody hearings — Evidence at hearing — Hearsay evidence.

Family Law --- Children in need of protection — Practice and procedure in custody hearings — Appeal of order — Powers and duties of court on appeal.

Family Law --- Children in need of protection — Effect of Charter of Rights and Freedoms.

Family law — Children — Child protection — Permanent committal — Appeals — On review of order of permanent guardianship, court being permitted to consider new evidence only where evidence not available at trial and where new evidence being practically conclusive — Affidavit evidence of new relationship, new job and new lifestyle mother intending to pursue not being particularly conclusive, especially where trial judge being concerned about pattern of short, inappropriate relationships and mother's willingness to place child with various family members — New evidence therefore not being admissible on appeal — Ample evidence at trial indicating child in need of protective services — Trial judge considering all available options and concluding perman-

ent guardianship being in best interests of child.

Civil liberties and human rights — Legal rights — Fair and public hearing — At trial of application for permanent guardianship of child, evidence consisting of agreed statement of facts as well as viva voce evidence — Even if statement being hearsay, evidence being reliable because mother agreeing to truth of contents and her viva voce evidence not contradicting statement — Department of Child Welfare being obliged to provide counselling services to mother but not being obliged to ensure their success, especially where mother being unwilling to participate fully — Trial judge considering all possible options before determining best interests of child requiring permanent guardianship — Mother not being deprived of right to procedural fairness.

The mother was aged 16 when her son, now aged 5, was born. He had been in and out of care for the first 3 1/2 years of his life, and had spent only 13 months of that time with the mother. The mother had several male partners during that time and a history of abusive relationships. She had been abused herself as a child and had resided with a variety of family members and friends. Many counselling services were provided to assist the mother in developing her parenting skills. On a number of occasions, the mother recognized her inadequacies as a parent and indicated that she did not want her child to experience a repetition of her life. On those occasions, she expressed a desire to surrender the child. The director applied for an order of permanent guardianship. The evidence at trial consisted of an agreed statement of facts which the mother declined to cross-examine upon, as well as viva voce evidence. The trial judge granted the order and the mother appealed on the grounds that the trial judge erred in interpreting the evidence and that the order violated the mother's rights under s. 7 of the *Charter*. The mother applied for leave to introduce new evidence on appeal.

Held:

Application and appeal dismissed.

Although review of an order of permanent guardianship is not to be conducted as a trial de novo, the court is permitted to consider new evidence where that evidence would not have been available at trial and would be practically conclusive. The evidence sought to be introduced by the mother consisted of affidavit evidence of a new relationship, new job and new lifestyle which she professed to be pursuing, as well as her beliefs as to what situation would be in the child's best interests. While that evidence disclosed events which had occurred since trial and could therefore not have been adduced at trial, it could not be said that the evidence would be particularly conclusive of the appeal, or even very helpful. It was exactly that pattern of short, inappropriate relationships which was of concern to the trial judge, along with the mother's willingness to place the child with various family members, with no stability or permanence in his life. Furthermore, it was unlikely that the new evidence would impact on the lack of procedural fairness being complained of or the *Charter* breach.

Even if portions of the agreed statement of facts were hearsay, the evidence was reliable because the mother agreed to the truth of its contents and waived any right of cross-examination. Furthermore, the mother's viva voce evidence at trial did not contradict the contents of the statement. Accordingly, the admission of the statement at trial did not constitute reversible error. Moreover, it could not be said that the trial judge gave undue weight to the statement, if it was in fact hearsay.

There was ample evidence at trial that the child was in need of protective services. The trial judge's conclusions in that regard were therefore not reviewable. The evidence also disclosed that the mother had been offered, and given, extensive counselling opportunities that she did not choose to engage in. While the department was obliged to provide those services, it was not obliged to ensure they were successful. The counselling failed because

of an unwillingness of the mother to participate fully, and it therefore could not be said that the department failed in its obligation to provide protective services. Accordingly, there was no breach of the mother's right to procedural fairness. The trial judge considered all of the possible options available, and concluded that the order was the only one that would be in the child's best interests.

Cases considered:

Adams v. McLeod, [1978] 2 S.C.R. 621, 5 Alta. L.R. (2d) 391, 1 R.F.L. (2d) 330, 84 D.L.R. (3d) 440, 9 A.R. 1, 20 N.R. 203 — *considered*

Alberta (Director of Child Welfare) v. C. (N.) (1994), 153 A.R. 156 (Q.B.) — *referred to*

Alberta (Director of Child Welfare) v. R. (T.) (1990), 74 Alta. L.R. (2d) 116, 70 D.L.R. (4th) 306, 106 A.R. 161 (Q.B.) — *considered*

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1994), [1995] 1 S.C.R. 315, 9 R.F.L. (4th) 157, 122 D.L.R. (4th) 1, 26 C.R.R. (2d) 202, (sub nom. *Re B. (S.))* 176 N.R. 161, 78 O.A.C. 1 — *considered*

D. v. Alberta (Director of Child Welfare) (January 13, 1995), Montgomery J. [unreported] — *applied*

Imperial Bank v. Latham (1962), 41 W.W.R. 33 (Alta. C.A.) — *referred to*

K. (P.) v. M. (J.B.) (1990), 26 R.F.L. (3d) 410, 70 D.L.R. (4th) 727, 107 A.R. 145 (C.A.) [leave to appeal to S.C.C. refused (1991), 29 R.F.L. (3d) xxxvi, 74 D.L.R. (4th) viii, 114 A.R. 320, 126 N.R. 160] — *referred to*

Lucas v. Lucas (1982), 35 R.F.L. (2d) 216 (Alta. C.A.) — *referred to*

M. (J.J.), Re (1995), 11 R.F.L. (4th) 166, 162 A.R. 321 (C.A.)*applied*

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. *M. v. Director, Child Welfare Act)* 32 D.L.R. (4th) 394, (sub nom. *Re M. (S.E.))* 74 A.R. 23 (Q.B.) — *applied*

McKee v. McKee, [1951] A.C. 352, 2 W.W.R. (N.S.) 181, [1951] 2 D.L.R. 657, [1951] 1 All E.R. 942 (P.C.) — *considered*

Statutes considered:

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

s. 7*considered*

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

s. 1(2)*referred to*

s. 2(*b*) [am. 1988, c. 15, s. 3]*considered*

s. 2(*e*) [am. 1988, c. 15, s. 3]*considered*

s. 2(*e*)(i)*considered*

s. 2(*e*)(ii)*considered*

s. 2(*m*) [am. 1988, c. 15, s. 3]*considered*

s. 16*referred to*

s. 21(4)*referred to*

s. 32(6)*referred to*

s. 32(7)*referred to*

s. 74(2)*considered*

s. 74(4)*referred to*

s. 80*referred to*

s. 83*considered*

s. 83(1)*referred to*

s. 85(6)*referred to*

s. 90.1*referred to*

Child Welfare Act, R.S.O. 1980, c. 66 — *referred to*

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

s. 21(5)*referred to*

Application for leave to introduce new evidence on appeal from order of Cook-Stanhope Prov. J. granting order of permanent guardianship.

***Fruman J.*:**

1 The Appellant's son, T., was born on May 22, 1989 in Ontario, when the Appellant was 16 years old. His biological father is unknown. T. was cared for by his maternal grandmother for the first 7 months of his life and was first placed in care in Ontario in August of 1991. He was returned to the Appellant in November of 1991, to facilitate a move to Alberta, and was supervised in Alberta. T. sometimes lived with the Appellant and on other occasions resided with different members of her family. In February of 1993, the Appellant entered into a custody agreement with the Director of Child Welfare. T. was placed in foster care and has remained continuously in care in Alberta since September 4, 1993. T. was actually in the care of the Appellant for a total of 13 months during his first 3 and one-half years. The Appellant has had several male partners and a history of abusive relationships with many of these men. She herself had been abused as a child and had resided with various family

members and friends.

2 Many services were provided to the Appellant to assist her in developing her parenting skills. On a number of occasions the Appellant recognized her inadequacies as a parent and indicated that she did not want her child to experience a repetition of her own life. On those occasions she expressed a desire to surrender the child.

3 The Director applies for an Order of Permanent Guardianship of T., pursuant to the *Child Welfare Act*, S.A. 1984, c. C-8.1, on December 8, 1993. The matter came to trial on May 31, 1994. The Appellant was represented by counsel throughout.

4 On June 21, 1994 Her Honour Judge Cook-Stanhope provided a verbal summary of her decision and issued detailed reasons for judgment on August 7, 1994. She granted the Director's application and ordered the child T. to be the subject of a Permanent Guardianship Order. She ordered that the Appellant could have supervised access for one farewell visit for a three-hour duration.

5 The Appellant has filed a Notice of Appeal. The grounds of the appeal are based on error and on a violation of the Appellant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms*.

The Standard of Review

6 The Appellant, by way of Notice of Motion, applied for an order granting leave to admit new evidence in her appeal. The preliminary issue for determination is the standard of review of a Court sitting on appeal of a child welfare matter. The Appellant suggests the Court acts in a manner similar to a trial de novo. The Respondent contends that the appeal is on the record, with the standard of review that the trial judge acted on some wrong principle or disregarded material evidence.

7 Section 83 of the *Child Welfare Act* provides as follows:

> 83(1) On hearing an appeal, the Court of Queen's Bench shall determine the appeal on the material filed with or forwarded to the Court of Queen's Bench and such further evidence as the Court of Queen's Bench may require or permit to be given.
>
> (2) The Court of Queen's Bench may
>
> (*a*) confirm the order or refusal,
>
> (*b*) revoke or vary the order made, or
>
> (*c*) make any order the Court could have made in the hearing before it.

8 There appears to be some confusion and perhaps some contradictions in the case law pronouncing upon the role of the Court sitting in appeal under s. 83(1). These cases can be reconciled by an examination of the manner in which a matter comes before this Court. The avenues to the Court of Queen's Bench are two-fold. Under s. 80, an appeal lies from an order of the Provincial Court; under s. 85(6), the decision of a Child Welfare Appeal Panel may be appealed to the Court of Queen's Bench.

9 The authorities cited to me in support of a trial de novo at the Court of Queen's Bench level are both appeals from a decision of an Appeal Panel. (*Alberta (Director of Child Welfare) v. R. (T.)*, unreported, April 23,

1990 [reported 74 Alta. L.R. (2d) 116] (Q.B.); *Alberta (Director of Child Welfare) v. C. (N.)* (1994), 153 A.R. 156 (Q.B.).) The authorities cited to me in support of an appeal based on the record are both appeals from orders of the Provincial Court. (*M. (R.E.D.) v. Alberta (Director of Child Welfare)* (1986), (sub nom. *Re M. (S.E.)*) 47 Alta. L.R. (2d) 380 [[1987] 1 W.W.R. 327] (Q.B.); *D. v. Alberta (Director of Child Welfare)*, unreported, Jan. 13, 1995.)

10 Dea J. recognizes this distinction in *Alberta (Director of Child Welfare) v. R. (T.)* at p. 5 [pp. 119-20]:

> 5. The provisions for appeal to Queen's Bench in the Child Welfare Act (ss. 80-83, inclusive) have clearly been tailored for appeals from Provincial Court. There the appeal will almost invariably be an appeal on the record, and the power of the appeal court to order or allow "further evidence" will no doubt be used infrequently. But in applying the sections to an appeal panel, the authority given to Queen's Bench to hear "further evidence" and to "make any order the [appeal panel] could have made" require a different emphasis to be applied. The construction with such an emphasis mandates a hearing of evidence and not simply an argument on the record.

11 In *Re M. (S.E.)*, Virtue J. examines the scope of a judge's exercise of discretion pursuant to s. 83 of the *Child Welfare Act*. In doing so, he considers the scope of review under s. 21(5) of the *Divorce Act* in respect of matters of custody. At p. 388 he cites the reasoning of Lord Simonds in *McKee v. McKee*, [1951] A.C. 352 [2 W.W.R. (N.S.) 181] (P.C.):

> ... the question of custody of an infant is a matter which peculiarly lies within the discretion of the learned judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

12 This statement was accepted by the Supreme Court of Canada in *Adams v. McLeod* (1978), 1 R.F.L. (2d) 330 [5 Alta. L.R. (2d) 391]. Spence J. states at p. 333:

> There is no need to cite any authority to delineate the task of a court upon an infant's custody issue. Time after time, and more particularly through all the latter part of this century, it has been said and repeated that the one cardinal issue is the best interest of the infant and that all else is secondary. How then is that best interest to be determined? Again our courts have been unanimous that the most authoritative pronouncement thereon is by the trial court judge who hears the evidence and assesses it.

13 After considering the Alberta Court of Appeal decision in *Lucas v. Lucas* (1982), 35 R.F.L. (2d) 216, and the position of the Supreme Court of Canada on custody appeals, in the *Re M. (S.E.)* case Virtue J. concludes at p. 388:

> ... I am of the view that on an appeal under s. 83 of the Child Welfare Act the decision of the Provincial Court judge should not be disturbed unless he has clearly acted on some wrong principle or disregarded significant material evidence or his final award is otherwise clearly wrong.

14 I agree that this is the appropriate standard of review in this case, an appeal from a Permanent Guardianship Order pronounced by the Provincial Court following a lengthy trial. To treat the appeal as a trial de novo would require a decision to be made on the record, without the benefit of having observed the witnesses, assessed their credibility and made the many other assessments and observations which a trial judge instinctively

does when he or she has the benefit of having key witnesses testify. I cannot conclude that conducting the appeal as a trial de novo would be in the best interests of the child.

Admission of New Evidence on Appeal

15 The Appellant sought to adduce new evidence in this appeal. The evidence consists of affidavit evidence of the Appellant and Mr. M., an individual with whom she now lives in a common law relationship and the videotape of her final access visit with T. The Appellant also asked for leave to lead viva voce evidence in order to determine the credibility of accusations which lead to the violation of the Appellant's right to liberty under s. 7 of the *Charter*.

16 In *D. v. Alberta (Director of Child Welfare*), at p. 3, Montgomery J. summarizes the principles to be considered in the exercise by the Court of its discretion to permit new evidence. They are:

> a) whether the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial;
>
> b) whether the new evidence is such that, if adduced, it would be practically conclusive.

The authority cited in support of this proposition is *Imperial Bank v. Latham* (1962), 41 W.W.R. 33 (Alta. C.A.), at pp. 39-41.

17 The Appellant disputes that this is the correct statement of the principles. She agrees that the admission of new evidence on appeal is a matter of judicial discretion, but contends that any new evidence should be admitted which might reasonably affect the best interests of the child.

18 I note the provisions of s. 2(*b*) and (*m*) of the *Child Welfare Act* which read as follows:

> 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:
>
> (*b*) the interests of a child should be recognized and protected;
>
> (*m*) there should be no unreasonable delay in making or implementing a decision affecting a child.

19 Adopting the standard suggested by the Appellant would mean that any subsequent evidence which is relevant might reasonably be determined to have an impact on the best interests of the child. As a result, every level of appeal would re-open the evidence to admit new evidence of the circumstances of the parents and child since the last court appearance. There would be no certainty in the child's life until the final avenue of appeal had been exhausted. A child's life would be placed on hold, adoption proceedings would be delayed, and with the passage of time the child's chances of a successful adoption would be reduced. I cannot think such a broad standard for the admission of evidence to be in accordance with s. 2(*b*) and (*m*) of the *Child Welfare Act*, or in the best interests of the child. I accept the standard set out in *D. v. Alberta (Director of Child Welfare)*.

20 I deal now with the 3 types of evidence which the Appellant sought to introduce in appeal. The affidavit evidence consists of affidavits dated June 21, 1995, of the Appellant and Mr. M., her common law spouse, attesting to their new relationship. Since the trial, the Appellant has com pleted some courses, has a new job, and

professes to a new lifestyle. Beverley Reed, a child welfare worker, filed an affidavit dated July 27, 1995 in response. The Appellant filed a further affidavit dated September 7, 1995 and Ms. Reed then responded by affidavit dated September 13, 1995. These affidavits indicate that since the completion of the trial in June of 1994, at which time the Appellant was engaged in a common law relationship with Mr. B., the Appellant married Mr. J. and separated from him, and entered into a relationship with Mr. M., her current common law partner. In her final affidavit the Appellant states that she does not believe that it is in the best interests for T. to be adopted and suggests that instead the child should be returned to her or to her brother. The child T. has now been placed with an adoptive family and is adjusting.

21 While this evidence discloses events which occurred since the trial and could not have been adduced at trial, I do not conclude that this new evidence would be particularly conclusive of the appeal, or even very helpful. It was exactly this pattern of short term, inappropriate relationships which was of concern to the trial judge and is alluded to in her reasons at p. 28. Also of concern was the Appellant's willingness to place the child with various family members, with no stability or permanence in his life.

22 I have not viewed the videotape of the final access visit or read a transcript. I am advised that it will show a loving relationship between the Appellant and T. and evidence of bonding. I say at the outset that that evidence was certainly available at trial and could have been adduced. Secondly, both the Appellant and Ms. Reed confirmed that the Appellant had been carefully coached for the visit and the Appellant stated in her affidavit that she felt constrained from speaking freely. The videotape is therefore of dubious evidentiary value. Finally the fact of the loving relationship and bonding between the Appellant and T. were alluded to by other witnesses and accepted by the trial judge. The test for determining whether a child is in need of protective services goes well beyond a consideration that a mother loves or has bonded with the child. This evidence would be far from conclusive.

23 Finally I consider the Appellant's application for leave to lead viva voce evidence in order to determine the credibility of accusations which lead to the violation of the Appellant's rights under s. 7 of the *Charter*.

24 As I understand the Appellant's arguments, she does not suggest that the framework or scheme of the *Child Welfare Act* in fact violates s. 7 of the *Charter*. Certainly, no notice to that effect was served upon the At torney General. Rather, I believe that arguments might be summarized as follows:

25 1) The provisions for obtaining a Permanent Guardianship Order under the *Child Welfare Act* infringe the right of a parent to liberty, under s. 7 of the *Charter*.

26 2) The procedural scheme or framework of the Act is in accordance with the principles of fundamental justice; however, the manner in which the actions were carried out in this particular case violated the Appellant's right to procedural fairness.

27 Although the Appellant's factum is somewhat unhelpful, in the course of argument it appeared that two grounds were put forward in support of the alleged violation of the Appellant's right to procedural fairness. The first is that necessary protective services were not supplied to the Appellant to support the family unit and prevent the need to remove the child, pursuant to s. 2(*e*)(i) of the *Child Welfare Act*, and the second is that the Permanent Guardianship Order was not the least intrusive measure available, pursuant to s. 2(*e*)(ii).

28 A third ground, an allegation that the Director had failed to serve a notice of the hearing upon the Appellant, was withdrawn in light of s. 21(4) of the Act. The Appellant had been made aware of the hearing, was

present and was represented by counsel at all stages. The other grounds put forward in the Appellant's factum relate to error of the trial judge rather than to a violation of the Appellant's right to procedural fairness.

29 Counsel has offered little guidance as to the credibility issues which arise from the *Charter* arguments and the manner in which viva voce evidence would resolve them. Based upon the arguments made, I concluded that the credibility issues related to the Appellant being denied her right to liberty, due to such causes as family stress. I believe we can approach the *Charter* issues from the starting point that the granting of a Permanent Guardianship Order under the *Child Welfare Act* infringes the right of a parent to liberty under s. 7. The decision of the Supreme Court of Canada in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315, examines the provisions of the *Child Welfare Act*, R.S.O. 1980, c. 66, and concludes that a parent's right to liberty is infringed by the provisions of that Act, which permit the imposition of medical treatment for an infant. In that decision, La Forest J. states at p. 363:

> I also note that while this case can be disposed of solely on the issue of the right of parents to choose medical treatment for their infant, it is not without consequence for child protection as a whole. Intervention may well be compelling here, but this appeal raises the more general question of the right of parents to rear their children without undue interference by the state.

30 Obtaining a Permanent Guardianship Order results in a parent losing her right to care for, protect and make decisions for a child. It follows from the *B. (R.)* decision that such an Order affects a parent's right to liberty under the *Charter*. It is therefore unnecessary for the Appellant to adduce viva voce evidence to prove this loss of liberty. Counsel for the Appellant could not say what viva voce evidence might be adduced to deal with the 2 grounds alleged in support of the *Charter* breach and conceded that she could not see how this evidence might be useful. As there is no foundation for the admission of the evidence, this is not an appropriate case to grant leave to adduce viva voce evidence.

31 I therefore denied the Appellant's application to adduce new evidence in the appeal.

The Appeal

32 As I have indicated, the appeal is based on certain errors which the trial judge is alleged to have committed, and on a violation of the Appellant's right to liberty under s. 7 of the *Charter*, by denying her right to procedural fairness.

33 I deal first with the error. The trial judge is said to have erred by failing to adhere to the tests of admissibility for hearsay set out in s. 74(4) of the *Child Welfare Act* and by placing inordinate weight on hearsay evidence, and by granting a Permanent Guardianship Order with no evidence of harm to the child apart from hearsay evidence.

34 The contested evidence is an Agreed Statement of Facts prepared by the Durham Region Children's Aid Society in connection with proceedings held in Ontario. The Ontario Court (Provincial Division), issued an Order on November 15, 1991 declaring T. to be in need of protection, with all evidentiary rights reserved. The Statement is attached to the Order. A certified copy of the Order and attached Statement were placed in evidence at the trial before Her Honour Judge Cook-Stanhope and marked as an exhibit. The opening paragraph of the Statement reads as follows:

> The undersigned parties hereby agree that the following statement of facts be submitted as evidence at the

> pending court hearing regarding T. and hereby agree to the truth of the contents of the following facts:

Paragraph 11 reads as follows:

> 11. All parties consent to this Agreed Statement of Facts being filed with the Court or read into the Court record without prejudice to the rights of any of the parties to cross-examine on evidence adduced or to introduce evidence at any future date that could have been introduced at the court proceedings on November 15, 1991.

The Statement is dated November 15, 1991 and is signed by the Children's Aid Society of the Durham Region, the Appellant and her legal counsel.

35 At trial the admission of the Statement was discussed in reference to s. 90.1 of the *Child Welfare Act*. The Appellant contends that this is the incorrect section and the Statement could only have been admitted as hearsay evidence under s. 74(4), and then only in accordance with the tests set out in that section. I agree that s. 90.1 does not deal with the admission of evidence, but rather with the recognition of foreign orders and their force and effect in Alberta. The appropriate section for admission would have been s. 74(2), which reads as follows:

> (2) The record of the evidence given at any other hearing, any documents and exhibits received in evidence at any other hearing and an order of the Court are admissible in evidence in a hearing under this Act.

It is to be noted that the hearsay section, s. 74(4), requires for admissibility a determination by the Court that it is proper to accept the evidence and that the Court is satisfied that no better form of evidence is readily available. Section 74(2) contains no such prerequisites.

36 There are additional safeguards on the admissibility of the Statement in this case. First, the Appellant and her counsel both signed the Statement, thereby agreeing to the truth of its contents. This is unlike most hearsay evidence. Secondly, the learned trial judge did not admit the Statement in evidence when it was first put before the Court. She permitted the Appellant's counsel to review the Statement. Sometime later the Appellant's counsel advised the trial judge that he had spoken to the Appellant and they had no difficulty with the Statement going into evidence. At p. 60 of the transcript the learned trial judge then inquired whether the Statement constituted an agreed statement of facts in the proceedings before her without the need for cross-examination. The Appellant's counsel agreed. The Appellant's counsel therefore agreed to the admissibility of the Statement for its truth, and having been alerted to the possibility of cross-examination by the trial judge, waived his right to do so. Finally, at the trial the Appellant testified on her own behalf. In the course of her testimony she did not on any occasion contradict the facts set out in the Statement, and she would have been in the best position to do so.

37 In the Alberta Court of Appeal memorandum decision in *Re M. (J.J.)* (1995), 162 A.R. 321, the Court considers the tests for admissibility of hearsay evidence set out in s. 74(4). At p. 324:

> The statute offers two tests for admissibility: whether it is "proper to do so" and whether there is "better" evidence. While this case does not require us to define these tests with precision, they seem to us very much to raise the two tests of necessity and reliability, as described by the Supreme Court in a series of cases beginning with *R. v. Khan*, [1990] 2 S.C.R. 581 ... This statute pre-dates those decisions, but the statutory test seems to us to raise similar concerns. The requirement that there be no better evidence certainly evokes the necessity test, and we think it is proper for a judge to admit evidence if it is reliable.

The Court of Appeal also commented at p. 326 that it was clear from the record that both counsel were alive to the issue and did not object. The trial judge's admission of the reports represented no reversible error. Further, the failure of the trial judge to weigh the evidence for admissibility explicitly in terms of the statutory test was harmless.

38 It is equally harmless in this case that admissibility was discussed under s. 90.1 rather than the correct section, s. 74(2). Clearly the Appellant's counsel was aware that he could contest its admissibility and he waived his right to cross-examine. Even if portions of the Statement are hearsay, the evidence is reliable because the Appellant agreed to the truth of its contents, and waived any right of cross-examination. The Appellant chose not to contradict the contents of the Statement in her testimony. The admission of the Statement in evidence at trial does not constitute a reversible error.

39 The learned trial judge referred to some of the facts set out in the Statement at pp. 6 to 8 of her reasons for judgment. The Statement describes certain facts which are disputed by the Appellant, and summarizes her position. The learned trial judge, when summarizing these facts, fairly set out such disputed evidence. The facts set out in the Statement are of minor importance in the trial judge's lengthy and detailed review of the evidence, facts and problems. While a quantitative analysis is far from conclusive, I do note that the learned trial judge's summary of all the facts comprise the first 27 pages of her reasons. Having considered her analysis and conclusions, I do not conclude that the learned trial judge gave undue weight to the hearsay evidence, if in fact the Statement or portions of it could be characterized as hearsay. The weight placed upon the Statement by the learned trial judge does not constitute reversible error.

40 The Appellant suggests that there is no evidence of harm to the child except as set out in the Statement. The Statement contains facts concerning bruising and physical abuse suffered by the child. There is no other evidence of physical abuse in the trial.

41 Section 16 of the *Child Welfare Act* sets out the circumstances that permit the director to make an application for a Permanent Guardianship Order. The first requirement is the director must be of the opinion that the child is in need of protective services. Section 1(2) provides a comprehensive definition of when a child is in need of protective services. Certainly, observable physical injury is included in the list, but the definition is much broader. There are many other categories, including abandonment, inability or unwillingness to provide the child with necessities of life, sexual abuse and emotional injury. The section does not require evidence of actual abuse or injury: a substantial risk of physical injury or sexual abuse, or an inability or unwillingness to protect a child from physical injury, sexual abuse or emotional injury all are subsumed within the definition of a child in need of protective services. Obviously there is a spectrum contemplated in the section. Admittedly, it is much easier to form a conclusion based on tangible physical evidence of abuse compared, for example, to deciding that a parent is unable or unwilling to protect a child. Nevertheless, the section recognizes that there are many types of bruising, and we do not have to wait until a child is badly scarred, either physically or emotionally, before the state can intervene.

42 I disagree with the Appellant's contention that the only evidence of harm to T. is the physical evidence of bruising alluded to in the Statement. I have read the transcript of the evidence at trial and the exhibits. Most relevant are the supervised visit reports of Maria Gill and the report of Lynn Nickel. The learned trial judge, at p. 28 of her reasons, concludes that the Appellant:

> ... is so focused on her own appearance that she chooses to attend to her personal hygiene, fitness, attire and

> other physical accoutrements rather than attending to the instrumental needs of her son such as stimulation outside the four corners of a temporary residence, or food on the table.

She describes the Appellant's attitude towards her son as that of a "benevolent baby sitter" with little real concern expressed about T.'s well-being beyond her own need to see him from time to time. She suggests that long-term demonstrated commitment is lacking.

43 I conclude that there was ample evidence at trial that T. is a child in need of protective services. The comments made by the learned trial judge suggest that the perceived harm is not the bruises referred to in the Statement, but rather an inability and an unwillingness to provide the child with the necessities of life or to protect him from physical or emotional harm. The learned trial judge did not err in concluding that T. is a child in need of protective services.

44 I now consider the *Charter* arguments. Both arguments derive from s. 2(*e*) of the *Child Welfare Act*, which reads as follows:

> 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:
>
> (*e*) the family is responsible for the care and supervision 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 protective services are necessary to assist the family in providing for the care of a child, those services should be supplied to the family in so far 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.

45 The Appellant contends that her right to liberty as a parent under s. 7 of the *Charter* was infringed because the granting of the Permanent Guardianship Order in respect of T. was not in accordance with the rules of procedural fairness. Her first argument is that she was not provided with adequate services to support the family unit and prevent the need to remove the child from the family.

46 The witnesses at trial included Susan Triolet, a child welfare worker who provided support to the Appellant from March to December of 1993 to see if the Appellant could keep and parent T.; Deborah Carnat, a therapist who provided individual counselling to the Appellant from May to July of 1993; Lynn Nickel, a social worker who provided in-home family counselling from March to December of 1993; and Marla Gill, a worker for Interfaith Youth Services who observed the Appellant and T. from January to May, 1994 and provided assistance and training in parenting. They were accompanied by several other social workers and case workers who supervised, responded to the Appellant's requests for T.'s placement and investigated. The professionals provided individual counselling to the Appellant, in-home family counselling to her in con nection with her care of T. and parenting training and support. They also assisted her in exercising access to T., by providing her with transportation and bus passes.

47 The Appellant's argument centres around the individual counselling services provided by Ms. Carnat.

The Appellant worked downtown and did not have transportation available to her. Ms. Carnat came downtown and counselled the Appellant over the lunch hour. The Appellant contends that this was inadequate.

48 In her testimony Ms. Carnat stated that her primary task was to help the Appellant come to a decision whether she wanted to be an active parent with her son and to help her come to terms with some of the past struggles in her life. She acknowledged that she and the Appellant were not meeting under optimum conditions as they did not necessarily have a great deal of privacy, and added that she was uncertain whether the Appellant really effectively engaged in a counselling relationship. Ms. Carnat understood that the Appellant felt fairly comfortable with her.

49 In cross-examination by the Appellant's counsel, at p. 76 of the transcript, Ms. Carnat was asked whether it was conceivable that if they had met in typical office conditions there would have been more success. Ms. Carnat responded that it would be very much dependent on the Appellant's intentions and her ability to commit to a counselling relationship in a focused way. Ms. Carnat acknowledged that it was difficult to have a counselling relationship over the lunch hour, but she was not sure that was the main obstacle. In the summary to her report Ms. Carnat states:

> Ms. O bears significant strength, in terms of understanding her history and not wanting to repeat it with her son. However, most aspects of her life appear to be characterized by ambivalence, which included the counselling relationship to which she never appeared fully able to commit. Ms. O. did eventually decide to surrender her son permanently, and felt she was receiving adequate support from her boyfriend and friends, so she did not feel further counselling was necessary at this time.

The Appellant testified at trial but did not contradict Ms. Carnat's evidence.

50 The learned trial judge was impressed with Ms. Carnat's flexibility and the steps she took to accommodate the Appellant. While there is a possibility that the counselling might have gone better if it were held in Ms. Carnat's office, the evidence indicates that the Appellant's failure to commit to a counselling relationship was the most significant obstacle. When an individual is offered services, fails to utilize them in an effective way and ultimately discontinues them, she can hardly complain that her *Charter* rights have been violated.

51 Section 2(*e*)(i) requires the supply of protective services in so far as it is reasonably practicable to do so. The test is one of reasonableness. The Department is not required to ensure success in every relationship and keep trying until the family is rehabilitated. In the circumstances of this case I conclude that the Department provided the protective services required under s. 2(*e*)(i). There was no violation of the Appellant's right to procedural fairness.

52 The second *Charter* argument is that the learned trial judge failed to utilize less intrusive measures as required under s. 2(*e*)(ii), again denying the Appellant's right to procedural fairness. The Appellant suggests that the Court had available to it less intrusive options to protect the child, including a Temporary Guardianship Order, or a Permanent Guardianship Order, with specified access to the Appellant. I have reviewed the transcript and I conclude that the learned trial judge was well aware of the various options and in fact outlined and explored them in some detail with the Appellant's counsel. The Appellant suggests that the trial judge erred by failing to order some form of access, even the provision of pictures, a report card and a letter each year.

53 Section 32(6) of the *Child Welfare Act* provides that a Court may order access to a former guardian of a child with whom the child has a significant relationship. Section 32(7) prohibits such an order unless the Court

is satisfied that it will not interfere with the adoption of the child.

54 The evidence indicates that during the months preceding the trial, the Appellant exercised access to T. on a sporadic basis. There was also evidence that the Appellant approached an adoption agency and attempted to arrange an adoption. The family selected by the Appellant declined the placement. Other witnesses indicated that the Appellant's ambivalence towards her son could interfere with an adoptive placement.

55 I find that the learned trial judge exercised her discretion in an appropriate manner. She was aware of the numerous options which were available to her in making an Order, and discussed these fairly with the Appellant's counsel. The best alternative for T.'s long term development would be a secure, non-abusive, non-transient family environment. An appropriate adoptive placement would satisfy that goal, and T., a 5-year-old child with a difficult family history, might not be the easiest adoptive placement. Any form of access to the Appellant could jeopardize an adoption for a number of reasons, including the fact that even minimal access would result in the Appellant having standing to participate in the adoption proceedings and contest the adoption. (*K. (P.) v. M. (J.B.)* (1990), 26 R.F.L. (3d) 410 (Alta. C.A.) .) A Permanent Guardianship Order was the only realistic order which could have been granted. Given the provisions of s. 32(6), I find that the learned trial judge chose the least intrusive means to protect the survival, security and development of T. The Appellant's right to procedural fairness has not been violated and her second *Charter* argument fails.

56 On the whole of the record, I am satisfied that the learned trial judge understood the tests and requirements set out in the *Child Welfare Act* and acted throughout in the best interests of the child. She did not violate the Appellant's right to procedural fairness, act on some wrong principle or disregard significant material evidence, nor is her final award otherwise clearly wrong. I uphold the Permanent Guardianship Order and dismiss this appeal.

Application and appeal dismissed.

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