2002 CarswellAlta 1568, 2002 ABCA 269, 33 R.F.L. (5th) 315, 317 A.R. 231, 284 W.A.C. 231

D. (J.) v. B. (T.D.)

J.D., Appellant (Respondent) J.J.D., Not Party to the Appeal (Respondent) and T.D.B., Respondent (Applicant) Respondent

Alberta Court of Appeal

Fraser C.J.A., Trussler, Clackson JJ.A.

Heard: October 22, 2002
Judgment: November 28, 2002
Docket: Calgary Appeal 0201-0263-AC

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Counsel: *Diann P. **Castle***, for Appellant

Pam L. Bell, for Respondent

Subject: Family

Family law --- Adoption — Under statute — Governing principles — Best interests of child

B was exclusive guardian of child and subsequently gave guardianship of child to D along with consent to adoption — Consent was not revoked within 10-day period prescribed by s. 61 of Child Welfare Act — Adoption was not completed — Child was originally placed with D on basis that child would be subject of open adoption with access to B — Relationship between B and D soured to point where B was refused access — B applied for order terminating D's guardianship — Trial judge concluded that it was in best interests of child that primary care be given to B with access to D — D appealed — Appeal dismissed — Nothing in Act clothed adoption guardian with preeminent status or stripped consenting guardian of guardianship status — Consenting guardian remained equal guardian until adoption was concluded — If consent is not revoked and adoption not perfected, then guardians are on equal footing and custody would depend on best interests of child — Trial judge adopted correct test of best interests of child and was alive to length of time child had spent in care of D — Trial judge chose to rely on evidence of court-appointed expert who opined that bond between child and B was very strong — No error in trial judge's approach or conclusion.

Statutes considered:

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

Generally — referred to

s. 59 — referred to

s. 60 — referred to

s. 61 — referred to

s. 61(1) — considered

APPEAL by adoption guardian from judgment awarding custody to consenting guardian.

***The Court*:**

1 This appeal involves interpreting s. 61(1) of the *Child Welfare Act* in circumstances where there is a custody dispute between the guardian who consented to the adoption of the child and the person who becomes guardian as a result of that unrevoked consent.

2 The Respondent, Ms. T.D.B., was made exclusive guardian of her daughter's child. She subsequently gave the child to the Appellant, Ms. J.D. along with a consent to adoption pursuant to s. 59 of the Act. That consent was not revoked within the ten day period prescribed by s. 61 of the Act. The adoption has not been completed.

3 It appears that the child was originally placed with Ms. J.D. in May, 1998. That placement was on the basis that the child would be the subject of an open adoption with access to Ms. T.D.B. However, the relationship between the parties soured to the point where Ms. T.D.B. was refused access and therefore brought an application for an order terminating the guardianship of Ms. J.D. in February 2001.

4 The Trial Judge concluded that it was in the best interests of the child that the primary care of the child be given to Ms. T.D.B. with specified access to Ms. J.D. The learned Trial Judge did not terminate Ms. J.D.'s guardianship.

5 Ms. J.D. argued that the learned Trial Judge was wrong to approach the determination of the dispute on the basis of what would be in the best interests of the child. Rather the learned Trial Judge should have approached the matter on the basis that Ms. T.D.B. had to establish that Ms. J.D. was unfit. The foundation for this argument is the existence of Ms. T.D.B.'s consent to adoption. Ms. J.D. argues that by virtue of s. 60 of the Act, she became a guardian of the child. Then by virtue of s. 61(1) of the Act, once the ten day period for revocation of consent had passed without revocation, the adopting guardian (Ms. J.D.) became an effective sole guardian and the consenting guardian (Ms. T.D.B.) became a *de facto* stranger in a competition between the two. This result is compelled by s. 61(1) as otherwise that section has no meaning. Ms. J.D. argued that if s. 61(1) is interpreted so as to allow the consenting guardian to seek to be restored to custody notwithstanding unrevoked consent, then the consenting guardian would effectively be allowed to do indirectly what she could not do directly. That is she would be effectively allowed to revoke her consent even after the ten day limitation.

6 We do not agree. There is nothing in the *Child Welfare Act* that clothes the adopting guardian with a preeminent status or strips the consenting guardian of her guardianship status. Rather, the Act supports the conclusion that the consenting guardian remains an equal guardian until the adoption is concluded.

7 In our view the effect of s. 61(1) is that if the consent is revoked within the prescribed period, then the adopting guardian reverts to the status of stranger.

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8 If however the consent is not revoked and the adoption not perfected, then the guardians are on an equal footing in terms of guardianship status in a custody dispute between them. In that event, the resolution of the custody dispute will depend on what is in the best interests of the child. If a child has been in the custody of the adopting parent for an extended period, that will be a weighty factor in determining the child's best interests, given the very real need for stability in the life of a child.

9 That interpretation does not allow the consenting guardian to do indirectly what she could not do directly. The consenting guardian could have revoked consent and made the adopting guardian a stranger. But not having revoked consent in a timely fashion, the consenting guardian must face the challenge of the adopting guardian on a more equal footing. Additionally, as previously noted, the longer that the consenting guardian waits before contesting custody, the more likely it is that the child's best interests are served by maintaining the status quo. That is maintaining custody with the adopting guardian.

10 The foregoing interpretation of s. 61(1) results in the resolution of the dispute on the basis of what is in the best interests of the child. That is the test utilized by the Trial Judge.

11 Having adopted the correct test, it is clear that the learned Trial Judge was alive to the length of time that the child had spent in the care of Ms. J.D. Notwithstanding that fact, which clearly weighed heavily in favour of maintaining the status quo, the learned Trial Judge concluded that the interests of the child were best served by awarding custody to Ms. T.D.B. In doing so, the trial judge chose to rely upon the evidence of the court-appointed expert. The expert opined that even though the adopting guardian had had custody of the child for about three years, the bond between the child and the consenting guardian was very strong. The expert initially indicated that the bond was stronger but did concede that as she had not seen the child interacting with her adopting guardian for about a year, she could not now say if one bond was stronger than the other. Nevertheless, she remained of the view that the child should be returned to the consenting guardian, the child's grandmother, Ms. T.D.B. That is a finding which could reasonably be made on the evidence and we decline to interfere with it.

12 Accordingly we find no error in the learned Trial Judge's approach or his conclusion.

13 The appeal is dismissed.

Appeal dismissed.

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