2003 CarswellAlta 2020, 2005 ABQB 641, [2005] W.D.F.L. 3946, [2005] A.W.L.D. 3245, 386 A.R. 182

Alberta (Director of Child Welfare) v. R. (M.)

The Director of Child Welfare and The Child, S.R. (Appellants) and M.R. (Respondent)

Alberta Court of Queen's Bench

Hughes J.

Heard: December 10, 2003
Judgment: December 10, 2003
Docket: Calgary 0301-04420

Counsel: T.D. Larochelle for Director

Ms B.S. Border for Child

Ms D.P. **Castle** for Defendant

Subject: Family

Family law --- Children in need of protection — Status review hearing — Access by parents.

Statutes considered:

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

Generally — referred to

s. 2 — referred to

s. 2(d) — considered

s. 34(8) — referred to

s. 34(9) — considered

s. 34(12) — referred to

s. 117 — referred to

***Hughes J.*:**

1 On January 14th, 2001, Mr. R. murdered his wife R. Their only child, S., was apprehended and Her Honour Judge Flatters granted a permanent guardianship order on January 3rd, 2002. The order provided that access to S. occur if agreed on by the parties and in consultation with S.'s psychologist. No access occurred.

2 In October 2002, an application was filed by the Director seeking a review of the access term of the permanent guardianship order pursuant to Section 34(12) of the *Child Welfare Act*. The application says the Director was applying to terminate the access term of the permanent guardianship order in order to proceed with the adoption of S. The application was heard before Her Honour Judge Vickery in March 2003.

3 At the hearing before Judge Vickery, S. was represented by counsel. Counsel advised the Court as follows, and I quote from the transcript at page 7, beginning at line 1:

> Mr. Van Harten: Just to clarify my client's position, he is 12. He's very aware of the nature of this proceeding. He's very aware of the nature of an adoption proceeding. He is extremely well aware of the nature of the criminal proceeding involving his father, and in particular not only that there was a conviction, but that there was a guilty plea entered by his father to second degree murder.

4 Mr. Van Harten continued on further down:

> I raise that only because given his age, and given the minimum period, there is one thing that's actually not in dispute, is that this man [the father] will remain incarcerated until well after my client reaches the age of majority. That's one thing.
>
> The other thing is that he has given me very clear instructions that at this point in time he does not wish to have any type of access and/or communication with his father. And I don't think that's — that that is his position now is disputed by anyone. It may be disputed by his father, but we may have to hear from him on that point.

5 At the conclusion of the hearing, Judge Vickery made an order. She did not terminate the access provision but varied it so there was still access. At page 279 she said:

> I am ordering that the foster parents promptly provide father with a current photograph of S. Once in each year beginning in 2003, father is to receive a current photograph of S. and at least a summary of S.'s school grades, extracurricular activities, and the state of his health. This is to be delivered by mail or by hand in the month of December in each year. Unless and until S. indicates that he wants further contact with his father, nothing more is to occur.

6 The Director and counsel for the child S. appeal this order. The Director argues the hearing judge erred by placing undue emphasis on the needs and the interests of the respondent and not the child S. Counsel for S. argues the hearing judge erred in the application of section 34(9) and section 34(12) of the *Child Welfare Act*. Those arguments are as well put forward by the Director. Counsel for the respondent argues the hearing judge made no error, and there is any error and, if anything should be ordered, it should be a continuation of the hearing in front of Judge Vickery, alternatively a new hearing.

7 All parties agree on the standard of review, that being the hearing judge's decision may only be disturbed if she clearly acted on a wrong principle of law or disregarded material evidence.

8 The first issue raised by counsel is section 34(9) and its meaning. Counsel for the Director and counsel for the child suggest section 34(9) of the *Child Welfare Act* is a threshold. Ms. Castle's position, on behalf of the respondent, is if it is a threshold, one requires an evidentiary foundation; submissions of counsel are not sufficient. The Director and counsel for S. say submissions of counsel are sufficient. They go further and say that submissions of counsel are sufficient because first, the Act is designed to protect children, and to require there to be an evidentiary foundation for this, would in essence hamper the whole notion of protecting children. Second, they suggest there might be no available way to put forward an evidentiary basis because the lawyer may be the only person the child confides in.

9 The first issue then for me is, is section 34(9) a threshold issue? In my view, it is. Section 34(9) provides:

> 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.

10 Section 34(8) is the provision that allows a judge to make an access order once a permanent guardianship order had been made.

11 It is clear from the record that at the time of Judge Vickery's order, S. was 12 years of age.

12 I find section 34(9) is a threshold issue when I look at the language of subsection 9. It says "no order shall be made without the consent of the child." I have also reviewed section 2 of the Act which sets out principles of the Act, and at section 2(d), the language is not mandatory at that stage. It says:

> 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:
>
> > (d) a child, if the child is capable of forming an opinion, is entitled to an opportunity to express that opinion on matters affecting the child, and the child's opinion should be considered by those making decisions that affect the child.

13 There "child" is not defined in terms of age. However, section 34(9) does have an age limit included in that section, and includes the word "shall." Thus I find it is in fact a mandatory section.

14 I then go on to consider whether evidence is required in regards to putting forward whether or not a child of 12 or older consents.

15 The first thing I note in regards to this issue is that when the submission of Mr. Van Harten was made at the beginning of the hearing, and it was reiterated throughout the hearing, no counsel took objection to that submission, and in fact, the submission was relied upon by all counsel in their cross-examination of Mr. Glossop.

16 Second, I accept that the purpose of the Act is to protect children. By requiring a child to provide the evidentiary foundation in front of his or her parent, in my view, destroys the whole purpose of the Act in protecting the children.

17 I then go on to consider, what about, as Ms. Castle submits, a worker or someone else providing that evidentiary foundation? In regards to subsection 9, I do not find, at least on the facts of this case, that that would have assisted in any way. Here we had experienced counsel, Mr. Van Harten, who indicated that he was counsel for the child. Mr. Van Harten, as an experienced counsel, understands the importance of taking instructions from clients. He has had much experience with this, both in the field of family law, as well as in the field of criminal law. He understands what is required. Based on he as counsel, and his experience, indicating to the Court his client did not consent, I find that Judge Vickery was able to in fact rely on that submission of counsel, and that no evidence was required.

18 If I am wrong in finding the submission of Mr. Van Harten was sufficient in regards to the consent of his client, there was some evidence of this before the hearing judge — that is that S. did not wish to see his father. It is at page 136, line 11. Ms. Castle referred to this, but she referred to it in a different context. I put it in perspective. Ms. Castle was cross-examining Mr. Glossop regarding any bias and Mr. Glossop went to testify about S. being able to reconnect in a healthy way with his biological father, and then, and I quote, Mr. Glossop said:

> So, as I began to — and perhaps it was thinking too far in the future — explore that with him, he nodded. That was his response rather than — when I check my notes, he didn't say, "I want to see my dad now." He said that down the road —

19 From that phrase "down the road" I find there was some evidence before the hearing judge that in fact S. did not consent to seeing his father. Certainly when one looks at the plan put forward by Mr. Glossop, it is a step-by-step procedure in regards to contact between S. and his father. For example, at page 137 he testified whether the therapy would include contact; if so, it would be doing a letter that is not sent, then maybe actually doing a letter, depending on his age, and then going on and on. Certainly from this I can infer that S. has not consented to seeing his father.

20 Thus, I have found section 34(9) is a threshold matter. In fairness to the learned Provincial Court judge, it was not raised in argument in front of her, but it is a matter that I find is in error not to have addressed, and therefore, pursuant to section 117 of the Child Welfare Act, I do not confirm her order. I find there is an error based on the lack of consent of S., consent is a prerequisite to the making of an order of access in this case. I find Judge Vickery's order was an order of access in regards to sending the photos and the information. Therefore, the access is deleted, or the access is terminated.

21 I would like to thank counsel, all counsel in this matter. I know that this is a difficult matter, but your briefs were most helpful, as were your arguments. Thank you.

22 Thank you, My Lady.

23 May I seek some clarification.

24 Yes.

25 Is the Court's ruling then that Judge Vickery's order is set aside?

26 Judge Vickery's order is set aside in regards to the access, yes.

27 Correct. And with respect to — there was also — that application was based upon a P.G.O. order,

ma'am, that had access in it. Is that access then terminated?

28 Yes.

29 Thank you.

30 There is no access of any sort.

31 Thank you, My Lady.

32 Thank you.

END OF DOCUMENT