2006 CarswellAlta 1773, 2006 ABCA 404, [2007] 3 W.W.R. 626, [2007] A.W.L.D. 1131, [2007] W.D.F.L. 1289, 69 Alta. L.R. (4th) 215, 391 W.A.C. 175, 401 A.R. 175

2006 CarswellAlta 1773, 2006 ABCA 404, [2007] 3 W.W.R. 626, [2007] A.W.L.D. 1131, [2007] W.D.F.L. 1289, 69 Alta. L.R. (4th) 215, 391 W.A.C. 175, 401 A.R. 175

W. (K.V.) v. Alberta (Director of Child Welfare)

K.V.W. (Appellant / Applicant) and The Director of Child Welfare (Respondent / Respondent)

Alberta Court of Appeal

C. Fraser C.J.A., C. Conrad, K. Ritter JJ.A.

Heard: November 7, 2006
Judgment: November 7, 2006
Written reasons: December 29, 2006
Docket: Calgary Appeal 0601-0119-AC



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

T.D. Larochelle for Respondent

Subject: Family

Family law --- Children in need of protection — Application for permanent custody — Relation to third party's application for custody

Appellant was aunt of infant girl who was apprehended by director at birth — Director placed infant in foster home and filed permanent guardianship application in October 2004 — Two months later aunt brought application for private guardianship and director agreed to assess aunt's home — Five days later director placed infant in foster home in which infant's biological brother was adopted — At hearing on aunt's and director's cross-applications, director acknowledged that aunt had adequate parenting tools and stated that judge's role was to choose between two positive prospective parenting arrangements — Judge dismissed aunt's application and granted director's application on basis that infant's best interests were served by continuing 11-month attachment to current foster parents — On appeal from decision, Queen's Bench justice declined to grant aunt's application and ordered new trial on basis that trial judge had no evidence that foster parents had parenting and psychological qualities equal to aunt — Aunt brought appeal from decision — Appeal allowed; order of private guardianship to aunt was issued — Courts below made fundamental error in treating cross-applications as competition between aunt and foster parents — Proper procedure pursuant to s. 56(1) of Child, Youth and Family Enhancement Act was to resolve aunt's application first and only then assess if child was in need of protective services — Director had no right to permanent guardianship order unless court ruled child was in need of protection and no such ruling was issued — Director could contest private guardianship application only on grounds of fitness and not because better caregivers were found — Director acknowledged aunt's fitness to parent.

**Cases considered by *C. Fraser C.J.A.*:**

*Alberta (Director of Child Welfare) v. G. (B.J.)* (2002), 2002 ABPC 86, 2002 CarswellAlta 838, 321 A.R. 78 (Alta. Prov. Ct.) — considered

*Children's Aid Society of Metropolitan Toronto v. S. (D.)* (July 26, 1991), Doc. Toronto C2349/89 (Ont. Prov. Div.) — considered

*L. (R.) v. Children's Aid Society of Niagara Region* (2002), 34 R.F.L. (5th) 44, 167 O.A.C. 105, 16 O.F.L.R. 127, 2002 CarswellOnt 4262 (Ont. C.A.) — considered

*P. (N.P.) v. Alberta (Regional Children's Guardian)* (1988), 14 R.F.L. (3d) 55, 1988 CarswellAlta 86, 59 Alta. L.R. (2d) 289, 88 A.R. 114 (Alta. Q.B.) — referred to

**Statutes considered:**

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

Generally — referred to

s. 2 — considered

s. 18(1) — considered

s. 34(1)(a) — considered

s. 34(1)(b) — considered

s. 34(1)(c) — considered

s. 34(4) — considered

s. 34(5) — considered

*Child Welfare Amendment Act, 2003*, S.A. 2003, c. 16

Generally — referred to

s. 116(4) — considered

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

Generally — referred to

s. 2(i)(i) — considered

s. 52(1) — considered

s. 52(2) — considered

s. 52(3) — considered

s. 52(4) — considered

s. 52(5) — considered

s. 54 — considered

s. 55 — considered

s. 56(1) — considered

s. 57(1) — considered

s. 57(2) — considered

**Tariffs considered:**

*Alberta Rules of Court*, Alta. Reg. 390/68

Sched. C, Tariff of Costs, column 3 — referred to

APPEAL by aunt from decision to refuse application for private guardianship.

***C. Fraser C.J.A.* (for the Court) (orally):**

1 K.V.W., the aunt (Aunt) of a young baby girl, M.W. (Baby M), appeals the decision of a Queen's Bench justice declining to grant the Aunt's application for private guardianship of Baby M. Instead, the QB justice directed that there be a new trial to determine if the best interests of Baby M lie with her remaining in the custody of her foster parents who intend to adopt her, or with guardianship going to her Aunt who also intends to adopt her.

2 Fresh evidence has been led by the respondent Director of Child Welfare (Director) during the course of this appeal. The Aunt's counsel has not objected to it, and we have considered that evidence.

**I. Facts and Procedural History**

3 Baby M was born in late September, 2004 to her mother, the Aunt's sister. The day after the birth of Baby M, while she and her mother were still in the hospital, the Director apprehended baby M under an *ex parte* apprehension order.

4 Initially, the Director had placed Baby M in a foster home. The Director then filed a permanent guardianship application on October 10, 2004. Soon thereafter, on December 7, 2004, Baby M's Aunt applied for private guardianship. The Director initially undertook to consider the Aunt as a potential guardian for the child. Indeed, Ms. Sholdice, the Director's representative, was present in court before the family court judge on December 7, 2004 and confirmed that the Director had agreed to look at the Aunt as a possible placement for the child, and had also agreed to undertake a kinship care home assessment [AB IV 460/9-18].

5 However, five days after the Aunt had filed her private guardianship application, the Director elected to place Baby M in a foster-to-adopt home that had already adopted her biological brother. Baby M currently remains in the care of that foster family. At the time of this placement, the Director had received an opinion that

this action, that is placing Baby M in the care of the foster-to-adopt family, was "high risk".

6 Following a lengthy series of delays, the Aunt's home assessment was outsourced to Ms. Forsyth, an assessor with the organization Adoption by Choice [AB III 200/9-17]. Midway through completing her assessment, Forsyth also assumed a position with Alberta Child and Family Services [AB IV 392/1-17]. On June 6, 2005, Forsyth completed the first draft of the Aunt's home assessment which concluded that "the home of [the Aunt] be conditionally approved for Private Guardianship of [Baby M], pending the outcome of a Parenting Assessment"[AB IX E302; brackets added].

7 This assessment was reviewed by Ms. Sholdice, who requested that the assessment be changed to be conditional on a positive neuro-psychological assessment rather than the recommended Parenting Assessment [AB IV 482/9-26]. The matter then came before a family court trial judge in September, 2005. He adjourned the hearing until November 14, 2005 to allow the recommended Parenting Assessment to be completed on the Aunt [AB V 671/23-26]. That Assessment had still not been completed despite having been recommended in the first draft of Forsyth's home assessment five months earlier.

8 Dr. Sally During then prepared a psychological parenting assessment report on the Aunt (During Report) which was filed with the court on November 14, 2005. The During Report, done over 16 hours and eight separate days, concluded there was no indication that the Aunt did not possess sufficient parenting capability to provide adequate care for Baby M. To the contrary, the During Report was relatively positive, stating at AB IX E250 that:

> [The Aunt] was able to independently parent her daughter ... has owned and managed her own home and finances, and does not demonstrate any significant personal or psychiatric pathology at this time. There are no concerns in regard to substance use, criminality, overall health, or friendships... While [the Aunt] does present with some areas of cognitive weakness, they are not at a level that would impede acceptable parenting.

9 In the interim, Ms. Sholdice had requested an additional psychological report from a Dr. Vellet (Vellet Report) which was prepared after two hours of interviews, and this too was filed on November 14, 2005. The Vellet Report recommended that an alternative permanent placement to the Aunt be considered on the basis that placing Baby M with the Aunt would involve a "significant risk for childhood maladaption and poor long-term outcomes" [AB IX E256].

10 Notwithstanding Dr. Vellet's reservations, at the hearing before the trial judge, the Director conceded the Aunt was "a good and decent person" and, in terms of her capabilities, did "have the tools" necessary to adequately parent Baby M [AB VII 924/2-3 and 925/10-16]. The Director's position was that the trial judge had to choose between "two, I would suggest, positive prospects for [Baby M]" [AB VII 925/22-25; brackets added]. The Director also acknowledged that the permanency of the foster-to-adopt family could not be guaranteed as it "is possible that the adoptive home might suffer a break down" [AB VII 926/1-5].

11 The trial judge clearly saw the issue as a competition between two relatively equal homes. He indicated that he had considered both placements for the child — with the Aunt and with the current foster-to-adopt family — at length. He held that he "was assuming that both placements have capable persons" and that "that's an equal" [AB VII 1016/7-12]. He accepted that any order made in favour of the Aunt could be done in such a way as to prevent physical contact between Baby M and her mother and that the Aunt would abide by any such limitations [AB VII 1017/1-3]. Nevertheless, the trial judge concluded it was in the best interests of Baby M that she

remain with the current foster parents. In making this decision, he relied on the attachment that Baby M would have developed with her foster parents since she had been placed with them about 11 months earlier.

12 Accordingly, the trial judge approved the Director's permanent guardianship application and dismissed the Aunt's application for private guardianship.

13 The Aunt appealed these decisions to the Queen's Bench. The QB justice ordered a new trial on the basis there had been no evidence before the trial judge concerning the parenting abilities and psychological qualities of the foster parents:

> In my view, the learned trial judge erred in assessing the two homes to be equal as there was no evidence to make that finding. It may well be that the foster parents' parenting and psychological skills are equal to those of the [Aunt's] but there was no evidence presented in that regard. Therefore, I allow the appeal and order a new trial: [AB I F4/ para.11; brackets added].

14 Since November of 2004, the Aunt had been permitted supervised access to Baby M on a weekly basis which continued until the end of the trial before the trial judge, at which point access terminated. Then, following the decision of the QB justice, this access regime was reinstituted with the Aunt and her parents, Baby M's grandparents, being permitted weekly supervised visits with Baby M. The new evidence indicates that Baby M has been reacting negatively to those visits.

**II. Analysis**

15 This case raises a number of issues.

***1. What legislation applies to the Director's application for permanent guardianship of Baby M?***

16 The child welfare legislation in Alberta was substantially amended over the course of this action. The Director's apprehension of the child and subsequent permanent guardianship application, filed on October 10, 2004, both occurred under the *Child Welfare Act*, R.S.A. 2000, c. C-12 (*Old Act*). Both parties agree that the *Old Act* applies to the apprehension of Baby M and to the Director's application for a permanent guardianship order. We, too, agree that this is so.

***2. What legislation applies to the Aunt's application for private guardianship of Baby M?***

17 On November 1, 2004, almost all the changes made to the *Old Act* by the *Child Welfare Amendment Act*, S.A. 2003, c. 16 (*Amendment Act*) were proclaimed in force. As a result, as of November 1, 2004, the *Old Act* was renamed the *Child, Youth and Family Enhancement Act* (*New Act*) and numerous other changes came into effect. [Attached to this memorandum are copies of the relevant provisions of both the *Old Act* and the *New Act* .]

18 Section 116(4) of the *Amendment Act* provides that private guardianship applications commenced but not disposed of prior to the coming into force of the *Amendment Act* continue as though the *Amendment Act* had not come into force. That then raises the question of when the *Amendment Act* came into force. In fact, that occurred on multiple dates. As noted, the bulk of the *New Act* was proclaimed in force as of November 1, 2004. Since the Aunt brought her private guardianship application on December 7, 2004, it follows that the Aunt's private guardianship application is governed by the *New Act*, as it existed on the date of that application. The test that a court is required to use in determining whether to grant a private guardianship order is the same under the *New Act* as

that under the *Old Act* though the considerations that are to apply in assessing a child's best interests differ.

19 It is true that certain changes made by the *Amendment Act* to private guardianships were not proclaimed into force until October 1, 2005, well after the Aunt had filed her private guardianship application. Those changes related primarily to timing issues as to when and on what basis a party could bring a private guardianship application. However, since those particular amendments postdated the date of the Aunt's private guardianship application, they do not apply to it.

***3. On what basis is a court to deal with competing applications for private guardianship vs. permanent guardianship?***

20 It is apparent that the problems that arose in this case were linked to the way in which the central issue was presented to both the family court trial judge and then, on appeal, the QB justice. Essentially, the trial judge was invited to decide what was in the child's best interests by choosing between the Aunt and a foster-to-adopt family selected by the Director. And after the trial judge determined that the child's best interests lay with remaining with the foster family, the QB justice repeated this error by ordering a new trial to hear about the parenting abilities of that family on the basis that no evidence had been led on this point at trial.

21 In our view, it was a fundamental error to treat this as a competition between the Aunt and the foster parents, then or now.

22 The Director, acting on behalf of the state, has no right to a permanent guardianship order unless and until a court has decided that a child is in need of protective services. This is the statutory condition precedent to the Director's ability to secure a permanent guardianship order. To answer the question whether an individual child is in need of protective services, a court must look not only at the legal guardian and his or her capabilities but also at any arrangements the legal guardian has made for the custody, care and supervision of the child in question. Viewed from this perspective, a court must first consider whether a legal guardian, whose parenting abilities are challenged by the Director, has, at the time of hearing, made satisfactory arrangements for the custody, care and supervision of that child. Those satisfactory arrangements include placing the child with a person who is fit to parent that child.

23 The general principle is that if a legal guardian has made proper arrangements, and the fitness of the private guardian is not in issue, then there is no basis for state intervention. Therefore, where, as here, the birth mother has consented to a private guardianship application in favour of her sister, the court must first consider the merits of that application before going on to consider the merits of the state's application for permanent guardianship. There are several reasons for this.

24 First, if the person selected by the legal guardian is a fit person to parent the child, the child is not in need of protective services at the critical time. In other words, where a legal guardian is incapable of providing safely for his or her child and delegates the care, custody and supervision of that child to another, the Director would have to prove that notwithstanding that delegation, the child remains in need of protective services. The critical time for purposes of this assessment is the date of the first full hearing on notice to affected parties. It follows therefore that where, as in this case, an application for private guardianship remains outstanding before any contested hearing has been held, then in order for a court to be satisfied that the child is in need of such services, the court must first consider the parenting ability of the person designated by the legal guardian to care for and have custody of his or her child.

25 Second, an applicant for private guardianship whose application is consented to by the legal guardian is not required to establish that he or she is better than any other parents the state might find. Of course, it must be in the best interests of the child for a private guardianship order to be granted. In this regard, s. 56(1) of the *New Act* provides that a court must be satisfied not only that an applicant is "able and willing" to become the child's guardian — in other words is a "fit" parent — but also that a private guardianship order is in the child's best interests. That said, it must be remembered that what is in the best interests of a child is always considered within the context of a given case. The Director's interest in a private guardianship application, consented to by the legal guardian, is to ensure that the private guardian is otherwise fit and that the child will not be in need of protective services from either the legal guardian or the proposed private guardian.

26 In evaluating whether it is in the child's best interests for a private guardianship order to be made, the contest is not between a stranger selected by the state and the private guardianship applicant. Indeed, it is not even between the private guardianship applicant and the state, unless the state has an order for temporary or permanent guardianship. Instead, ordinarily, it will be between the legal guardian and the applicant for private guardianship unless, of course, the legal guardian has already consented to the private guardianship. Therefore, at this stage, absent any temporary or permanent guardianship order in favour of the Director, the question for the court to answer is whether the private guardian is fit to parent the child and whether a private guardianship order is otherwise in the child's best interests. That is so whether the state has apprehended a child on an *ex parte* basis or the legal guardian has consented to a private guardianship application. In both cases, the state has a legitimate interest in ensuring that the applicant for private guardianship is a fit parent whose guardianship would not result in the child being in need of protective services and that private guardianship is otherwise in the child's best interests. What the state cannot do though is contest that private guardianship application, not on the basis of the fitness of the applicant for private guardianship, but on the grounds it has found a better set of parents.

27 This point was addressed in *Children's Aid Society of Metropolitan Toronto v. S. (D.)*, [1991] O.J. No. 1384, 28 A.C.W.S. (3d) 205 (Ont. Prov. Div.). There, the court was required to consider competing guardianship applications from a child's aunt and the child's foster parents, who had been caring for the child for over 13 months. The court correctly drew a bright-line distinction between the role and status of foster parents preceding a permanent guardianship order and their role after a court order has been issued making the child a ward of the state. In commenting on the role of foster parents *before* a court has issued a permanent guardianship order, the court stated:

> I find it remarkable how widespread are the misconceptions about the status of foster parents at this initial stage. This is the investigative stage and sometimes the 'assessment' stage....
>
> Until it has been determined that there are grounds for removing the child from the family, and that there is no one in the family who is acceptable as a substitute caretaker, the foster parents cannot be putting forward their own resources as being 'better' than the family's or calling for a comparative analysis of plans as between themselves and the family. Before removal from the family has been justified, foster parents cannot have status to compete for the child and to argue 'attachment' or 'better resources'.

28 In fact, in *L. (R.) v. Children's Aid Society of Niagara Region* (2002), 167 O.A.C. 105, 34 R.F.L. (5th) 44 (Ont. C.A.), the Court of Appeal characterized interim foster parents into whose custody a child is placed prior to that child's being made a ward of the state as "risk foster parents" and stated at para. 38:

> [P]rior to the initial hearing, foster parents are meant to provide temporary care for children pending their return to their family or transfer to a more permanent placement. They are not intended to provide a comparative basis for the determination of the child's best interests from the outset. A best interests comparison between the foster home and the original family at this stage would run contrary to the entire scheme of state intervention in cases where there is reason to believe that a child is in need of protection....

29 It is true that the relevant Ontario legislation required that a court consider placement of a child with a member of the child's extended family prior to granting permanent wardship to the state. Nevertheless, the point made about the status of foster parents prior to the state's securing a permanent guardianship order or even a temporary guardianship order has equal application under Alberta legislation.

30 Where there has been no temporary or permanent guardianship order in favour of the Director, and where the legal guardian consents to a private guardianship application, and the person seeking private guardianship is a member of the child's extended family, and that person is found to be willing and able to assume the responsibility of a guardian toward the child, then it will ordinarily be in that child's best interests that the private guardianship order be granted. We recognize that when an *ex parte* apprehension order has been granted in favour of the Director, the Director has the right and responsibility to challenge the ability of an applicant for private guardianship. But it should be challenged on the applicant's fitness to parent and not on the basis that the Director might have found some better caregivers.

31 Third, resolving competing applications for the custody and control of the child in this manner is most consistent with the philosophy underlying the child welfare legislation in Alberta. That legislation recognizes the importance of maintaining children within a family unit. We are of the view that for purposes of s.2 of the *Old Act*, "family" includes a member of the extended family to whom the legal guardian has ceded custody, care and supervision: *P. (N.P.) v. Alberta (Regional Children's Guardian)* (1988), 59 Alta. L.R. (2d) 289 (Alta. Q.B.). Even if we were wrong in that conclusion, the Aunt is a member of Baby M's extended family. And while it is true that under the *Old Act*, s. 2 does not make any explicit reference to the child's extended family, the concept of keeping the child within the family — including the extended family — is implicit in that legislation. Indeed, this concept was expressly adverted to in the Director's Policy under the *Old Act* and it remains so under the *New Act*. Further, s. 2(i)(i) of the *New Act* now contains an express provision to the effect that any placement outside of the family should take into account the benefits to the child of a placement within the child's extended family, the clear implication being that placement within the extended family continues to be seen as a superior alternative.

32 Therefore, the import of the child welfare legislative regime under both the *Old Act* and the *New Act* is that even where the child is in need of protective services, the Director is effectively called on to consider whether there is family ready, willing and able to parent the child. In other words, both the *Old Act* and the *New Act* make it clear that the removal of a child from the child's family is not seen as an option of first resort. Instead, the focus is on providing intervention services in a manner that supports the family and prevents "the need to remove the child from the family".

33 Family in this context must necessarily include a member of the extended family to whom the legal guardian has entrusted the care, custody and supervision of her child. A case in point is *Alberta (Director of Child Welfare) v. G. (B.J.)*, 2002 ABPC 86, 321 A.R. 78 (Alta. Prov. Ct.). There, the court was faced with competing applications from the Director for permanent guardianship and two applicants for private guardianship. In emphasizing the desirability even under the *Old Act* of keeping a child within its extended family, the court

stated at para. 35:

> The *Child Welfare Act* is clear that whenever possible the integrity of the family should be maintained. It is possible to do that with this family because [the mother's cousin] has come forward to act in a parental capacity. I find that she is a fit and proper person to take on that responsibility, and that it is in the best interests of the child that she remain within her extended family in the care of [the mother's cousin]... The biological and family connection is compelling. [Brackets added.].

34 Further, and in any event, while the *Old Act* applies to the Director's application for permanent guardianship, the Aunt's application for private guardianship is governed by the provisions of the *New Act* as it existed at the time of her application. This being so, whether the Aunt's application is in the best interests of Baby M should be evaluated against the considerations and philosophy now expressly entrenched in the *New Act* and in particular those provisions emphasizing the importance attached to placement within the extended family.

35 Fourth, if a court in circumstances such as these did not first consider the private guardianship application, then the danger would be that the state could always find someone who might be a "better" parent(s) than the person(s) selected by the legal guardian to have custody and control of his or her child. An application for private guardianship consented to by a legal guardian is not — and should not be turned into — a contest between the proposed private guardian and some strangers selected by the state. If this were so, then there is a very real risk that only the fittest of the fit in our society would be permitted to parent. That cannot be.

36 Fifth, public funds are not unlimited. Where there are family members who wish to step in to assist when a child from that extended family has been apprehended — and do so — the state should first determine if the party seeking guardianship is fit before expending resources on evaluating/locating other options.

37 In summary, both the QB justice and the trial judge erred in assuming there was a competition between two competing families for Baby M. There was not. Although both the Aunt's application for private guardianship and the Director's application for permanent guardianship could be heard together, there being sound reasons for doing so in many cases, the court should have considered the merits of the Aunt's application for private guardianship first. Once this was resolved, only then could the court properly assess whether Baby M was in need of protective services.

38 Here, the trial judge found the Aunt to be fit and capable of parenting Baby M. It is clear that the only reason he did not grant the private guardianship order is because he saw this case as a contest between the Aunt and the foster parents — and in the end, the attachment issues as between Baby M and the foster parents governed. In our view, the trial judge erred in viewing this as a contest between the Aunt and the foster parents. The foster parents had no status before the trial court. The QB justice continued that error. Both viewed this as a competition between the Aunt and the foster parents. For reasons we have given, this was not so. Any contrary approach as to how to deal with competing private and state guardianship applications would alter in a fundamental way the careful balance the state has struck in child welfare matters between private rights and public power.

39 Given the trial judge's findings that the Aunt was a fit guardian, the legal guardian's consent to the private guardianship and the importance of family, including extended family under Alberta's child welfare regime, we have concluded that the private guardianship order was in the best interests of Baby M. Even if we were wrong in how a court should deal with competing applications by a member of the extended family, on the one hand, and the state, on the other, it would have been improper to order a new trial for the purpose of permit-

ting the Director to lead evidence that could have been called in the first instance. No litigant gets two chances to perfect its case.

40 We are very much alive to the attachment issues that may well arise with moving Baby M at this time. But taking into account all circumstances, we must allow the appeal, grant the Aunt's application for private guardianship, waive the requirement under s. 52(1) of the *New Act* that the Aunt have had the continuous care of Baby M for more than 6 months, and order that Baby M be placed into the custody of the Aunt. Both parties agree there should be an appropriate transition period before Baby M is placed in the Aunt's full-time custody. In our view, that should occur by December 31, 2006. We direct counsel to work out a viable transition and enhancement plan, failing which counsel are at liberty to apply to any member of the panel to resolve any outstanding issues. Finally, we wish to stress that in making this decision, we do not criticize the steps taken by the Director. It is evident that this area of the law required clarification of the manner in which a court should deal with competing guardianship applications.

(Discussion as to costs)

41 Costs ordinarily follow the event, and we see no reason to deviate from that in this case. We award costs to the Aunt under Column 3 plus reasonable disbursements. However, there will be no costs for the Aunt's factum.

*Appeal allowed.*

**Appendix — Addendum to Memorandum**

**Child Welfare Act (Old Act)**

***Matters to be considered***

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:

(a) the family is the basic unit of society and its well-being should be supported and preserved;

(b) the interests of a child should be recognized and protected;

(c) the family has the right to the least invasion of its privacy and interference with its freedom that is compatible with its own interest, the interest of the individual family members and society;

(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;

(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 insofar 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;

(f) any decision concerning the removal of a child from the child's family should take into account

(i) the benefits to the child of maintaining, wherever possible, the child's familial, cultural, social and religious heritage,

(ii) the benefits to the child of stability and continuity of care and relationships,

(iii) the risks to the child if the child remains with the family, is removed from the family or is returned to the family, and

(iv) the merits of allowing the child to remain with the family compared to the merits of removing the child from the family;

(g) if it is not inconsistent with the protection of a child who may be in need of protective services, the child's family should be referred to community resources for services that would support and preserve the family and prevent the need for any other intervention under this Act;

(h) any decision concerning the placement of a child outside the child's family should take into account

(i) the benefits to the child of a placement that respects the child's familial, cultural, social and religious heritage,

(ii) the benefits to the child of stability and continuity of care and relationships,

(iii) the benefits to the child of a placement within or as close as possible to the child's home community,

(iv) the mental, emotional and physical needs of the child and the child's mental, emotional and physical stage of development, and

(v) whether the proposed placement is suitable for the child;

(i) the provision of protective services is intended to remedy or alleviate the condition that caused the child to be in need of protective services;

(j) if a child is being provided with care under this Act, the child should be provided with a level of care that is adequate to meet the needs of the child and consistent with community standards and available resources;

(k) if a child is being provided with care under this Act, a plan for the care of a child should be de-

veloped that will address the child's need for stability and continuity of care and relationships;

(l) a person who assumes responsibility for the care of a child under this Act should endeavour to make the child aware of the child's familial, cultural, social and religious heritage;

(m) there should be no unreasonable delay in making or implementing a decision affecting a child.

***Permanent guardianship application***

18 (1) A Director may make an application in the prescribed form to the Court for a permanent guardianship order under section 34 in respect of a child if, in the opinion of the Director,

(a) the child is in need of protective services or is the subject of a temporary guardianship order,

(b) the survival, security or development of the child cannot adequately be protected if the child remains with or is returned to a guardian other than the Director, and

(c) it cannot reasonably be anticipated that the child could or should be returned to the custody of the child's guardian within a reasonable period of time...

***Permanent guardianship order***

34(1) The Court, on application pursuant to this Part by a Director, may make a permanent guardianship order appointing the Director as guardian of the child if it is satisfied that

(a) the child is in need of protective services or is the subject of a temporary guardianship order,

(b) the survival, security or development of the child cannot adequately be protected if the child remains with or is returned to the child's guardian, and

(c) it cannot be anticipated that the child could or should be returned to the custody of the child's guardian within a reasonable time.

. . . . .

(4) If the Court makes a permanent guardianship order, the Director is the sole guardian of the person of the child and the Public Trustee is the sole trustee of the estate of the child.

(5) A Director shall, on request, send the Public Trustee a copy of the permanent guardianship order.

**Child, Youth and Family Enhancement Act (New Act) (After November 1st 2004, Before October 1st 2005)**

***Matters to be considered***

2 If a child is in need of intervention, a Court, an Appeal Panel and all persons who exercise any authority or make any decision under this Act relating to the child must do so in the best interests of the child and must consider the following as well as any other relevant matter:

. . . . .

(i) any decision concerning the placement of a child outside the child's family should take into account

(i) the benefits to the child of a placement within the child's extended family...

***Private guardianship***

52 (1) Any adult who has had the continuous care of a child for a period of more than 6 months may apply to the Court in the prescribed form for a private guardianship order in respect of the child if the child or the applicant resides in Alberta.

(2) A director may, on behalf of an applicant, make an application under subsection (1) in respect of a child who is the subject of a permanent guardianship order or agreement if

(a) the applicant consents in writing, and

(b) the director is satisfied that it is in the best interests of the child for the child to be placed under the guardianship of the applicant.

(3) If it is satisfied that it is in the best interests of the child to do so, the Court may waive the requirement in subsection (1) that

(a) the child or the applicant resides in Alberta, or

(b) the applicant has had the continuous care of the child for more than 6 months.

(4) No private guardianship order shall be made under this section

(a) in respect of a child who is the subject of a temporary guardianship order, or

(b) if the purpose of the application is to facilitate the adoption of the child.

(5) No application shall be made for a private guardianship order in respect of a child who is the subject of a permanent guardianship order unless the appeal period for the order has expired.

. . . . .

***Report***

54 (1) The Court, on hearing an application for a private guardianship order, may require the applicant to provide it with a report in the prescribed form prepared by a qualified person respecting

(a) the suitability of the applicant as a guardian,

(b) the ability and willingness of the applicant to assume the responsibility of a guardian toward the child, and

(c) whether it is in the best interests of the child that the applicant be appointed as a guardian of the child.

(2) If the child is the subject of a permanent guardianship agreement or order, the report required under subsection (1) shall be prepared by a director.

(3) If the child is not the subject of a permanent guardianship agreement or order, the applicant shall serve a copy of the report required under subsection (1) on a director not less than 2 days before the report is provided to the Court.

(4) On being served with notice of an application for a private guardianship order, a director may conduct an investigation with respect to the proposed guardianship and may make representations to the Court at the time that the application is heard.

(5) If a director intends to make representations to the Court under subsection (4), the director shall notify the Court and the applicant not less than 2 days before the date of the hearing of the application.

***Consent to guardianship***

55 (1) A private guardianship order shall not be made without the consent in the prescribed form of

(a) the guardian of the child, and

(b) the child, if the child is 12 years of age or older.

(2) Notwithstanding subsection (1), the Court may make an order dispensing with the consent of

(a) a guardian of the child other than a director, or

(b) the child,

if the Court is satisfied that it is in the best interests of the child to do so.

(3) A consent to guardianship executed in any province or territory in a form prescribed for consents in that province or territory is as good and sufficient as if it had been executed in the form prescribed under this Act.

***Private guardianship order***

56 (1) If the Court is satisfied that

(a) the applicant is able and willing to assume the responsibility of a guardian toward the child, and

(b) it is in the best interests of the child,

the Court may make a private guardianship order appointing the applicant as a guardian of the child...

. . . . .

***Effect of order***

57 (1) Notwithstanding Part 7 of the Domestic Relations Act, for all purposes when a private guardianship order is made the applicant is a guardian of the child.

(2) Notwithstanding Part 7 of the Domestic Relations Act, if the Court makes a private guardianship order, it may make a further order terminating the guardianship of any other guardian of the child if

(a) the Court is satisfied that the other guardian of the child consents to the termination, or

(b) for reasons that appear to it to be sufficient, the Court considers it necessary or desirable to do so.

. . . . .

END OF DOCUMENT