

2008 CarswellAlta 458, 2008 ABQB 97, [2008] A.W.L.D. 3444, [2008] A.W.L.D. 3445, [2008] A.W.L.D. 3447, [2008] W.D.F.L. 4115, [2008] W.D.F.L. 4109, [2008] W.D.F.L. 4110

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F. (A.), Re

T.W. and R.W. (Appellants) and Child and Family Services Authority, Anne Marie Kingston (Respondent)

Alberta Court of Queen's Bench

J.D.B. McDonald J.

Heard: February 6, 2008

Judgment: February 7, 2008

Docket: Calgary FL01-02525

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Proceedings: affirming *F. (A.), Re* (2006), 2006 ABPC 225, 2006 CarswellAlta 1779 (Alta. Prov. Ct.)

Counsel: Kimberley A. **Medora** for Appellants

Mr. C. Ford for Respondent

Subject: Family

Family law --- Children in need of protection — Practice and procedure in custody hearings — Commencement of proceedings — Parties — Grandparents

Standing to bring application for guardianship — Parents had five children, and had entered into series of six-month support agreements with Director of Children's Services under Child, Youth and Family Enhancement Act (CYFEA) — Children were apprehended after parents breached supervision order — Director brought application for permanent guardianship and grandparents brought cross-application for guardianship, parenting and contact respecting children — Director's application was granted and grandparents' cross-application was dismissed since CYFEA did not permit anyone with connection to children and consent of parents to intervene in Director's application for permanent guardianship — Grandparents appealed — Appeal dismissed — Grandparents had no standing on facts of case to bring application for private guardianship pursuant to provisions of Family Law Act (FLA) — Fact that trial judge did not make ruling at outset of hearing did not affect grandparents' legal position, and trial judge likely allowed grandparents to participate in limited fashion out of abundance of caution — Court cannot grant private guardianship application brought pursuant to provision of FLA when children who were subject of application were in custody of Director pursuant to CYFEA.

Cases considered by J.D.B. McDonald J.:

Innovative Health Group Inc. v. Calgary Health Region (2006), 2006 ABCA 184, 2006 CarswellAlta 720,

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384 A.R. 378, 367 W.A.C. 378, 70 Alta. L.R. (4th) 15 (Alta. C.A.) — referred to

M. (F.), Re (2008), 2008 ABQB 94, 2008 CarswellAlta 457 (Alta. Q.B.) — referred to

W. (O.T.), Re (2008), 2008 ABQB 93, 2008 CarswellAlta 466 (Alta. Q.B.) — referred to

Statutes considered:

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

Generally — referred to

Family Law Act, S.A. 2003, c. F-4.5

Generally — referred to

s. 23 — referred to

APPEAL by grandparents from judgment reported at *F. (A.), Re* (2006), 2006 ABPC 225, 2006 CarswellAlta 1779 (Alta. Prov. Ct.), concerning permanent guardianship order.

J.D.B. McDonald J.:

Introduction

1 This is an appeal from the decision of Vickery PCJ and by way of Written Reasons for Judgment and reported as re: A.F. 2006 ABPC in an application brought by the Director.

2 At the end of her decision, Vickery PCJ dismissed the application brought on behalf of the grandparents of the subject children.

Facts

3 The Appellants, T.W. and R.W., are the maternal grandparents of five children, namely: A.F.; J.F.; B.F.; D.F.; and P.F.

4 The children's biological mother and father are T.F. and T.F.

5 The children were apprehended from the care of their parents on May 19, 2005. The Director obtained an apprehension order from the Provincial Court of Alberta on May 19, 2005 and applied for a permanent guardianship order (PGO) on May 27, 2005. The trial commenced on December 12, 2005.

6 The Appellants, through counsel, filed for private guardianship under the provisions of the *Child, Youth and Family Enhancement Act* RSA 2000 Chapter C-12 (the "*CYFEA*"). This application was dismissed by Vickery PCJ on December 15, 2005 approximately three days into the trial as the Appellants did not meet the provisions for private guardianship under the *CYFEA*. She did, however, allow the Appellants, through counsel, to re-file for guardianship under the provisions of the *Family Law Act*, SA 2003 Chapter F-4.5 (the "*FLA*") and provided a fiat on the application to ensure the filing of same.

7 On December 16, 2005, the Appellants filed claims for guardianship of the children, parenting of the chil-

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dren and contact with the children. These applications were brought pursuant to Section 23 of the *FLA*.

8 The Appellants were in attendance during the trial and were represented by counsel. The Appellants' counsel was permitted to cross-examine witnesses during the trial; however, the Appellants, through counsel, were not permitted to testify or present any evidence.

9 The trial was concluded on July 31, 2006. Written reasons were provided on November 21, 2006.

10 Vickery PCJ granted the PGO with respect to the children and dismissed the Appellant's claim under the *FLA*.

11 In her reasons, Vickery PCJ stated the following at para. 65:

Once a Court is satisfied that three conditions under Section 34(1) of the *Child, Youth and Family Enhancement Act* have been met by the case brought by the Director, no order under the *Family Law Act* can override the permanent guardianship order except with the consent of the Director.

12 On July 23, 2007, the Honourable Justice S.M. Bensler granted an order separating the Appellant's appeal from that of the parents. The order also stated that the Appellants' appeal was to be heard with the appeals in Action Numbers FL01-02883 and FL01-02980 on Wednesday, December 12, 2007. I have previously rendered decisions on those appeals and they are reported at [2008 ABQB 93](#) (Alta. Q.B.) and [2008 ABQB 94](#) (Alta. Q.B.) respectively.

Issues on Appeal

1. Can the Court grant a private guardianship application pursuant to provisions of the *FLA* when the children who are subject of that application are in the custody of the Director pursuant to the provisions of the *CYFEA*?
2. Did Vickery PCJ err in law in deferring her decision regarding the Appellant's standing until the end of the trial?

Standard of Review

13 The first issue requires interpretation of statutory provisions and therefore the applicable standard of review is correctness: *Innovative Health Group Inc. v. Calgary Health Region*, [2006 ABCA 184](#), [384 A.R. 378](#) (Alta. C.A.) at para.13.

14 In light of my ruling with respect to the first issue, the second issue on appeal becomes moot.

Law and Analysis

1. Can the Court grant a private guardianship application pursuant to provisions of the FLA when the children who are subject of that application are in the custody of the Director pursuant to the provisions of the CYFEA?

15 The issue was addressed by me in my Reasons for Judgment in *M. (F.), Re*, [2008 ABQB 94](#) (Alta. Q.B.) and I incorporate that reasoning into this Judgment. For the reasons discussed therein, this issue on appeal is dismissed.

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2. Did Vickery PCJ err in law in deferring this issue regarding the Appellant's standing until the end of the trial?

16 I have ruled that the Appellants had no standing on the facts of this case to have brought an application for private guardianship pursuant to the provisions of the *FLA*.

17 That being so, they never had the right to bring an application pursuant to the provisions of the *FLA* and the fact that Vickery PCJ did not make that ruling at the outset does not affect their legal position. In fact, it seems that Vickery PCJ — perhaps out of an abundance of caution — allowed the Appellants to participate in a limited fashion quite likely with a view to assist her in making her decision.

18 The Appellants' substantive rights could not have been affected by the decision of Vickery PCJ on this procedural point and therefore, on appeal, there is no need for me to deal with it.

Conclusion

19 Accordingly, I dismiss the appeal and hold as follows:

(a) A court cannot grant a private guardianship application brought pursuant to the provisions of the *FLA* when the children who are the subject of that application are in the custody of the Director pursuant to the provisions of the *CYFEA*;

(b) This issue is moot.

Appeal dismissed.

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