2006 ABQB 778, [2007] A.W.L.D. 709, [2007] W.D.F.L. 822, 34 R.F.L. (6th) 414,
70 Alta. L.R. (4th) 81

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2006 CarswellAlta 1401

W. (K.) v. Alberta (Director of Child Welfare)
In the Matter of M.W. born in September 2004 a Child within the Meaning of the Child Welfare Act, R.S.A. 2000, c. C-12 as amended
And In the Matter of an Appeal by the Appellant from the Order of the Honourable Judge S.E. Wood granted the 17th day of November, 2005
K.W. (Appellant) and Director of Child Welfare (Respondent)
Alberta Court of Queen's Bench
J.C. Coutu J.
Heard: September 25, 2006
Judgment: October 13, 2006
Docket: Calgary FL01-00508

Counsel: Diann **Castle** for Appellant

Todd LaRochelle for Respondent

Subject: Family; Civil Practice and Procedure

Family law --- Costs -- Children in need of protection

Mother gave birth to child at hospital -- Director immediately apprehended child from mother and filed permanent guardianship application -- Child's aunt also applied for guardianship of child -- Director sought to permanently place child in interim foster home -- Guardianship applications were consolidated into one hearing -- Trial judge allowed director's guardianship application after nine-day trial -- Aunt appealed decision -- Appellate court overturned decision due to fact that virtually no evidence about foster parents was led before trial judge -- Appellate court ordered new trial -- Aunt brought application for award of trial costs -- Application granted -- Aunt was awarded costs on solicitor and client basis -- Special and unusual circumstances existed which mandated award of costs -- Director failed to adjust trial procedure to take into account unique circumstances of case -- Director's omissions with regard to evidence of foster parents had led to nine-day trial which had to be redone -- Aunt had unnecessarily incurred significant legal fees and expensive expert assessments due to need for retrial -- Director had not acted in fair, impartial and expedient manner in determining whether or not to support aunt's application.

Cases considered by J.C. Coutu J.:

> Alberta (Director of Child Welfare) v. T. (J.) (2003), 2003 ABQB 402, 2003 CarswellAlta 634, 38 R.F.L. (5th) 239 (Alta. Q.B.) -- considered
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> Alberta (Director of Maintenance & Recovery) v. P. (T.) (1991), (sub nom. Walde v. Podwysocki) 8

W.A.C. 117, 1991 CarswellAlta 9, 37 R.F.L. (3d) 275, 1 Alta. L.R. (3d) 187, (sub nom. Walde v. Podwysocki) 120 A.R. 117 (Alta. C.A.) -- referred to

B. (D.) v. Children's Aid Society of Durham (Region) (1987), 1987 CarswellOnt 459, 20 C.P.C. (2d) 61 (Ont. Fam. Ct.) -- considered

Children's Aid Society of Algoma v. M. (R.) (2001), 18 R.F.L. (5th) 36, 2001 CarswellOnt 2204 (Ont. C.J.) -- followed

Children's Aid Society of Brant v. C. (D.M.) (1997), 27 R.F.L. (4th) 123, 1997 CarswellOnt 767 (Ont. Prov. Div.) -- considered

Children's Aid Society of Hamilton-Wentworth (Regional Municipality) v. M. (P.) (1988), 1988 CarswellOnt 297, 17 R.F.L. (3d) 46 (Ont. H.C.) -- considered

Children's Aid Society of Niagara Region v. D. (W.) (2004), 2004 CarswellOnt 562, 1 R.F.L. (6th) 84 (Ont. S.C.J.) -- considered

Children's Aid Society of Waterloo (Regional Municipality) v. C. (Z.B.) (1996), 1996 CarswellOnt 4670, 10 O.F.L.R. 124 (Ont. Prov. Div.) -- considered

Feagan v. Corcoran (1978), 12 A.R. 431, 5 Alta. L.R. (2d) 216, 1978 CarswellAlta 16 (Alta. Dist. Ct.) -- distinguished

M. (J.J.), Re (1994), 154 A.R. 319, 1994 CarswellAlta 570 (Alta. Q.B.) -- distinguished

Statutes considered:

Child and Family Services Act, R.S.O. 1990, c. C.11

Generally -- referred to

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

Generally -- referred to

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

Generally -- referred to

Courts of Justice Act, 1984, S.O. 1984, c. 11

s. 131 -- referred to

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

s. 94 -- referred to

Maintenance and Recovery Act, R.S.A. 1970, c. 223

Generally -- referred to

Rules considered:

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

R. 218 -- referred to

Tariffs considered:

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

Sched. C, Tariff of Costs -- referred to

APPLICATION by aunt for award of trial costs.

***J.C. Coutu J.*:**

Issue

1 The issue in this application is whether costs for the trial and appeal should be awarded against the Director of Child Welfare, in favour of the Appellant K.W. This application arises from my decision to allow the Appellant's appeal and order a retrial.

Background

2 I will summarize the chronology of events relevant to the issue of costs. M.W. was born on September 29, 2004 to S.W. On September 30, 2004 the Director of Child, Youth and Family Enhancement (the "Director") apprehended the child from the hospital and a permanent guardianship application was filed on October 10, 2004. The Appellant, K.W., who is the aunt of M.W., made it known to the Director that she intended to apply for guardianship of her niece. On December 7, 2004 the Director's delegate, a social worker, advised the Court that a Kinship Care Assessment of the aunt K.W. would be done. On December 12, 2004 the Director moved the child M.W. from a temporary foster home to the home of foster parents who wanted to adopt M.W. (if, and after, the Director obtained a permanent guardianship order.) The two applications, the aunt's private guardianship application and the Director's application for a permanent guardianship order, were consolidated at trial.

3 In September 2005, the Provincial Court Judge dismissed the Appellant K.W.'s application for private guardianship and granted the Director a permanent guardianship order. On appeal, *W. (K.) v. Alberta (Child Youth & Family Enhancement Act, Director)*, 2006 ABQB 339, I granted the Appellant K.W.'s appeal and ordered a new trial.

4 In my reasons, I stated that this is an unusual case, in that this was not just a case of the Director seeking a permanent guardianship order. Here, there was a private guardianship application by the Appellant K.W., the aunt of the child, and the Director was applying for a permanent guardianship order with the intention that, if the order was granted, the foster parents who had care of the child would adopt the child. In my reasons, I noted that counsel for the Director had submitted that either home was a good home and had suggested to the trial judge that he was in the unenviable position of having to choose between the home of the Appellant and the home of the foster parents. I commented that the trial judge chose the foster parents despite the fact that the foster parents

did not testify, and very little was known about them. At trial, the Director did not produce any home assessments or reports concerning the foster parents, as the Director maintained that such reports are confidential. No parenting or psychological tests were done on the foster parents, unlike the Appellant K.W.

5 I held that the trial judge erred in assessing the two homes to be equal when there was no evidence to make that finding. Therefore, I allowed the appeal and ordered a new trial.

6 I should add that the Appellant K.W. requested that the Court allow the appeal and order that her private guardianship application be granted. However, I allowed the appeal but ordered a new trial, as I was of the view, as I stated in my oral reasons, that I could not determine, on appeal, what was in the best interest of the child without any evidence from the foster parents.

Position of the Appellant K.W.

7 The Provincial Court trial was lengthy, lasting approximately nine days, and the Appellant incurred significant legal fees. Moreover, the Appellant called expert evidence which, again, was costly. The Appellant seeks costs, on a full indemnity basis, of both the Appeal and the Provincial Court trial, or in the alternative, costs pursuant to Schedule C. The Appellant relies on s.94 of the *Family Law Act*, S.A. 2003, c.F-4.5, which gives the Court discretion to award costs

8 The Appellant relies on the decision of Burrows J. in *Alberta (Director of Child Welfare) v. T. (J.)*, 2003 ABQB 402 (Alta. Q.B.), wherein double costs were awarded against the Director. Burrows J. held that he had the jurisdiction to award costs. He referred to and followed the decision of the Alberta Court of Appeal in *Alberta (Director of Maintenance & Recovery) v. P. (T.)* (1991), 1 Alta. L.R. (3d) 187 (Alta. C.A.), wherein it was held that an award of costs against the Director should only be granted if the case presents special and unusual circumstances. Justice Burrows held there were special and unusual circumstances to award costs. These circumstances were outlined at paras. 27, 28, and 31 of his decision: the Director failed to prosecute the appeal with diligence (it took over a year), and the Director should have abandoned his application to seek a permanent guardianship order as the expert opinions clearly favoured the return of the children to the mother.

9 The Appellant submits that, in this case, there are special and unusual circumstances which warrant costs being awarded. It was the decision of the Director not to have the foster parents testify, which prevented counsel for the Appellant cross-examining them. Further, no psychological tests or home assessments were presented by the Director in regard to the foster parents. On the other hand, the Appellant fully co-operated with the Director in completing multiple tests, which were positive for the Appellant. At trial, the Director conceded that the Appellant had the tools to parent the child. In short, the retrial results from the Director's omissions, not the Appellant's.

10 The Appellant further submits that she was successful in the Appeal and should have her costs, as the Director is funded by the government and the Appellant is a private citizen who has "taken on" the state. The Appellant submits that redirecting the matter back for another trial imposed a financial burden on the Appellant, and this is not fair because the retrial results from the omissions of the Director.

11 Also, the Appellant submits that costs should be awarded as there were special and unusual circumstances relating to the handling of this case by the Department of Child Welfare ("the Department") and the Director which were unfair to the Appellant. The Appellant points out that:

• The Department moved the child to the care of foster parents who wanted to adopt the child, even though it was aware of the Appellant's intention to apply for guardianship and knew that the foster parents were not agreeable to allowing access to the child's biological family;

• Knowing that the Appellant had applied for private guardianship, the Director told the Court on December 4, 2004, that a Kinship Care Assessment would be done on the Appellant, but the Department delayed in doing this assessment and the Appellant submits that this delay was prejudicial to the Appellant's application.

• In March, 2005 the Director insisted the trial should proceed without the Kinship Assessment, which was still not complete, necessitating an application for an adjournment by Counsel for the Appellant, which was granted. Again, the Department indicated to the Court that it would complete the Kinship Assessment in a timely manner, but the Appellant was not contacted by the Department until some six weeks later, on April 8, 2005;

• The Department was provided with a worker's Kinship Assessment on June 6, 2005, which supported the Appellant's application, however this was not made known to the Appellant. Instead, the Department asked the worker to make changes to the Kinship Assessment;

• It is only on August 21, 2005 -- three weeks before trial -- that a copy of the Kinship Assessment was given to Counsel for the Appellant, despite repeated earlier requests by counsel for a copy;

• On June 6, 2005 when the Department received its social worker's Kinship Assessment, it was recommended that a parenting assessment of the Appellant be done. This was not done by the Department and, at trial, it was the trial judge who ordered it to be done. Again, this delay was prejudicial to the Appellant;

• After November 2004, when the trial judge made his decision, the Department declined to allow the Appellant access to K.W., notwithstanding the fact that the Department was aware that the Appellant was pursuing an appeal.

Position of the Respondent the Director of Child Welfare

12 Counsel for the Director concedes that the Court has jurisdiction to award costs against the Director. However, he submits that costs should not be awarded unless it can be shown that there are special or unusual circumstances and he submits there are no such circumstances in this case.

13 Counsel for the Director refers to the decision of *M. (J.J.), Re* (1994), 154 A.R. 319 (Alta. Q.B.) wherein counsel for the parents applied for costs against the Director of Child Welfare. At para. 3, Rawlins J. stated, "We, as a society, have sanctioned the intervention and investigation through the *Child Welfare Act* and there may be situations where the Director is unsuccessful at a hearing but short of improper conduct or special circumstances, it would be improper to impose costs upon him."

14 Justice Rawlins held that the Director, under the *Child Welfare Act* and the Director, under the *Maintenance and Recovery Act* have the same mandate and she applied the principle as set out by McFayden J. in *Feagan v. Corcoran* (1978), 5 Alta. L.R. (2d) 216 (Alta. Dist. Ct.). In *Feagan*, the respondent was found not to be the father of a child and a complaint against him under the *Maintenance and Recovery Act* was dismissed. He

applied to the Court for costs against the Director. The application was dismissed and McFadyen J., as she then was, stated at para. 12:

> The position of the Director is different from that of either of the two parties in view of the Director's responsibility to insure that the interests of the public and of the child are protected. While I am satisfied that the court has the power to award costs against the Director, I am of the view that this award should not be routinely made but should be made only in cases of special and unusual circumstances. Such unusual circumstances are not present in this case. The application for an order for costs against the Director of Maintenance and Recovery is dismissed.

15 Lastly, the Director submits that neither the Appellant nor the Respondent was completely successful in the appeal. The Appellant sought to have the trial judge's decision overturned and the child placed with her under a Private Guardianship order. The Respondent asked that the Appeal be dismissed. However, although the appeal was granted, the matter was ordered to be reheard.

Decision

16 It is clear that I have jurisdiction to award costs. I agree with the general principle that we, as a society, have sanctioned the intervention and investigation through the *Child Welfare Act* and there may be situations where the Director is unsuccessful at a hearing *but unless there are special and unusual circumstances*, costs should not routinely be awarded against the Director. I accept the underlying rationale behind this principle, which is that protection agencies are not ordinary litigants and there should be a distinction between a society or protection agency as a party litigant and parties in non-child protection matters. The adversarial concept of winning and losing does not apply very well to protection cases. It would be generally undesirable for a protection agency to have to be concerned about the cost implications of a course of action that they otherwise believed was in the child's best interests.

17 On the other hand, the Director is not immune from costs, and the reason there is an exception, where there are special and unusual circumstances, is that some cases call for an award of costs against the Director. This is one of those cases.

18 First of all, let me distinguish *Re. M.(J.J.)* and *Feagan*, the cases to which the Director referred. In those cases, the Director was not successful, but there was no issue raised as to the manner in which the case was conducted by the Director. In the present case, there were legitimate issues raised as to the manner in which this matter was conducted by the Director. In those cases, the trial did not have to be redone as a result of omissions by the Director. In the present case, a new trial was ordered, as a result of omissions by the Director.

19 Before I go on, in fairness to counsel, I should emphasize that counsel who acted for the Director at trial was not the counsel responsible for handling the file before trial. He was in the unenviable position of being asked to conduct the trial shortly before the trial commenced.

20 I find there are special and unusual circumstances justifying costs against the Director. I accept the submission of the Appellant that the retrial was a result of the decision of the Director not to have the foster parents testify, the result of which was that there was no evidence for the trial judge to consider in his assessment of them. Further, as counsel for the Appellant submitted, the Appellant was denied the opportunity to challenge the evidence of the foster parents in cross-examination. Further, it was the Director's decision not to present to the court parenting or home assessments in regard to the foster parents. It may well be that in the usual permanent

guardianship application this is not necessary, as the only question is whether a permanent guardianship application should be granted.

21 However, as I stated in my reasons, the trial proceeded on the basis that there were two "competing" homes in which M.W. could be placed. The Director made such submission to the trial judge and in my view the necessity for a new trial arises out of the Director's failure to assess the uniqueness of this case. The Director conducted the case as if it were the usual permanent guardianship case, but it was not. The Director has much more experience in this area than the Appellant. It is not as if this was a quick trial, where the uniqueness of this case could have come as a surprise to the Director. Counsel for the Director and the Appellant dealt with preparation for trial for close to one year.

22 I find that the Director failed to adjust its trial procedure to take into account the unique circumstances of this case, and the Director's omissions led to a nine-day trial which has to be redone. Further, the Department failed to reassess its position as more information became available.

23 The Appellant did everything that was required of her by the Director to present her case. It is the omissions of the Director which necessitate a new trial. Therefore, in these special and unusual circumstances, I find that it is only just and equitable that the Appellant receive costs against the Director. The foster parents incurred no legal fees whatsoever, although the intention was that their adoption application would follow the permanent guardianship order. Yet the Appellant has incurred significant legal fees and expensive expert assessments, all of which are "thrown away costs" due to the Court ordering a re-trial. Would it be equitable that the Appellant pay for the Director's omission? I do not believe so.

24 There are other special and unusual circumstances justifying costs against the Director, and in that regard, I accept the submissions of counsel for the Appellant that the handling of this case by the Department, as the case proceeded to trial and at trial, was unfair to the Appellant. Costs should be payable to make the Department accountable. There was delay in the preparation of the Kinship and Parenting Assessments reports, which delay was prejudicial to the Appellant. In the circumstances of this case, this delay is inexcusable.

25 Although Counsel for the Director, at the end of the trial, in submissions to the trial judge, appeared to put forth a neutral position by submitting the choice was between two equally good homes, this neutrality was not apparent during the trial, nor was it the case when it was being handled by the Department before trial.

26 First, let me refer to some of the submissions by counsel for the Director, from pages 923 to 925 of the trial transcript:

> And Your Honour has two applications before him. First is a private guardianship application... And, secondly, an application for permanent guardianship by the Director. I'd submit the test under both applications is the best interests of the child... There's no particular onus on either party in this case. If the Director were dealing with guardians within the PGO hearing we would have to prove -- the onus would be on the Director to prove the child could not reside with those guardians without risk. In this case there are no guardians so the Director simply has to prove what's in the best interests of the child. If the PGO is - and likewise the aunt has to prove if the private guardianship is in the best interests of the child. That's the test. It's obvious, I would say to all of us, that this is a very difficult case for the court. Right off the top and after conferring with Ms. Sholdice the Director wishes to concede that K.W. is a good and decent person. She obviously cares for her niece and she has jumped through every hoop the Director has asked of her. She raised a daughter who appears to be a very nice young girl... When

> my friend gives her argument I'm hopeful that she will concede that the Director's delegates are also good people; that they care about the best interests of M; that they made the decisions they could at the time; and that they stand by those decisions today... Dr. During carried out a parenting assessment and concluded that there was nothing precluding [K.] (K.W.) from parenting M.W. Dr. During was careful to note that she was not asked to assess whether that was the best outcome for M. W. Simply that the mother - or the aunt has the tools. The Director concedes that the aunt does have the tools...So Your Honour has the unenviable choice between two, I would suggest, positive prospects for M.W. Good news for M.W. Perhaps bad news for the court.

27 Yet, the trial transcript shows that before the trial and during the trial, it was clear that the Director was not neutral and was supporting the foster parents' plan to adopt the child, if and after the permanent guardianship order was granted.

28 In fact, initially, the Department's own social worker recommended that the Appellant aunt be granted guardianship of the child. Then the Department took the most unusual step of retaining an expert witness to negate their own worker's recommendation.

29 Throughout the cross-examination of the Appellant and her witnesses, counsel for the Director challenged the evidence, making it clear that the Director was not supporting the Appellant's application. In fact, at trial, the Director, without providing a Rule 218 notice to counsel for the Appellant, called two expert witnesses who testified in favour of the child remaining with the foster parents. One expert gave her opinion on "attachment and bonding" and one gave evidence as an adoption specialist. This surprise evidence was unfair to the Appellant. Counsel for the Appellant objected. However, she realized that if the matter was adjourned, this further delay would be prejudicial to her client's position. It had already taken a year to get to trial. The Appellant, in effect, was denied the opportunity to thoroughly cross examine these witnesses without a Rule 218 report. More significantly, the Appellant did not have any opportunity to call her own expert to challenge the opinion. In my view, this was most unfortunate, as this has great bearing on what is in the best interests of the child.

30 On appeal, counsel for the Appellant submitted many instances of a lack of neutrality by some of the Department's social workers. It was difficult to determine if these allegations were correct. However, I did question the Director's neutrality when I heard that the Appellant, up until trial, had 34 visits at the Department's office with her niece M.W and that, after trial, the social workers or counsel for the Director took the position that the access visits would cease, even though the Appellant aunt had appealed the judgment. Then, when I gave my oral reasons, I indicated that until the retrial occurred, I was of the view that the access visits by a loving aunt and grandmother, in the Department's office, surely could not be a problem, in view of the fact that at trial Counsel for Director had no concerns with the Appellant aunt as an applicant. A social worker present in court immediately requested Counsel for the Director to take the position that the access visits should not resume, as this would be harmful to the child. I did not change my ruling. Subsequently, Counsel for the Director addressed a judge in Provincial Court to have this ruling changed. Counsel indicates it was not brought up by him but by the judge, however, it did not appear that Counsel took the position the Department was content to leave the matter alone. In fact it was addressed again and a different provincial court judge suggested it should come back to me. It did come back in front of me and I indicated I was functus. Counsel for the Director then suggested there would be an appeal of my access ruling and a stay application, even though the appeal on the merits was only a month or so away. Then, there was a suggestion that there would be an application, with new evidence, by the same social worker who testified at trial, to oppose the Appellant's application on the basis that the resumption of access was harmful. It appeared to me on reading the transcript of the trial and later, that this was a case

where the social workers were in control of the litigation and there was a lack of neutrality.

31 I note that in *T. (J.)*, Burrows J. found similar factors to be special and unusual circumstances justifying double costs against the Director. At para. 31, he concluded:

> In my view the circumstances justify an award of costs to L.T. greater than might ordinarily be awarded. L.T.'s provision of the expert opinion supporting her reunification with her children in July, 2002 opened an avenue to the appropriate resolution of the main issue in this matter - the future custody of the children. All of the expensive steps which followed on that could and should have been avoided. In my view the unreasonable delay largely caused by the Director, the Director's failure to accept and act on the psychologists' opinions, and the Director's failure to diligently adhere during the course of these proceedings to the principles which the Legislature has ordained must guide those charged with making decisions under the *Child Welfare Act*, justify increased costs in favour of L.T.

32 A case which is remarkably similar, and contains comments by the trial judge which are apt to this case, is a decision by Kukurin J. of the Ontario Court of Justice in *Children's Aid Society of Algoma v. M. (R.)* (2001), 18 R.F.L. (5th) 36 (Ont. C.J.). In that case, Kukurin J. granted solicitor-client costs of $77,000.00 to the applicants (the aunt and uncle of the child), payable by the Society. The case is similar in that, from a child protection point of view, the case represented an oddity in the sense that protection of the child became a secondary issue as the child could have done well if he were to be raised in either home, and the society ventured into an area that bordered on contested custody.

33 In *Children's Aid Society of Algoma* the child was apprehended from the biological parents. The Society placed the child with foster parents who wished to adopt the child. The aunt and uncle of the child applied for care of the child and were added as parties and had their own counsel. Unlike this case, in *Children's Aid Society of Algoma*, the foster parents were added as parties and were represented by their own counsel.

34 The Society retained an expert who supported the aunt and uncle's application. Nevertheless, the matter went to trial. At trial, the trial judge placed the child with the aunt and uncle. The aunt and uncle applied for costs against the Society on the basis that the Society mishandled the trial and the applicants incurred substantial expense as a direct result of the Society's conduct.

35 One of the main reasons why Kukurin J. awarded costs against the Society in *Children's Aid Society of Algoma* was the failure of the Society to reassess its position as more information was acquired and its failure to adjust accordingly. At paras 99-106:

> In all of the circumstances, it seems clear that the society failed to do at least one thing it should have done - an important task - namely to investigate Ms. Barbara B. and Mr. Brian B.
>
> One of the considerations important to the consideration of costs is the obligation of a society to reassess its position as more information is acquired and to adjust accordingly. It is the failure of the society to do so that attracts much of the criticism of Ms. Barbara B. and Mr. Brian B. Dr. Seim prepared an assessment report that praised both the foster parents as well as Ms. Barbara B. and Mr. Brian B. as potential long-term caregivers for Donald M. But he came down on the side of extended family and he gave reasons for this.
>
> Despite this report and his testimony, the society did not amend its claim and did not change its posi-

tion. One can assume that it reassessed its position and decided to stand pat. No reason was apparent why the society would prefer to disagree with the recommendations of its own expert witness. And if it was not disagreeing, it was certainly not being forthright in declaring its intentions to do what he had recommended. The position of the society was incomprehensible.

Closely related to the failure to reassess and re-adjust, or to explain why not, is the curious stance taken by the society on its claim. The society advocated a disposition of Crown wardship with no access. Its intention was that Donald M. would be adopted and this would be the best permanency plan for him. By the time of trial, there was sufficient indications that Donald M.'s foster parents wanted to adopt him. They asked for and were granted party status. They retained their own counsel. The first witness for the society admitted that the society was aware of the interest of these foster parents to adopt and to adopt Donald M. in particular, and that the society was leaning in that direction. Dr. Seim's report made no secret of competition between the foster family and the extended family. The society, however, would not budge from its defective plan of care. It did not disclose any description or details about Donald M.'s long-term care.

The result of playing its cards so close to its vest is that this litigation was extended. In fact, the litigation was centred on this very issue. The aunt and uncle sought assurances that the society would view their application for adoption favourably if an order were made for Crown wardship. The society would not make any such commitment. It maintained what was described as a "veil of neutrality" that was, in fact, no neutrality at all. It amounted to a total opposition to what Ms. Barbara B. an Mr. Brian B. were advocating and that was apparent from every aspect of this case from the initial advice to get their own lawyer to the manner in which examination and cross-examination took place; to the questions that were asked or not asked, to the argument of parties and their counsel.

It was not difficult to conclude that Donald M. could not be raised by his mother or father. The big contest here was in which family was Donald M. going to grow up. The society did its job to present the evidence to exclude Donald M.'s biological parents as caregivers. Beyond that, it took a position that Donald M. should not go to his aunt and uncle. It did so as a primary litigant. It was clearly aligned with the foster parents even though its ostensible position was put forward as one of neutrality. There is no doubt in my mind that, without the resources and support of the society, the foster parents could not have continued with this litigation. The fact that this case was not resolved and continued for twelve or so days can be attributed primarily to the society.

From a child protection point of view, this case represented an oddity in the sense that protection of Donald M. became a secondary issue. The evidence was very clear that Donald M. would have done very well if he were to be raised in either home. They were both very good families. Why would the society engage its resources in a twelve-day trial to champion one alternative over another when neither posed any risk for Donald M.? One hopes that the motivation of all litigants in child protection matters springs from the conviction that what they are advocating is really what's in the child's best interests.

In this case, the society ventured into an area that borders on contested custody. I have to recognize that, in one sense, it had no choice. A status review application was required under the *Child and Family Services Act*. This was a child protection case. However, it did have a choice in what it should do nor not do. By its action or omissions, it caused a detrimental situation that concerned Ms. Barbara B. and Mr. Brian B. The society may not have been grossly negligent but it performed below a reasonable level

> with respect to its mandated responsibilities. It also made a choice that prolonged the litigation. It was not neutral as it claimed to be. As counsel for Ms. Barbara B. and Mr. Brian B. pointed out, the fact that it appealed the trial decision is proof that it was partisan; it was not so neutral as to accept the judicial determination at trial.

36 I find the decision of Kukurin J. helpful, as he conducted an extensive review of the development of the law concerning costs against a Society (equivalent to the Director in this case) in child protection cases. In summary, it is as follows. The "old case law" visualized the society as a special litigant mainly because of the obligations imposed by its mandate under the child protection statute, and almost immune from an adverse determination on costs. The exception to this near immunity arose only in exceptional circumstances, and these were generally connected in some way to conduct of the society that was so improper as to be indefensible. However, that view was not universally held through the years. The more "current view of the law" considers a society involved as a litigant in the court, perhaps in a somewhat different role than in classical civil litigation, but nonetheless still a litigant and still subject to virtually all of the strictures that bind any party in litigation including the consequences of costs.

37 In *Children's Aid Society of Hamilton-Wentworth (Regional Municipality) v. M. (P.)* (1988), 17 R.F.L. (3d) 46, [1988] O.J. No. 1584 (Ont. H.C.), a case involving, in part, an appeal from an award of costs against the society, Eberle J. of the Ontario High Court, upheld the costs award and queried whether the criterion of the society's "behaving in some indefensible way" was not putting a gloss on the terms of s. 131 of the *Courts of Justice Act* that simply was not there.

38 In *B. (D.) v. Children's Aid Society of Durham (Region)* (1987), 20 C.P.C. (2d) 61 (Ont. Fam. Ct.) Judge Dunn considered costs, in the context of how the society fulfilled its role. He enunciated obligations of the society, mostly related to its conduct in child protection matters, both within and outside of litigation. These obligations have been mentioned with approval by other courts in other cases. They provide a useful guide to a society in carrying out its function in bringing a case to court and to the court when asked to review a society's actions in an application for costs. Judge Dunn's premise is that an ordinary person would perceive a society as having acted fairly and justifying costs against the society, if these obligations are not satisfied:

> 1. The society has an obligation to conduct a thorough investigation before acting.
>
> 2. The society has an obligation to consider alternative measures for protection of children before proceeding to court.
>
> 3. The society has an obligation to treat all clients fairly and equally and with as much dignity as possible.
>
> 4. The society has an obligation to continue its investigation up until the time of a final court determination in a vigorous, professional manner.
>
> 5. The society has an obligation to reassess its position as more information becomes available.
>
> 6. The society has an obligation to ensure that its workers are skilled in the performance of their roles.

39 Judge Dunn reviewed the exiting case law relating to costs in protection proceedings and concluded, at p.

65:

> The cases use various expressions to describe the society's actions where costs have been awarded against it - indefensible, exceptional, lacking in good faith, lacking due diligence and reason, abusive of its power, negligent. These tests could, in my opinion, be expressed in this simple way: "would the society be perceived by ordinary persons as having acted fairly?"

40 Judge Dunn granted solicitor client costs against the society, as he held several of the society's obligations were breached and the society would be perceived by ordinary persons as having acted unfairly, justifying costs.

41 Another case which addresses the Director's obligations and the costs consequences, in terms of the "current law" is the decision of Judge Katarynych in *Children's Aid Society of Waterloo (Regional Municipality) v. C. (Z.B.)* , [1996] O.J. No. 4245 (Ont. Prov. Div.). After a review of case law, she concluded at para. 39:

> 1. A society has no immunity from a costs award.
>
> 2. As a general rule, child protection agencies should not be penalized in attempting to carry out their statutory mandate under the Province's child protection legislation.
>
> 3. Protection agencies are not ordinary litigants. The society has a mandate to protect children, and children have a right to be protected.
>
> 4. As part of its duty to act with fairness and reasonableness in carrying out its statutory responsibilities a society must exercise good faith, due diligence and reason in its investigations. A society is not free to assume that "if there is smoke, there must be fire".
>
> 5. Nowhere is a society authorized, in the name of the powers entrusted to it by the legislature, to ignore or trample on a parent's rights.
>
> 6. The essential test for the appropriateness of an award of costs against the society is whether the society should be perceived by ordinary persons as having acted fairly.
>
> 7. An ordinary person perceives a society as having acted fairly in the following circumstances:
>
> > (a) before launching a court proceeding, the society has undertaken a thorough investigation on allegations or evidence of a child's need for protection;
> >
> > (b) as part of its thoroughness, the society has recognized and acted on its duty to look beyond an allegation for corroboration or independent evidence of it;
> >
> > (c) as part of its thoroughness, the society, mindful of its duty under subsection 2(2) of the Act to ensure that children and parents have an opportunity, where appropriate, to be heard and represented when decisions affecting their interests are made, has interviewed the person who is alleged to have created the need for protective intervention, invited that person to have counsel involved, permitted that person an opportunity to reply to the allegation, and then weighed the competing versions for their likely reliability and credibility - before the society proceeds to 'validate' the allegation and draw the unequivocal conclusion that the need for protection exists;

> (d) the society has demonstrated its openness to any version of the events that is offered, including the version offered by the person against whom the allegation is made;
>
> (e) as part of its thoroughness, the society, has been alert to rancour that might reasonably be animating the allegations;
>
> (f) the society has reassessed its position as more information becomes available, even if a court hearing is in session at the time; in short, it has continued its investigation up to the time of a final court determination of the alleged need for protection, and done so in a vigorous professional manner; and
>
> (g) the society has investigated all pieces of relevant information, not just those pieces for which there is uncontroverted proof.
>
> 8. The Society's good faith will not relieve it of an award of costs against it. It will, however, preclude an award of costs other than in accordance with the normal tariff.

42 Other courts have justified costs on the basis of accountability. In *Children's Aid Society of Brant v. C. (D.M.)* (1997), 27 R.F.L. (4th) 123 (Ont. Prov. Div.) Judge Agro refers to the principle of accountability of a litigant for the manner in which he, she or it presents its case and expedites a reasonable resolution. For a society, this extends to how it investigates its case and presents it to the court, always measured against the background of the statutory requirements of the *Child and Family Services Act*. Judge Agro awarded costs against the society and commented that costs are neither reward nor punishment. He stated that, in his view, it is not fairness that is the issue in the exercise of discretion on costs, it is accountability. He stated that, in the absence of an award of costs, there is no such accountability. He noted, at para.13, that what was of particular relevance to the proceeding he heard was the issue of accountability and, the society's obligations to treat all clients fairly and equally, to continue its investigation and assessment until the time of a final court order in a vigorous, professional manner and to reassess its position as more information becomes available and he referred to *B. (D.) v. Children's Aid Society of (Durham Region).*

43 Kukurin J., in *Children's Aid Society of Algoma*, concluded his extensive review of the law by summarizing the "current law" on costs against the society at paras 107-108:

> In summary, the society is historically treated differently than other litigants. However, that treatment can be different where the society steps beyond its usual boundaries or where it conducts itself in some indefensible way, or in a way where it would be perceived by ordinary persons as having acted unfairly. It is not immune from the consequence of litigation and it is not necessary that the society must have acted in bad faith.
>
> A society should neither be rewarded or punished by costs but should be held accountable. That accountability is in the manner in which a society investigates its case and presents it to the court and these are to be measured against the background of the statutory requirements of the *Child and Family Services Act*. That accountability can be expressed in an award of costs.

44 The decision of Kukurin J. was followed by Quinn J. in *Children's Aid Society of Niagara Region v. D. (W.)* (2004), 1 R.F.L. (6th) 84 (Ont. S.C.J.) in awarding solicitor client costs against the Society. Justice Quinn held that to attract an adverse award of costs, a society need not have acted in bad faith and costs may be awar-

ded against a society, "where it conducts itself... in a way where it would be perceived by ordinary persons as having acted unfairly". At paras. 65-73, he referred to the modern law, which holds that costs may be awarded against a society if the society's conduct of the case is "unfair", "indefensible" or "exceptional". Justice Quinn found that all three of these grounds existed and awarded costs against the society.

45 At para. 75, Quinn J. commented that the society failed in its obligation to reassess its position as more information becomes available:

> A society must be prepared to reassess its position as the investigation unfolds and more information becomes known. Ms. Wowk argues that this is what occurred at bar. It is true that the society reassessed and changed its position more than once, but this was in respect of positions that were indefensible in the first place.

46 At para. 78, he addressed accountability:

> The society has a very difficult mandate and, no doubt, like all government agencies, it is plagued with inadequate funding and understaffing. Nevertheless, it must be accountable both for the manner in which it investigates a case and also in the way it chooses to litigate that case. One method of achieving accountability is by the use of costs sanctions.

Conclusion

47 In my view, the difference, if any, between the Alberta and Ontario "current law" is purely semantic. In other words, in Alberta, what the Ontario courts refer to as fairness or accountability or a breach of the society's obligations, in Alberta is considered "special and unusual" circumstances justifying an award of costs against the Director. Here, for the reasons I have outlined, I find that there are special and unusual circumstances justifying costs against the Director.

48 I now go on to consider whether the Appellant should be entitled to solicitor/client costs or merely party and party costs for the trial in Provincial Court and the Appeal. The rationale for my ordering costs against the Director in the first place is that the re-trial is due to the Director's omissions. The Appellant incurred significant solicitor client costs for a trial which has to be redone and for which she bears no fault. In my view, to award merely party and party costs would be inconsistent with the rationale. Therefore, I order solicitor/client costs against the Director, for trial and on appeal, such costs to be taxed unless the Director agrees they are reason- able.

Delay in Rendering Judgment

49 There has been a delay in rendering this judgment as Counsel submitted written argument and I then communicated with them as to whether they also wanted the opportunity to argue the matter orally. I was advised that they did. I was waiting for counsel to set up a time to argue the same. Later, counsel advised that they did not require oral argument and that I should render the judgment based on the written arguments.

Application granted.

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