Applications for Guardianship of Children in Foster Care

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Child Welfare

Presented by:
Sonja Lusignan
Campbell O'Hara
Calgary, Alberta

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INTRODUCTION

When children in Alberta are removed from their family by Child and Family Services, the ultimate goal is to reunify the child with that family. When that does not happen, and when it is clear it will not happen, the question becomes "where should this child's forever home be?"

Ideally, when a child is **first** brought into care, concurrent planning begins. Plan A is typically to reunite the child with her family, and Plan B is the plan that will come into effect is that is not possible. The filing of the concurrent plan was a legislated requirement until a few years ago. While not a legislated requirement today, it is still good practice, and in a child's best interest, to have a detailed Plan B. From the Alberta government:

> Through the concurrent planning process, casework practice has an increased focus on collaboration with families and service providers, early resolution of issues and increased permanency for children. Caseworkers are required to focus on reunification as a priority and concurrently explore extended family placements for the child.
>
> Concurrent planning also involves early discussions with caregivers regarding their ability to provide a permanent home to the child in the event that the child cannot return to the care of their parents and no extended family placements are available. These discussions should also include the caregiver's willingness to adopt or obtain private guardianship of the child, with adoption always being the preferred option.
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> > "Concurrent planning provides for reunification services while simultaneously developing an alternative plan, in case it is needed. The approach follows logically from child-focused family–centered practice, as parents are involved in decision-making and are given direct feedback from their caseworker throughout the process."
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> The concurrent plan addresses, at the outset, two avenues of care for the child which are developed at the same time:
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> - The *family reunification plan (Part A)* outlines the tasks and services required to assist the guardians in making the changes needed to create a safe and secure home for their child and facilitate the return of the child to the custody of the child's guardian, and
>
> - The *alternative permanency plan (Part B)* arranges for the care of the child to be placed with an alternative caregiver, preferable other family members, should reunification of the child with the guardian not occur in a timely manner. The plan places a priority on finding a placement for the child within the child's extended family and/or community.[1]

If only one potential guardian under Plan B is identified, and if and when Plan A is clearly not viable, and if Child and Family Services agree to that individual becoming guardian, the application usually happens after a Permanent Guardianship Order is made. The reason for this is that if the individual becomes the child's guardian under the *Child, Youth, and Family Enhancement Act* (post-PGO), there

[1] http://www.child.gov.ab.ca/enhancementact/Presentation/earlier_permanency_content.htm

may be funding available. If the application is made before the PGO is granted, it would likely be made under the *Family Law Act*, and then the possibility of funding seems to be precluded. [2]

IS A GUARDIANSHIP APPLICATION POSSIBLE BEFORE A PGO HAS BEEN GRANTED?

1. By a non-guardian parent?

2. By a legal stranger?

There is a case by the Alberta Court of Appeal that speaks specifically to the situation of:

1. An application for guardianship of a child in the care of the Director;

2. By a legal stranger to the child;

3. That is consented to by the child's guardian;

4. But that is opposed by the Director.

K.V.W. v. Alberta [3] was a situation as described above. The facts generally were as follows: a baby was apprehended at birth. A few months later, the baby's maternal aunt applied for guardianship. There was a positive home assessment, a positive parenting assessment, and a somewhat negative attachment assessment. The Director did not support the maternal aunt's application.

At trial, the aunt's application was dismissed. When appealed to Queen's Bench, a retrial was ordered because the Provincial Court hadn't had any evidence regarding the foster home. Before a retrial, it was appealed to the Court of Appeal, who concluded it was not a competition between the foster parents and the guardian selected by the parent.

The Court of Appeal's decision was that if the guardian has made arrangements to place the child with a suitable guardian, the Director's involvement should end. And it was later clarified by the Court of Appeal in *R.W.* (at paragraph 35) [4] – that it is a two part test – the proposed guardian has to be suitable, and placing the child with the proposed guardian must be in the child's best interest.

The Court of Appeal's decision is arguably limited to that specific fact pattern, and in that decision, they gave 5 main reasons for agreeing that the aunt should be the child's guardian:

1. If parent delegates care to another person, the Director has to prove the child still is in need of intervention;

2. That delegated person doesn't have burden of proving she's better than the Director's choice – it's a "fitness" test;

3. This "no competition" model is in line with the policy of reunification of family – that includes extended family;

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[2] http://humanservices.alberta.ca/documents/Enhancement-Act-Policy-Manual.pdf ("ACYS Policy Manual"). Section 12.1, page 3.

[3] K.V.W. v. Alberta (Director of Child Welfare), 2006 ABCA 404

[4] R.W. v. Alberta (Child, Youth and Family Enhancement Act, Director), 2011 ABCA 139