

An Introduction to Alberta Adoption Law for Family Law Practitioners

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LEGISLATIVE FRAMEWORK AND KEY JURISPRUDENCE

Child, Youth and Family Enhancement Act, RSA 2000, Chapter c-12 as Amended

This piece of legislation (hereinafter referred to as the CYFEA) contains the substantive requirements for adoptions. There are some regulations passed under the CYFEA, however these are largely applicable only to licensed adoption agencies. The key provisions in the CYFEA relating to adoption are contained in part 2 starting with section 58, and continuing on through section 86. Division 5 in the Act governs the licencing of adoption agencies, and division 6 deals with inter-country adoptions with respect to designated States.

Sections 58 through 70 state the law relating to who has to consent to an adoption; and whether that consent can be dispensed with, and if so under what circumstances. These sections also contain the overarching criteria to be considered in regards to adoptions (section 58.1); the rules relating to guardianship following the signing of consent; when and how a consent can be revoked, and the legal effects of same, and also a list of what other documents must accompany the adoption petition. This includes such things as when a home study would be required, the rules and laws governing a child with aboriginal heritage, and the existence of any openness agreement. These Sections also deal with who must be served with the adoption documents, and the effects of the filing of a Notice of Objection by an interested party. The differences between direct placement and step parent adoptions are also outlined and discussed, as well as, “Agency Adoptions”, (adoptions facilitated and processed through a licensed adoption agency).

Before giving legal advice to anyone involved in the adoption process it is strongly recommended that these sections be carefully studied.

Family Law Act of Alberta, SA 2003, Chapter F-4.5, as amended

The CYFEA states who must consent to an adoption (Sec. 59 – all guardians) but guardianship is defined in the Family Law Act (FLA), Section 20, which indicates that the “parent” of a child is a guardian, if the parent: A) has acknowledged that he or she is a parent of the child and B) has demonstrated an intention to assume the responsibility of a guardian in respect of the child within one year from either becoming aware of the pregnancy or becoming aware of the birth of the child. The evolution of there guardianship provisions will be discussed in more detail later on in this paper.

“Parent” is defined earlier in the Legislation (FLA Section 7) and generally speaking means Biological Parent. There is provision in Section 9 for any interested party to make an application for a Declaration of Parentage if there is a question of paternity.

As in the CYFE Sec. 58.1, the FLA also contains in Section 18 the overarching consideration of “Best interest of the Child”.

Case Law Relating to “Best Interests of The Child”

The foundational principle relating to all aspects of adoption is the “best interest of the child” test. A substantial body of case law has developed over the years interpreting this test in the context of adoptions, and the Supreme Court of Canada case of *King v. Low* [1985] 1 S.C.R.A, is still the “go to” decision. The key statement that forms the basis for the “best interest” test comes from a quote, of an earlier case in the Supreme Court of Canada (*Racine v. Woods*): “Wilson J. considered the decisive factor to be the welfare of the child, and she gave much less weight to the consideration of biological ties than did the trilogy of cases decided thirty years earlier. She said on page 185:

“Be that as it may, I do not think a finding of abandonment was necessary to the trial judge’s decision. I think the statute is clear and that s. 103(2) dispenses with parental consent in the case of a ‘de facto’ adoption. This does not mean, of course, that the child’s tie with its natural parent is irrelevant in the making of an order under the section. It is obviously very relevant in a determination as to what is in the child’s best interests. But it is the parental tie as a meaningful and positive force in the life of a child and not in the life of the parent that the court has to be concerned about. As has been emphasized many times in custody cases, a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations. In giving the court power to dispense with the consent of the parent on a ‘de facto’ adoption, the Legislature has recognized an aspect of the human condition – that our own self-interest sometimes clouds our perception for what is best for those for whom we are responsible. It takes a very high degree of selflessness and maturity – for most of us probably an unattainable degree – for a parent to acknowledge that it might be better for his or her child to be brought up by someone else. The legislature in its own wisdom has protected the child against this human frailty in a case where others have stepped into the breach and provided a happy and secure home for the child.”

In the Alberta case of *S. (J.W.) v. M. (N.C.)* (trial judgment) 1993 10 Alta L.R. (3d) page 395; [1993] A. J. no. 761, Appeal number 14361 (Appellate decision), the Court of Appeal quoted the following:

“Therefore, in determining what is in the best interests of the baby boy, it is necessary to consider and evaluate the advantages that can be conferred upon the child by each of the claimants. It is who can best provide healthy growth, development and education for the child, and best meet his psychological, spiritual and emotional needs. Serious consideration must be given to parental claims if they will be a positive force in the life of a child. To quote Prowse J. in *Re: British Columbia*

Birth Registration No. 030279 (1190), 24 R.F.L. (3d) 437 (B.C.S.C.), at p. 450: ... where the dispute is between natural parents and proposed adoptive parents, the ties of consanguinity will be taken into consideration in balancing the best interests of the child, but that those ties will be considered from the point of view of their significance to the child, rather than their significance to the natural parent”.

EVOLUTION OF BIRTH FATHER RIGHTS IN ADOPTIONS IN ALBERTA

The Status of the Law Pre 2005

Under the predecessor legislation to the CYFEA namely the Child Welfare Act, it was also stipulated that guardians had to consent to adoptions unless the Court dispensed with that consent. The definition of “guardian” was contained in the predecessor to the FLA namely the Domestic Relations Act, and up until 2005, guardians were stipulated to be the following: 1) always the mother of a child and 2) the father, only if the father and mother had co-habited for a twelve month period prior to the birth of the child, or if they were married, in which case the father was also an automatic guardian. The net result of this was that the consent of “non-guardian birth fathers” was not required for adoptions. Birth fathers were faced with a significant uphill battle in order to firstly apply to be appointed as a guardian, and secondly to then successfully survive a counter application by the adoptive parents to have their consent dispensed with even if they were to be named as a guardian by the Court. (See for example the Red Deer Case of CR v. M.T. Alberta (Alberta Q.B. Un-reported Decisions number 0210-01573; the Honorable Mister Justice Sirrs 2002).

The Pizza Man Case

Because of the wording of the legislation prior to 2005, and because of the “best interests of the child” test governing the interpretation and application of these statutes, a non-guardian birth father wishing to oppose an adoption, and parent a child, had to in effect show that he could provide a home equally as good or better than that offered by the prospective adoptive parents. This would be a very rare occurrence indeed, since adoptive applicants are typically carefully screened, model parents, coming complete with home studies etc.

In 2004, Mr. Justice Lee rendered a landmark decision in what has become known as the Pizza Man Case. (M.(JF) v. P.(V.) 2004 ABQB 208). This case involved an application by a biological father who cohabited for a period of 8 months with the mother before separation, and while the mother was still pregnant. After the birth of the child, the mother being the sole guardian under the law as it was worded, placed the child for adoption through an agency. When the father was notified, he opposed the adoption. When the child came into the care of the adoptive parents immediately following the mother’s discharge from the hospital, the father then applied for guardianship and custody of the