IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***C.K. v. The Director, Ministry of Children and Family Development and British Columbia (Attorney-General),*** 2003 BCSC 785

Date: 20030516
Docket: L030189
Registry: Vancouver

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Between:

C.K. and S.K.

Petitioners

And

The Ministry of Children and Family Development, and The Director, Vancouver Region

Respondents

And

The Attorney-General for British Columbia

Respondent

Before: The Honourable Mr. Justice Maczko

(In Chambers)

Reasons for Judgment

Counsel for the Petitioners:	M. Dunnaway
Counsel for the Respondents:	R.J. Stewart
Counsel for the Siblings, M.B. and T.B.:	A.E. Thiele
Date and Place of Hearing:	April 9, 10, 11, 17, 24 and 25, 2003 Vancouver, B.C.

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[1] This is an application by foster parents to prohibit the Director of Children and Family Services from moving a child, V, from their home to another foster home.

[2] V was born on […], 2001. He was apprehended from his biological parents at birth and placed in the K home. V has three biological brothers who had been apprehended from the same parents previously and reside in the G household. The brothers are: M, 14 years old; L, 12 years old; and J, 8 years old. M, L, J and V are the biological children of Mrs. B.

[3] A number of years prior to the birth of M, Mrs. B had two other children by a different father: a male, M.B.; and a female, T.B.; both of whom were apprehended and were raised in foster homes. M.B. is now 24 years old and T.B. is 26.

[4] In 2000, it was M.B. and T.B. who alerted the Ministry of Children and Family Development (the "MCFD") to the fact that Mrs. B was about to have another child, and that they were concerned about the mother's ability to care for the child. The MCFD responded by apprehending V on February 9, 2001 on the grounds of a history of neglect of children and the likelihood that V would inherit Duchenne Muscular Dystrophy, a disease with which his parents could not deal.

[5] Mrs. B resisted the apprehension and V was placed in the K home on February 16, 2001, pending completion of the custody proceedings, which took over a year.

[6] On February 23, 2001, V had his first of many stays with his brothers in the G home. The first stay was three nights and, on average, V stayed in the G home three nights and four days every two weeks until July 15, 2002, when the visits were reduced to two nights and three days every two weeks. There were also unscheduled visits to the G home.

[7] M.B. and T.B. were informed by the MCFD that once the apprehension proceedings were complete, V would be placed permanently with his brothers in the G home. M.B. and T.B. were pleased with this arrangement because they had also formed a relationship with the Gs and saw their half-siblings on a regular basis. Had this arrangement not been agreed to, M.B. and T.B. say they would have made application for custody at the apprehension stage. Assuming one of them was in a stable situation, it is almost certain that the MCFD would have placed V with one of his adult half-siblings because it is the policy of the MCFD to place children with families wherever possible.

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[8] By October 2001, the Gs requested that the MCFD follow through with what they understood to be the plan of placing V with his brothers in their home. They also made an adoption request at that time.

[9] The K family resisted the movement of V from their home to the G home and, as a result, Leslie Bullard, an MCFD social worker, was directed to review the case and recommend placement arrangements pending an adoption decision.

[10] A continuing custody order was granted in January 2002.

[11] On June 28, 2002, Ms. Bullard submitted her report and recommended that V remain in the K home. This decision was communicated to all parties in August 2002.

[12] On August 21, 2002, M.B. and T.B. wrote to Minister Gordon Hogg complaining about the decision and the Minister referred the complaint to the local director of the Vancouver Coastal Region of the MCFD (the "Director"). Bev Kerr was assigned by the Director to review the case.

[13] The Ks resisted V's move to the G home because the Ks felt that V was going to be put in a situation which was not only bad for his psychological well-being, because he had

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bonded with the Ks, but would also be bad for his health because he had Duchenne Muscular Dystrophy.

[14] The G home already has in it seven children: five foster children and two of the couple's own biological children. Of the three B brothers in the G home, two of them also have Duchenne Muscular Dystrophy. The Ks believe that they are better able to provide for the needs of V because the G family, although a good family, is stretched to the limit with seven children, two of whom have serious illnesses.

[15] Although V is not yet showing the symptoms of his disease, he will surely develop them. The prognosis for the three boys with Duchenne Muscular Dystrophy is that they will not likely live until their 20th birthday. Much of this information came out in the Bullard report.

[16] Ms. Kerr, faced with these competing interests, arranged to retain Dr. Kot, a psychologist, and Dr. Jain, a medical doctor, for advice on placement. By September 30, 2002, Dr. Jain and Dr. Kot submitted reports, in essence, recommending that V stay in the K home because he had bonded to that family. Neither of these doctors did an investigation of the G home and may not have realized that V was also bonded to the G household.

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[17] Dr. Jain summarized her impression and plan as follows:

> V is a 20-month-old boy with a complex history. He is physically handicapped and also has developmental delay. He has a confirmed diagnosis of Duchenne Muscular Dystrophy and suspected retinitis pigmentosa. He is also microcephalic and has difficulty with hearing loss. This makes V a very high-needs child, whose needs will continue to increase over time since both retinitis pigmentosa and Duchenne Muscular Dystrophy are chronic and progressive illnesses. V appears well bonded and attached to his foster family, and I think that this is a great strength for him. I would recommend that V continue to have regular visits with his siblings, and this would be of benefit to all the children. I hope that the families will be able to facilitate this in a friendly environment.

[18] Dr. Kot also recommended that the child stay in the K home, and summarized her findings as follows:

> M, L and J have been in their foster home for about 4 years. V has been in his foster home for all his life (about 19 months). The complexity of this decision making task is compounded by the fact that three of the four children have Duchenne's Muscular Dystrophy (DMD), a degenerative neuromuscular disease. M is the only one without the disease. V has additional medical needs due to suspected retinal pigmentosa, hearing problem and global developmental delay. Dr. Jain explained the implication of DMD and retinal pigmentosa during the medical consult to Ms. R and Ms. K. According to Dr. Jain, children suffering from DMD will be wheelchair bound in their late childhood (around age 10). DMD is also associated with short life expectancy, resulting in death around late teen years. Retinal pigmentosa will result in blindness at some point in a child's development. V's multiple medical needs are cared for by different specialists.

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> In consideration of V's best interest, attention needs to be given to the fact that he is a young child (0-2) with complicated medical needs. In other words, he needs the security provided by a consistent caregiver who started the care at birth. He needs the stability of being in the same environment with his psychological siblings (siblings he has shared the household and the parenting). A move to live with his biological siblings would not provide additional benefits to V at this point in time. On the contrary, a move is likely to compromise the development of secure attachment with a consistent caregiver who started the care at birth.

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[19] On October 23, 2002, Ms. Kerr met with the guardianship team responsible for the B children, to review the case with the team. On November 20, 2002, Ms. Kerr met with the Director to review the case and a decision was taken to place V full-time with the G home by February 2003. This decision was communicated to the parties on November 22, 2002 and the social workers were directed to work out a transition plan. The Ks resisted that decision. There was an attempt at mediation, however, that came to an end when this action was commenced.

ARGUMENT FOR THE Ks

[20] The Ks seek to have V remain in their home on the basis that it is in V's best interests to do so.

[21] Counsel for the Ks argued that V will be put in a situation of danger because of his illness and this court should exercise its *parens patriae* jurisdiction to protect the child from harm.

[22] Counsel submits that this court has two grounds of jurisdiction to substitute its view of the best interests of V for that of the Director. First, the court can exercise its *parens patriae* jurisdiction to act in the best interests of a child in the need of protection; and second, s. 70 of the ***Child, Family and Community Service Act***, R.S.B.C. 1996, c. 46 (the "***Act***"), gives a child in care the right to be nurtured according to community standards and to be given the same quality of care as other children in the placement. Counsel argues that this court has the obligation to ensure that the rights guaranteed in s. 70 have a remedy.

[23] Counsel also submits that children in foster homes are treated differently than children who are not in foster homes and therefore are denied the right to equal treatment before and under the law as provided by s. 15 of the ***Charter***.

ARGUMENT FOR THE MCFD

[24] Counsel for the Director argues that the court cannot substitute its opinion for that of the Director; it can only

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consider whether the decision of the Director was capricious or arbitrary, *i.e.*, if I were deciding this case in an administrative law context, I should apply the patently unreasonable test and not a correctness test to the decision of the Director.

[25] Counsel argues that the Director had before him all the facts and arguments from both sides and took all factors into consideration. Counsel submits that the Director supplied reasons for his decision through Ms. Kerr, and that decision was not patently unreasonable.

PROCEDURAL MATTERS

[26] Before going to the heart of the matter, I would like to dispose of two procedural matters. Counsel for the Ks made an application to have the Ks appointed as litigation guardian for V and to have V added as a party so that he would have standing before the court.

[27] Counsel for M.B. and T.B. applied for standing on their own behalf.

[28] I ruled that I would grant standing to anyone who can assist me with this decision. Although I did not formally rule on the application at the time, I heard all parties with

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an interest and treated all parties, including V, as though they had standing.

[29] With regard to the s. 15 ***Charter*** argument, I do not think the ***Charter*** applies to the Director, when he is acting as guardian of a child, any more than it applies to any other guardian deciding what is in the best interests of a child. A child that is not in care cannot use the ***Charter*** to have the courts review day-to—day decisions of parents or guardians. Similarly, a child in care cannot use the ***Charter*** to have the courts review day-to-day decisions of the Director.

SECTION 70

[30] Section 70(1) of the ***Act*** provides in part as follows:

> Children in care have the following rights:
>
> (a) to be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children in the placement;

[31] Counsel for the Ks argued that if a child felt, or someone on behalf of the child felt, that the rights provided by s. 70 were being violated, there was in place a mechanism, which was an appeal to the Children's Commissioner to enforce those rights. The government has done away with the Office of the Children's Commissioner and the mechanism for protecting

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the rights no longer exists. There is now a gap in the legislation and the courts should fill the gap by fulfilling the role previously filled by the Children's Commissioner.

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[32] A very similar argument was made before Lowry J. in ***L.S. and S.S. v. The Ministry of Children and Family Development et al.,*** 2003 BCSC 428. The issue in that case was whether the ***Act*** gave foster parents standing to petition for a review of the Director's decisions pertaining to what is in the child's best interests. The foster parents referred to two decisions made under the ***Children's Commission Act***, S.B.C. 1997, c. 11, where complaints were made by foster parents on the basis that the s. 70(1) rights of the child were not being observed. On this point, Lowry J. said, at ¶ 20, that:

> … the legislation has now been repealed and is of significance only as illustrative of the kind of statutory provision required to give foster parents standing …

[33] Lowry J. also considered s. 70. He found no basis on which it could be said that s. 70 provides for the review of the Director's care of wards. He decided at ¶ 21:

> The current legislation is, like its predecessor, an exclusive, comprehensive code that vests in the Director the determination of what is in the best interests of children in his care save where provision may be expressly made for the exercise of that discretion to be questioned.

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[34] I agree with counsel for the Director that the court should not substitute its opinion for that of the Director. I accept that the test is as set out by the Court of Appeal in ***Perteet v. British Columbia (Superintendent of Family and Child Services)*** (1988), 23 B.C.L.R. (2d) 329 (C.A.), which is that the court should not intervene in a decision of the Director unless it is capricious or made in bad faith.

[35] In ***Perteet***, Anderson J.A. held that with respect to the ***Family and Child Services Act***, R.S.B.C. 1980, c. 11, which was then in force, foster parents did not have standing to make an application for custody or access because that statute was an exclusive and comprehensive code relating to the care and custody of children in need and it made no provision for an application by foster parents for custody or access.

[36] He held that the court's inherent *parens patriae* jurisdiction to protect a child could not be exercised to substitute the court's jurisdiction for that of the superintendent in determining the best interests of the child. He said, at p. 338, that:

> … the "best interests" of the child will in the case of permanent wards be served by requiring the superintendent to act solely within the ambit of the

> legislative mandate and to act "in good faith and not capriciously".

[37] Although counsel for the Ks argued that I should apply a correctness test, she argued that in any event the decision of the Director was patently unreasonable or at least unreasonable because he made a decision which was against all of the evidence.

[38] I do not think that the Director, through Ms. Kerr, made a decision that was against all of the evidence. She made a decision which rejected the professional opinions about where V should live. She did, however, consider the opinions of V's other family members and considered V's interest in living with his brothers. Having reviewed her reasons and the evidence to support her reasons, I cannot say that her decision is unreasonable.

[39] A summary of her reasons are set out in her affidavit in response to this application:

a. Placement of siblings together wherever possible is beneficial to children in the long term and is an established principle and practice in the Ministry;

b. M had functioned as a responsible advocate for his brothers for years, and his considered wishes and views ought to be given some weight;

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c. The concerns of the BCCH psychologist and paediatrician were significant and given weighty consideration. However, they raised issues concerning a disruption of attachments for V that we felt could be remedied in this special case, and neither Dr. Kot nor Dr. Jain were commenting about the quality of care available in either home;

d. While Dr. Kot states that she would expect little benefit for V in placing him with his brothers at his present age, she also explains in her opinion that as children grow older, sibling and biological family connections will have more meaning to them. Postponing a move to that age will make a move more difficult for V, and may also deprive him and his brothers of the opportunity given the shortened life expectancy of L, J and V;

e. A move for V from the home of the Petitioners to the G home would not be like the usual move of a child from a primary caregiver to an adoption placement with strangers. V had established relationships and attachments with the caregivers and the other children in the G household which in our view reduced the risks referred to by Dr. Kot and Dr. Jain;

f. Mr. and Mrs. G were equally able to attend to V's special needs as were the Petitioners, and the G household was set up for dealing with the unique disorders experienced by V and his brothers, and they were familiar with the various specialists involved with V and his brothers. We were not concerned that there would be a decline in care with this move;

g. Given what appeared to be a cooperative relationship between the two households involved with V, we believed that we could set up a transition program that would continue to have V involved extensively with the Petitioners and the children in their home until he was well settled in the G home, and then on a regular basis thereafter indefinitely.

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[40] There is a clear policy articulated in the ***Act*** that children in care should be placed with siblings wherever possible. I see nothing wrong with that policy, provided it is not followed blindly and provided it does not endanger the child.

[41] The evidence here is that although V has bonded with the Ks, he has also bonded with the G household. The Gs have exceptional parenting skills and have considerable experience in dealing with children with Duchenne Muscular Dystrophy. The older children in the G home are clearly capable and willing helpers in the care of the children. The MCFD will, without a doubt, provide whatever support services are required to physically manage the daily needs of the children.

[42] The K family is also exceptional, and I have no doubt that they are willing and capable of providing for all of V's needs, both physically and emotionally. They have a large extended family, and it appears that V has developed relationships with them.

[43] I cannot say that the Director's decision is unreasonable, let alone capricious, in the circumstances. I do hope, however, that everything possible is done to

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encourage and facilitate the maintaining of the relationships with both families. V should be deprived of neither. That is not a requirement that I can impose. That is a decision for the Director. I am merely expressing a hope based on the evidence and extensive argument that I have heard.

[44] I find this to be an extremely difficult case and do not envy the task of the Director.

[45] It is highly probable that foster parents will become attached to the children they care for, particularly when they receive the children immediately after birth. I cannot help but express my admiration for the people who take in needy, handicapped children and care for them as though they were their own.

[46] Unfortunately, the lot of a foster parent is inherently insecure. There are competing interests, such as the interests of biological parents and biological siblings. The legislature anticipated such problems and carefully crafted a statute to ensure that the Director has the necessary discretion to act freely in the best interests of the child in care. The Ks signed a contract with the MCFD which contained the following clause:

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> 3. A Director may at any time, in his or her sole discretion, retake physical care and control of a child who is receiving services from the Caregiver and revoke any guardianship authority specified or implied, which has been delegated by a Director to the Caregiver.

[47] Although I have used the term "foster parents" throughout this judgment as a matter of convenience, the legislation and the contract does not. The foster parents are, in fact, temporary caregivers and are subject to the direction of the Director.

[48] In summary, the legislature has given the Director the power and responsibility of determining what persons are to act as foster parents of children in need of protection, and to remove the children from the care of foster parents and place them with other foster parents as deemed by the Director to be in the best interests of the children. There is no legislative gap where the legislature clearly intended to withhold from the court the power to reconsider the Director's decisions.

[49] The court cannot substitute its view for that of the Director. The court can only intervene and overrule a decision by the Director if that decision is capricious or made in bad faith. I cannot say that in the circumstances of this case.

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[50] I cannot even say that the Director's decision was unreasonable in the unusual circumstances of this case.

[51] I therefore must dismiss the application by the Ks.

[52] I am convinced that the Ks were acting out of love for V with a sincere effort to protect him from what they perceived to be danger. In view of that, I exercise my discretion and award no costs to any party in this case before the court.

“F. Maczko, J.”
The Honourable Mr. Justice F. Maczko

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