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Courts send message to legislature that the Child, Youth and Family Enhancement Act requires amendment

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Cases Considered:

Alberta (Child, Youth and Family Enhancement, Director) v. Q.F., 2008 ABQB

It is always interesting to see a court sending a message to the government about the difficulties presented by a particular piece of legislation. In constitutional law, the dialogue metaphor has been used (and some would say overused) to describe this process of back and forth between the courts and legislatures (see Peter Hogg and Alison Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall Law Journal 75). Outside the constitutional law context, however, legislatures are not forced to listen and respond, as the remedial implications of striking down a piece of legislation, or severing certain sections as unconstitutional, are absent. Courts might thus need to repeat themselves before the legislature takes notice of non-constitutional problems with a statute, as we see in a recent child welfare case in Alberta.

At issue in *Alberta (Child, Youth and Family Enhancement, Director) v. Q.F.* was section 21.1 of the *Child, Youth and Family Enhancement Act*, RSA 2000, c. C-12 (CYFEA). This section provides as follows:

> 21.1(1) If a Director makes an application to the court under section 21(1)(b) for a temporary guardianship order or permanent guardianship order, the Director mustalso apply for an order for custody of the child until the application for a temporary guardianship order or for a permanent guardianship order is withdrawn or disposed of.
>
> (2) On hearing a custody application under sub-section (1), the court must
>
> (a) order the child into the custody of the Director, or
>
> (b) order that the child be returned to the custody of the child's guardian
>
> until the Director's application for a temporary guardianship order or a permanent guardianship order is withdrawn or disposed of.

In the case at hand, the RCMP attended the respondents' home in response to "a request to remove the mother from the home because she was intoxicated" (at para. 2). It is not clear from the judgment who made this request. The RCMP found five children present along with the respondents (the mother and father), and called Child and Family Services. In the meantime, the mother advised the RCMP that there had been a "domestic dispute" during which she had been injured by the father, who was charged with assault and taken into police custody. A social worker then arrived, and interviewed the three eldest children (aged 7, 6 and 5). The children confirmed "that there had been violence on the night in question" (at para. 2), although the judgment does not specify whether they identified the perpetrator, and they advised that there had been previous instances of domestic violence (again, it is unclear by whom). They also disclosed that their parents "used drugs on a regular basis" (at para. 2). The children were taken from the home and placed into foster care that evening.

At the Provincial Court hearing into whether there should be a temporary guardianship order made in respect of the children, evidence of the children's statements was given by a social worker and not the children themselves. The respondents also testified, with the mother denying that the father was responsible for her injuries, which she blamed on being very intoxicated and having fallen. Both parents denied the occurrence of any domestic violence in the home, and both denied having a problem with alcohol or drugs.

The Provincial Court judge (who is not identified in the Queen's Bench judgment, nor does his decision seem to have been reported) ordered that pending the determination of the guardianship application, the children were to be returned to the custody of their parents upon certain conditions. The parents were not to consume alcohol or non-prescription drugs, and child welfare workers could visit the home at least twice per week, unannounced. It is also said that "*the parents* were to abide by all the terms of the judicial interim release order made against the father" (at para. 3, emphasis added). It is unclear what the conditions of *the father*'s release were, and why or how they could be made binding on the mother as well, given that she does not appear to have been charged or released on bail.

In response to the Director's appeal to the Court of Queen's Bench, Madam Justice C.A. Kent found that the custody order with conditions went beyond the terms of section 21.1 of the *CYFEA*, which only permits two kinds of orders. Children can either be ordered into the custody of the Director, or returned to the custody of their guardian, period. Calling this a "stark choice" (at para. 5), Justice Kent quoted from an earlier judgment of Justice Acton in *The Director of Child, Youth and Family Enhancement v. K.S. and K.K.*, 2008 ABQB 565 at para. 19:

> Where infants are concerned, every day counts, especially during such a crucial bonding period. Currently, the statute only provides the option of releasing the child into the care of its guardian without additional court supervision, which is hardly a desirable course of action when the parents have been involved in pernicious and illegal activities not conducive to a healthy child rearing environment. On the other hand, wresting a child entirely from the custody of its parents by placing it in the care of the Director pending a trial is also not ideal.

Justice Kent noted her "complete agreement" with Justice Acton's comments, stating that they apply equally to children as to infants (at para. 5).

Taken together, these judgments should serve as a strong message to the legislature that section 21.1 of the *CYFEA* requires amendment to permit the sort of conditions that the Provincial Court judge made here, which seem reasonable on the facts of the case (with the exception of the condition related to the judicial interim release order, for the reasons above).

There were two other grounds of appeal, both of which were also decided in favour of the Director.

The second ground related to the finding by the Provincial Court judge that "the facts did not appear to disclose a level of *emotional injury* to the children as one might expect with ongoing and chronic physical, alcohol and drug abuse." He further noted that "the children appeared bright, healthy and well adjusted which contradicted any suggestion of *emotional injury* caused by ongoing or chronic abuse." The judge did, however, acknowledge that there was admitted "*domestic disharmony*" between the mother and father (all references at para. 3, emphasis added).

The terms "emotional injury" and "domestic disharmony" are used in the *CYFEA* to define the circumstances in which a child may be in need of intervention. Under section 1(2) of the *CYFEA*,

> a child is in need of intervention if there are *reasonable and probable grounds* to believe that the survival, security or development of the child is endangered because of any of the following:…
>
> (f) the child has been *emotionally injured* by the guardian of the child; …

Section 1(3) goes on to provide that

> (a) a child is *emotionally injured*
>
> > (i) if there is impairment of the child's mental or emotional functioning or development, and
> >
> > (ii) if there are reasonable and probable grounds to believe that the *emotional injury* is the result of …
> >
> > > (C) exposure to *domestic violence* or severe *domestic disharmony*, … [emphasis added].

The Director argued that the Provincial Court judge erred in finding that there must be actual emotional or physical harm before an intervention order is warranted. Justice Kent agreed with the Director's argument, holding that "it is not necessary to show actual emotional or physical

harm before a child is taken into care" and to the extent that the Provincial Court judge implied otherwise, he had erred (at para. 6).

While no judicial decisions are cited to support this reading of the *CYFEA*, there is case law on point. In *Re R.M.*, 2005 ABPC 222, Judge S.E. Lipton cited a number of authorities which establish that the reasonable apprehension of harm is all that is required to provide grounds for intervention. For example, in *Regional Director of Child Welfare v. R. (R.)* (1989), 99 A.R.67 at 69 (Q.B.), Justice Berger held that the previous provision in the *Child Welfare Act*, which permitted intervention on identical grounds, "clearly contemplates emotional injury as a future event…One cannot "protect" a child from an injury which has already occurred." In support of this finding, he cited *Newton v. Newton*, [1924] 2 W.W.R. 840 at 849, where Justice Deniston stated that "The Courts are never called upon to wait until physical injuries have been received or minds unhinged. It is sufficient if there has been a reasonable apprehension that such things will happen and the Courts should interfere before they have happened if that be possible."

Family violence researchers have raised concerns about this aspect of child welfare legislation, particularly the provision that "exposure to domestic violence or severe domestic disharmony" is a basis for apprehending emotional injury and permitting intervention. One concern is that such a provision might deter victims of domestic violence, who are primarily women, from reporting abuse for fear of having their children apprehended (see Kendra Nixon, Leslie Tutty, Gillian Weaver-Dunlop, and Christine Walsh, "Do good intentions beget good policy? A review of child protection policies to address intimate partner violence" (2007) 29 Children and Youth Services Review 1469 at 1470).

Alberta has attempted to address this concern by providing in section 2(f) of the *CYFEA* that "if a child has been exposed to domestic violence within the child's family, intervention services should be provided to the family in a manner that supports the abused family members and prevents the need to remove the child from the custody of an abused family member." This section might help to avoid the problems noted with section 21.1 by permitting intervention short of guardianship (e.g. a supervision order under section 28). However, domestic violence and domestic disharmony are not defined in the *CFYEA*, potentially leading to "inconsistent and inadequate responses" from child welfare workers in the implementation of this provision (Nixon et al, *ibid.* at 1482). It is important to recall that in the case at hand, the mother's report of a domestic dispute did lead to a guardianship application in respect of the children rather than a lesser form of intervention (although there may have been other factors at play in this decision, such as the parents' substance abuse).

The third ground of appeal related to the Provincial Court judge's finding that "in considering the evidence of the three children… there must be caution exercised" in relying on their unsworn and uncorroborated statements provided through the social worker (at para. 5). Citing *Khan v. Her Majesty the Queen*, [1990] 2 SCR 531, Justice Kent noted that a more flexible approach to evidence had been adopted in the case of children, "allowing hearsay evidence … to be admitted if the requirements of necessity and reliability were met", and not necessarily requiring

corroboration (at para. 7). To the extent that the Provincial Court judge had suggested that the lack of corroboration of the children's evidence was problematic, he had again erred.

In spite of the three errors in the reasons of the Provincial Court judge, Justice Kent decided not to order the children into the care of the Director, as the temporary guardianship application would be heard within a week of her decision "and the conditions imposed by the Provincial Court judge have alleviated any concerns about the welfare of these children" (at para. 8). This outcome may soften the "stark choice" presented by section 21.1 of the *CYFEA* in this case, but this issue is sure to arise again unless the Alberta government heeds the judicial calls for reform of this section.