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Deference, Discretion, and Adjudicative Substitution

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Case commented on: *E.G. v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2014 ABCA 237

Editor's Note: The University of Calgary Faculty of Law runs a fantastic legal clinic, Student Legal Assistance (SLA), that employs several students during the summer. This year's crop of students was encouraged by SLA's Executive Director, Michelle Christopher, to submit posts to ABlawg in the criminal and family law areas. This is the second post in the series; the first is available here and there will be more to come.

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In a recent decision from the Court of Appeal of Alberta, the Honorable Mr. Justice Jack Watson engages in a discussion around judicial discretion in an often nuanced and complex area of the law. At trial, the Director of Child and Family Services ("the Director") applied for a Permanent Guardianship Order ("PGO") of two twin boys; both parents contested the PGO. After 16 days of evidence at trial in Provincial Court, the Honorable Judge L.T.L. Cook-Stanhope concluded that there was gross abuse of the twins based on evidence of a pattern of maltreatment and poor attitudes towards parenting. Judge Cook-Stanhope found that the parents presented a substantial risk of further physical and emotional harm, and relied on the testimony of several witnesses to support this apprehension of substantial risk if the twins were to be returned to their parents. She granted the PGO on this basis. (*E.G. v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2013 ABPC 311 at para 224)

On appeal to the Court of Queen's Bench, the Provincial Court decision was reversed on the grounds that the Court acted on a wrong principle and disregarded material evidence (*E.G. v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2014 ABQB 406 at para 3). The Honorable Mr. Justice G.C. Hawco disagreed with the weight Judge Cook-Stanhope placed on expert testimony at trial, and found that she disregarded expert written reports which suggested that the parents had motivation and capacity for positive change. According to section 34(1)(C) of the *Child, Youth and Family Enhancement Act*, RSA 2000, c. C-12 ("the Act"), a PGO is only to be used in most extreme cases where there is no reasonable hope of returning the child to the parents in a reasonable time (ABQB at para 11). As such, according to Justice Hawco, these reports should have been considered by Judge Cook-Stanhope because they appear to provide some support that a PGO may not be necessary. Justice Hawco also disagreed with the definition of abuse adopted by Judge Cook-Stanhope because there was some inconsistency in the older

children's reports of the abuse, and because the twins did not display symptoms of trauma (ABQB at para 14). Essentially, Justice Hawco re-evaluated the evidence, the weight of the written reports, and dispensed with Judge Cook-Stanhope's finding that the twins were victims of abuse.

The Director applied to the Court of Appeal for a stay of Justice Hawco's decision pending appeal, which was granted by Justice Watson. In his reasons, Justice Watson was careful to focus on the grounds of the appeal rather than allow his own perception of the evidence to guide his decision. He also made certain to avoid any direction on custody and to recuse himself from participating in the appeal. This is important given the issues being argued: how much deference should be given to the fact finding process at trial? And when does an appeal decision arise from adjudicative substitution rather than a palpable and overriding error?

The written reports were deemed admissible at trial, but they were not relied upon by Judge Cook-Stanhope; she made it quite evident that she relied heavily on the testimony of the witnesses who contradicted the written reports (ABCA at para 4). Justice Watson discussed the problem with one report in particular, by Dr. Vellet. On appeal, Justice Hawco appeared to have relied almost completely on the opinion expressed in this report by reversing Judge Cook-Stanhope's decision, yet Dr. Vellet was not called by the parents and, as such, was not open to cross examination. This is troubling because the authors of written reports are not then available to answer questions about the parents' past actions or speak to other pertinent issues around risk (ABCA at para 15).

The Court of Appeal stayed the Queen's Bench decision because Justice Hawco appeared to have re-weighed the evidence from trial. Justice Hawco opined about the prejudicial influence of evidence presented at trial about the treatment of the older, adopted children, and claimed that Judge Cook-Stanhope failed to consider whether the adopted children could have been treated differently than the biological twins. Further, Justice Hawco took issue with the definition of abuse adopted by Judge Cook-Stanhope, despite the evidence given at trial by an expert in Infant Mental Health who suggested that mere exposure to the abuse of others has the same effect on a child's development and often results in the same problematic outcomes (ABPC at para 122). This re-weighing of the expert reports indicated that while Judge Cook-Stanhope did not find the written reports reliable, Justice Hawco found them to be "material evidence" which had been disregarded, resulting in grounds for appellate review according to *M.T. v Alberta (Director of Child Welfare)*, 2005 ABCA 125 at para 241.

While a PGO is the worst outcome a parent can receive under the Act, the decision making process for custody and guardianship must always be guided, firstly, by the best interests of the child or children in question. This process relies upon evidence presented by all parties to an action, and according to section 34(1) of the Act, the evidence must show there is no reasonable possibility of returning the children to their parents if a PGO is to be granted. By staying the decision of Justice Hawco, it seems that the Court of Appeal has indicated that if there is expert evidence that a party wishes to rely upon in order to cast some doubt on the necessity of a PGO, that evidence must be made available for cross examination.

The three part test adopted in Alberta regarding a stay is arguableness, irreparable harm and balance of convenience, though the test has been modified in cases involving children to include consideration of their best interests (*B(C) v C(P)*, 2003 ABCA 321). Arguments for the parents

against the stay focused on Judge Cook-Stanhope's fact finding process and exercise of discretion under section 34(1) of the Act, but Justice Watson found the Director's arguments on procedural and evidentiary errors made by Justice Hawco alongside preserving the physical and psychological stability of the children much stronger (I refer to section 34(1) because although Justice Watson cites section 36(1) of the Act (at para 27), section 36(1) was repealed in 2003, and so I assume this to be a typographical error). Justice Watson found the factors all favored arguments by the Director for the stay, because it would preserve the integrity of the fact finding process and prevent the yo-yo effect where children go back and forth between their parents and the state (ABCA at para 28).

Ultimately, expert evidence submitted without an opportunity for cross examination should carry less weight at trial. The complexities of childhood development and parental patterns of abuse do not exist in a vacuum. Therefore, expert opinions cannot be relied upon heavily without a full and complete opportunity to explore those opinions within the entire context of the issue at trial. Even when that opportunity is used, according to this recent development, the trial judge must be granted deference in analyzing and weighing the expert evidence alongside all other evidence to make a decision. In reversing Judge Cook-Stanhope's decision, it appears that Justice Hawco erroneously considered the written reports "material evidence", and further, substituted his own fact finding process on appeal. Justice Watson rightfully stayed this decision pending appeal, but the decision also highlights the potential issues on appeal in matters under the Act wherein an appellate court should support and uphold the integrity of the discretionary process of fact finding at trial, and avoid the occurrence of adjudicative substitution.