Court of Queen's Bench of Alberta

Citation: Western Cree Tribal Council v SG et al, 2021 ABQB 967

Date:
Docket: FL04 03300
Registry: Grande Prairie

Between:

Western Cree Tribal Council, Child, Youth and Family Enhancement

Appellant

- and -

SG, HS, NC

Respondents

Reasons for Judgment
of the
Honourable Madam Justice D.L. Shelley

Appeal from the Decision by
The Honourable Judge A.B. Chrenek
Filed on the 10th day of February, 2021
Dated the 9th day of February, 2021
(Docket: CP021000555)

Background

[1] HS is the mother of five children. SG is the father of four of the children and the NC is the father of one of them.

[2] Between October and November of 2020, the Director of the Western Cree Tribal Council (the Director) was granted six-month Supervision Orders in relation to the five children.

[3] On January 28, 2021, the Director filed two applications with the Provincial Court. The first, brought under s. 29 of the *Child Youth Family Enhancement Act* (the *Act*) requested termination of the Supervision Orders and replacement of them with Temporary Guardianship Orders (TGOs). This application also included a request for interim custody of the children until the application could be heard or disposed of. The second application was for apprehension of the children.

[4] In the supporting Affidavits, the Director detailed several breaches of the Supervision Order. These allegations included physical assault and strangulation in the presence of the children, intoxication, failure to attend drug and alcohol testing, and SG's failure to abide by directions not to allow the children to return to HC's home when NC was present.

[5] On January 28, 2021, the Apprehension Order was granted and executed, but the s. 29 application was put over to the next docket date.

[6] On February 2, Duty Counsel argued that once apprehension occurs a Supervision Order is terminated. This would effectively nullify the s. 29 application. Duty Counsel argued, therefore, that the Director should make an application for an initial custody hearing and a new order which would give the guardians a chance to challenge the Director's custody. The Court acknowledged that the procedure to bring the children into care under a s. 29 application was a novel issue. It therefore invited the Director's counsel to make written submissions before the next scheduled date, which was February 9. In the interim, the Court granted custody to maintain the Court's jurisdiction. It also directed that an initial custody hearing would be held on February 9th. Written submissions were not made by the Director's counsel before the February 9th hearing.

[7] At the February 9th hearing, the Court found that there were two options available to the Director in the case of a breach of a Supervision Order. The first was to apply to replace the Supervision Order under s.29. The second was to proceed with an Apprehension Order.

[8] The Court found that an Apprehension Order sets the requirements of s. 19 through 21.1(1) in motion. In the present case, the Court found that no application had been filed for a new order according to s. 21(1)(a), nor had an application been made for custody in accordance with s. 21.1(1). The Court observed that the *Act* prescribed strict requirements, specific times, and particular forms for Apprehension Orders, since apprehending children is a significant

intrusion into the lives of parents and children. The Court observed that an initial custody hearing is the means to provide parents with the required fair and prompt post-apprehension hearing, ***Winnipeg Child and Family Services (Central Area)*** **v** ***W(KL)***, 2000 SCC 48.

[9] Because the Court concluded that an initial custody application had not been made within the specified timeframe, it determined that it no longer had jurisdiction in relation to the children. It therefore ordered that they be returned to their parents' care. The Court refused to stay its decision pending appeal pursuant to s. 115 or to exercise its jurisdiction under s. 27 of the *Act* to make an alternative order.

[10] The Director filed a Notice of Appeal on March 5, 2021.

Issues on Appeal and Relief Sought

[11] The main issues to be determined in this appeal are:

1. The correct procedure for a Court to follow in order to obtain custody of a child under s. 29;
2. Whether the Provincial Court made an error in law on February 9th by finding that it had lost jurisdiction and ordering the children to be returned to their parents without addressing the s. 29 application;
3. The legal effect of apprehension on an existing Supervision Order.

[12] The Director requests this Court to use its powers on appeal under s. 117 of the *Act* to permit the s. 29 application to proceed and be scheduled on the basis that the Provincial Court erred on February 9th by concluding the initial custody hearing could not proceed due to lost jurisdiction; by finding that the children had to be returned to the care of their parents; and by failing to address the s. 29 application.

[13] The Director requests this Court to order a summary hearing of the s. 29 application on an expedited basis on notice to the parents. The Director submits that this would limit the number of subsequent proceedings and provide the Director the authority to keep the children safe while working with the family to re-establish parental custody in accordance with the goals of a TGO.

[14] At the hearing of the appeal, counsel for the Director acknowledged that events subsequent to the February 9th decision may have rendered this particular appeal moot as it relates to these five children and their parents. However, the Director is of the view that this is an important issue which ought to be determined, regardless of whether it will have a meaningful effect on these particular parties, as clarification of this procedural issue will assist the Director in conducting similar matters in the future.

Applicable Legislation

[15] Section 1.1 of the *Act* requires that it be interpreted and administered in accordance with several principles, including that the best interests, safety and well being of children are paramount.

[16] Factors listed in ss. 1(2)(a) – (h) and s.1(2) provide guidance in determining whether there are reasonable and probable grounds to believe that the safety, security or development of a

child is endangered and, as a result, whether the child is in need of intervention. Sections 1(2.1) and (3) provide clarification in that regard. In ***T* v *Alberta***, 2000 ABCA 182, the Court of Appeal confirmed that child welfare legislation is designed to protect children from harm, while striking the appropriate balance to ensure that parental or family interests are not cavalierly treated or ignored.

[17] Alberta Regulation 39/2002 provides, in ss. 3(1) and 3(2), that non-compliance with the Regulations does not render any act or proceeding void unless the Court so directs, although it may be set aside wholly or in part, or amended or otherwise dealt with, and that no proceeding shall be defeated on the ground of an alleged defect of form. The Regulation also provides that the Court may give directions respecting any practice or procedure in the Court (s. 2(2)). In addition, pursuant to s. 2(3) of the Regulation, on application the Court may vary a rule of practice or procedure, or refuse to apply a rule of practice or procedure, or direct that some other practice or procedure be followed.

[18] Division 3 of the *Act* outlines various court orders that can be applied for. These include Supervision Orders, Apprehension Orders, TGOs, PGOs, and Custody Orders.

[19] The Director may apply for apprehension if there are reasonable and probable grounds to believe that a child is in need of intervention (s. 19(1)). If an apprehended child is not returned within two days, the Director shall apply to the Court in the prescribed form for a Supervision Order, TGO, or PGO, or an order to return the child (s. 21(2)). Such an application shall be heard not more than 10 days after apprehension has occurred. At the application, the Court may order the child be returned if not satisfied that the child is in need of intervention, or it may grant any order that it is authorized to grant under Division 3.

[20] The Court may order a TGO if it is satisfied that the child is in need of intervention, and the safety, security or development of the child may not be adequately protected if the child remains with the guardian(s). Section 23(1) requires that notice be given to the guardian(s) of the child specifying the nature, date, time, and place of every hearing. At a hearing under Division 3, a court may make any order it has jurisdiction to make under that Division or under Division 4, if it satisfied as to the appropriateness of that order, notwithstanding that it is not the order applied for (s. 27).

[21] If a Director makes an application for a TGO or a PGO under s. 21(1)(b), the Director must also apply for custody until the application is disposed of or withdrawn. No prescribed form is mentioned in the *Act* in relation to this application.

[22] Despite s. 21(3), the application for the requested order may be adjourned for 14 days at a time for a total period not the exceed 42 days. In connection with an adjournment, the Court must make an interim order for custody until the hearing of the matter.

[23] Notwithstanding the adjournment time limits under s. 21.1, the Court may adjourn other hearings under Division 3 for up to 42 days, or longer at the Court's discretion. If it does so, the Court must make an Interim Custody Order in respect of the concerned child (s. 26).

[24] The initial custody hearing requires the Director to bring an application on notice to the guardian(s). It provides the guardian(s) the right to call evidence and to be heard, in order to determine the best interests of the children in the interim. (***AP* v *Alberta***, 2020 ABQB 634).

[25] At an interim or initial custody hearing, the ultimate concern is whether it is safe to return the child to the guardian(s) pending a full hearing of the application (***Alberta (CYFEA, Director)***

v LT, 2013 ABPC 326; ***Alberta (CYFE, Director) v KS and KK***, 2008 ABQB 565). At this stage, the Director is required to satisfy the Court that there are reasonable and probable grounds to believe the child is in need of protective services (***XS(Re)***, 2020 ABPC 223). This requires that there be evidence before the Court which objectively supports the Director's subjective belief in the need for intervention. The second element of this analysis is consideration of the best interests of the child. This hearing is not a comprehensive determination of whether the child in fact needs intervention. That issue is to be determined at a full hearing of the application. Rather, at this early stage, the question is about the best way to care for the child until there can be a complete examination at the protection hearing (***XS*** at para 35).

[26] Section 29(1) is the main provision which applies in the case of an alleged breach of a Supervision Order. It provides that, on an application by a Director in the prescribed form, if the Court is satisfied that a guardian or another person residing with the child has failed to comply with a term of the Supervision Order, it may, without hearing any further evidence as to the child's need for intervention, renew, vary or extend the Supervision Order, or make a Temporary Guardianship Order or a Permanent Guardianship Order in respect to the child. It further provides that s. 23 of the *Act* applies to the service of notice of the time and place of the hearing of an application brought in respect of an alleged breach of a Supervision Order.

[27] Pursuant to s. 115 of the *Act*, a Court can stay an execution of an order for five days pending a hearing of the appeal. This may be done on application provided notice of the appeal is filed during that period.

[28] On hearing an appeal pursuant to s. 116 of the *Act*, this Court may confirm the order or refusal, revoke or vary the order, or make any order the Court could have made in the hearing before it. The standard of review on a question of law is correctness.

[29] In ***CAS* v *Alberta (Director of Child Welfare),*** 2003 ABCA 233, the Court of Appeal directed that:

> "an appellant justice should not disturb a trial judge's decision unless the trial judge clearly acted on a wrong principle, applied the incorrect law, disregarded significant material evidence, or failed to consider relevant factors, or unless the final disposition is patently wrong."

Position of the Parties

Director's Position

[30] The Director submits that s. 29 creates a summary process for a Guardianship Order on the basis of a presumption that returning the child to the guardian(s) is not safe if or until the breaches can be redressed. The Director submits that, given the pre-established need for intervention already underlying the original Supervision Order, a breach of the terms of the Supervision Order makes it highly likely that removal of the children is necessary. Otherwise, there would be no need to make a s. 29 application for guardianship.

[31] The Director further submits that this is distinct from the initial custody hearing which follows a regular apprehension in which the question to be determined is whether it is safe to return the child to the guardian(s) until a full hearing of the related application. The Director submits that, in a s. 29 application, the presumption is that it is not safe, thereby establishing the grounds for the Director to have interim custody until the alleged breach can be determined by

the Court. At that time the order may or may not be granted and, if not granted, the child would be returned to the parents.

[32] The Director submits that s. 29 should have the effect of giving the Court jurisdiction to grant interim custody, with a TGO or PGO, immediately upon establishing the breach of a Supervision Order, without the need to resubmit evidence on the need for intervention.

[33] The Director submits that s. 26 and 29 combine, when applied for concurrently, to allow for a child to be brought into the Director's care under a s. 26 application, pending the determination of the s. 29 hearing.

[34] The Director submits that, if the only way to bring a child into care on a s. 29 application is an Apprehension Order, this would thwart the purpose of s. 29 to create an expeditated process. The Director acknowledges however, that if apprehension occurs, as was the case here, the processes mandated by statute must be completed.

[35] The Director submits that, once the Apprehension Order was sought, the s. 29 process should not have been foreclosed altogether. Rather, the requirements of ss. 19-21.1 could have been met on the basis of the filed application, which should have subsequently allowed the s. 29 hearing to be conducted within 42 days following the apprehension. If a child is apprehended and not returned, within two days an application must be made in the prescribed form for a Supervision Order, TGO or PGO, along with a custody application pursuant to ss. 21(1)(a)- (d) and 21.1(1).

[36] In this case, the Director submits that the s. 29 submissions did make an application for a TGO, although the application was pursuant to s. 29 rather than s. 31. The application for interim custody was also made using the same Form 15 as a s. 29 application. The Director submits that the custody hearing could have been held and the s. 29 application adjourned in 14 day increments to a maximum of 42 days after the apprehension. The Director argues that the February 9th hearing should have been able to proceed to an initial custody hearing despite the absence of a formal application under Form 11. The Director submits that the Court could have granted interim custody and scheduled the s. 29 hearing to consider the breach allegations and ultimately determine if the TGO should or should not be granted.

[37] Relying on ***XS (Re)***, the Director submits that all that was required at the February 9th hearing was to satisfy the Court that the Director had reasonable and probable grounds that the children were in need of intervention. This would have been satisfied on the basis of the Supervision Order, further supported by the caseworker's affidavit outlining the alleged breaches of the its terms. The Director submits that it was an error to require another formal initial custody application after submitting the s. 29 application, when such a hearing had already been ordered at the February 2nd hearing at which the mother was in attendance and of which the other Respondents had been given notice. The Director suggests that this decision was at odds with the guiding principles of the *Act* established under ss. 1.1 and 2 and ss. 2 and 3 of the Regulations, which permit the Court to proceed in the absence of strict compliance with the Forms.

Position of the Respondents

[38] Although served with Notice of the Appeal, none of the Respondents appeared or submitted any written materials in connection with the appeal.

Analysis

What is the correct procedure for the Court to follow to obtain custody of a child under s. 29?

[39] In contrast to other orders available under Division 3 of the *Act*, s. 29 explicitly states that the Court may make an order without hearing any further evidence regarding the child's need for intervention. This clause must have some specific meaning or purpose which sets it apart from other processes and applications in the *Act*. Otherwise, it would be meaningless and redundant within the legislative scheme.

[40] Form 15, the prescribed form for s. 29 applications, can also be used for reviews under s. 32, 34 and 49. To obtain a PGO under s. 34, the Applicant must satisfy the Court in relation to several matters, including that the child is in need of intervention or is the subject of a TGO. The latter is presumably because, if the child is already the subject of a TGO, it would be redundant to have to re-establish whether the child is in need of intervention.

[41] Section 32 allows for a review of a Supervision Order or a TGO. The provision outlines a number of factors for the Court to consider, including the circumstances which cause the need for intervention. Section 29 deals specifically with beaches of terms rather than a general review of the order. It states that evidence of the need for intervention is not required, presumably for reasons similar to those at play under s. 34.

[42] In contrast, s. 29 establishes that if the Court is satisfied that the terms of a Supervision Order have been breached, then the Court may, without further evidence regarding the need for intervention, do one of several things: renew, vary or extend the supervision, or grant a TGO or a PGO. The breach establishes the Court's authority to make the order without evidence of the need for intervention. This supports the argument of the Director, that it is not necessary to conduct an initial custody hearing in the circumstances because the question of whether there are reasonable and probably grounds to believe that the child is in need of intervention has previously been established. The Court is not required to make the requested order. Therefore, it does not automatically mandate interim custody, but there is no longer a burden on the Director to prove a need for intervention. The Court can consider any relevant evidence and make an order for interim custody pursuant to s. 26(2).

[43] The reiteration that s. 23 applies to s. 29 applications in relation to the notice required to be provided to the guardian(s), which is already stated in s. 23, suggests that the Legislature contemplated different procedural and notice requirements from those in s. 25.1 while still ensuring that procedural safeguards are in place for affected guardians.

[44] This process differs from an ex-parte application for apprehension and custody, where the need for intervention may not have been established. Making an application, on notice to the child's guardian(s), for the Court to decide custody in accordance with s. 26 facilitates an ability for guardians to challenge the application, as well as custody, while prioritizing the child's safety. This process balances the paramountcy of ensuring child safety while affording guardians' procedural protection.

Did the Provincial Court make an error in law on February 9th by finding that it has lost jurisdiction and ordering the children to be returned without the s. 29 application?

[45] The s. 29 application, made using Form 15, sought a TGO and interim custody of the children pending the outcome of the hearing. The application was made on notice to the respondent guardians.

[46] The Provincial Court's decision resulted in the children being returned to the guardians in a potentially unsafe situation, requiring a fresh application to apprehend the children. Refusing to hear the Director's s. 29 application on February 9th, and requiring a new custody application under a separate form, has led to a multiplicity of proceedings which both increases the costs incurred by the litigants and results in an inefficient use of the Court's time.

[47] At the February 2nd hearing, the Provincial Court ordered an initial custody hearing to be held on February 9th. The matter could have proceeded on February 9th as the applications before the Court essentially met the procedural requirements of s. 21 and 21.1 even though Form 11 was not used in conjunction with the request for custody. It is to be noted that s. 21(1) of the *Act* does not require the application be made in a prescribed form and the application which was made on Form 15 contained virtually the same information and language as Form 11.

[48] The interpretation and application of the *Act* must take the best interest of the child into account (s. 1.1). The Regulation is clear that a deficit of form does not void proceedings, indicating the Court has some flexibility in terms of practice and procedure. Notwithstanding technical deficiencies in the forms used, considering the best interest of the children and their safety in this case, as well as the flexibility granted to the Court in relation to issues of practice and procedure, the s. 29 application could have proceeded on February 9th. The question then is whether the apprehension of the children on January 28th had the legal effect of terminating the Supervision Order. If so, s. 29 would not be available.

What is the legal effect of apprehension on an existing Supervision Order?

[49] At the February 2nd appearance in Provincial Court, Duty Counsel raised the case of ***CT (Re)***, in which the Provincial Court judge commented that a Supervision Order had been extinguished by virtue of the Director's decision to apprehend the children. No analysis or authority was provided for that statement.

[50] In ***Alberta (CYFE) v KS & KK***, 2008 ABQB 565, the Court found that a judge presiding over an initial custody hearing is limited by the legislation to do one of two things: order custody to the Director or return the child to the guardian(s). The Court concluded that, at an initial custody hearing, the judge cannot rely upon the general jurisdiction granted by s. 27 to impose a Supervision Order. However, this analysis appears to apply to cases in which the judge made a fresh Supervision Order at the custody hearing. I find that it does not provide any guidance in relation to the impact of apprehension on an existing Supervision Order; nor is there any case law which addresses whether an order for custody extinguishes a Supervision Order which has not expired.

[51] Section 29 is specific to situations in which the Director alleges that there has been a breach of, or failure to comply with, a term or terms of a Supervision Order. It specifically applies to the situation before this Court. It also specifically provides that, if the Court is satisfied that there has been such a breach or failure, it may do one of two things **"without hearing any**

further evidence as to the child's need for intervention". This supports the Director's position that it was not necessary in these circumstances to re-establish a need for intervention. Rather, notice and the hearing contemplated in this section relate to the obligation on the Director to provide evidence to the Court which satisfies the Court that there has been a breach of, or failure to comply with, one or more terms of a Supervision Order. The remedies provided in s. 29(1) can only be imposed once the notice has been given, the hearing regarding the breach held, and the Court having determined that the breach or failure has been established.

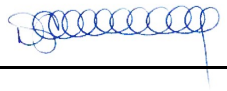
[52] Holding that the Director is prevented from taking steps, prior to the hearing of the breach allegation, to protect the children (likely by apprehension, as was the case here) is at odds with the overriding objective of the *Act*, which places the safety, security and best interests of children ahead of all other objectives. Reading s. 29 in conjunction with the whole of the Act, and seeking to ensure that its objectives are fulfilled, leads me to conclude that apprehension of the children during the short interval between when the Director becomes aware of breaches of the Supervision Order and the hearing of the s. 29 Application, does not result in a loss of jurisdiction or a termination of an existing Supervision Order. Rather, such a process reconciles the need to protect the children while ensuring that guardians are provided with notice of a hearing which must be held in a short time frame and at which they can contest the breach allegations.

[53] The position taken by the Director results in a process that protects children who have already been found in need of intervention and whose safety and security is alleged to be jeopardized by breaches of the Order which was put in place to protect them, while protecting the rights of guardians to challenge the position taken by the Director and to have input into the appropriate remedy where the Court concludes that the breach or breaches have occurred.

[54] Accordingly, I conclude that the actions taken by the Director in this case did not result in a loss of jurisdiction and that the matter could have proceeded on February 9 as had been directed on February 2.

[55] The appeal is therefore allowed. Although it may have no impact on this particular matter, it may be of some assistance in relation to future matters involving similar facts and issues.

Heard on the 13th day of September, 2021.
Dated at the City of Grande Prairie, Alberta this 7th day of December, 2021.



D.L. Shelley
J.C.Q.B.A.

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- and -

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