

# Court of Queen's Bench of Alberta

**Citation:** F.M. v. S.S., 2010 ABQB 195

**Date:** 20100322

**Docket:** FL06 01468

**Registry:** Lethbridge/Macleod

Between:

**F. M. [“Frank Mason”] and B. M. [“Barbara Mason”]**

Appellants

- and -

**S. S. [“Stephen Smith”], S. S. [“Sheryl Smith”],  
Department of Child and Family Services and  
Office of the Child and Youth Advocate**

Respondents

**Restriction on Publication:** The Court's adoption file in this matter is sealed pursuant to the *Child, Youth and Family Enhancement Act*, s. 74.1.

**TAKE NOTE THAT** by order of this Court pursuant to the *Child, Youth and Family Enhancement Act*, s. 74.1, this judgment will be added to the Court's judgment database where it will remain, and it will be distributed both in print and electronically to legal publishers and the subsequent sealing of the judgment shall not apply to the judgment database or to legal publishers. The judgment will then be sealed in accordance with the *Child, Youth and Family Enhancement Act*, s. 74.1.

No one may publish any information serving to identify a child or guardian of a child who has come to a Minister's or a director's attention under the *Child, Youth and Family Enhancement Act*. See the *Child, Youth and Family Enhancement Act*, s. 126.2.

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**Memorandum of Decision  
of the  
Honourable Mr. Justice Sterling Sanderman**

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**Note:** In order to comply with the requirements of the *Child, Youth and Family Enhancement Act*, this judgment uses fictitious names for the parties and the child.

[1] In late February of this year a five day hearing was held in order to determine which of two families would have the privilege of raising a delightful 2½ year old boy. In October of 2009 I ordered that a *viva voce* hearing be held to determine the appeal advanced by the Masons in relation to a decision that denied them the right to raise their nephew. I ordered that the appeal take the form of a *de novo* hearing because they had not been able to fully advance their case in May of 2009 when an Appeal Panel reversed the decision of the Director appointed pursuant to the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 to place the child with the them.

[2] The child, Ryan, was born August 6, 2007. He is presently 31 months of age. He was abandoned by his parents in a hospital in Lethbridge, Alberta as soon as his mother was able to discharge herself.

[3] Ryan's parents have shouldered no responsibility in relation to this child. They discarded him without a second thought. Their actions exhibit a tremendous disregard for this child. They are self-centered individuals who think only of themselves.

[4] The biological father came to Canada to flee legal entanglements in the United States. Warrants for his arrest exist in a number of jurisdictions. Before coming to Canada he abused the hospitality of the Appellants and came to this country to avoid repercussions for his behaviour. He established a relationship with the birth mother. It appears as if their time together was marked by extensive substance abuse. During the pregnancy, the birth mother abused cocaine and methamphetamines. It appears she also consumed significant quantities of alcohol.

[5] During the pregnancy she neglected to properly care for herself. No prenatal care was sought. Her nutritional needs were ignored. Consequently, when her son was born he was underweight. She testified positive for the HIV virus and for hepatitis C. Upon regaining her strength after delivery, she left the hospital with the birth father. No meaningful information was provided to the authorities in relation to their whereabouts. They were unwilling to parent this child. It is just as well that they took no interest as they were unfit to parent him.

[6] Because the child was abandoned, the Department of Child & Family Services was contacted by the hospital staff. There was a compelling need to place this child. Because there was a possibility the child bore the same infectious diseases as the mother, he was handled with great care by the hospital staff. He was isolated from other children in the intensive care unit. He had no skin to skin contact in the hospital for the first few weeks of his life. The nursing staff handled him with protective coverings.

[7] The Department attempted to locate relatives of the birth parents who might be prepared to provide a home for the child. The birth mother's family declined. They were not in a position to accept the responsibility of raising this child.

[8] No information was provided by the birth father in relation to his background. The Department's attempts to locate him were not successful. Although he was before the courts in Canada in relation to serious criminal charges, he was not willing to provide the Department with any information in relation to his family. They were all in the United States. His unsatisfactory responses prevented the Department from locating any of his relatives.

[9] The Department had difficulty placing the child with a foster home. The difficulty arose because of the problems that accompanied this child. In addition to the potential HIV and Hepatitis C difficulties, it was highly likely that the child suffered from Fetal Alcohol Syndrome Disorder. The first five homes that were approached for possible placement declined. The Smiths willingly accepted this child into their home approximately three weeks after his birth. He has been there continuously.

[10] The child's exposure to non-prescription drugs and alcohol during the mother's pregnancy make behavioural problems as he grows older a real likelihood. There is a high probability that Fetal Alcohol Syndrome Disorder and Attention Deficit Hyperactivity Disorder will make parenting him a challenge. He will require a tremendous investment in time, energy and commitment from his caregivers. Both the Masons and the Smiths have been alerted to the extraordinary commitment required of them. Both are prepared to accept it.

[11] The Smiths accepted the child into their home on August 30, 2007. They raised him along with their two daughters. On March 13, 2008 the Director of Family & Child Services was granted a permanent guardianship order in relation to the child. The Smiths continued to care for him as if he was their son.

[12] The biological father's status before the courts changed in 2008. His family had not been informed that he was a father. He was sentenced to serve a penitentiary term in Canada. Shortly after this occurred, he notified his family of the birth of the child. He called a sister who immediately passed on this information to the Masons. They quickly contacted the Department in Alberta and expressed their desire to adopt Ryan. They were informed of the significant difficulties that raising the child would present. Their commitment was unconditional. They expressed a willingness to adopt him and to take him into their home. They first made contact with the Department in May of 2008 some nine months after Ryan's birth.

[13] By the end of the month of May of 2008 two families were committed to providing a home for the child. By then, the Smiths, as a family, had decided to apply to adopt Ryan. This

was not a decision made without careful consideration. They discussed it as a family and decided to make a corresponding application.

[14] The Smiths had a very positive history with the Department. Their home was a Level 2 foster home. Their ability to parent Ryan was not in question. The Director was giving the Masons an opportunity to provide an acceptable home study to the Department so that their offer to adopt Ryan could be properly assessed. In late January of 2009 the Director approved the Masons' proposed adoption of Ryan and consented to it.

[15] The Smiths were upset with this decision. Ryan had been in their care for 17 continuous months. They appealed the Director's decision to a Child, Youth and Family Enhancement Appeal Panel. This appeal was conducted from May 26 to May 28, 2009. This hearing was fundamentally flawed. It was conducted in a fashion that was unfair to the Masons. They came from their home in Washington State to attend the hearing. They were not granted standing at the hearing until the morning of the first day. They were not in a position to adequately put their case before the panel. They were not in a position to secure any expert witnesses to give evidence on their behalf. Although they were represented by counsel, they had no time to prepare properly for the appeal.

[16] The Smiths were in a much different position. Although they were not represented by counsel, they were fully prepared to put evidence before the court in an attempt to overturn the Director's decision. They called expert witnesses who gave evidence in relation to various topics that were relevant to the matters before the panel. It was a one sided hearing.

[17] On July 21, 2009 the Appeal Panel released a written decision. It determined that moving Ryan at this stage of his life would not be appropriate. The panel found that the possible risks to him outweighed any potential benefits. The decision of the Director to remove Ryan from the Smiths' home was reversed. The panel decided that the Smiths should be able to adopt Ryan.

[18] The Masons filed a Notice of Appeal to this court on August 10, 2009. In order to ensure that they would be fully able to place their case before the court, I determined in October of 2009 that the appeal would take the form of a hearing *de novo* with each party able to call whatever *viva voce* evidence they desired.

[19] The motivating factor in reaching this decision was the flawed process at the Appeal Panel stage. In addition to the Masons being unable to present their case, no transcript of the proceedings was capable of being prepared that would allow for an appropriate review. During the week of February 22, 2010 all interested parties were represented by counsel and able to call whatever evidence they cared to.

[20] As this is a hearing *de novo*, no deference need be shown to the decision of the Appeal Panel. The matter is to be decided in the first instance. The entire focus of the hearing was on the best interests of the child. The materials that were filed before the Appeal Panel were before this Court. They have been considered along with the oral testimony of all of the witnesses and any exhibits filed by the parties.

[21] Section 58.1 of the *Child, Youth and Family Enhancement Act* sets out the matters that have to be considered when determining whether an adoption order should be granted. It states:

A court and all persons who exercise any authority or make any decision under this Act relating to the adoption of a child must do so in the best interests of the child, and must consider the following as well as any other relevant matter:

- (a) the importance of a positive relationship with a parent, and a secure place as a member of a family, in the child's development;
- (b) the benefits to the child of stability and continuity of care and relationships;
- (c) the mental, emotional and physical needs of the child and the child's mental, emotional and physical stage of development;
- (d) the benefits to the child of maintaining, wherever possible, the child's familial, cultural, social and religious heritage;
- (e) the child's views and wishes, if they can be reasonably ascertained;
- (f) the effects on the child of a delay in decision-making;
- (g) in the case of an aboriginal child, the uniqueness of aboriginal culture, heritage, spirituality and traditions, and the importance of preserving the child's cultural identity.

[22] It is clear that the overarching principal is the best interests of the child. The Appellants submitted that certain principles contained in Section 2 (a) and 2 (i) should also be considered by the Court in determining where Ryan should be placed. They state:

If a child is in need of intervention, a Court, an Appeal Panel and all persons who exercise any authority or make any decision under this Act relating to the child

must do so in the best interests of the child and must consider the following as well as any other relevant matter:

- (a) the family is the basic unit of society and its well-being should be supported and preserved;
- (i) any decision concerning the placement of a child outside the child's family should take into account
  - (i) the benefits to the child of a placement within the child's extended family;
  - (ii) the benefits to the child of a placement within or as close as possible to the child's home community,
  - (iii) the benefits to the child of a placement that respects the child's familial, cultural, social and religious heritage,
  - (iv) the benefits to the child of stability and continuity of care and relationships,
  - (v) the mental, emotional and physical needs of the child and the child's mental, emotional and physical stage of development, and
  - (vi) whether the proposed placement is suitable for the child;

[23] Clearly, the Department places significant emphasis upon kinship placement when required to find alternative caregivers for a child. Significant evidence was led at the hearing in relation to the policy and best practices of the Department. Kinship placement is viewed with great favour by the Department.

[24] The Section 2 considerations are applicable to a child in need of intervention. Ryan is not such a child. His guardian is the Director of the Department of Child & Family Services. A permanent guardianship order has been in place since March 13, 2008. He has long passed the intervention stage. He is at a stage in his life where two good families have come forward with an offer to adopt him and the court is required to determine what placement is in his best interests.

[25] Section 2 considerations deal with a potential reunification, reconfiguration or restructuring of a family unit. Biological and family connections are of great importance at this stage. It is apparent that the legislators considered the maintenance of an existing family connection important at this stage. Ryan has never had an existing family connection with any of his biological family. His case is a pure best interests case. Ryan has had some contact with the Masons. Since they expressed a firm commitment to adopt him, they have visited him in Canada at some considerable expense to themselves on eight or nine occasions. The first visit was in August of 2008. They saw him twice in May of 2009. The remaining visits have been on a monthly basis since October of 2009. Each visit has been approximately two hours. The entire time that they have spent with Ryan has been less than 20 hours.

[26] A number of authorities were presented during argument by the parties. A number of them dealt with the elements a court should consider when determining competing adoption claims. At paragraph 93 in *Hendricks v. Swan*, 2007 SKQB 36, Justice Smith, in dealing with kinship versus non kinship care states:

In summary, the instruction I draw from the case law is that the critical elements the Court must consider in a debate such as this are:

- (i) The paramount consideration is the best interests of the child;
- (ii) Blood ties are a factor to be considered in determining the best interests of the child but they are to be considered from the point of view of the significance to the child, rather than the significance to the biological parent;
- (iii) The question must be asked which environment can best provide for the health, emotional well being, education, training, intellectual, economic and psychological needs of the child;
- (iv) The Court must consider uncertainties associated with transferring custody of a child from a known situation of security and stability to a situation with many unknowns. In the case of an infant, the Court must consider the potential harm to a child in disrupting attachments that have developed or are in the advanced stages of formation.

[27] I agree with this statement. The law in this area is not in dispute between the parties. This case turns on the findings of fact the Court will make.

[28] Both sets of prospective adoptive parents testified at the hearing. Employees of the Department testified to set out the history of their dealings with Ryan and the two families. Both sides called expert witnesses who testified in the area of brain development, attachment theory and the transitional plans that would be required in order to ensure Ryan's emotional well being if he was moved to the United States.

[29] None of the expert witnesses assessed Ryan. None attempted to offer their opinions in relation to Ryan's placement. Some relied upon research and literature reviews in relation to their field of expertise to offer a theoretical opinion to the Court. One offered a clinician's theory based upon her experience in the area of children's mental health and attachment difficulties related to adoptions.

[30] Dr. Robbin Gibb is an assistant professor in the Department of Neuroscience at the University of Lethbridge. She received her PhD in 2004. The University of Lethbridge is the only university in Canada that has such a Department. She was qualified as an expert in neuroscience and brain development. She established that this is a developing field of scientific study that shows great promise for the future. She was a passionate witness who is extremely interested in her research and the application it has to explaining human behaviours.

[31] She clearly established that a pre-natal experience can be a significant factor in a child's brain development. The brain is a complex organ that continues to develop from its prenatal stage into early childhood. Exposure to substance abuse during the prenatal stage has a significant effect upon brain development. The introduction of alcohol and street drugs into the womb and an accompanying lack of prenatal care can have a dramatic negative effect upon the development of a child's brain. Similarly, separation from a firmly established attachment figure can have a detrimental effect.

[32] Dr. Gibb did not see Ryan. She was given information in relation to his history and came to the conclusion that there is indeed a high risk of significant behavioural problems with this child in the future. He has experienced significant trauma in his young life and further trauma should be avoided as much as possible. She classified trauma as any experience that can alter brain function.

[33] Dr. Gibb's evidence in relation to her field of expertise is accepted by the Court. When she strayed into areas that were beyond her expertise the Court could not accept her suggestions. Certainly she has no experience in the area of adoption and her comments in this area will be ignored.

[34] Marlene O'Neil-Laberge was qualified as an expert in the areas of children's mental health and attachment difficulties experienced in adoptions. She could not make any



recommendation in relation to either one of the families because she had not seen Ryan nor had she performed any assessment. She gave theoretical evidence based on her extensive experience as a clinician.

[35] She identified that biological roots are important to a child as they get older. It is important that children know their true story. It is important for the positive self image of the child.

[36] She believed that Ryan could form a strong attachment to the Masons as he undoubtedly had fashioned one with the Smiths. Her expert opinion was that if a child was able to form one secure attachment then it would not be difficult for them to form a second one with time. She recognized that the probable presence of Fetal Alcohol Syndrome Disorder would be a complicating feature. She conceded that at this time from Ryan's perspective the Smiths are his parents. She conceded that if there was some difficulty in forming an attachment with the Masons that there would be significant problems for the development of Ryan's emotional and mental health.

[37] She conceded that the only positive that would come from a relocation would be establishing a connection to Ryan's biological family. She felt that any risk associated with a move of Ryan could be overcome with an appropriate transition plan. She gave evidence in relation to the type of plan that would have to be in place. She gave evidence in relation to other transition plans that she had been involved in that were successful.

[38] It is noteworthy that these successful plans involved couples that were highly motivated to ensure that there was a seamless transition. They worked closely with one another for a considerable period of time. A great deal of energy and effort was required in order to make them successful, because that's what the parties wanted. They were working co-operatively to reach a common goal.

[39] Evelyn Wotherspoon testified as an expert witness in early childhood development and mental health. She gave extensive evidence in relation to attachment relationships and how they develop between a caregiver and a child. It takes time to develop, but once formed, the secure caregiver is able to manage the child's stress response very well. This relationship develops before the ability to talk appears. The caregiver and the child adapt to one another. The caregiver reads and reacts to cues given by the child. The strong attachment forms after the child reaches six months of age and continues to develop.

[40] Ms. Wotherspoon did not give any recommendation in relation to the placement of this child as like all others she had not assessed the child nor the prospective parents. She was able to

say that to interrupt a secure attachment relationship runs the risk of doing significant emotional harm to the child. She cautioned against making any such move unless absolutely warranted.

[41] She was able to review certain medical assessments made by the child's pediatrician. She came to the conclusion that this was a fragile child whose Fetal Alcohol Syndrome Disorder will present significant problems in the future. At this time, she believed that the caregiver was in tune with the child's needs and was able to deal with his deficiencies. These deficiencies will be much more noticeable after he begins school. He will not have the protection of the constant caregiver and greater expectations will be placed upon him. Ms. Wotherspoon foresees considerable difficulties with this child and that it would be courting significant risk to move him for no apparent good reason. At his age he has no concept of a blood or biological tie. There has never been a meaningful connection with his biological family. This fleeting connection came into existence after the attachment to the Smiths was established.

[42] Maryann Curran was qualified as an expert who was able to give evidence in relation to the adoption process in the State of Washington and the adequacy of the Masons' health care plan and the facilities able to provide care for Ryan that exist in the region of the State where the Masons live. Her evidence was non-contentious and is accepted by the Court without hesitation.

[43] In the preceding paragraphs I have very briefly summarized the import of the evidence given by the various experts. I have not dealt with their evidence in great detail but have set out the various theoretical premises in relation to this case that I accept in good conscience. It is against this backdrop that the evidence of the Masons and the Smiths must be viewed. These four individuals testified at great length in relation to the type of home, care and commitment that they could give to Ryan.

[44] In order to determine what is in Ryan's best interests, it is necessary to closely examine the attributes of each family. Both families come before the Court with a firm commitment to dedicate themselves to ensuring that Ryan is well cared for. The Masons have been in a stable relationship since 1993. They married on April 1, 2000. They have no children of their own. Mr. Mason will be 44 years of age in October. Ms. Mason recently celebrated her 59<sup>th</sup> birthday. Theirs is a very stable and caring relationship. They are financially secure. It would not be necessary for Ms. Mason to work. She could provide full time care for Ryan.

[45] Their commitment to bringing Ryan into their home and back to his family cannot be questioned. They moved expeditiously when they learned of Ryan's birth. They wanted to adopt him in the first instance. Their commitment was unwavering even after they were alerted to the difficulties that he would present for them. Once his paternity was resolved through DNA testing, they did everything in their power to adopt this child. Their dedication to this task is admirable.

[46] The Masons have a comfortable home in eastern Washington State. They live in a smaller community that has a regional population of 6,000 to 7,000 people. They live in a good home. It is situated in a safe neighbourhood. This community has all the amenities of any urban centre.

[47] They live within 25 minutes of Spokane, Washington. That is a major centre that has all of the facilities that might be needed to address Ryan's difficulties that cannot be found within their immediate community.

[48] Mr. Mason has secure employment as a heavy equipment mechanic. With overtime, his annual income can approach \$90,000. His earning capacity has not been adversely affected by the recent economic recession.

[49] The Mason opened their lives to scrutiny when they allowed an assessment to be completed in the State of Washington in relation to the suitability of placing Ryan in their home. This report was looked upon with favour by the Department. The Director agreed to allow this international adoption in January of 2009.

[50] The employees of the Department who testified at this trial gave evidence in relation to their dealings with the Masons and supported the decision of the Director to allow Ryan to go to the State of Washington. The group of employees that were charged with the responsibility of placing Ryan permanently were unanimous in their decision that he should go to the Masons' residence. They felt that the biological or kinship connection was of paramount importance and should be developed in this case.

[51] It appears as if kinship placement is viewed with great favour by the Department. During this trial I heard evidence that the factors that appear in Section 58.1 of the *Act* and Section 2 (a) and 2 (i) are given different weight by those charged with making decisions in relation to these two areas. The policy is set at head office through a process that involves consultation with policy analysts and senior people in the Department who have considerable experience.

[52] There is a danger in blindly following policy. By doing so, the statutory factors found in the legislation can have their importance diminished. Policy should never overrule a statutory regime decided by the legislative body of this province. A blind application of policy can, in certain circumstances, lead to diminution of the best interests test.

[53] Kinship placement generally presupposes a pre-existing relationship that is necessary to be maintained in order to ensure continuity of placement and continuity of cultural ties. The *Act* certainly recognizes the need to make such an effort in the case of aboriginal children. None of

these factors are present in this case. Still the members of the Department placed a greater emphasis upon policy than a careful consideration of the statutory factors mandated by s. 58.1.

[54] No deficiencies exist in the Masons' residence. They are prepared to offer their home to Ryan. They wish to expose him to his Turkish heritage. This is his father's ethnic background. The Masons believe they have a responsibility to return this child, born in Canada, to his extended family in the United States.

[55] In preparation for their parenting responsibilities, they have taken courses on line. They feel that it is important to do so as Mr. Mason has never been a father and Ms. Mason has not been an active parent for a considerable period of time. Her children from an earlier marriage were born in the early 1970s.

[56] The Masons take the position that the home that they can provide for Ryan is every bit as good if not superior to that of the Smiths. In addition to this they can expose Ryan to his extended family and through them to a Turkish heritage. They suggest that the issue of self-identification can only be met in this environment. Only they can satisfy his inquiry into who he is and where he comes from. The Masons suggest that this all-encompassing approach to raising Ryan is in his best interests. They take the position that to leave him in the Smiths' care will deprive him of this ability to know his true self. Their basic position is that if the homes are equal in their abilities to provide love, comfort, direction, stability and nurturing then the connection to the biological family should determine the placement. They suggest the Director followed this philosophical approach and was correct in his assessment.

[57] The Smiths have provided the day-to-day care for Ryan since they took him home from the hospital. Ms. Smith has been the primary caregiver to Ryan but she has been ably assisted by her husband and two daughters now aged 17 and 13. Their decision to apply to adopt Ryan was a family decision. It was a decision that was not made lightly. They discussed the difficulties that they would all face with the behavioural problems that would surface in the future. They willingly accepted this challenge.

[58] Like the Masons, the Smiths are financially secure. Mr. Smith, who is 39, has been employed with one company for over 20 years and has a total income in the area of \$90,000. He supplements his basic income by selling hail insurance. The Smiths are actively involved in their community. They live in a small town that is 20 minutes away from a major centre, Lethbridge. They have been attending to Ryan's medical needs in a very responsible fashion. They have established good working relationships with a family doctor, a pediatrician and other therapists who have been employed to address some of Ryan's deficits. Ryan has become a part of their family and their lives.

[59] Both of the Smiths have extended family in the Lethbridge area. They see them often and Ryan is well acquainted with most of them and has become part of their lives.

[60] In addition to raising their own teenage daughters, the Smiths have taken foster children into their residence. In the past, they have had ten such placements. Both Smiths' have taken training offered to them in order to improve their parenting skills. Ms. Smith has taken extensive training in a number of areas including dealing with Fetal Alcohol Syndrome Disorder children.

[61] In addition to providing foster care for ten children, the Smiths' residence has been a mental health receiving home for short term placements of children with emotional and mental health problems. The individual charged with the responsibility of overseeing the Smiths' foster home for the Department gave evidence at this trial. He has had extensive dealings with the Smiths. His evidence was extremely positive in relation to their ability to foster children and to raise Ryan.

[62] The Smiths gave evidence in relation to the demands that Ryan places upon them. Parenting this young boy can be exhausting. It is a demanding task. At the age of 40, Ms. Smith finds it to be extremely tiring and she does rely upon her husband and daughters to assist her in this endeavour.

[63] The Smiths have established a relationship with Ryan's maternal grandmother. Even though the mother has had no contact with Ryan, the grandmother is interested in him and sees him when she is in the Lethbridge area. She teaches school in northern Manitoba. She has a home in a small town close to Lethbridge. She spends her summer months there and intends to retire there within two or three years. At this time she sees Ryan on a regular basis. The Smiths encourage this type of contact and have extended it to Ryan's half brother, with whom he shares a mother. This child is two years older than Ryan. They are aware of the need to inform Ryan of his life story. They are not attempting to shield him from the maternal side of his family in any fashion.

[64] They take the position that they would welcome continued contact with the Masons if Ryan stayed in their home. They realize the importance to an individual to know his particular life story and they would not attempt to hide it from Ryan. At the present time, they have not considered how they will inform Ryan of his background. They are quite prepared to deal with it when it is appropriate.

[65] Like the Masons, the Smiths can provide Ryan with a well-equipped modern home filled with love and commitment to raising him properly. They are financially secure and they live in a safe community that is close to a major urban centre that has all of the facilities needed to deal with the problems that Ryan will experience as he grows older.

[66] The Smiths submit that Ryan should not be removed from their family because of the dangers inherent in breaking the close bond that has developed between this young boy and them. He knows no other family. He believes that the Smiths are his parents and their daughters his siblings. He is doing well in their care and has a professional support group fully developed in the Lethbridge area that will continue to address his medical needs and his proper emotional development. They suggest that to remove him from this environment would have serious repercussions for him. They suggest that his grief would be great and there would be harm to him if such a move was made.

[67] This young boy is fortunate to have two loving families committed to his continuing welfare wanting to adopt him. Both families are financially secure. Both live in safe communities that have services available to address deficits possessed by Ryan. The question that the court must answer is what placement is in the best interest of this young child. It is necessary to consider the factors listed in Section 58.1 of the *Act* to make this determination. The Court is compelled to take a broad view of what is in Ryan's best interests in making this decision. No one factor is to be given greater consideration than any other. The totality of the evidence must be examined in making this determination.

[68] In this case, three of the factors listed in Section 58.1 do not apply. The child is too young to have his wishes ascertained. The effects of a delay in the decision making process is not relevant as there has been significant delay in making a permanent placement. Lastly, Ryan is not an aboriginal child. The factors that have to be considered are subsections (a) to (d) inclusive and any other relevant matter.

[69] In the *Child, Youth and Family Enhancement Act* family is not defined. That is because families come in many shapes and forms. To define family would be restrictive. The legislators clearly did not want to do this. As the legislation is child centred, it is appropriate to view the concept of family from the perspective of the child. This would be consistent with the intention of the legislators. Clearly family has much more than a biological or genetic connotation.

[70] Subsection (a) to (c) inclusive have to be decided in favour of the Smiths. This child is a member of their family. He has established a positive relationship with the people he perceives as his parents and the two individuals he views as his sisters. He is secure in this knowledge and continues to develop as a functioning family member. They tend to all of his developmental needs.

[71] He has been in a stable home and has had continuity in relation to the daily care he gets and the relationships that have been fostered. These relationships extend beyond the immediate

family and include extended family members from the Smith family as well as the maternal mother's family.

[72] This child is a special needs child. His mental, emotional and physical needs are being addressed and they will continue to be within this environment. The Smiths have established a regime of care for this child that is broad in scope. He has a pediatrician who has treated him since birth. The pediatrician communicates with the family doctor. The Smiths have sought different types of therapy within the community to address Ryan's specific needs. He lacks nothing in relation to his continued mental, emotional and physical development.

[73] The Smiths are well equipped to see that these needs are addressed in the future. The training that the Smiths have taken in relation to specific areas of emotional development is noteworthy. They are well equipped to deal with this child who already exhibits symptoms of Fetal Alcohol Syndrome Disorder. The Masons have only taken some introductory courses in relation to adoption that were offered online. The courses taken by Ms. Smith are much more extensive and have had a live instructor.

[74] One might think that the factors listed in subsection (d) might favour the Masons. In this case, the evidence has not been compelling that there is a distinct cultural, social and religious heritage that should be fostered. Indeed, the evidence of Turkish heritage is scanty. The Masons basically enjoy eating Turkish food. There is no religious or cultural connection existing between them and members of a Turkish community in Washington State. In Subsection (d) there is a qualifying phrase. The phrase "where ever possible" diminishes the importance of this factor.

[75] If one compares the two homes it becomes clear that they are not equal. The Smiths are younger and better equipped to deal with the challenges that raising Ryan will present. They also have the assistance of two daughters in the home who are willing to help. They also have an extended family close by. The Masons' extended family lives in a different State and contact with them is not as regular.

[76] Although both families are committed to raising the child, the Smiths' commitment has been tested over the past thirty months. They know the problems and difficulties that he will face in the future. The Masons have had limited contact with him and have always seen him under ideal conditions. They see him at a neutral visiting spot for a brief period of time early in the morning. The child is well rested and well fed. They bring him gifts and shower love and affection upon him. He responds well to this. They have never seen the different moods that can come over him. Their perception of this child is somewhat idyllic. They do not have the realistic perspective the Smiths possess. They do not truly appreciate the scope of the task that confronts Ryan's caregivers.

[77] As indicated earlier the support network in relation to family and professional assistance is well established in the Smiths' home. The Masons' extended family lives a considerable distance away and although there are facilities in Spokane that would undoubtedly rival those in Lethbridge, the professional caregivers in Canada are well acquainted with the child's present and future needs.

[78] The parenting skills that the Smiths have surpass those of the Masons. Mr. Mason has never been a parent. The Smiths have training in a number of areas and have experienced raising ten foster children in their home in addition to their own daughters.

[79] The Smiths are prepared to continue a strong kinship connection with the maternal grandmother. She lives in the immediate vicinity. This connection would be broken if the child was to be moved to the United States.

[80] There is a tremendous risk in disrupting the stable environment in which Ryan finds himself. His attachment to the Smiths is strong. To take him away from the only family he has known at this stage would be traumatic. It would cause further difficulties with his emotional development. This child will have enough challenges in his life and it is not prudent to create any more. He is a fragile child and moving him now solely for the purpose of allowing him to self identify with his biological family would be a mistake.

[81] He can come to know his biological family through continued contact with them. The Smiths have demonstrated a willingness to allow contact with the maternal grandmother. It would be expected that they would encourage contact with Ryan's paternal relatives. They recognize a need for any child to know his roots and his story. They would not want to hide this from him. Continued contact with the Masons is necessary in order to ensure that Ryan does know his biological family.

[82] An examination of all of the factors leads one to the inescapable conclusion that it is in Ryan's best interests to leave him with the Smiths. These families are not equal. The Smiths' home is a better place for him. To take him from this setting for no tangible guaranteed benefit would be folly. Too many risks would accompany this move. Great stress would be brought to his life. There is no guarantee that he would form a secure attachment with the Masons as he has with the Smiths. There is a possibility of bringing devastation into the life of this child. That should not happen. It is clearly in his best interest to stay where he is.



[83] The appeal brought by the Masons is dismissed. The child Ryan shall remain in the Smiths' care and they will be permitted to adopt him. That is in his best interest.

Heard on the 22<sup>nd</sup> day of February, 2010 to the 26<sup>th</sup> day of February, 2010.

**Dated** at Lethbridge/Macleod, Alberta this 22<sup>nd</sup> day of March, 2010.

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**Sterling Sanderman**  
**J.C.Q.B.A.**

**Appearances:**

Jerald D. Palmer  
for the Appellants

Scott C. Paul  
for the Respondents, Stephen Smith and Sheryl Smith

Robynn Bonin  
for the Respondent, Department of Child & Family Services

Sonja Lusignan  
for the Respondent, Office of the Child and Youth Advocate