Court of Queen's Bench of Alberta

Citation: A.D. v. Alberta (Director of Child, Youth and Family Services), 2011 ABQB 577

Date: 20110926
Docket: FL01 10991
Registry: Calgary

Between:

A.D.

Appellant

- and -

ALBERTA (DIRECTOR OF CHILD, YOUTH AND FAMILY SERVICES)

Respondent

Restriction on Publication: 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.

Reasons for Judgment
of the
Honourable Madam Justice S. L. Martin

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1. Introduction

[1] A socially isolated single mother with cognitive limitations appeals the Permanent Guardianship Order (PGO) that terminated all her parental rights. The Director of Family Services chose to apply for a PGO without ever having obtained a Temporary Guardianship Order (TGO). Previously the mother had consented to three supervision orders after which the child was apprehended.

[2] The Director presented ten witnesses during the five day trial. Only the mother testified on her behalf. After argument the trial judge delivered a brief oral decision granting the PGO and allowing one final access visit. The mother appeals that decision on various grounds: essentially

arguing that the evidence did not support a PGO, that the trial judge erred by giving insufficient weight to the value of keeping families together, and the trial judge failed to consider whether a TGO would have been the appropriate and least intrusive order.

[3] The mother also argues that the reasons provided by the trial judge were insufficient both generally and specifically in relation to the absence of any explanation of the factual basis on which the judge concluded that the child could or should not be returned to the mother within a reasonable amount of time, the crucial difference between a TGO, which was also available, and the PGO applied for and granted.

[4] After a full review of the record I am satisfied that the evidence does not support the granting of a PGO. The conclusion that the child could or should not be returned within a reasonable time is not explained or established on a balance of probabilities and the appeal succeeds on this ground alone.

[5] This court has the power to issue any order available to the trial judge. A TGO is the appropriate order in the complex circumstances of the case at bar. A TGO will provide continuity for the child while it is determined whether sufficient supports can be put into place to safeguard the development of this special needs child and whether the mother is able and willing to learn how to care for this child and to commit fully to the child's welfare.

2. Facts, Evidence at Trial and the Procedural History

[6] The mother gave birth in late 2007 as the result of a one-time sexual encounter with the child's biological father. The father was not aware of the birth and has taken no part in caring for the child.

[7] The mother left school in grade ten and lives a relatively socially isolated existence from her peers. The mother has been diagnosed with a cognitive delay and, at times, exhibits unusual behaviours and beliefs. It is not clear whether she suffers from a mental illness or what illness it may be.

[8] The mother's primary support is her own mother, who will be referred to as the grandmother. At all times the mother lived with the child at the grandmother's home. The grandmother works outside the home. For some time after the child was born the mother, grandmother and great grandmother lived at the grandmother's home. The great grandmother has since moved out. Initially the grandmother did much of the care of the child. Over time the mother became the primary caretaker.

[9] Ms. McCool, the first case manager from Child and Family Services and the author of numerous case assessments tendered as evidence (some in her maiden name) explained that three supervision orders were issued over the course of the Director's involvement with the family.

A. The First Supervision Order: April 2008

[10] The first supervision order was put in place in April 2008, with the consent of the mother, after concerns were raised about pushing, shoving and verbal altercations between the mother and the grandmother. The mother hid her pregnancy at the outset and the grandmother was angry at the mother for becoming pregnant. There was also tension between them caused by the stresses of adapting to care for the child within their shared home. Following the birth of the child the mother was referred to Child and Family Services after she disclosed to a counsellor that she had left the child alone in a bathroom for two hours while she slept. The evidence suggests this was a one time event.

[11] According to Ms. McCool, the focus of the first supervision order was to reduce tensions in the home; in particular to improve the communication and relationship of the mother and grandmother through in-home support. It was effective, as far as she could tell, and the in-home caseworker, the mother and the grandmother all indicated that communications had improved and there were no further physical incidents. Ms. McCool also reported that the mother was taking on more responsibility in terms of parenting time with the child and the situation was improving in that regard.

[12] At this point in time Ms. McCool also did not report any concerns about the mother meeting the child's basic needs. She stated that the mother was able to feed, clean and clothe the child appropriately and the child appeared happy and healthy.

[13] In addition to mandating in-home support, the first supervision order also required a parenting assessment to be conducted, as well as further mental health assessment of the mother through the Collaborative Mental Health Program.

[14] Ms. June Ann Pirie became involved with the mother and the child in July 2008 as a clinical supervisor with the Collaborative Mental Health Program. At trial Ms. Pirie was qualified as an expert in infant mental health and child development.

[15] Ms. Pirie's report was based on one clinical session with the mother, when the child was seven months old, and a home visit one month later. She commented that the mother appeared apprehensive about that meeting but was more comfortable and responsive to the child during the at-home visit. She thought the mother may suffer from an anxiety-based mental health disorder. In particular, she expressed concern about the manner in which the child was conceived, the mother's odd beliefs and her unrealistic plan to move to Los Angeles to audition for the mother's favourite soap opera. Ms. Pirie testified that the incident where the mother had placed the child in a bathroom alone for a two-hour period was likely a one-time event, although she also stated that the mother did not appreciate the seriousness of an infant being left alone when crying.

[16] At the time Ms. Pirie indicated that there were no concerns about the child's development. Ms. Pirie testified that the mother would smile at the child, conveyed terms of

endearment and settled the child when fussy. She also noted, however, that the mother continued to feed the child when the child appeared to be tired and that the mother failed to understand that by raising its arms the child may have been indicating a desire to be picked up.

[17] Ms. Pirie's work with the mother and the child ended with a discharge plan dated October 7, 2008, in which she recommended parenting and mental health assessments, which were later conducted by Drs. Filyk and During. At this time there appeared to be conflict between the mother and the caseworker, which was evident in the case reports. The caseworker chose to terminate her involvement because she was frustrated repeating parenting advice to the mother.

B. The Second Supervision Order: October 2008

[18] A second supervision order was later granted in December 2008 with the consent of the mother. The second order required the mother to continue to live with the grandmother for on-going parental support and she could not leave Alberta with the child without the knowledge and permission of Child and Family Services.

[19] The need for the second supervision order was brought about primarily because the parenting assessment required in the first supervision order had not yet been completed. Ms. McCool testified (at page 18, lines 20 to 27, of the transcript) as follows:

> Q Why did you need a – a second supervision order?
>
> A The parenting assessment wasn't completed at that point, and based on the Collaborative Mental Health recommendations and ---and the fact that it was a term on the initial supervision order, we wanted to be able to follow through with that and follow up on whatever recommendations were going to come from that.

[20] The parenting assessment was initially expected to take place in June 2008, however, the mother did not meet with Dr. During, the assessor, until September, 2008. There is a conflict in the evidence as to what occasioned this three month delay.

[21] The Director's witnesses suggested that one reason for the delay was that the mother felt the appointments offered by the doctor at 11:00am were too early. There was much discussion over the mother's desire, sometimes self-focussed and rigidly adhered to, to maintain a chosen sleep schedule. However the mother explained that she was working about 40 hours per week during that time frame. Given when the child woke up, an 11:00am appointment would have meant she could only obtain fours hours of sleep, and she preferred not to do this.

[22] The location of Dr. During's office would also require the mother to take the child on the bus since she did not own a car and the grandmother worked during the day. The mother testified at trial that she experienced discomfort being in large crowds but that she took public transit for years and was accustomed to it. She also told her caseworker that a family member had been

injured in a bus accident and she was therefore reluctant to take the child on the bus when there was no mechanism to secure the child in a seat. The mother also cited the absence of money to take a taxi to the appointment. The mother did attend at the parenting assessment after the Director agreed to pay for a taxi.

[23] In-home support continued throughout the second supervision order, and caseworkers reported that the communication between the mother and grandmother continued to improve.

[24] By December 2008, however, Ms. McCool testified that she started to have concerns over the child's limited speech and as such in-home support began to focus on teaching the mother how to encourage healthy childhood development.

[25] Prior to that point, when the child was approximately 18-months old, no concerns were raised in the various reports over the child's language development. In-home support was therefore not focussed to any significant degree on teaching the mother how to interact with the child to meet the child's developmental needs.

[26] Although begun in September 2008, Dr. During's parenting assessment was only completed in April 2009 - shortly before the expiry of the second supervision order and approximately 8 months after the assessment began.

C. The Parenting Assessment by Dr. During in April 2009

[27] Dr. During, a chartered psychologist, conducted a parenting assessment with the mother based on several sessions in which she observed the mother and the child. No collateral persons were contacted or interviewed as part of the assessment, including the grandmother who lived with and was involved with parenting the child.

[28] Based on her assessment, Dr. During identified two primary challenges facing the mother: 1) the mother experienced a cognitive delay that resulted in a very limited ability to think sequentially and effectively plan, and 2) she was socially insecure which inhibited her ability to interact with people and form healthy relationships.

[29] Dr. During described the mother as being immature and lacking "cognitive flexibility". As a result, the mother entertained ideas of moving to Los Angeles, for example, to audition for a role on a soap opera without considering how realistic the plan was or the steps necessary to achieve such a goal while caring for a young child. Dr. During also characterized the mother's career goals as being very immature and based on weak planning and exceptionally poor social judgement.

[30] In terms of her interactions with the child, Dr. During noted that although the mother did attempt to respond to the child, by offering toys and playing, she was quiet in her interaction with the child and did not consistently read the child's cues very well. Despite this, the mother was found to have good verbal skills and enjoyed writing and reading.

[31] Dr. During used the adult intelligence scale to assess the mother and to identify what support she needed to learn to effectively parent the child. Dr. During found the mother to be at a teachable level of cognition if provided with concrete intervention and repetition. Dr. During's recommendations included an intensive in-home support component for the mother not only in terms of parenting skills, but also in regard to more practical life skills. She also recommended the mother seek counselling, and gain the skills necessary to parent the child independently of the grandmother.

[32] Accordingly, Dr. During recommended very focussed, hands-on learning to improve the mother's parenting skills. Dr. During also recommended the use of videotaped feedback, heavy repetition, point form reviewing and the use of written cues as part of the in-home support provided to the mother. Only some of these recommendations were ever implemented.

[33] Even with this type of support, however, it was Dr. During's opinion that teaching the mother new parenting techniques would be difficult because of her slow processing speed, difficulty engaging in common sense kinds of thinking and weak abstract reasoning.

[34] Dr. During also noted that the mother's difficulties parenting her child were driven more by personality features and cognitive limitations than by a mental illness. As an example, Dr. During noted that the mother's cognitive persistence was weak and as a result she was unable to stay focussed on learning new skills or techniques to manage life demands.

D. The Mental Health Assessment by Dr. Filyk

[35] In addition to Dr. During's evaluation, the mother was also referred to Dr. Filyk for a mental health assessment. Dr. Filyk based her findings on her own observations as well as the information contained in a previous psychiatric assessment of the mother as a teenager, conducted by Dr. Addington in July 2004.

[36] In that prior mental health report Dr. Addington diagnosed the mother with bi-polar disorder and psycho-social stressors. The mother attended three or four therapy sessions recommended by Dr. Addington and then stopped attending. No reasons for her decision to stop participating at that time were ever provided. The mother also did not take the medication prescribed by Dr. Addington.

[37] As part of her own examination Dr. Filyk performed a differential diagnosis of the mother based on two home visits, an office visit and a case conference with the mother, child and caseworkers.

[38] Dr. Filyk stated that the mother often exhibited unrealistic beliefs and abnormal behaviours, but was not clinically delusional. She was also unable to confirm the diagnosis of bi-polar disorder by Dr. Addington, but did rule out a diagnosis of Asperger's syndrome.

[39] Dr. Filyk stated that she did not believe that the mother's odd behaviours amounted to a obsessive-compulsive disorder and that they did not impair her day-to-day functioning. While aware of Dr. Addington's assessment and attuned to the possibility of a delusional disorder as a possible ongoing condition, Dr. Filyk also did not diagnosis the mother with any mental disorder. She noted instead that while the mother did exhibit odd and unrealistic beliefs in 2004, nothing of the same degree was found in 2008. She explained this by noting that a mental disorder could manifest itself at one point in time and later clear up.

[40] Dr. Filyk then stated that there should be further intervention and assessment to help clarify the mother's condition, including an evaluation of her mental capacity and possibly learning disabilities, without making a particular diagnosis.

[41] Following her second in-home visit Dr. Filyk stated that she did not observe any major difficulties in the mother's relationship with the child. She also stated that the mother's odd ideas needed to be put in context and what was suggested was a watch and wait approach to assess whether and how these ideas may impact her parenting over time. She noted specifically (at page 118, lines 5-8 of the transcript):

> ...[M]y observations didn't suggest any major difficulty in their relationship. A few missed cues but, you know, you can also understand a mother being quite nervous when two strangers coming into your home to--to interview you".

[42] In her report Dr. Filyk did not comment on the mother's capacity to learn new parenting techniques or her ability to incorporate feedback from caseworkers. She did recommend, however, further psychological assessment to properly diagnose and treat the mother. This treatment plan was ultimately abandoned though, when the grandmother indicated that she and the mother were overburdened and would not attend any subsequent appointments.

E. The Third Supervision Order: June 2009

[43] A third and final supervision order was issued in May 2009 to modify the in-home support to target the needs of the mother and the child and to incorporate Dr. During's assessment: (see page 22, lines 17-27 of the transcript.) Dr. During's recommendations included an intensive in-home support component for the mother not only in terms of parenting skills, but also in regard to more practical life skills.

[44] Ms. McCool testified that at this point the mother began expressing some frustration with the ongoing intervention in her life, and demonstrated a lack of awareness with regard to why others might be concerned with her ability to parent the child and the state of her mental health.

[45] Another in-home support worker, Ms. Sandy Pineda-Silva, worked with the mother beginning in April 2009. After Dr. During's recommendation, collaborative goals were established to improve the mother's parenting skills. Teaching techniques needed to be repeated

and involved demonstration, charting and parental videos. Ms. Pineda-Silva testified the mother did not take recommended parenting courses and would not take the child to the park.

[46] A case conference was held in December 2009 at which various matters were discussed. There were disagreements, after which the mother and grandmother did not re-initiate contact with Child Services and in-home support was terminated. The file was closed February 2010.

[47] Ms. Pineda-Silva observed that the child may have speech delay and recommended assessment.

F. The Apprehension of the Child in November 2009

[48] By November 25, 2009 the Director apprehended the child. Ms. McCool said this step was taken because the mother refused to continue to work with the caseworker and Dr. During said the mother required outside support to appropriately parent the child. Ms. McCool stated that the Director's decision to apply for a PGO was also taken in light of their view that the support provided to the mother over the previous 18-months did not produce sufficient progress or change.

[49] Ms. Donna Geiger became the case manager in March 2010. Ms. Geiger testified that when she took over the file she offered services to the mother which were refused. However, by mid-2010 the mother indicated to Ms. Geiger she wanted to participate in counselling. Ms. Geiger referred her in July 2010 to the Calgary Counselling Centre, where the mother attended two sessions. Four weeks before the trial, the mother also requested in-home support be reinstated. At the time of trial she was still on a waiting list.

[50] After the apprehension the child was placed in foster care.

G. Assessments of the Child Done While the Child was Apprehended

[51] Ms. Radmanovich, a speech pathologist, became involved with the family as part of a referral in February 2010 at a time the child was just over two years old. While caseworkers initially noted that the child was meeting all the developmental milestones of a normal child, that began to change gradually when concerns were raised about the child's language development.

[52] Ms. Radmanovich testified that after her examination she found the child was experiencing a moderate to severe delay in receptive language and had fallen behind peers in terms of verbal communication by a factor of one year, qualifying as a severe delay. She recommended the child receive sustained and intensive intervention, ideally by experts in speech pathology, interact with other children and receive reinforcement and support by the family at home.

[53] In terms of at-home support Ms. Radmanovich stated that strong familial relationships and the ability to adapt to the changing needs of the child would be critical for a parent in such a situation.

[54] Ms. Josie Bennett, a social worker with the Collaborative Mental Health program, became involved as part of a consultative evaluation in February 2010. Ms. Bennett was qualified at trial as an expert in the field of child development and infant mental health.

[55] Ms. Bennett did not meet with the mother or grandmother and based her views on observing the child while in care and the information given by the child's foster parents.

[56] As part of her involvement Ms. Bennet analysed five different developmental factors in the child: gross motor skills, communication skills, personal and social skills, problem solving and fine motor skills.

[57] The results of the screening showed that the child was not in the age-appropriate range for any of the five areas. It was recommended that there be monitoring of the child's fine motor and personal and social skills. Professional intervention was thought necessary in relation to the child's gross motor skills, communication skills and problem solving capacity.

[58] According to Ms. Bennett a child of that age should have at least 50 words and should be capable of putting different words together. While the child's receptive language was not a problem, the child's expressive language was almost nonexistent and she found that the child had no discernible words. As such, the child communicated through grunting, gestures and actions. The child could not throw or kick a ball and could not copy a sequence of blocks. Upon an inquiry from the Court, Ms. Bennett said that she would question whether a parent had a good grasp of child development if they did not notice this level of deficiency in a child.

[59] Ms. Bennett recommended stimulation for the child in a consistent, repetitive, nurturing and attentive manner, linked to the young child's developmental capabilities. This type of invention would require a caregiver who could offer ongoing and consistent support that would need to last past the child's pre-school years. She also made clear that her report was consultative in nature and that further evaluation of the child would be required.

H. Supervised Visits Between Mother and Child

[60] Supervised visits were granted to the mother under the apprehension order. Between December 2, 2009 and July 24, 2010 the mother had over 60 two hour sessions with the child; demonstrating both love and continuing commitment to the child. The evidence included the notes of the caseworkers who supervised the access. While most of the reports were simply descriptive of the events, there were no problems reported and some entries spoke positively of the mother's abilities and the parent-child interaction observed.

I. The Mother's Evidence at Trial

[61] For her part the mother was the only person to testify at trial against granting the PGO.

[62] She claimed in her testimony that she was committed to improving her parenting skills, however, she experienced difficulty in understanding the suggestions and feedback from the caseworkers. She also stated that certain suggestions or techniques were not effective, or that she preferred different parenting techniques based on her own childhood experiences. The mother also refuted the suggestion she suffered from delusional beliefs or that she was mentally unwell.

[63] In her testimony the mother explained why she stopped in home supports at page 244, lines 21 to 32:

> Q It was mentioned that, at one point, you determined that you no longer wanted to have in-home support. What – what is your recollection of why in-home support ended?
>
> A Well, because, like she said – she said that she –
>
> Q Now, when you say she, who?
>
> A Oh, sorry, Sandi said that she was praising me because people like me do need help and if they get praise, they respond better. And so I thought that she was actually praising me to the point where I thought I was doing good enough that she didn't have to be involved anymore. And so during the case conference, she acted like everything I did was wrong and that frustrated me. So I thought, Well, I'm not getting anywhere with this, and I – you know, I'm – I'm hearing two different stories and I'm frustrated and I don't – I don't really want to continue.

[64] The grandmother's application for guardianship was withdrawn before the trial and the grandmother did not testify.

3. The Legal Framework

[65] Sections 31(1) and 34(1) of the *Act* permit the Court to make a TGO and PGO respectively. Both orders require that:

> (1) the child is in need of intervention (see s. 2(c)); and
>
> (2) the survival, security or development of the child may not be adequately protected if the child remains with his or her guardian.

[66] The main difference between the two orders arises in respect to the third requirement set out in s. 34(1).

[67] Generally a TGO is issued when it can be anticipated that within a reasonable time the child may be returned to the custody of the child's parent or guardian. Conversely, a PGO is warranted when, under s. 34(1)(c) it cannot be anticipated that the child may be returned to the custody of the child's parent or guardian within a reasonable time.

[68] Section 2 of the *Act* sets out the factors to be considered by the courts when assessing the appropriate form of intervention when a child is neglected. One of the primary obligations created in this section is the promotion of family reunification, as far as possible in the best interests of the child: see subsections 2(a)(e)(f)(g)(h) and (j).

[69] Judge Ayotte discusses the objective of family reunification in *Alberta (Director of Child Welfare) v B(C)*, noting:

> Permanent guardianship is the most devastating invasion of the family unit permitted by law. It is not an order which should be made lightly. The very nature of the test the statute imposes makes it clear, in my view, that our society is still committed to the principle that, where reasonably possible, it is always in a child's best interest to remain within its birth family": 2003 ABPC 97 at para 24, [2003] AJ No 671.

[70] In *T(M) v Alberta (Director of Child Welfare)*, at para 32, *supra*, the Court of Appeal acknowledged the need to consider sections 2 and 34 together. In that case the Court emphasized that unless the Director proves that it cannot be anticipated that the child could or should be returned within a reasonable time, the application for a PGO must fail. The Court then stated at para 20:

> A court, hearing an application for permanent guardianship under the Act, must consider the requirements of both sections 2 and 34(1). Section 2 sets out the guidelines for determining what is in the "best interests of the child." These guidelines indicate, among other things, that a child's best interests are usually served by maintaining the family unit where that is possible.

[71] Section 34(1) is therefore to be read and applied together with the factors listed in section 2 of the *Act.* However important a value, family unity cannot always be maintained where a child is in need of intervention. In such cases the best interests of the child may conflict with and take priority over the desire to preserve family unity.

4. Trial Judgment

[72] After closing arguments the trial judge acknowledged the parties' desire for an immediate decision and delivered the following judgment, with identifying information removed:

> I have listened carefully to the evidence that has been presented over the past five days including the documents and Reports that have been entered as Exhibit 1 (the Binder).

I have given considerable weight to the Reports and recommendations of the Experts that testified, namely Dr. Sally During, Report is at Tab 4 in Exhibit #1, the Parenting Assessment; Dr. Filyk - psychiatrist - Report at Tab 8 in Exhibit #1; and Josee Bennett – Report at Tab 6 in Exhibit #1.

The areas of concern of the mother center around her cognitive limitations, and her poor judgment and her mental health issues. The mental health issues alleged by the Director include delusional thinking, hoarding, obsessiveness, extreme anxiety, and social inhibition.

The Court must consider not just the mother's ability to parent but to parent the child – a child with significant special needs as set out in Josee Bennett's Report at Tab 6 of Exhibit #1. She testified as an Expert in Infant Mental Health.

I have considered carefully the evidence of the mother. I was impressed with her demeanor, and her ability to respond without difficulty to questions put to her. Any cognitive delays or mental health issues were not apparent in her presentation.

The mother denied that her behaviour is odd or abnormal. She denied that the reason it took her six months to attend for a parenting assessment because she had a fear of public places. The excuse she offered was that it took too long to get there. (she did finally attend when a taxi was paid for by Child Welfare.) She stated she didn't have the money before that to taxi to the appointment although she did have money to pay for music lessons.

The mother also denied that social anxiety had anything to do with her refusal to take the child to the dentist with the in-home support worker. No explanation was offered to the worker at that time.

The concern that mother's only social interaction was by way of the internet was denied by the mother. She offered no excuse for refusing to take the child to play in the park when repeatedly asked to do so by the in-home support worker.

The mother also denied that she had an obsession on movie stars and moving to Hollywood to appear on a Soap Opera. At time of trial, she denied that she still suffered from the delusional belief that she was Cher's daughter.

The evidence provided by the in-home support worker of the lack of interaction and bonding she explained was that she didn't know that was what she was supposed to do.

Mother did admit to a complete aversion to her child when the child throws up and admits she would not be able to attend to the child but would go on the internet and find a nurse to come to the house.

These are very disturbing behaviours and I do not accept mother's denials or explanations.

In reaching my decision, I have also considered the refusal of mom over the years to accept the recommendations given to her as a teenager. She refused to attend the early psychosis clinic that was recommended by Dr. Addington. She has also denied the more recent suggestion of Dr. Filyk, a psychiatrist, to commence intensive therapy.

There is a duty of a parent to ensure a child is reaching the child's milestones. Had mother taken steps on her own accord to address the child's lack of speech sooner, the future for the child may be more promising.

I am satisfied that the test set out in section 1(2)(c) has been met. I find that the child is a neglected child within the meaning of the *Act*. I am satisfied that mother was not able to provide him with the basic necessities of life. Furthermore, I find he has suffered emotional injury while in mother's case. I am also satisfied that the mother is not now nor would she be within the foreseeable future in a position to provide adequate parenting for the child. Accordingly, the Permanent Guardianship Order is granted.

I am granting the mother and grandmother one final access visit to be arranged by the Director. Although the grandmother did not testify at trial to support her daughter or to seek Joint Guardianship, I am satisfied that that would not be sufficient to ensure the child's needs would be met. The grandmother was a joint caregiver at the time the child was found to be neglected and apprehended.

5. Issues

[73] The mother appeals this decision on the following three grounds:

(1) The trial judge erred in failing to apply the correct test with respect to granting the PGO, particularly with regard to weight given to the factors listed under section 2 of the *Act*;

(2) Child and Family Services failed to provide services to the Appellant consistent with her needs to meet the legislative objectives of family reunification; and

(3) The trial judge failed to consider that a temporary guardianship order was available before granting a PGO.

[74] In addition, and underlying these grounds is the allegation that the reasons for judgment are insufficient to support the decision reached.

[75] While noting that the reasons for judgment provided were limited, the Director responds that:

(1) the trial judge gave appropriate regard to the factors outlined in s. 1(2.1) of the *Act* which defines when a child is considered to be neglected, and applied them correctly to the facts;

(2) Child and Family Services provided all the appropriate services to promote family reunification, and any additional services were either not beneficial to the mother or rejected; and

(3) there is no requirement that a PGO must be preceded by a temporary guardianship order, and all the requirements for the issuance of a PGO under s. 34 of the *Act* were met.

6. Standard of Review

[76] According to the case law, the scope of review of a PGO is restricted to where the trial judge has acted on a wrong principle or disregarded material evidence, or where the decision is otherwise clearly wrong: see *T(M) v Alberta (Director of Child Welfare*), 2005 ABCA 125 at para 24, 363 AR 306; *O(TL) v Alberta (Director of Child Welfare)* (1995), 175 AR 194 (QB), 34 Alta. LR (3d) 194; *P(T) v Alberta (Director of Child Welfare)*, 1998 ABQB 892, 231 AR 115.

7. Analysis of the Grounds of Appeal

A. The Overall Sufficiency of the Trial Judge's Reasons

[77] The Appellant argues that the lack of reasons, specifically the failure to tie facts as found to the legal requirements for a PGO, impairs the analysis and makes it difficult or impossible to know the basis for the trial judge's conclusions.

[78] The failure to provide sufficient reasons may amount to a reviewable error of law. In *R v Sheppard* the Supreme Court of Canada stated that trial judges have a duty to provide adequate reasons for their decisions: 2002 SCC 26 at para 55, [2002] 1 SCR 869. The purpose for this duty is to justify and explain the result, to tell the losing party why he or she lost, to provide for informed consideration of any grounds of appeal, and to satisfy the public that justice has been done: *R v Walker*, 2008 SCC 34 at para 19, [2008] 2 SCR 245.

[79] In terms of appellate review, a discussion of the reasoning process and the factors considered in arriving at a decision reduces the possibility that a trial judgement has overlooked, under-emphasized or misinterpreted important points of fact or law: *R v M(RE)*, 2008 SCC 51 at paras 11-12, [2008] 3 SCR. 3. For the appellate court this component of the duty to give reasons is crucial for an effective review of trial decisions.

[80] While the duty to give reasons is most often discussed in the context of criminal matters, the underlying principles that caution against making conclusions without setting out reasons

also apply in child custody cases: *Young v Young*, 63 OR (3d) 112 (Ont CA) at para 27, 223 DLR (4th) 113.

[81] Child welfare matters are exceedingly demanding and time sensitive. The need for expediency in resolving custody and guardianship disputes often requires judges to issue oral decisions immediately. The trial judge in the case at bar acknowledged and responded to this very desire.

[82] It is also important, however, to ensure that judgements clearly set out how the decision-maker has interpreted the evidence and applied the law to the facts as found, especially since a PGO is among the most final of final awards. The overall sufficiency of the judicial reasons provided is to be measured in the context of the entirety of the evidence presented, especially when the thrust of the evidence demonstrates a particular pattern. There is no obligation on a trial judge to discuss every piece of evidence in detail, or at all, when explaining his or her reasons for awarding custody of a child: *Van de Perre v Edwards*, 2001 SCC 60 at para 10, [2001] 2 SCR 1014.

[83] The impugned decision is brief, but it is not so insufficient as to give rise to a separate ground of appeal.

[84] The trial judge appeared to turn her mind to all three requirements under the *Act* to ground a P.G.O under s. 34(1). First, the judge found the child had been neglected based on a failure of the mother to meet the child's emotional needs. Second, while the trial judge made no express finding that the child may not be adequately protected while in the mother's care, such is clearly implied. The finding that the mother was not providing the necessities of life is a part of the definition of neglect in s.2(2)(c), but this conclusion may also have been relevant to this second requirement. The trial judge noted the concerns stated by the Director about the mother having delusional thinking, hoarding, obsessiveness, extreme anxiety and social inhibition. While there was no statement as to whether this evidence was accepted or rejected by the trial judge, it appears to underpin the trial judge's conclusion. Third, the trial judge provided a conclusion on timing under s. 34(1)(c), a conclusion attacked by the Appellant as being in error, and not supported by the evidence, but the requirement was addressed.

[85] The trial judge considered some of the evidence, did not accept the mother's explanations and denials, outlined certain problematic behaviours of the mother and signalled what weight was given to which expert reports. In the circumstances this level of coverage and explanation means the reasons provided are not so insufficient that they amount to an independent error of law.

[86] However, this general finding of sufficiency does not preclude the Appellant from arguing that a particular conclusion was in error, or even that the paucity of reasons on a particular point was part of that error.

B. The Finding of Neglect

[87] The Appellant argues that the concerns established do not rise to the level of neglect. Subject to an important observation, the decision of the trial judge on this point, is supported by and explained by reference to evidence, is not obviously in error and attracts deference.

[88] While the mother's desire to care for the child was evident and she was able to provide adequate food, shelter and clothing to the child, there was other evidence, found to be more persuasive by the trial judge, that the mother lacked the knowledge and capacity to adequately care for the child. The trial judge found that the child had been emotionally injured by the mother. Under s. 1(3) a child is emotionally injured if there's an impairment of the child's mental or emotional functioning or development, and if there are reasonable and probable grounds to believe that the emotional injury is the result of rejection; emotional, social cognitive or physiological neglect or the deprivation of affection or cognitive stimulation.

[89] However, the evidence does not go so far as to support the view that the mother's disturbing behaviours caused the child's speech delays. The Director makes this suggestion and there are some indications that the trial judge may have accepted or might have been influenced by this assertion. No expert at trial was able to state that there was a causal link between the mother's parenting and the child's speech delays: see the transcript of the testimony of Ms. Bennett at page 60, lines 11-20, and Ms. Geiger at page 78, lines 9-13. Other evidence suggests that the child's serious speech delay may also not be probative of any previous maternal neglect. The child was also cared for by the grandmother and great grandmother and Ms. Bennett noted that even though the child was in a strong foster home, that had been using recommended strategies to encourage development, the child was still not making significant progress.

[90] On this point, whatever the cause of the child's developmental delay, on the whole of the evidence the trial judge found that the mother had not been capable of providing the parenting supports necessary for the child to develop at an age-appropriate level. The special developmental intervention required in concert with the mother's own psychological challenges and social inhibitions together indicate that she was unable to provide the necessities of life for her child as required by section 1(2.1). Consequently, the findings that the child was neglected as defined by the *Act* and intervention was necessary were both supported by the record and explained in the judgment.

C. *Were Insufficient or Inadequate Services Provided to the Mother to Meet the Objective of Family Reunification?*

[91] Under the *Act*, intervention services should be provided to the family, in so far as it is reasonably practicable, in a manner that supports family unity and prevents the need to remove the child from the family. The purpose of intervention services is intended to remedy or alleviate the condition that caused the child to be in need of intervention and it is recognized that intervention services are most effective when provided through a collaborative and multi-disciplinary approach.

[92] The Director was involved with the family beginning in April, 2009 and argues the department provided sufficient and adequate services to meet the objective of family reunification. There is no doubt that the Director required and provided many services: including facilitating a parenting assessment, a psychiatric assessment, multiple clinical consultations, a collaborative mental health consultation, a speech and language consultation for the child, and produced multiple home health reports, many case assessment records, family development programs service plans, progress reports and quarterly reports.

[93] The services were intended to be educative and supportive and involved a multi-disciplinary approach. By all reports the services provided designed to improve the relationship between the other and the grandmother were successful. Many interventions involved diagnostic tests intended to facilitate understanding of the mother's condition, and thereby lay the foundation for responsive support services.

[94] Despite this, there were certain problems associated with the services provided. First, much of the initial hands-on training with the mother was done before the parenting assessment by Dr. During was completed in April 2009. Before Dr. During's assessment, the cognitive limitations of the mother, while perhaps suspected, remained unconfirmed and unquantified. At that point in time there was an incomplete understanding of how this mother could best learn and benefit from the support provided – a fact that is especially important in light of the mother's cognitive delay. For example, the first case worker quit because she had to repeat herself with the mother: repetition according to Dr. During was not only to be expected, it was the manner in which instructive was to be given.

[95] Second, even after the parenting assessment there were differing views on what type of support the mother required. There was internal dispute within Child and Family Services about what the mother needed. While Dr. Filyk made no diagnosis of a mental illness, Dr. Filyk was of the view that the mother would benefit from therapy to deal with troubling behaviours. In contrast Ms. McCool explained that while Dr. Filyk suggested that exposure therapy was the best option, the Director's staff thought this was not a recommendation they believed would work with the mother. After Dr. During's recommendation were provided, Ms. McCool stated that no further professional investigations or diagnoses were conducted: see page 43, lines 1-9 of the transcript.

[96] Third, certain recommended services, like mother-child groups and video-taped feedback for the mother, as well as exposure therapy were not made available to the mother.

[97] Given the high level of support provided, any of the difficulties encountered do not amount to an independent ground on which to say the Director failed to meet its obligations. The Director need not provide all recommended services to discharge its obligation and there is no separate, distinct or free standing breach. However, the relationship and fit between what is needed and what was provided may be considered when assessing whether the child could or should be returned within a reasonable time.

D. Did the Trial Judge Err by Failing to Consider That a Temporary Guardianship Order Was Available before Granting a PGO

[98] There are many aspects to this claim, some of which overlap. The Appellant argues that it was not appropriate to move directly to grant a PGO when there were less intrusive orders available, there was no consideration given to family unity and no reasons given for why the court determined this requirement was satisfied in light of the competing evidence. Further, the Appellant argues that the evidence does not support a PGO. The Director argues that they have worked with the mother for 18 months, that progress has been slow or non-existent and she has refused counselling and support and is unable to parent without them.

i. A TGO is Not Required Before a TGO Can Be Sought or Granted

[99] In many cases the Director will seek a TGO before applying for a PGO, however, the *Act* does not require that one order precede the other.

[100] The jurisprudence is also clear that procedurally the Director is not obliged to obtain a TGO before applying for a PGO: see *F(T) v Alberta (Director of Child & Family Services)*, 2009 ABCA 290 at para 24, 70 R.F.L. (6th) 278; *S(T) v Alberta (Director of Child Welfare)*, 2002 ABCA 46 at paras 31 and 35, 299 A.R. 290.

[101] There is therefore no procedural basis on which to impugn the actions of the Director in applying for a PGO, or for the court awarding it.

[102] That said, the burden of proof remains on the Director to establish that all requirements of a PGO have been established on a balance of probabilities, whenever applied for.

ii. Sections 34 and 2 Are to be Read Together

[103] A trial judge must read s. 34 and s. 2 together and must be satisfied that the evidence supports the conclusion that the child cannot or should not be returned within a reasonable amount of time. Thus, a trial judge is obliged to consider the values found in s. 2 and ought to address whether a less disruptive measure may be appropriate, while still protecting the safety, security and development of the child.

[104] The Appellants argue that the trial judge failed to take any or sufficient account of the values in s.2 of the *Act*, specifically family unity.

[105] While the absence of an express reference to the statutory value of family reunification in the judgment is not fatal, the Alberta Court of Appeal noted in *C. (A.) v. Alberta (Director of Child Welfare)*:

> [T]here was nothing to indicate to the appeal justice that the trial judge had turned her mind to the possibility of granting a less intrusive order or why [...] she concluded that a P.G.O. rather than a T.G.O. was warranted.
>
> Our careful review of the evidence before the trial judge leads us to the view that there was insufficient evidence upon which to base [the trial judge's] conclusion that the mother could not, with ongoing therapy and in-house support, improve her parenting sufficiently within a reasonable time, and thus avoid the drastic measure of permanent separation of the family unit. The only expert testifying on this point repeated numerous times that he was unable to draw such a conclusion. For the judge to reach that conclusion herself was, in our view, an error warranting our intervention": 2008 ABCA 63, at paras 15-16, 429 AR 225.

[106] Similarly, there is nothing in the judgment under appeal to indicate that the trial judge had turned her mind to the possibility of granting a less intrusive order.

[107] There is also no clear or comprehensive map as to why the trial judge concluded that a PGO rather than a TGO was warranted.

[108] The trial judge framed the issue as to whether the mother had the ability to parent a special needs child, as set out in Josee Bennett's Report. This is an appropriate formulation which incorporates both past events, the recent diagnosis and predictions about future behaviour. However, on the crucial issue of timing under s. 34(1)(c), the trial judge did not reference the evidence on which her conclusion was based. There was no discussion of how the Director discharged the burden to demonstrate that the mother was unable to provide adequate care for the child within a reasonable amount of time – the critical distinction between when a temporary rather than permanent guardianship order is warranted.

[109] This Court is therefore required to conduct a careful review of the evidence before the trial judge to determine whether there was sufficient evidence upon which to base the conclusion, according to the Court of Appeal in *C. (A.)*, "that the mother could not, with ongoing therapy and in-house support, improve her parenting sufficiently within a reasonable time, and thus avoid the drastic measure of permanent separation of the family unit."

[110] In terms of determining what is a reasonable time for a child to be returned to their parent, the child's best interest – and special needs of the child in this case – must be the primary concern.

[111] There are some suggestions as to what may have been considered by the trial judge and there is some evidence in support of this finding. However, the burden on the Director is to show that the child cannot or should not be returned by a preponderance of evidence. As noted in *B(C) v Alberta (Director of Child Welfare)*, uncertainty cannot form the basis for a PGO and each criterion in section 34(1) must be proven according to the proper standard: 2007 ABQB 234 at para 101, 2007 ABQB 234.

[112] As such, the issue before this Court is focussed on whether the Director presented sufficient evidence to discharge its burden under section 34(1) of the *Act*. The evidence on whether the child may be returned within a reasonable time or cannot or should not be so returned is limited, nuanced and tends to point in different directions. I will consider the claims of the Director, address the expert evidence, discuss material evidence that was not considered in respect of the mother's refusal of treatment and support services and point to certain qualifications to the evidence that produce a more full, fair and complex picture.

iii. The Director's Evidence and Argument

[113] The Director presented evidence and argued that a PGO was warranted because they had worked with the mother for 18 months, she made little progress despite significant support, Dr. During's assessment spoke of a limited ability to parent independently without support and in-home support and counselling had been discontinued and refused.

[114] While many witnesses expressed that opinion, every aspect of this composite claim is subject to certain important qualifications. An assessment of the basis for those opinions should have been undertaken and close attention paid to the goals, terms and timing of the various supervision orders, as well as the responsiveness of the intervention services provided.

[115] Ms. McCool and Ms. Geiger justified their actions in proceeding to a PGO based on the above arguments. These two individuals held the same position of case manager with Child and Family Services. The opinion of the one should not be seen to be independent or corroborative of the other. For example, Ms. Geiger expressed the view that in the 18-months of in-home support that had been offered, no change in the mother's skills or behaviour had taken place. However, Ms. Geiger had no contact with the mother or child during any of the in home support and any testimony about her views of the mother's progress or lack thereof is derivative and based on the observations and opinions of others. After the apprehension Ms. Gieger visited the child at the foster home and had only limited contact with the mother, over arranging counselling and support services.

[116] In some instances, especially in relation to the Director's internal reports, the person writing the report had not met the mother and child, or either of them, and there was the restatement of past notes without the benefit of first hand experience.

[117] The running time of interaction with this family may have been 18 months, but the time directed to improving the mother's parenting skills was less than half that period. The procedural history demonstrates that the first two supervision orders were primarily directed to violence between mother and grandmother, and indeed after the orders the physical altercation stopped and communications improved. So less time has been devoted to teaching parenting skills than eighteen months and there was success on this aspect of the intervention.

[118] The in-home support provided was offered without the benefit of having Dr. During's recommendations until April 2009.The support services directed to parenting really began in earnest and were directed to known needs during the third supervision order. While there was some movement to implement concrete, hands-on teaching, with repetition, other recommended supports were not put in place.

[119] It is simply not accurate to say, in the general manner suggested, that the support services provided were not successful. Caseworker Sandy Pineda-Silva, who did have first hand experience, as she was the one providing the teaching, stated that there was little improvement in the parenting skills of the mother in their time together. However, there is other evidence that the mother may be slow to change but there has been progress. She acknowledged in testimony that she did not initially know what to do with a child: she was an only child, with no previous experience of caring for a child. Her starting point probably did not contain what many would expect to be common knowledge. The overlay of cognitive limitations, social isolation and behavioural issues means there is a real lack of knowledge and much territory to make up.

[120] Ms. McCool also testified that the mother moved into the basement suite in an attempt to act upon the suggestion that she try to become more independent. Likewise, in cross-examination Ms. McCool admitted that while the mother spoke of going to Los Angeles to audition for a soap opera, she never acted on any of her plans, nor was there concrete evidence that she planned to.

[121] The trial judge was critical of the mother for not taking sufficient steps to ensure the child was meeting developmental milestones. Ms. Geiger believed a parent had the responsibility to become familiar with child development and as such the mother ought to have known what milestones the child should have achieved at 12, 18 and 60 months. The trial judge was also critical of the mother's failure to address the child's lack of speech sooner and on her own accord. However, it is important not to measure the mother with the benefit of hindsight. The in-home workers, who are professionals, did not raise concerns about the child's speech until the child was almost two years old. The first evidence of others that Ms. McCool noticed some problems with the child's speech was in December 2009. The mother testified that she noticed his limited verbalizations but thought that as long as she spoke to the child, the child would learn by example.

[122] The fact that the child's special needs were only diagnosed after the child was apprehended means that there was no opportunity for the mother's to demonstrate whether she has the ability and willingness to do what will be necessary for this special needs child as the child's needs change. The mother said she would do what was necessary and that in light of this information her original hope that she could home school the child was no longer appropriate. Whether she is able to do so, with supports in place, is a difficult question that remained unexplored. She has shown some difficulties attending at such things as parenting assessments and dentist appointments, and the difficulties are disputed. Her evidence is that she took the child to the doctor for all necessary check-ups and as needed. She also quit smoking when she discovered she was pregnant, and maintained the common family areas of the home despite her

own room being in disarray, suggesting she may make changes for the child she was not prepared to make solely for herself.

[123] The record shows the mother implements suggestions slowly, but that her parenting skills have improved. For example, the trial judge noted that the mother did not take the child to the park when it was suggested by caseworkers. In reviewing the approximately 60 reports filed in respect to the supervised visits that took place after the child was apprehended, there are accounts of the mother and child being at the park together, as well as one instance where a supervisor refused to allow the mother to take the child to the park.

iv. The Mother's Refusal and Request of Counselling and Services

[124] The trial judge was influenced by the mother's refusal to follow suggested courses of treatment. The trial judge specifically noted her refusal as a teenager in 2004 to accept the recommendations to attend the early psychosis clinic given to her by Dr. Addington and the subsequent refusal by the mother to participate in intensive therapy as suggested by Dr. Filyk.

[125] However, the mother did attend some sessions with Dr. Addington and no reason was given as to why the number of sessions was limited. The accuracy of Dr. Addington's approach is open to interpretation and the weight to be given to the mother's failure to take the medication prescribed or to go further than she did in the program is equivocal. In later years Dr. Filyk could not confirm Dr. Addington's initial view that the mother suffered from bipolar disorder. Dr. Filyk's testimony on whether the drugs prescribed by Dr. Addington should have been taken is also interesting: she said there was a division of opinion about their benefit and some thought the risk of the medication outweighed its benefits.

[126] The mother stopped attending sessions with Dr. Filyk as she and the grandmother felt overburdened. That was clearly an error in judgment.

[127] In-home services were stopped after there was a meeting in which there was some pointed verbal exchanges. At trial the mother explained that she thought she no longer needed support as she had been praised by her caseworker and felt betrayed at the meeting when the caseworker spoke of her deficiencies.

[128] A key point in relation to counselling and services, that was not even mentioned by the trial judge and was not put to Dr. During when asked for her opinion, is that the mother had recommenced therapy in 2010 and had asked for support services and was on a wait list for support services before the trial. While Ms. Geiger said she thought such efforts were essentially strategic and too little too late, there was no mention of this important fact by the trial judge. This material omission is serious and creates the impression not only that all the evidence was not considered but that a linchpin fact supporting the Director's argument was only partially true.

v. The Supervised Visits

[129] The trial judge also failed to mention or consider that after the child was apprehended the mother had over 60 supervised visits with the child, which suggests a dedication and long-term commitment to her relationship with the child; one that appears at odds with the Director's claim that persons with her characteristics lack resolve. Further, the supervised visit reports show increased verbal engagement between the mother and the child and no problems were noted.

vi. The Evidence of the Experts

[130] The trial judge specifically stated that considerable weight was given to the opinions of three experts. Two of these experts, however, did not address the issue of whether the child could have been returned to the mother within a reasonable amount of time. Dr During's testimony provides some evidence on which a court could conclude that the child could not be returned within a reasonable time. However, there are limits on that evidence that suggest it is not sufficient on a balance of probabilities, especially in light of other evidence and the value of family re-unification.

[131] Ms. Bennett wrote in her report that the child needed permanency and that the window of opportunity for forming healthy attachment to a primary caregiver was closing rapidly. The main reason she said the child urgently needed permanency was because the child had a significant break with the primary attachment figure (when the child was apprehended and placed in a foster home). Ms. Bennet also commented on how this child needed a caregiver who could work collaboratively with the necessary support services and who could demonstrate an understanding of the child's special needs.

[132] Ms. Pirie, who was part of the same collaborative health team, testified to the importance of seeing the mother and child together before making an assessment. Ms. Bennett admitted that she had not met the mother and had relied upon information obtained by others about the mother's cognitive function and ability to follow through with support services. Ms. Bennett specifically admitted she was not in a position to say whether the mother was capable of performing her role, talking instead about the level of commitment and integration that would be required "whoever the caregiver is": see page 58, lines 21-24 of the transcript. As such, little or no weight can be placed on Ms. Bennett's testimony in regards to this factor.

[133] Dr. Filyk provided no useful information on whether the mother would be able to learn to parent the child adequately within a reasonable time. When asked in cross-examination about whether the mother could be taught or coached in how to respond when the child gives a cue, she answered (at page 121, lines 28 to 32 of the transcript):

> Well, I didn't actually address that or address that too directly. I observed [the mother] in her home and I observed [the mother's] interaction with [the child] at that case conference. So on the two occasions I think it was only that I saw them together. I observed but I didn't directly try to coach or teach her. I didn't engage in infant/parent psychotherapy...

[134] Dr During, on the other hand, did give evidence on whether the mother could be in a position to meet the child's needs, speaking to the factor of timing under section 34(1)(c) of the *Act*.

[135] There are some differences between her written report and her testimony and there is also a tension between various strands of her views. On the one hand she spoke to and outlined recommendations for the mother to improve her parenting skills. This was accepted as the basis of the Director's third apprehension order showing some willingness to allow the mother to improve her parenting abilities.

[136] On the other hand, Dr. During predicted that if there were improvements, they would be relatively small and based on a fair amount of intervention. She concluded in her written report that it would not be possible for the mother to parent in any independent manner. While no time frame is provided in her report, the implication appears to be that she meant at present or anytime in the foreseeable future.

[137] In her testimony Dr. During noted the need for long- term support for someone with this type of cognitive delay (at page 147, lines 17-22 of the transcript), stating:

> [...] with this level of cognitive limitation we would have to say that the parent is going to require long-term support. So it's not that we could instruct them and– and give them some guidance, and then they would go away and be able to function independently. What we see over time, and we followed many cases, that they need that level of support long-term.

[138] There would be challenges associated with a fairly long and intense period of intervention and the willingness of a parent to stay motivated.

[139] In terms of the potential for success at parenting her child without invention and support, Dr. During made the following comments as part of her examination (at page 139, lines 20-35 of the transcript):

Q Okay. If you learned that-- that hands-on in-home support had been provided but then terminated by [the mother], no longer willing to participate, what-- how would you-- what impact would that have on --on a prognosis for successful parenting?

A Well, definitely that would interfere given the level of concern and need that was outlined in the report. And this is something again that we typically see in parents that present with their personality and cognitive profile as [the mother], that at times they initiate, they begin, but they then cannot withstand the degree of intervention in terms of intensity and duration, and that they very frequently prematurely terminate.

Q So how would that termination impact your prognosis in terms of successful parenting down the road?

A Well, we-- if we look at what that would mean it would be that we would have to assume that the parent then can take that task on independently without that degree of in-home assistance, which, of course, is not the case here and that [the mother] has shown that that's very difficult for her to do, and so we could not assume that she could take that on her own and learn those tasks.

[140] The questions posed to Dr. During's asked her to assume that all supports were refused. She was not asked what her opinion would be if the mother had recommenced therapy and was on the wait list for in home support at the time of trial.

[141] If counselling and supports continued to have been refused by the mother, the evidence of Dr. During may have been sufficient for the Director to prove that the child cannot or should not be returned to the mother within a reasonable time. However, the mother's willingness to continue counselling and receive support changes the basis for Dr. During's assessment. At the time of trial Dr. During's assessment was over a year old. In response to questions about its currency Dr. During said that if the mother had not taken any of the recommended steps, little change would have occurred. While other steps had been taken, the renewal of counselling may also call into question whether there had been changes in the year since Dr. During's report was completed.

[142] Otherwise the thrust of Dr. During's opinion and the operative assumption of the Director's intervention services was that the mother is teachable, albeit with appropriate long term supports.

vi. Inconsistencies in the Evidence

[143] Certain small inconsistencies in the evidence were not noted or explained by the trial judge, which may have suggested to the mother that the whole of the evidence was not considered or that she was being judged harshly.

[144] For example, the mother had very limited financial resources, but the trial judge commented that the mother found funds for the music lessons she wanted. However, the time frame for the assessment was June 2008 to September 2008. The music lessons, paid for by the mother's father, did not commence until a year later in November 2009.

vii. Conclusion

[145] The *Act* requires a careful consideration of competing interests at every juncture and sets out a range of available orders with their own separate requirements. Taken as a whole the *Act* promotes family unity and establishes an incremental structure, with a progression from the least to the most invasive intervention.

[146] To obtain a PGO the Director is required to satisfy the court on a balance of probabilities that it cannot be anticipated that the child could or should be returned to the custody of the child's guardian within a reasonable time.

[147] After spending months reviewing the record, the evidence falls short of what is required. The Director's evidence on the final requirement for a PGO was limited and equivocal and the judge's view of the evidence was unexplained, making it difficult to infer that a less intrusive option was considered. The picture and pattern that emerges after a full analysis is much more complex, difficult and nuanced than suggested by the Director. Acknowledging that the trial judge had the full benefit of hearing all the witnesses, the review of the record shows there are qualifications and clarifications to the Director's claim that are not insignificant, that were not referred to and appear not to have been weighed in the balance. It is an error not to consider all the evidence. There are too many, limitations, gaps, omissions and uncertainties, and unanswered questions, including the role that may be played by the grandmother, to conclude that it "cannot be anticipated" that the child could or should be returned. I note further that a PGO is to not be granted on the basis of uncertainty.
[148] Further, the *Act* tells courts to consider the least invasive order and to attempt to promote family unity.

[149] Surprisingly, given the facts and that there were never any safety or security issues raised in relation to the mother's care of the child, no consideration was given to allowing continued visits or access to the mother, even if a PGO was warranted. In a very real way such would promote family unit while ensuring that the emerging and evolving developmental child's needs were being met. There was no evidence that allowing the mother to continue a relationship with the child would reduce the chances of the child receiving a suitable placement.

[150] The mother's cognitive delays and mental health issues may have played a part in her failing to appreciate the seriousness of what was happening and the consequences of failing to confront any issue that would prevent the child from developing to the best of the child's abilities. I am left with the impression that there was fatigue and frustration on the part of the mother, grandmother and the Director. The mother may not have initially appreciated what was truly at stake. At a minimum this process has brought clarity that more is necessary.

7. Remedy

[151] After a great deal of time with and in consideration of the record, I find that there was insufficient evidence on which to conclude that a PGO was warranted, especially given the legislative value of family unification and the obligation on courts to make the least intrusive intervention required to secure the safety of the child.

[152] In the case at bar, the mother has shown commitment and desire but lacks knowledge, resources and perhaps the ability to meet all the needs of this child. The child's special needs are real, intensive and long term, but were only recently diagnosed. The mother has not been given the opportunity to demonstrate whether she can meet those needs, especially since she has shown

a renewed willingness to confront her issues with counselling and increase her knowledge with support services. There will need to be commitment on both sides, adequate supports, even if long term, and an appreciation by the mother of the resolve, commitment and self sacrifice required to parent a special needs child.

[153] Under s. 117(2) of the *Act*, it is open to me to make any order that could have been made by the trial judge. The evidence supported the granting of a TGO; it was not shown that it "cannot be anticipated" for a PGO, so the residual category is, to use the words of s. 31(1), that "it can be anticipated that within a reasonable time the child may be returned to the custody of the guardian."

[154] A TGO is granted in favour of the Director for a six month period from today's date. The Director may exercise the rights of a guardian in relation to this child, including where the child resides. The parties are to work together to explore counselling and support options, and provide for visitations.

[155] Whether the child will be returned to the mother remains to be seen. A TGO is available when it can be anticipated that the child "may" be returned to the Guardian. The *Act* requires steps be taken to promote family unity because these matters are not known and the result of efforts cannot, on this mixed record, be approached as a foregone conclusion. It is crucial that in matters of such importance and finality courts are scrupulous with evidence and respect fully the values set out by the legislature and not rush forward.

[156] If there are disputes concerning the TGO, the *Act* provides that the parties may return before me.

Appeal heard June 10 to 13, 2011.
Written submissions received April 27, 29, May 10 and 13, 2011.
Dated at the City of Calgary, Alberta this 26th day of September, 2011.

S. L. Martin
J.C.Q.B.A.

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