

Director v M.G.N. and M.D.J., J.M.S., and M.J., 2023 BCPC 154.

Summary:

J.M.S. is applying for an order under the [Family Law Act](#) (FLA) to be added as a guardian to the [Child, Family and Community Service Act](#) (CFCSA) proceedings. J.M.S. is former foster parent of the child, M.J.N., and such an order would provide her all-parenting responsibilities. Court makes clear they are not determining if J.M.S. is a guardian, only if J.M.S. has standing to bring this application. Ferriss, J. determines that restricting who can apply for guardianship within interpretation of legislation is predetermining a child's best interest – this cannot happen as best interest needs to be a case-by-case determination. Thus, J.M.S. has standing to apply to be a guardian.

JURISDICTION	British Columbia
COURT	Provincial Court of British Columbia
JUDGE	Ferriss J
PARTIES	<u>Parties in matter of The Child, Family and Community Service Act (CFCSA), R.S.B.C. 1996 c. 46:</u> Applicant 1. Director of Child, Family and Community Service [Director] Respondent(s) 1. M.G.N. Mother 2. M.D.J. Father <u>Parties in matter of the Family Relations Act (FRA), R.S.B.C. 1996 c. 128</u> Applicant 1. J.M.S. Former foster mother Respondents 1. M.D.J. Father 2. M.G.N. Mother
TREATY TERRITORY	None.
INDIGENOUS GROUP, COMMUNITY, OR PEOPLE	Omitted for publication.
APPLICABLE INDIGENOUS LAW	None.
TOPICS	Best Interests Foster Parents Parties

LEGISLATION CITED	<i>Child, Family and Community Service Act</i>, RSBC 1996, c 46. (CFCSA) Sections 1(“Parent”; “Caregiver”; “Custody”); 2; 32; 40; 41; 45(1.1); 47; 50; 54; 56 <i>Family Law Act</i>, SBC 2011, c 25. (FLA) Sections 37; 39; 50; 51
CASE LAW CONSIDERED	British Columbia (Director of Family and Child Services) v MK, 2000 BCPC. <i>British Columbia (Director of Family and Child Services) v PK and TK</i>, 2002 BCSC 1762. <i>CK v The Director, Ministry of Children and Family Development and British Columbia (Attorney-General)</i>, 2003 BCSC 785. <i>Director and L et al</i>, 2014 BCPC 284. Director of Child, Family and Community Service v B and D, (12 July 2002). <i>Director of Family and Child Services v K (P)</i>, 2002 BCSC 1762. <i>Director v ML</i>, 2005 BCPC 77. <i>Galbraith v Superintendent of Family and Child Service</i>, 1981 CanLII 783 (BCSC). <i>JMDC v DIDC</i>, 2019 BCSC 172. <i>JMS v British Columbia (Director of Child, Family and Community Services)</i>, 2021 BCSC 2104. <i>K v HMTQ (BC) & Others</i>, 2003 BCSC 1248. <i>LJG v NB</i>, 2017 BCSC 350. <i>LM v British Columbia (Director of Child, Family and Community Services)</i>, 2015 BCSC 2261. <i>LM v British Columbia (Director of Child, Family and Community Services)</i>, 2016 BCCA 367. <i>LM v British Columbia (Director of Child, Family and Community Services)</i>, 2016 BCSC 275.

	<u><i>LS and SS v British Columbia (Ministry of Children and Family Development)</i>, 2004 BCCA 244.</u> <u><i>LS and SS v The Ministry of Children and Family Development et al</i>, 2003 BCSC 429.</u> <u><i>M v W</i>, 1985 CanLII 442 (BCSC).</u> <u><i>NK v British Columbia (Director, CFCSA)</i>, 2008 BCSC 1321.</u> <u><i>P (E) v BC (Supt. Of Family and Child Service)</i>, 1988 CanLII 2985 (BCCA).</u> <u><i>Re Mirasty (sub nom M (R) v C (BA))</i>, 1984 CanLII 5388 (FCA).</u> <u><i>RL and TL v Children’s Aid Society of the Niagara Region</i>, 2002 CanLII 41858 (ONCA).</u> <u><i>The Director of Child, Family and Community Service v K</i>, 2003 BCSC 742.</u> <u><i>TL v British Columbia (Attorney General)</i>, 2023 BCCA 167.</u> <u><i>WN v CG</i>, 2012 BCCA 149.</u>
CASE HISTORY	None.

CASE BRIEF

DECISION

- J.M.S. has standing to apply to be a guardian of M.J.N.
- The application for guardianship should be heard the same as the Director's application for a continuing custody order (CCO).

FACTS

- M.J.N. is child of M.G.N. and M.D.J.
- Child is Métis.
- Director has been involved since birth, has a temporary custody order (TCO) and is apply for a CCO.
- J.M.S. is applying to be added as guardian under FLA.
- This would terminate the parents' (M.G.N. and M.D.J.) guardianship and give J.M.S. all parenting responsibilities and parenting time.
- J.M.S. is Métis.
- Director does not agree with application of J.M.S. and intends to continue with CCO application.
- Métis Commission agrees with this application.
- M.D.J. has not been involved with proceedings, M.G.N. opposes all applications.
- After birth, M.G.N. leaves hospital indicating no intention to parent M.J.N.
- Director enters Voluntary Care Agreement (VCA) with M.D.J., but he does not follow through with services and child is placed with J.M.S.
- Finding of protection is made under s.40 CFCSA with TCO to director.
- Director makes multiple applications under s. 45(1.1) of CFCSA, extending duration M.J.N. can remain in the temporary care of the society (at time of hearing, has been in care for over 3.5 years).
- Director says extension is to allow M.J.N. access to M.D.J. and other family members, in effort to explore alternative permanency plans.
- M.J.N. is moved to non-Indigenous foster home in October 2021.

ISSUE

1. Whether J.M.S. has standing to bring her application under the FLA

ANALYSIS

** Note that FLA replaces the FRA in 2013. **

- s. 1 CFCSA – definition of a parent.
 - Does not include caregiver (foster parent) or Director.
 - Can be someone given custody by court order or arrangement.
 - Custody includes care and guardianship of a child.
 - Those who were guardians prior to the order being made maintain their status as guardians.
- s. 2 CFCSA – Act must be interpreted so that safety and well-being of children is paramount.
 - S. 2(b) & 2(b1) – Family is preferred environment for care. Indigenous families and Indigenous communities share the responsibility for care. .
- 3 stages to proceedings after child is removed under CFCSA
 - Presentation hearing or interim stage
 - The protection hearing or temporary order stage
 - The permanent stage
- S. 41(2) CFCSA – court cannot order continuing custody of the Director unless
 - Parent has not be found after diligent search
 - A parent us unwilling or unable to resume custody
 - The nature / extent of the harm is such that it would not be in the child’s best interests to be returned to the parent.
 - Director and L. et al, 2014 BCPC 284 – At the interim stage, a guardian who did not have primary residency at the time of removal can be considered a ‘parent apparently entitled to custody’.
- s. 50 FLA – once a CCO has been made, any guardianship orders under the FLA are no longer of any effect.
 - Case law is clear that one Director has obtained a CCO, foster parent rights are limited.
 - Cannot apply to set aside CCO

- Have no standing to ask for return of the child if the Director moves them to a different home
 - Cannot petition for adoption unless the Director consents to that adoption.
 - There is good policy reason for these limitations – without them, the Director's actions to plan for a child's future would be compromised.
 - The jurisdiction of the court under the FRA is not necessarily ousted where CFCSA proceedings are underway.
 - Re Mirasty et al. and Charles et al., (1984), 1984 CanLII 395 (BCCA).
 - In a case of conflict between the CFCSA and the FLA, the CFCSA is paramount.
 - The CFCSA's guiding principles of returning children to their natural parents as soon as possible apply to determinations requiring state intervention, not to questions of custody for any other purpose.
- S. 51(1) FLA – authority for a court to appoint or terminate a person as a child's guardian.
 - No limit on foster parents' standing to apply to be guardians.
 - Requires 'modern principle / approach' to statutory interpretation.
 - Section must be given its plain meaning – on application any person may be appointed as guardian.
 - Any person includes a foster parent or a former foster parent.
 - If the legislation restricted who could apply to be a guardian without hearing evidence on the child's best interests, it would be essentially predetermining the best interest of the child.
 - You cannot predetermine best interest – family cases are too nuanced and have their own facts to examine.
 - Only consideration when dealing with children under FLA is the best interests.
 - J.M.S. argues applicability of The Federal Act – as J.M.S. has standing to make application under the FLA, there is no need to conduct an analysis of this legislation.

RELEVANT EXCERPTS

[34] Nothing in s. 51 limits who can apply to be a guardian and I note that, while s. 51 of the FRA refers to the CFCSA, there is no limit placed on the foster parents' standing to apply to be guardians.

[59] Section 50 sets out the effect of a continuing custody order. The Director becomes the sole personal guardian of the child and may consent to the child's adoption. The Public Guardian and Trustee becomes the sole property guardian of the child. Any guardianship orders under the FLA are no longer of any effect.

[60] The case law is clear that once the Director has obtained a CCO, foster parents have few rights regarding the child in their care. For instance, they have no right to petition for adoption unless the Director consents to that adoption; they have no standing to apply to set aside a CCO under s. 54 of the CFCSA; and they have no standing to ask the court to return a child to them if the Director decides to move the child to another foster home.

[103] The Supreme Court determined that it would be unfair to permit the foster parents to rely on the bond established between them and the children as foster parents in an application under the FRA. To permit that reliance would be contrary to public policy and would undermine their role as foster parents. It would be unfair to the parents to be in competition with the foster parents and it would override the decision made by the Director.

[136] I find that s. 51 of the FLA must be given its plain meaning which is that on application, any person may be appointed as a guardian. Any person includes a foster parent or former foster parent.

[139] The M. v. W. and K.(P.) decisions were released long before the FLA came into effect. Yet no changes were made to the wording as to who could apply for guardianship. In my view, no changes could be made because it is too difficult to determine who is or will be "family" to a child. To predetermine a child's best interests by restricting who can apply to be a guardian without hearing evidence on the child's best interests would be contrary to the Court of Appeal's decision in W.N. Accordingly, I find that J.M.S. has standing to apply to be a guardian of M.J.N.

LEGISLATION CITED

[Child, Family and Community Service Act, RSBC 1996, c 46.](#)

Section 1 – Definitions and Interpretation

1 (1) In this Act:

"caregiver" means a person with whom a child is placed by a director and who, by agreement with the director, is authorized to carry out the rights and responsibilities, under the agreement, of the director;

"custody" includes care and guardianship of a child;

"parent" includes

(a) a person to whom guardianship or custody of a child has been granted by a court of competent jurisdiction or by an agreement, and

(b) a person with whom a child resides and who stands in place of the child's parent or guardian,

but does not include a caregiver, prospective adoptive parent or director;

Section 2 – Guiding Principles

2 This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

(a) children are entitled to be protected from abuse, neglect and harm or threat of harm;

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;

(b.1) Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;

(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

- (d) the child's views should be taken into account when decisions relating to a child are made;
- (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
- (f) Indigenous children are entitled to
 - (i) learn about and practise their Indigenous traditions, customs and languages, and
 - (ii) belong to their Indigenous communities;
- (g) decisions relating to children should be made and implemented in a timely manner.

Section 32 – Care of Child if Child Removed

32 (1) If a child is removed under section 30, 36 or 42, the director has care of the child until

- (a) the child is returned by the director under section 33 (1) or (1.1),
- (a.1) the director withdraws from a presentation hearing under section 33.01 (1),
- (b) the court makes an interim order about the child under section 35 (2), 36 (3) or 42.1 (6), or
- (c) the child is returned by the court under section 35 (2) (c),
- (d) [Repealed 1999-26-13.]

whichever happens first.

(2) While the child is in the director's care, the director may

- (a) authorize a health care provider to examine the child, and
- (b) consent to necessary health care for the child if, in the opinion of a health care provider, the health care should be provided without delay.

(3) On consenting to health care for the child, the director must, if practicable, notify the parent who at the time of the child's removal was apparently entitled to custody.

(4) Subsection (2) does not affect a child's right under section 17 of the [Infants Act](#) to consent to health care.

(5) While the child is in the director's care, the director may consent to the child's participation in routine school, social or recreational activities.

Section 40 – Protection Hearing

40 (1) At the protection hearing the court must determine whether the child needs protection.

(2) If the court finds that the child does not need protection, it must

(a) if the child was removed, order the director to return the child as soon as possible to the parent apparently entitled to custody unless the child has already been returned, and

(b) terminate any interim order made under sections 33.2 (2), 35 (2) and 36 (3).

(3) If the court finds that the child needs protection, it

(a) must consider the plan of care presented by the director, and

(b) may hear any more evidence the court considers necessary to help it determine which order should be made under section 41.

Section 41 – Orders Made at Protection Proceeding

41 (1) Subject to subsection (2.1), if the court finds that the child needs protection, it must make one of the following orders in the child's best interests:

(a) that the child be returned to or remain in the custody of the parent apparently entitled to custody and be under the director's supervision for a specified period of up to 6 months;

(b) that the child be placed in the custody of a person other than a parent with the consent of the other person and under the director's supervision, for a specified period in accordance with section 43;

(c) that the child remain or be placed in the custody of the director for a specified period in accordance with section 43;

(d) that the child be placed in the continuing custody of the director.

(1.1) When an order is made under subsection (1) (b) or (c), the court may order that on the expiry of the order under subsection (1) (b) or (c) the child

(a) be returned to the parent, and

(b) be under the director's supervision for a specified period of up to 6 months.

(2) The court must not order under subsection (1) (d) that the child be placed in the continuing custody of the director unless

(a) the identity or location of a parent of the child has not been found after a diligent search and is not likely to be found,

(b) a parent is unable or unwilling to resume custody of the child, or

(c) the nature and extent of the harm the child has suffered or the likelihood that the child will suffer harm is such that there is little prospect it would be in the child's best interests to be returned to the parent.

(2.1) If an order was made under section 33.2 (2), the child has not been removed since that order was made and the court finds that the child needs protection, the court must order that the director supervise the child's care for a specified period of up to 6 months.

(3) The court may attach to an order under this section any terms or conditions recommended by the director to implement a plan of care.

Section 45(1.1) - Total Period of Temporary Custody

(1.1) On application the court may extend, by a specified period, a time limit in subsection (1) if the court considers it in the child's best interests to do so.

Section 47 – Effect of Interim or Temporary Custody Order

47 (1) A director who has custody of a child under an interim order or temporary custody order has the following rights and responsibilities unless they are limited by the court under subsection (3) of this section:

- (a) to consent to health care for the child;
- (b) to make necessary decisions about the child's education and religious upbringing;
- (c) to exercise any other rights and to carry out any other responsibilities of a personal guardian of the child, except the right to consent to the child's adoption.

(2) Any other person who has custody of a child under an interim order or a temporary custody order has the same rights and responsibilities that a director has under subsection (1) unless they are limited by the court under subsection (3).

(3) When an interim order is made under section 35 (2) (a) or (d) or 42.1 (6) or a temporary custody order is made, the court may, in the child's best interests, order that the parent retain either or both of the following rights:

- (a) to consent to health care for the child;
- (b) to make necessary decisions about the child's education and religious upbringing.

(4) Neither subsection (1) (a) nor an order under subsection (3) (a) affects a child's right under section 17 of the [Infants Act](#) to consent to health care.

(5) No order may be made under subsection (3) (a) if the parent's failure to consent to health care was a reason for removing the child or for finding that the child needed protection.

(6) If a parent who retains the right to consent to health care for a child is unavailable or unable to consent to health care that is essential to preserve the child's life or to prevent serious or permanent impairment of the child's health, the director may consent instead of the parent.

Section 50 – Effect of Continuing Custody Order

50 (1) When an order is made placing a child in the continuing custody of a director,

- (a) the director becomes the sole personal guardian of the child and may consent to the child's adoption,
- (b) the Public Guardian and Trustee becomes the sole property guardian of the child, and
- (c) the order does not affect the child's rights respecting inheritance or succession to property.

(2) At least 30 days before consenting under section 13 (3) of the [Adoption Act](#) to the child's adoption, the director must inform any person who, under section 56 of this Act, has been given access to the child of the director's intention to consent to the adoption.

(3) Subsection (1) (c) does not affect the operation of the [Adoption Act](#).

(4) The director must send a copy of the continuing custody order to the following:

- (a) the Public Guardian and Trustee;
- (b) if the child is a First Nation child, the designated representative of the First Nation;
- (c) if the child is a Nisga'a child, the designated representative of the Nisga'a Lisims Government;
- (d) if the child is a Treaty First Nation child, the designated representative of the Treaty First Nation;
- (e) if the child is not a First Nation child, a Nisga'a child nor a Treaty First Nation child but is an Indigenous child, the designated representative of another Indigenous community that has been identified by
 - (i) the child, if 12 years of age or over, or
 - (ii) the parent, if the child is under 12 years of age.

Section 54 – Cancellation of Continuing Custody Order

54 (1) With the permission of the court, a director or a party to a proceeding in which a continuing custody order was made may apply to the court for the cancellation of the order if the circumstances that caused the court to make the order have changed significantly.

(2) At least 10 days before the date set for hearing the application for permission to apply for cancellation of the continuing custody order, notice of the application must be served on the following:

- (a) the child, if 12 years of age or over;
- (b) the persons who under section 49 (3) are entitled to notice;
- (c) the Public Guardian and Trustee;
- (d) the director;
- (e) the parties to the proceeding in which the continuing custody order was made;
- (f) any person listed in section 49 (2) (b) to (d) who is not already entitled to notice under paragraph (b) or (e) of this subsection.

(2.1) If a person referred to in subsection (2) (d) to (f) appears at the commencement of the hearing, that person is entitled to be a party at the hearing.

(3) If permission is granted, the court must set a date for hearing the application for cancellation of the continuing custody order.

(4) After considering the importance of continuity in the child's care and the effect of maintaining a relationship the child has with any person, the court may cancel the continuing custody order, but only if it is satisfied that

- (a) the circumstances that caused the court to make the order have changed significantly,
and
- (b) cancelling the order is in the child's best interests.

Section 56 – Access to Child in Continuing Custody of Director

56 (1) If a continuing custody order is in effect, a parent or any other person may apply to the court for access to the child.

(2) At least 10 days before the date set for hearing the application, notice of the hearing must be served on

(a) the child, if 12 years of age or over,

(b) the director, and

(c) the parties to the proceeding in which the continuing custody order was made.

(2.1) If a person referred to in subsection (2) (b) or (c) appears at the commencement of the hearing, that person is entitled to be a party at the hearing.

(3) The court may order that the applicant be given access to the child if access

(a) is in the child's best interests,

(b) is consistent with the plan of care, and

(c) is consistent with the wishes of the child, if 12 years of age or over.

[Family Law Act, SBC 2011, c 25.](#)

Section 37 – Best Interests of Child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

(a) the child's health and emotional well-being;

(b) the child's views, unless it would be inappropriate to consider them;

(c) the nature and strength of the relationships between the child and significant persons in the child's life;

(d) the history of the child's care;

(e) the child's need for stability, given the child's age and stage of development;

(f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities;

(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

(3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

(4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

Section 39 – Parents are Generally Guardians

39 (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.

(2) Despite subsection (1), an agreement or order made after separation or when the parents are about to separate may provide that a parent is not the child's guardian.

(3) A parent who has never resided with the parent's child is not the child's guardian unless one of the following applies:

- (a) section 30 [parentage if other arrangement] applies and the person is a parent under that section;
- (b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;
- (c) the parent regularly cares for the child.

(4) If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.

Section 50 – Agreements Respecting Guardianship

50 A person cannot become a child's guardian by agreement except

- (a) if the person is the child's parent, or
- (b) as provided under this Division, the [Adoption Act](#) or the [Child, Family and Community Service Act](#).

Section 51 – Orders Respecting Guardianship

51 (1) On application, a court may

- (a) appoint a person as a child's guardian, or
- (b) except in the case of a director who is a child's guardian under the [Adoption Act](#) or the [Child, Family and Community Service Act](#), terminate a person's guardianship of a child.

(2) An applicant under subsection (1) (a) of this section must provide evidence to the court, in accordance with the Supreme Court Family Rules or the Provincial Court Family Rules, respecting the best interests of the child as described in section 37 [best interests of child] of this Act.

(3) Subsection (2) of this section applies regardless of whether there is consent to the application under section 219 [persons may consent to order being made].

(4) If a child is 12 years of age or older, a court must not appoint a person other than a parent as the child's guardian without the child's written approval, unless satisfied that the appointment is in the best interests of the child.

(5) A person who has custody of a child under section 54.01 (5) or 54.1 of the [Child, Family and Community Service Act](#) is deemed, for the purposes of this Act, to be a guardian appointed under subsection (1) of this section.