NOVA SCOTIA COURT OF APPEAL
Citation: A.M.S. v. Children's Aid Society of Halifax, 2006 NSCA 67

Date: 20060601
Docket: CA 262675
Registry: Halifax

Between:

A.M.S.

Appellant

v.

Children's Aid Society of Halifax, D.H. and R.S.

Respondents

Restriction on publication: pursuant to s. 94(1) of the **Children and Family Services Act**

Judges: MacDonald, C.J.N.S.; Freeman and Bateman, JJ.A.

Appeal Heard: May 26, 2006, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; MacDonald, C.J.N.S. and Freeman, J.A. concurring.

Counsel: David Grant, for the appellant
Elizabeth Whelton, for the respondent, Children's Aid Society of Halifax
Respondents, D.H. and R.S. not appearing
Thilairani Pillay, for the Minister of Community Services not appearing

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

[1] This is an appeal by A.M.S., the paternal grandmother of three children who were ordered into the permanent care of the Children's Aid Society ("the Agency") by Justice Douglas C. Campbell of the Supreme Court of Nova Scotia (Family Division). Ms. S. says the children should have been placed in her care or custody.

BACKGROUND:

[2] The three children here were approximately ages five, four and one and one-half years, at the time of the disposition hearing. The older two children were born in British Columbia and the youngest in Nova Scotia.

[3] The family has a consistent history of involvement by child welfare authorities which began prior to the birth of the first child on November (*editor's note- date removed to protect identity*), 2000. The evidence, accepted by the trial judge, was that at that time and following the birth the family was living in filthy conditions, there was drug and alcohol abuse by the parents and a large number of people resided in the home where there was a complete lack of household management.

[4] After the first child's birth, a teaching homemaker was made available to the couple with the baby in the parents care subject to agency supervision. By March 15th, 2001 the baby was taken into care. After 14 months she was returned to the parents' care under court ordered supervision which continued until May 14, 2002.

[5] In the meantime, on October (*editor's note- date removed to protect identity*), 2001, the second child was born and taken into Agency care at birth. She remained in care for approximately seven months until she, along with the first born child, was returned to the parents under a supervision order. Extensive services were provided by the agency to work with the couple in addressing conditions of filth and a lack of general household management and to assist in developing parenting skills to address the parents' significant deficits in the physical care of the young children. Eventually the supervision order was terminated.

[6] Approximately three months later, in November 2002, the family moved to Boston Bar, British Columbia where the local agency operating there became involved after a referral from the RCMP. That agency found the home and children were dangerously unkempt. The children were dirty with matted hair. Their home was in disarray with garbage, rotting food and fleas. The complete lack of parenting skills was apparent. The children were again taken into care, this time for eleven months. They were returned under court ordered supervision which lasted six months. The B.C. agency eventually made application for permanent care.

[7] Pending the determination of that application, the agency made a last ditch effort to equip the parents with the necessary parenting and household management skills so as to allow for safe return of the children. Extensive and intensive hands-on in-home training and services were implemented. This necessitated two in-home workers as well as counselling for both anger management and anxiety as well as stress related mental health issues for the father.

[8] The parents simply could not establish an independent ability to perform the basic tasks of running a safe and clean household and parenting the children. By January 21, 2004, the home, after having been kept clean for some time with the assistance of services, reverted to its previous filthy state.

[9] The parents took the children to Vernon, British Columbia to visit the appellant, Ms. S., and decided to stay. The supervision order was not renewed because Vernon was outside the jurisdiction of the Boston Bar agency.

[10] On May 19, 2004, a new referral about the family was made indicating the same complaints of household filth and a complete lack of personal hygiene in the children. However, in June 2004, before the agency in Vernon, B.C. could locate them, the family along with Ms. S. and her daughter, D., left British Columbia to move back to Nova Scotia. They travelled in a van with only two seats and a mattress in the back - the father, the very pregnant mother, Ms. S., her teenage daughter and the two young children. Without the financial resources to make the trip, they stopped twice along the way to obtain social assistance.

[11] On July 2, 2004, a Canada wide child welfare alert was issued by the Ministry of Children and Family Development in British Columbia indicating that the family had fled from British Columbia.

[12] Ms. S. had assured the family that they would have a place to live when they arrived in Nova Scotia. When that did not materialize, Ms. S. and her daughter found accommodation but the balance of the family lived in the van. They came to the attention of the police when the van fell over a bank in the middle of the night. The police made a referral to the Agency.

[13] The third child was born on July (*editor's note- date removed to protect identity*) 2004 in Halifax. The next day, the social worker from the Agency visited the mother at the hospital. She agreed to accept the services of a public health nurse and a "doula" (a person trained to provide parents of a new baby with parenting training). Over several months the doula worked with the mother three times weekly for three hour sessions each. The public health nurse and her replacement provided regular services for five months.

[14] Numerous child welfare concerns were noted by those who assisted the family. For example, a dog was left unattended sitting next to the baby; the apartment was filthy; mattresses were bare; on occasion the girls were wearing only their underwear; their hair was dirty; the dishes were unwashed; pots of food were left on the stove; and on one occasion, the children were given a pot of Kraft dinner to eat with their fingers, on another, a cold can of stew for breakfast. To assist with the socialization of the older two children, the Agency enrolled them in daycare. The children were dropped off at daycare in dirty clothes. The mother expected the children to function independently, leaving the two who were under four years old alone in the bathtub with instructions to dry and dress themselves.

[15] Notwithstanding the many services provided, progress was negligible. The doula reported that the uncleanliness of the house had worsened. The children smelled of urine, were often locked in their room and there were animal feces on the floors.

[16] By December 7, 2004, the Agency brought the matter before the court. The children were left in the care of their parents but by order made subject to the supervision of the Agency. The abysmal situation in the home continued

unabated. A temporary care and custody order was eventually granted placing the children with the Agency.

[17] During their time in Nova Scotia, the Agency provided the family with alcohol and drug counselling; individual counselling, in-home management; a doula; daycare for the two older children; a public health nurse; and access to a parenting resource centre and food banks, but to no avail. A parental capacity assessment was undertaken.

[18] By February, 2005, the parties reported that they would be separating. The father's close friend had been living in the same residence with the family. He began a relationship with the mother and at the time of the trial they were a couple residing with his parents.

[19] The Agency gave notice that it would be seeking permanent care at a hearing scheduled to being in early October of 2005.

ISSUES:

[20] The issue on this appeal involves Ms. S.'s allegations that: (i) the judge did not consider placement of the children with her, or, if he did consider that placement, that (ii) he improperly placed a burden on the parents to bring forward a plan for placement with her and that (iii) the respondent Agency did not adequately investigate Ms. S.'s plan.

STANDARD OF REVIEW:

[21] An appeal in a child protection case is not a retrial or a chance to second guess the discretion exercised by the trial judge. We may intervene only if the judge erred in legal principle or made a palpable and overriding error of fact. The recognized advantage enjoyed by the trial judge means that his decision is afforded considerable appellate deference except where there is clear and material error: (**Children's Aid Society of Cape Breton-Victoria v. A.M.** (2005), 232 N.S.R. (2d) 121; N.S.J. No. 132 (Q.L.)(C.A.)).

ANALYSIS:

[22] This appeal involves a consideration of s. 42 of the **Children and Family Services Act**, S.N.S. 1990, c. 5, as am. ("**CFSA**") in the context of the circumstances of these children and Ms. S. That section provides:

> 42 (1) At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:
>
> (a) dismiss the matter;
>
> (b) the child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of the agency, for a specified period, in accordance with Section 43;
>
> (c) the child shall remain in or be placed in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency, for a specified period, in accordance with Section 43;
>
> (d) the child shall be placed in the temporary care and custody of the agency for a specified period, in accordance with Sections 44 and 45;
>
> (e) the child shall be placed in the temporary care and custody of the agency pursuant to clause (d) for a specified period and then be returned to a parent or guardian or other person pursuant to clauses (b) or (c) for a specified period, in accordance with Sections 43 to 45;
>
> (f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.
>
> (2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.
>
> (3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible

> to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.
>
> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 42.
>
> . . .
>
> (4) A supervision order made pursuant to clause (b), (c) or (e) of subsection (1) of Section 42 may be for a period less than twelve months, but in no case shall a supervision order or orders extend beyond twelve consecutive months of supervision from the date of the initial supervision order pursuant to Section 42, subject to the maximum time limits set out in subsection (1) of Section 45 where an order is made pursuant to clause (e) of subsection (1) of Section 42. 1990, c. 5, s. 43.
>
> (Emphasis added)

[23] The facts here are integral to the assessment of Ms. S.'s claim of error. The protection proceeding in this jurisdiction commenced December 7, 2004. The three children were to remain with their parents under the supervision of the Agency. In January, 2005, they were placed in the temporary care of the Agency. Further interim proceedings occurred with the children remaining in the temporary care of the Agency on consent, with access by the parents, pending a parental capacity assessment. That assessment, which was completed in early June, 2005, recommended the children be placed in the permanent care of the Agency. The assessor, Dr. Lowell Blood, concluded that the children had been subjected to serious, chronic physical, emotional and medical neglect while in the care of their parents. The neglect had been mitigated only due to the extensive time the children had spent in foster care. Dr. Blood noted that the impact of chronic neglect can be even more profound than other types of maltreatment including physical abuse. He stated his concern that the consequences of the neglect could become apparent later in the children's development. It was essential, particularly

for the older two children, that the changing of placements and the moving from parental care to foster care stop. Dr. Blood said: "If at all possible, the next move for these children needs to be their last." The children had been "in the system" from birth, the oldest being five at the time of the hearing.

[24] In July the Agency made application for permanent care, the hearing to commence on October 3, 2005. In mid-September the appellant applied for leave to seek custody of the children under the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160 ("**MCA**").

[25] There is simply no merit to the appellant's submission that the judge did not consider the possibility of placing the children with her. He clearly recognized that placement as an option. He said, in discussing the options available at the outset of his decision:

> [30] Under the terms of the *Act*, the outside date for final disposition in this matter is April 27, 2006 which is approximately four months from the preparation of this decision. That being so, the alternatives available to the court are to terminate the proceedings and return the children to one of the respondents, to continue them in temporary care with services designed to resolve outstanding issues or to return them to either parent or the paternal grandmother subject to supervision. Since the paternal grandmother has brought an application pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c.160 ("The *MCA*") a further alternative if the child welfare matter were to be terminated would be to grant custody pursuant to the *MCA* to the paternal grandmother.

[26] He specifically considered Ms. S.'s plan and found it wanting:

> [45] Clearly, the child welfare concerns are of such significance that a termination of the proceedings and a full return of the children to their mother is not feasible. <u>The father concedes that a return to his care is also not appropriate. The remaining alternatives to permanent care are a return to the mother or the grandmother under supervision</u>. There are a number of factors that should be taken into account in responding to that suggestion.
>
> . . .

[47] The fact that this is the third court proceeding for this family is very significant. All three children were taken into care at birth. Of the 61 months since the oldest child was born, she has been in agency care for 37 months, in court ordered agency supervision for 12.5 months, in voluntary agency supervision for 6 months and with her parents on an unsupervised basis for 5 months. For the second born child's 50 month life to date, those respective statistics are 30 months, 9.5 months, 5 months and 5 months. For the third born child's 17 month life to date, he has never been in the unsupervised care of his parents and has been in agency care for 10 months, under court ordered supervision for a ½ month and under voluntary supervision for 4.5 months.

[48] Under the scheme of the *Act*, a child welfare agency does not have responsibility to sustain and bolster the parents' responsibilities indefinitely. Dr. Blood testified that, if possible, the next placement for these children should be their last one. He indicated that an attempt to test the parenting skills in the context of the mother's new common-law relationship offered too much risk to the children. He indicated that a return and then a subsequent reapprehension would be disastrous for the children. I agree with him.

. . .

[54] There are approximately four months from the release of this decision to the overall statutory deadline in this case. Given the longstanding pattern of services and parenting failures, it is not realistic to assume that the change in the mother's partnership would assure a full and permanent reversal of the problems from the past. Her current partner lived with the parents and these children for many months and was part of the lifestyle that gave rise to the apprehension. Their relationship is relatively new.

[55] There comes a time when permanency planning for children in care is a paramount consideration in assessing their best interests. These children are beyond that point. I am not satisfied that the child welfare concerns in this case are likely to change within a reasonably foreseeable time and in any event not within the four months remaining in the statutory time line. Not all of the child welfare concerns relate to the father's input or control over the mother, if that exists. Matters of a lack of basic cleanliness, hygiene, medical

> attention and minimum household management are to some extent based on both parents' inability to independently master the tasks. A change of partner cannot reinvent missing skills.
>
> [56] The paternal grandmother applied to be added as a third party a few short weeks prior to the trial. She supports the return of the children to their mother but in the alternative offers to take care and custody of all three children or alternatively of the two girls and in the further alternative, the youngest child. She has had some contact with her grandchildren. For the first number of years, she was not on good terms with their father and was not aware of their birth. She moved to British Columbia and lived in the same town and at times in the same residence with the family for a number of months. There was no contact for the period when the family moved from Vernon, British Columbia to Boston Bar. There has been some contact during the last year and half when the parties lived in Nova Scotia although they have been in care for much of that time and therefore the contact has been somewhat minimal.
>
> [57] The agency does not support the grandmother's plan noting that there was a period of involvement with a child welfare agency by the grandmother with respect to one of her children.
>
> [58] I have concluded that the grandmother's plan is not sufficiently developed, that it is presented too late in the process and that it has not had sufficient opportunity to be tested for the risks envisaged by the agency. Accordingly, I would deny the grandmother's claim both pursuant to the *Act* and alternatively through the *MCA*.
>
> (Emphasis added)

[27] The allegation that the judge improperly placed a burden on the parents to bring forward a plan for placement with the grandmother is similarly unfounded, resulting, perhaps from a misreading of the decision. After the judge had considered and rejected placement with Ms. S. he moved to address other "less intrusive alternatives" as is required by statute. He said:

> [59] Section 42(2) of the *Act* states that the court shall not make an order removing a child from the care of a parent unless the court is satisfied that less intrusive alternatives, including services have been attempted and have failed or have been refused or would be inadequate to protect the child. That finding has been made at the

> time that the children were taken into temporary care. Nothing has changed in the interim that would cause the court to reach a different conclusion.
>
> [60] Subsection (3) of Section 42 requires a court upon removing a child from their parents' care to consider the possibility of a placement with a relative, neighbour or community member. The burden is on the parents' to bring forward such a plan and that did not occur. Therefore no further consideration by the court is required.

[28] During the course of the proceeding the father of the children, R.S., who is not participating in this appeal, had put forward an alternative plan of care naming his aunt and uncle as potential custodians for the children, in the event they were not returned to his care. In response to his request that the Agency formally assess possible placement with the aunt and uncle, the Agency requested that the aunt and uncle contact the Agency to provide information necessary to consider an assessment. The aunt and uncle did not come forward to indicate a willingness to be considered caretakers. It was in that context and not in reference to the plan of Ms. S., that the judge made the above comments. His remarks are consistent with the law as set out by this Court in **T.B. v. Children's Aid Society of Halifax** (2001), 194 N.S.R. (2d) 149; N.S.J. No. 225 (Q.L.), per Saunders, J.A.:

> **[28]** I turn now to that portion of Cromwell, J.A.'s comments in **BD** emphasized by the appellant. I point out that all Justice Cromwell was approving was the trial judge's characterization of the effect of s. 42(3) while at the same time recognizing that s. 42(3) must be interpreted and applied in the context of the **Act** as a whole and in light of its paramount purpose, that being to protect a child's best interests.
>
> > "[15] The judge addressed himself specifically to s. 42(3) of the **Act**. He stated that the section is mandatory and that there is a positive obligation on the Agency and the court to see to it that *reasonable* family or community options are considered. I agree with this statement of the effect of the section. ... (italics mine)"
>
> **[29]** Neither this statement of Cromwell, J.A., nor the remarks of the trial judge which he approved, varied or added to the agency's responsibilities defined by the terms of the **CFSA**.

[30] Justice Cromwell's words should not be interpreted as imposing either upon the agency or the court a statutory burden to investigate and exhaust every conceivable alternative, however speculative or fanciful. He spoke of *reasonable* family or community options. Neither the agency nor the court is obliged to consider unreasonable alternatives. Their statutory obligation is nothing more than to assess the reasonableness of any family or community alternatives put forward seriously by their proponents. By "reasonable" I mean those proposals that are sound, sensible, workable, well conceived and have a basis in fact.

[31] The onus of presenting such a reasonable alternative must surely be upon the person or party seeking to have it considered. It is hardly the responsibility of the agency or the court to propose the alternative, provide the resources for its implementation, or shepherd the idea through to completion.

. . .

[48] Mr. Pavey's submissions are wrong in law. There is no obligation, statutory or otherwise, upon an agency "to explore any possible extended family placement option". The agency's responsibility is no greater than the **Act** requires. In the circumstances of this case, it was not obliged to lend its resources to ascertain or improve the viability of Tr.B.'s offer. At best, her willingness to assist as expressed to the agency was no more than that, a simple offer to help. She had done nothing on her own to demonstrate to agency staff any serious commitment to provide a lasting and permanent home for this child. The agency was hardly compelled to arrange for legal counsel or such other expertise as would embellish or solidify her prospects.

. . .

[51] The agency has a statutory duty to take reasonable measures to provide services to families and children that promote the integrity of the family (s. 13 **CFSA**). The court has its own responsibility to take into account such measures and alternatives as are applicable in the circumstances of the case, before removing the child from the care of a parent or guardian (s. 42(2) **CFSA**). Thus the court and the agency share a responsibility to see that *reasonable* family or community options are considered. <u>But the burden of establishing the</u>

> merits of the alternative proposed are squarely upon the proponent. It is the proponent who must satisfy what I would term a burden of persuasion. Only when specific arrangements have been conceived and put in place by the proponent can the viability of that proposal be assessed.
>
> (Emphasis added)

[29] The parents' bald suggestion of a third party as a possible placement option does not oblige the Agency to commence an investigation. The designated person must at a minimum evidence his or her willingness and the option must appear to be reasonably plausible. Only then can the Agency make a determination whether further investigation or an assessment is necessary or appropriate. There was no evidence before the court of a plan by the aunt and uncle to care for the children or any information about their connection, if any, with the children. At the July 20 hearing the presiding judge directed that any interested third parties provide an outline of a plan, with the Agency then having an opportunity to follow up. If any issue arose as to the Agency's responsiveness to such plans, it was to be addressed at the next pre-trial in August. No one, with the exception of Ms. S., came forward.

[30] Finally, as to allegations by the appellant, that the Agency did not adequately investigate Ms. S.'s plan, it was not until September 12, 2005 that Ms. S. presented as a potential custodian. At a pre-trial conference on that date she was introduced to the Court by the father of the children (her son) as a person who wished to seek custody. On September 19 Ms. S. sought leave to apply for custody of the children under the **MCA**.

[31] Her application for leave was brought forward on an emergency basis in view of the impending permanent care hearing scheduled to commence on October 3. The judge expressed concern at the lateness of the application. The Agency opposed Ms. S's application for standing, being of the view that she was not a reasonable alternative to parent these children. Ms. S. was known to the Agency, her daughter having being placed in temporary care. The Agency advised the Court that, if leave was granted, it would bring forward evidence from its files demonstrating that Ms. S. was not a suitable candidate. Ms. S. was granted standing under both the **MCA** and the **CFSA**.

[32] Although not detailed in the trial judge's decision, there was substantial evidence about Ms. S's own lengthy history with the child welfare authorities.

Sadly this is a family enmeshed in the child welfare system. Ms. S's daughter, D., was taken into care, albeit, returned to Ms. S. after a year or so. She has another daughter, L., whose two children have been placed in the permanent care of the Agency. The problems of her son, R.S., while growing up, were canvassed by Dr. Blood and appear in other places in the record. Some of the son's deficits are attributable to the care or lack of it provided by Ms. S. He and Ms. S. have a difficult and tempestuous relationship characterized by long periods of estrangement. Shelly Maguire, an Agency social worker, who had recently visited Ms. S.'s home, testified as to the disarray and the fact that there were signs of recent drug use. She raised, as well, her concerns about the care Ms. S. was providing to a two year old who had been entrusted to her. Ms. S. has had a transient lifestyle with her now fifteen year old daughter, D. being removed from a variety of schools without completing her year and having a record of chronic absenteeism.

[33] Ms. S. did not present well on cross-examination. Particularly damning is the fact that the family which is the subject of these proceedings lived with her, or she with the family, for periods of time while the child protection services were involved both in British Columbia and Nova Scotia. Yet Ms. S. steadfastly maintained that she did not observe any deficiencies in the household nor the circumstances of the children. She maintained that she did not know the child welfare authorities were involved. Her protestations are either false or she shares the appalling housekeeping and parenting standards of her son and his wife.

[34] In view of the wealth of information in possession of the Agency which did not remotely favour Ms. S. as a custodian for the children, the Agency cannot be faulted for declining to conduct a home assessment. As the evidence unfolded, however, it was clear that an assessment was neither necessary or appropriate. It speaks volumes that Ms. S. was presenting as a back-up alternative only. Incredibly, she continued to support return of the children to their mother notwithstanding the mountain of evidence demonstrating the chronic neglect in their parents' care.

[35] Ms. S. says, as well, that the judge summarily dismissed her plan without affording it consideration. In support of that submission she refers to his conclusory comments in para. 58 of his decision (at para. 26, above). His brief reference to the lack of merit in Ms. S's plan must be viewed in the context of the evidence that was before him. The plan was before the Court. The judge heard her evidence. Bluntly stated, there was absolutely nothing to commend Ms. S.'s plan. In that context his brief comments are not surprising.

[36] None of the issues raised by Ms. S. have merit.

DISPOSITION:

[37] I would dismiss the appeal.

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.

Freeman, J.A.