NOVA SCOTIA COURT OF APPEAL

Citation: Children's Aid Society of Cape Breton-Victoria v. L.D., 2006 NSCA 77

Date: 20060628
Docket: CA 263073
Registry: Halifax

Between:

The Children's Aid Society of Cape Breton - Victoria

Appellant

v.

D.(L.), E.(J.) and S.(C.M.)

Respondent

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

Judges: MacDonald, C.J.N.S., Freeman and Roscoe, J.J.A.

Appeal Heard: June 16, 2006, in Halifax, Nova Scotia

Held: Appeal is dismissed without costs, per reasons for judgment of Roscoe, J.A.; MacDonald, C.J.N.S. and Freeman, J.A. concurring.

Counsel: Christopher T. Conohan, for the appellant
David J. Iannetti, for the respondent, C.M.S.

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

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 appeal was dismissed at the close of the hearing with reasons to follow. These are the reasons.

[2] This is an appeal by the Children's Aid Society of Cape Breton - Victoria from a decision of Justice Darryl Wilson in a matter pursuant to the **Children and Family Services Act**, S.N.S. 1990, c.5. The decision is unreported. The Agency's application to stay the order after trial was dismissed by Justice Fichaud in Chambers by decision dated March 14, 2006. See 2006 NSCA 32; [2006] N.S.J. No. 95 (Q.L.).

[3] After lengthy proceedings involving a female child who is now three and one-half years old, the judge committed her to the permanent care and custody of the Agency with access to her natural father, CMS, for a period of six months during which a parental capacity assessment of him would be performed. The father's access was ordered to expire at the end of the six months, subject to the right of the father to apply to vary the order. In the decision refusing a stay, Justice Fichaud succinctly summarized the relevant background as follows:

> [2] SD was born on January (editor's note- date removed to protect identity), 2003. Her mother is the respondent LD, and her father is the respondent CS. LD and CS separated before SD's birth. LD then began a relationship with the respondent JE. That relationship terminated in early 2005.
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> [3] In April 2004, the Agency apprehended SD because of unhealthy and unsafe living conditions in LD's home. The Agency applied to the Supreme Court (Family Division) for permanent care and custody with no access. Justice Wilson conducted a three day trial and rendered an oral decision on October 13, 2005, followed by a written decision and order on January 31, 2006.
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> [4] The trial judge's decision noted that the child's living conditions with LD and her partner JE were inappropriate. Justice Wilson decided that it would not be in the child's best interest to return to the care of LD or JE. Neither LD nor JE has appealed that ruling. So I will not comment further on their parental capacities.
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> [5] CS, the child's biological father, lives with his mother in North Sydney. He has received social assistance for the last four years. He is looking for employment. His two and one-half year relationship with LD ended before SD's birth. For two years afterward CS did not try to contact his daughter.

[6] In February 2005 CS contacted the Agency. He said he was SD's father and requested access. He applied to be added to the protection proceeding. LD opposed his application and denied that he was the biological father. A paternity test confirmed that CS was SD's father. LD still opposed his application to join the proceeding. Finally, on September 15, 2005, the court granted CS's application for standing to participate in the disposition hearing.

[7] CS wants a relationship with his daughter. Justice Wilson's decision related CS's position.

> [41] He acknowledged that he should have sought a relationship with his child sooner. He was nervous and confused. He knew the Agency apprehended S. and that she had been returned to the mother's care. He hoped that the mother would get her act together and she would be able to provide care for the child. It was only when S. was taken into care for the second time that he decided that he should contact the Agency and inform them that he was the father and he wanted access. Now he wants to care for S. because it is important for his child to know family. He admits that S. does not know him as her father. His plan is to reside with S. in his mother's residence and eventually his own apartment. His mother and the maternal grandmother would assist him in providing care for the child. He acted promptly to get a lawyer when the Agency told him they could not help him with access. He feels that he is a capable father because he helped care for the mother's older child, D. He acknowledged that he used marijuana but not when the child was present. He said the mother is an angry person and they often had verbal conflicts during their relationship. He was not aware of any safety issues when they lived together but the mother ignored the child, D.'s needs at times.

[8] Because of CS's late entry into the proceeding, the Agency did not have time to assess his parental abilities. Justice Wilson stated:

> [60] The biological father does not have a relationship with the child and the child does not know him as her father. The Court is uncertain about the father's ability to care for the child on a long term basis ...
>
> [63] The Court is uncertain whether it is possible to place the child with him pursuant to Section 42(3) of the **Act**.
>
> [64] The maximum time limits pursuant to the statute have expired and a Court must either place the child in the permanent care of the Agency or with the biological father.

> [65] I have considered the plan of the Agency and the plan of the biological father. I find the plan of the Agency is in the child's best interests. In determining the child's best interests I have considered that no bond exists between the child and the biological father and further disruption in the continuity of the child's care would have a negative impact on the child. The father's ability to care for the child and to provide the child with a positive relationship in a secure home environment which is important for the child's future development is unknown. The biological father's lack of commitment to the child prior to February 2005 raises questions about his long-term commitment to care for the child.

[9] To address the uncertainty respecting the prospects of placement with CS, the trial judge decided that CS should have six months access with his daughter, followed by a parental assessment. Justice Wilson stated:

> [68] There are special circumstances which justify making an Order for access with respect to the biological father.
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> [69] The child is not yet three years old. It may be possible to place the child with her biological father and his family. The biological father's circumstances and parenting capacity could have been assessed prior to the final hearing in October but he was unable to participate until September 2005. The Agency knew he wanted to present a plan of care for the child in February and later agreed to his participation but did not take any steps to assess his circumstances until he was formally added as a party when it was too late. While the father was tardy in seeking a relationship with the child there was still plenty of time between February and September for his circumstances and capacity to be assessed.
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> [70] The Court is satisfied that an access Order for a limited period of six months (to expire on April 13, 2006) is appropriate in order to have the father's parenting capacity and circumstances assessed. The Agency is to arrange for a parental capacity assessment and the father is to make himself available for an assessment. Access between the child and the father will be in the discretion of the Agency and will allow the child and the father to be viewed by the Assessor.
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> [71] The access Order will expire automatically on April 13, 2006, unless there is an application to vary the Order.

> [72] The Court is satisfied that this limited access Order will not impair the child's future placement for a permanent placement in a family setting given the child's young age.

[4] Apparently the six months access started shortly after the Agency's stay application was dismissed by Justice Fichaud, so it would now run until September, 2006.

[5] The Agency alleges that the trial judge erred by finding that special circumstances existed as required by s. 47(2)(d) of the **Act**, by ordering access when access was inconsistent with the best interests of the child and by ordering access when it impaired the child's opportunities for permanent placement.

[6] The standard of review on appeals of this nature is as stated in **Children's Aid Society of Cape Breton - Victoria v. A.M.**, 2005 NSCA 58:

> [26] This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg County v. G.D.** , [2003] NSJ No 416 (Q.L.) (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.B.T.** (2002), 207 N.S.R. (2d) 109; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at paras. 10 - 16.
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> [emphasis added]

[7] The relevant parts of Section 47 of the **Act** state:

> 47 (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.

> (2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
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> (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
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> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
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> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.
>
> (3) Any access ordered pursuant to subsection (2) may be varied or terminated in accordance with Section 48.
>
> ...

[8] In **CAS of Cape Breton - Victoria v. A.M.**, *supra*, this court considered s. 47 of the **Act** and stated:

> [36] These submissions must be considered in light of three important legal principles. First, I would note that once permanent care was ordered, the burden was on the appellant to show that an order for access should be made: s. 47(2): **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, [1998] 2 S.C.R. 534 at para. 44 and authorities cited therein. Second, I would observe that, as Gonthier, J. said in **L.M.** at para. 50, the decision as to whether or not to grant access is a "... delicate exercise which requires that the judge weigh the various components of the best interests of the child." It is, therefore, a matter on which considerable deference is owed to the judge of first instance for the reasons I have set out earlier. I would note finally that, in considering whether the appellant had discharged her onus to establish that access ought to be ordered, the judge should consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access.

[9] It is clear from his lengthy decision that the main focus of the trial judge was the best interests of the child. He was also cognizant of the requirement to

consider the possibility of a family placement and that it was necessary for CMS to prove that special circumstances justified an access order. We have reviewed the record and considered the oral and written submissions of counsel and conclude that the trial judge did not make any error justifying appellate intervention. The judge carefully reviewed the relevant provisions of the **Act** and properly directed himself concerning the applicable legal principles. He weighed the various factors which the **Act** requires him to address and applied the evidence to his consideration of those factors. His view of the evidence is fully justified by the record before him. We conclude that the judge did not err in legal principle or make any palpable and overriding error of fact in reaching the conclusion he did.

[10] The appeal is therefore dismissed, without costs.

Roscoe, J.A.

Concurred in:

MacDonald, C.J.N.S.

Freeman, J.A.