NOVA SCOTIA COURT OF APPEAL

Citation: *L.L.A. v. Children's Aid Society of Cape Breton-Victoria,* 2003 NSCA 91

Date: 20030916
Docket: CA 203552
Registry: Halifax

Between:

L.L.A.

Applicant/Appellant

v.

The Children's Aid Society of Cape Breton-Victoria

Respondent

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

Judge: Bateman, J.A. (in Chambers)

Application Heard: September 11, 2003, in Halifax, Nova Scotia

Held: Application dismissed.

Counsel: L.L.A. in person
Robert Crosby, Q.C., for the respondent

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 application to stay an order of Justice Moira Legere-Sers of the Supreme Court of Nova Scotia (Family Division) made pursuant to the **Children and Family Services Act**, R.S.N.S. 1990, c. 5, (the "**Act**") which order issued August 7, 2003 following the rendering of her decision on June 9, 2003, and to stay further Supreme Court hearings in this matter.

[2] The applicant is the mother of J.C.A., a thirteen year old boy. The respondent became involved in this matter when the applicant mother, L.L.A., and her common law partner contacted the "Agency", the Children's Aid Society of Cape Breton Victoria, in the fall of 2002 wanting to put J.C.A. into the Agency's care asserting that he was unmanageable. Since that time the mother has vacillated in her position, at times seeking the assistance of the Agency and on other occasions rejecting any offer of help.

[3] The initial interim hearing in this matter (s. 39(1) of the **Act**) commenced on May 5, 2003 with further dates to be scheduled within 30 days (s. 39(4)). The interim hearing did not resume until June 9, being outside the 30 days contemplated by the **Act**. The reason for the delay was to accommodate the attendance of necessary witnesses who were unavailable to the court until then. Justice Legere-Sers gave an oral decision that day, which was embodied in the order issued August 7th, 2003. The Judge found that there were reasonable and probable grounds to believe that J.C.A. is in need of protective services. Pending the disposition hearing, which was to be held on July 21, 2003, Justice Legere-Sers ordered that J.C.A. was to remain in the care of his mother subject to the supervision of the respondent Agency, with a *guardian-ad-litem* to be appointed for J.C.A. and counselling for both mother and child.

[4] L.L.A. says that because the interim hearing was not completed within the 30 days contemplated by s. 39(4) of the **Act**, the court has lost jurisdiction in the matter and no further steps can be taken. In that regard she filed a Notice of Appeal of the interim order with this Court on July 24, 2003.

[5] There being no stay of the action, the matter continued in the Supreme Court (Family Division). When L.L.A. did not appear at the hearing on July 21, 2003, that proceeding was adjourned to July 24, 2003. On that date, L.L.A. was present but self-represented. She left the courtroom before the end of proceedings. The

presiding judge, Justice Darryl W. Wilson, rendered his decision that day finding J.C.A. to be in need of protective services pursuant to s. 22(2)(g) of the **Act** (order issued August 1, 2003) The matter was further adjourned for the disposition hearing to September 30, 2003.

[6] The appeal of the interim order of Justice Legere-Sers has been set down for hearing on November 18, 2003. This application for a stay is brought pursuant to s. 49(3) of the **Act** which provides:

> **49(3)** Where a notice of appeal is filed pursuant to this Section, a party may apply to the Appeal Division of the Supreme Court for an order staying the execution of the order, or any part of the order, appealed.

[7] In support of her application for a stay of the order of Justice Legere-Sers and of the proceedings under appeal, L.L.A. has filed a short affidavit. After identifying herself as J.C.A.'s biological mother and referring to her present involvement in protection hearings concerning her son and her prior involvement with the Agency, her affidavit concludes:

> 3. I have always been cooperative with the agency only to have them not be cooperative with myself and my family;
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> 4. I have filed and (sic) appeal to the Nova Scotia Court of Appeal in the matter now before the court which is attached to this my affidavit. I am appealing both the order of the presiding justice and the decision of the justice and the hearings scheduled in the matter. I am appealing the order and it's (sic) contents and appealing the validity of the hearings on grounds that the court both lost jurisdiction and that there are no grounds for the hearings;
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> 5. I am making this affidavit in support of my application to stay both the order and the hearings in this matter.

[8] It is important to note that the July 24, 2003 order did not change the physical custody of J.C.A. He remains in the care of the applicant.

[9] The test usually applied in determining whether or not to grant a stay is that stated by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

> **[28]** . . . stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
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> **[29]** (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. . . . and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
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> **[30]** (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[10] As was recognized by Flinn, J.A. in **Ellis v. Ellis** (1997), 163 N.S.R. (2d) 397 (C.A), this Court has shown a willingness to modify the test where the matter involves the custody of children. At p.398:

> **[8]** In **Fulton Insurance Agencies Ltd. v. Purdy** (1991), 100 N.S.R. (2d) 341, 272 A.P.R. 341 (C.A.), which is the source of the test generally used for stay applications in the appeal of civil matters, Hallett, J.A., recognized that a different test may apply in cases involving children's welfare. He said at p. 344:
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> > . . . That is not the only test: this court has considered stays of custody Orders on the ground that if special circumstances exist that could be harmful to a child if the Order were acted upon before the appeal was heard, a stay would be granted (**Millett v. Millett** (1974), 9 N.S.R. (2d) 26 (C.A.); **Routledge v Routledge** (1986), 74 N.S.R. (2d) 290; 180 A.P.R. 290 (C.A.)). These cases involved children's welfare, not monetary judgments. In **Millett** the stay was granted; in **Routledge** refused. In the latter case, Clarke, C.J.N.S., stated:
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> > > In my opinion, there need to be circumstances of a special and persuasive nature to grant a stay.

[11] The Agency opposes the granting of the stay. It submits that L.L.A. has not raised an arguable issue on appeal. L.L.A. was represented by counsel at the time the dates of the hearing before Justice Legere-Sers was set. Counsel for the Agency says that counsel for L.L.A. consented to the June 9th date, being outside the 30 day period. In **Children's Aid Society and Family Services of Colchester**

County v. H.W. et al. (1996), 155 N.S.R. (2d) 334; N.S.J. No. 511 (Q.L.)(C.A.), Freeman, J.A., for the Court wrote of time periods under the **Act**, as follows:

> **[28]** In my view, on a proper interpretation of the time limits contained in the **Children and Family Services Act**, the object of eliminating the excessive time delays experienced under the previous legislation can best be attained not at the expense of the paramount consideration but by giving the best interests of children their fullest and broadest effect.
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> **[29]** What Judge Levy has pointed out, and what this appeal illustrates, is that the time limits, which give effect to the concern expressed in the Preamble, are sometimes in conflict with the best interests of the child. When that occurs, the legislation must be given a construction consistent with the best interest of the child. In my view the ordinary meaning of the legislation creating the time limits cannot be ascertained from looking at the sections containing those specific provisions standing alone; they must be read in light of the Preamble and s. 2.
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> **[30]** The alternative, loss of jurisdiction which nullifies all proceedings prior to the infringement of the time limit, may not only be contrary to the best interests of the child but to the concern addressed in the Preamble, and to the intent of the time limits themselves. Nullification after a child is found in need of protection either deprives a child of that protection or subjects it to the delays inherent in starting proceedings all over again from the beginning. Child protection proceedings become a game of "snakes and ladders".
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> **[31]** Because their meaning varies with their context from case to case, depending on whether there is a conflict with s. 2, I would consider the time limits provisions to be not mandatory but strongly directory, to be obeyed to the fullest extent possible consistent with the best interests of the child. An error in extending a time limit to serve the best interest of a child would then be an error of law, subject to appeal, but would not result in the loss of jurisdiction nullifying proceedings. It is neither logical nor pragmatic that a court can be wrong as to a child's best interests and retain jurisdiction but, if it is wrong respecting a time limit, it is shorn of jurisdiction.

[12] See also: **Nova Scotia (Minister of Community Services) v. S.E.L.** (2000), 184 N.S.R. (2d) 165; N.S.J. No. 129 (Q.L.)(C.A.); **Family and Children's Services of Kings County v. H.W.T.** (1996), 156 N.S.R. (2d) 237; N.S.J. No. 521 (Q.L.)(C.A.); **Children's Aid Society of Halifax v. T.B.** (2001) 194 N.S.R. (2d) 149; N.S.J. No. 225 (Q.L.)(C.A.).

[13] Recognizing that extension of the time periods, if such occurred without consent of the parties and was not done in the best interest of the child, while not constituting a loss of jurisdiction, may, in some circumstances, be legal error, I accept that the Notice of Appeal may meet the minimal test of raising an arguable issue. I am not satisfied, however, that the other conditions necessary to granting a stay are met, applying either the **Fulton** or **Routledge** tests set out above. There is absolutely no evidence of irreparable harm should the stay not be granted nor are there any "special circumstances" which otherwise warrant a stay.

[14] The application for a stay is dismissed in all respects.

Bateman, J.A.