NOVA SCOTIA COURT OF APPEAL
Citation: ***K.L.M. v. Nova Scotia (Community Services***),
2007 NSCA 100

Date: 20071017
Docket: CA 280831
Registry: Halifax

Between:

K.L.M. and D.J.M.

Appellants

v.

Minister of Community Services

Respondent

Publication Ban: pursuant to s. 94(1) of the **Children and Family Services Act**

Revised Decision: The text of this decision has been revised according to the erratum dated October 19, 2007

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

Appeal Heard: September 21, 2007, in Halifax, Nova Scotia

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

Counsel: R. Ferguson Ford and Kelly M. Ryan, articled clerk, for the appellant K.L.M.
appellant D.J.M. not appearing
Katherine F. Carrigan, 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] On March 23, 2007, after an eight day trial, Justice N.M. Scaravelli of the Nova Scotia Supreme Court ordered that the infant, B.K.M., be placed in the permanent care and custody of the Minister (the "Agency") (reasons for judgment unreported). The parents, K.L.M. and D.M. appeal. Both parties were represented by counsel at trial. D.M. is not participating in the appeal.

BACKGROUND

[2] There is a long history of this family's involvement with child welfare authorities, preceding the permanent care order under appeal. I will provide but a brief summary.

[3] K.L.M. is now 25 years old and D.M. 49. They have been in a relationship since K.L.M. was 17, marrying in May 2005. In December 1999, K.L.M. gave birth to twins while residing in Alberta. In November 2000 another child was born in Ontario, with their fourth child born in April 2003 in Vancouver.

[4] The history of child protection involvement with the parents predates the birth of the twins. When K.L.M. was eight months pregnant and living in Edmonton she was placed on hospital bed rest when her pregnancy was found to be high risk with the possibility of death to her or the children during the birth. Against medical advice D.M. took K.L.M. from the hospital. K.L.M., who was under 18 at the time, was immediately apprehended by the Edmonton Agency and returned to hospital until the birth. So began the sad saga of this family.

[5] From that point on the family remained consistently involved with child welfare authorities in British Columbia, Alberta, Ontario and Nova Scotia. The agencies were concerned by reports that there were a number of child protection risks including domestic violence; physical abuse; severe medical neglect; physical neglect; emotional neglect; possible sexual abuse of the children; D.M.'s substance abuse and anger management issues; inappropriate discipline and parenting practices; and a transient lifestyle.

[6] In November 2003 the four children were apprehended by the Children's Aid Society of Northumberland (Ontario) due to serious medical concerns brought

to the attention of that agency by the family doctor. A protection application was commenced in Ontario with the children found to be in need of protective services. The children were assessed while in the care of that agency and found to be suffering from marked developmental delay.

[7] K.L.M., maintaining that she had separated from D.M., moved back to Nova Scotia to live with her mother. The Ontario proceeding concluded with an order that the children be in K.L.M.'s care only so long as she resided with her mother and on condition that K.L.M. would obtain certain services for the children.

[8] D.M. returned to Nova Scotia in August 2004. He made contact with the Agency in November to request access with the children. K.L.M. continued to reside with her mother and asserted that she had not resumed a relationship with D.M.

[9] There was conflict between K.L.M. and her mother. The Ontario agency agreed that K.L.M. could obtain separate accommodation for herself and the children, which she did. Both agencies became concerned that K.L.M. was not obtaining needed medical treatment for one the children; had not obtained daycare placements for two of the children; and was allowing D.M. to have unsupervised access.

[10] The children were taken into the Nova Scotia Agency's care in January 2005. A protection application was commenced. At a contested Interim Hearing the children were found to be in need of protective services and continued in the care of the Agency. At subsequent proceedings services were ordered for the parents. The parents were uncooperative with the service providers' efforts to remediate the many parenting deficiencies and were generally non-compliant. K.L.M. was unwilling or unable to benefit from the services of a family support worker. D.M. was hostile and threatening to Agency workers. On assessment, the children were found to have significant physical, social and emotional deficits.

[11] In the summer of 2005 it appeared to Agency workers that K.L.M. was again pregnant, although she denied being so. By September 2005 the Agency concluded that there was no option but to seek permanent care of the four children. The final disposition hearing was scheduled to take place in May 2006.

[12] At a settlement conference held in April 2006 before Williams, J. of the Supreme Court, the parents consented to the four children being placed in the permanent care of the Agency. Those children now reside with prospective adoptive parents.

[13] On October 4, 2005, K.L.M. acknowledged to the Agency that she was six months pregnant. B.K.M. was taken into Agency care at birth on January 7, 2006, and this protection application commenced.

[14] It was agreed that the evidence accumulated for the prior proceeding in relation to the four older children be admitted into evidence. Various further services were offered to the family by the Agency along with the parents committing to self-referral for other services. The parents were provided with supervised access with B.K.M. twice per week. The Agency observed that D.M. was dominating the contact with B.K.M. during the visits to the exclusion of K.L.M. The Agency separated the parental visits to ensure that K.L.M. had time with the child. In response the parents boycotted access for a month. As had been the case in the past, the services of the Agency family support worker were met with criticism and opposition by the parents. It was noted that while K.L.M. appeared to attempt at times to take advantage of the services provided to her, she was unwilling or unable to separate her or the child's best interests from D.M.'s attitudes.

[15] There being no prospect of remediating the dramatic parental deficits, the Agency sought permanent care of B.K.M. As stated above, *vive voce* evidence was heard over eight days, from March 5 to 14, 2007. By decision delivered March 23 and order dated April 10, 2007, B.K.M. was placed in the Agency's permanent care.

ISSUES

[16] The appellants say the judge erred:

(i) in finding that the Agency provided appropriate services to the parents;

(ii) in failing to fully and properly consider the parents' plan of care;

(iii) in relying upon past parenting conduct.

[17] In addition, D.M. says his lawyer was absent for parts of the trial due to illness and he therefore did not receive effective assistance of counsel.

STANDARD OF REVIEW

[18] An appeal is not a retrial where the appellate court can substitute its own exercise of discretion for that of the trial judge (**Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58, 232 N.S.R. (2d) 121 (C.A.) at para. 26). A trial judge's decision on a child protection matter may be set aside on appeal only if the trial judge erred in legal principle or has made a palpable and overriding error in his/her application of the evidence (**Family and Children's Services of Kings County v. B.D.**(1999), 177 N.S.R. (2d) 169; [1999] N.S.J. No. 220 (Q.L.)(C.A.) at 175; **Nova Scotia (Minister of Community Services) v. C.(B.)T. and F.Y.**, 2002 NSCA 101, 207 N.S.R. (2d) 109 (C.A.) at para. 111, **Nova Scotia (Minister of Community Services) v. B.F.**, 2003 NSCA 119, 219 N.S.R..(2d) 41 (C.A.) at para. 44).

ANALYSIS

[19] The main thrust of the appellants' arguments is that they wiped the slate clean by consenting to the permanent care of the four older children. B.K.M. was apprehended at birth. The parents say that since B.K.M. has not been in their care, he cannot be in need of protective services. The illogic of this submission is apparent. The record of longstanding parenting deficits and the harm it had caused to the four older children was graphic and unrefuted. The parents were, throughout the prior proceeding and during this one, unresponsive to services. In the absence of <u>any</u> evidence that the significant parenting deficits of D.M. and K.L.M. had been addressed, B.K.M., if placed in the care of his parents, was certain to suffer the same fate as had his siblings.

[20] An agency need not wait until a child suffers abuse or neglect at the hands of his parents. A child is in need of protective services where there is a "substantial risk" of harm (the **Act**, ss. 22(2)(b), (g) and (ja). A "substantial risk" means a real chance of danger that is apparent on the evidence (s. 22(1)).

[21] A parental capacity assessment was prepared by Susan Eakin, registered psychologist. She recommended that B.K.M. be placed in the permanent care of the Agency. Excerpts from her report summarize her findings:

> This is a family situation in which the child protection issues have been long standing, serious and pervasive in nature.
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> ...
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> Four children's lives have already been seriously affected and there is now the quality of life of a fifth child that must be considered.
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> ...
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> ... Unless this preventative intervention [permanent care] is made, the potential for this child's social/emotional development to be severely compromised (as was the case with his four older siblings) will be unacceptably high. This is a cycle of abuse that must be interrupted, as the parents take no accountability for the significant harm already incurred in their older children, and demonstrate no personal motivation whatsoever to change the status quo.

[22] The parents' lack of insight, intransigence and hostility to the efforts of service providers were documented in the July 29, 2005 psychological assessment and parental capacity report prepared by Sharon Cruishank, Psychologist, for the former proceeding.

[23] In the face of this evidence, the judge did not err in concluding that B.K.M. continued to be in need of protective services.

[24] Nor is the parents' assertion that service provision by the Agency was inadequate supported by the record.

[25] In addition to the services which had been provided in the proceeding relating to the four older children, the Agency requested orders for the following services within this proceeding:

a. supervised access for both parents;

b. referral of D.M. for anger management counselling and psychotherapy;

c. participation by D.M. and K.L.M. in random urine testing;

d. referral by D.M. to Capital Health Addiction Prevention and Treatment Services for a substance abuse assessment, and cooperation and participation in any recommended treatment;

e. self-referral of K.L.M. and D.M. to New Start, for domestic violence counselling;

f. should K.L.M. and D.M. indicate sufficient progress with domestic violence counselling and New Start, the services of a Family Skills Worker would be extended;

g. such other supportive and/or rehabilitative services to K.L.M. and D.M., as agreed to between the Minister and the parents.

[26] In the face of clear evidence that the parents consistently either rejected outright or failed to meaningfully engage with the services offered; failed throughout the proceeding to identify any additional services which might be of assistance; and denied any deficiencies which might warrant remediation, their submission that the Agency should have forced them to accept additional, unspecified services is without merit.

[27] The judge properly related past parenting conduct to future care of the child. He quoted the Eakin report on this issue:

> In cases such as this, where the child in question was apprehended at birth, a comprehensive and valid appraisal of parental capacity must include not only observations of the parents' current interactions with this child, but also a careful consideration of their patterns of parenting in the past, and the functioning of the other children for whom they have provided primary care. In families where there have been multiple child protection concerns identified in the past, the real question is whether the parents have been able to take accountability for past areas of difficulty, and have been able to rectify these issues, and thereby eliminate these risks, by making some decisive, proactive changes. Typically this is achieved through the productive use of services, including those provided by

> the agency, and other resources which the parents may have sought out on their own initiative. (pp. 66 - 67)

[28] The evidence of the parents' "past" parenting practices was highly relevant where, as here, the current child welfare proceeding overlapped with the former. The evidence supported the trial judge's conclusion that the services offered by the Agency had been effectively rejected by the parents as a result of which the child protection risks continued. He said:

> [40] I am satisfied on the evidence that these services were not successful in addressing the current and historical protection concerns. These services were met by the parents with constructive refusal or superficial cooperation. This is due in part to their failure or refusal to acknowledge any parenting issues. They accept no responsibility for the serious concerns regarding their four older children who were placed into permanent care following the birth of the child [B.M.]. They believe in their parenting style and have not been motivated to change. [K.M.] is totally submissive and under the control of [D.M.]. The court recognizes that parenting four children and parenting one child may constitute different circumstances. However, the child protection concerns that existed at the time of taking into care still exist at this time. Based on the evidence I find there is a substantial risk that the child would suffer social, emotional and possibly physical harm if the proceedings were dismissed and the child returned to the parents. Accordingly, I am satisfied the child remains in need of protection.
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> (Emphasis added)

[29] Contrary to the parents' assertion on appeal, their plan of care was considered by the trial judge. It was a simple plan — they proposed that B.K.M. be returned to their care. K.L.M.'s father, who lives in another community, would drop in from time to time. If the time lines of the proceeding were extended, the parents maintained they would cooperate with continuing services. That was it. Absolutely nothing could or can be said in support of the parents' plan. Indeed, the plan itself exhibited the parents' inability to recognize the needs of the child or to take steps so that they could become parents who could meet those needs.

[30] Throughout these proceedings the parents' approach had been one of "parental rights" rather than child protection. They say it is their right to raise their children as they see fit, unimpeded by society's oversight, regardless of the impact on the children. However, the Supreme Court of Canada has clearly rejected a

parental rights approach to child welfare. In **Syl Apps Secure Treatment Centre v. B.D.**, [2007] S.C.J. No. 38, Abella, J. wrote for the Court:

> 44 The primacy of the best interests of the child over parental rights in the child protection context is an axiomatic proposition in the jurisprudence. As Daley J.F.C. observed in *Children's Aid Society of Halifax v. S.F.* (1992), 110 N.S.R. (2d) 159 (Fam. Ct.):
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> > [Child welfare statutes] promot[e] the integrity of the family, but only in circumstances which will protect the child. When the child cannot be protected as outlined in the [Act] within the family, no matter how well meaning the family is, then, if its welfare requires it, the child is to be protected outside the family. [para. 5]
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> . . .
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> 45 This Court has confirmed that pursuing and protecting the best interests of the child must take precedence over the wishes of a parent (*King v. Low*, [1985] 1 S.C.R. 87; *Young v. Young*, [1993] 4 S.C.R. 3, *New Brunswick (Minister of Health and Community Services) v. L. (M.)*, [1998] 2 S.C.R. 534). It also directed in *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, that in child welfare legislation the "integrity of the family unit" should be interpreted not as strengthening parental rights, but as "fostering the best interests of children" (p. 191). L'Heureux-Dubé J. cautioned at p. 191 that "the value of maintaining a family unit intact [must be] evaluated in contemplation of what is best for the child, rather than for the parent".
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> 46 It is true that ss. 1 and 37(3) of the Act make reference to the family, but nothing in them detracts from the Act's overall and determinative emphasis on the protection and promotion of the child's best interests, not those of the family. The statutory references to parents and family in the Act, which the family seeks to rely on to ground proximity, are not stand-alone principles, but fall instead under the overarching umbrella of the best interests of the child. Those provisions are there to protect and further the interests of the child, not of the parents ...

[31] The paramount consideration is the best interests of the children.

[32] The record does not support D.M.'s complaint that he was ineffectively assisted by his counsel due to his absence during the trial. On two occasions when his lead lawyer was absent, D.M. was represented by associate counsel.

[33] In summary, the grounds of appeal are without merit.

DISPOSITION:

[34] I would dismiss the appeal.

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.
Cromwell, J.A.