Date: 20010412
Docket No.: CA 167073

NOVA SCOTIA COURT OF APPEAL

[Cite as: Children's Aid Society of Shelburne Co. v. S.L.S. ., 2001 NSCA 62]

Glube, C.J.N.S.; Flinn and Oland, JJ.A.

BETWEEN:

S. L. S.

Appellant

- and -

CHILDREN'S AID SOCIETY OF SHELBURNE COUNTY and C. L. J. and M. J.

Respondents

REASONS FOR JUDGMENT

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Counsel:	Patricia L. Reardon, for the appellant Donald G. Harding, for the respondent, Children's Aid Society of Shelburne County Wayne S. Rideout, for the respondent, C. J. Joahanne L. Tournier, for the respondent, M. J.
Appeal Heard:	March 21, 2001
Judgment Delivered:	April 12, 2001
THE COURT:	Appeal dismissed per reasons for judgment of Flinn, J.A.; Glube, C.J.N.S. and Oland, J.A. concurring.

Publishers of this case please take note that s. 94(l) 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.

FLINN, J.A.:

[1] The appellant (mother) appeals a decision of Chief Judge Comeau of the Family Court of Nova Scotia dated October 13, 2000, in which he granted an application of the respondent Agency, and ordered that the child A.S.J. be placed in the permanent care and custody of the Agency with no access to the appellant mother or the respondent father. The respondent father, C. L. J., supports the position of the Agency and the order of Chief Judge Comeau. The respondent M. J. is the father's sister. The Agency has placed the child A.S.J. with M. J. with the intention that she will adopt A.S.J. in due course.

[2] The child A.S.J. was born on November *, 1999 (**editorial note- date removed to protect identity*), and within two months the child was apprehended, twice, by the Agency. The circumstances of the first apprehension are described in the affidavit of Donna Kaulbeck, a child protection worker for the Agency, which affidavit was filed in conjunction with an interim hearing held on December 10, 1999:

> That S. L. S. [mother] and C. L. J. [father] (hereinafter referred to as "S." and "J.") moved to Shelburne from Ontario in the spring of 1999.
>
> That from their date of arrival in Shelburne, I am informed by the Shelburne R.C.M.P. and due (sic) verily believe that there have been eleven phone calls to the R.C.M.P. alleging violence between S. and J..
>
> That J. is on probation for assaulting S. during her pregnancy.
>
> That the baby, [A.S.J.] was born on the * of November, 1999.
>
> That I am advised by J. and do verily believe that on or about November 23rd, 1999, S. threw a baby bottle at J. which would have struck the infant child had J. not moved out of the way.
>
> That the police were involved in the incident and the couple separated temporarily.
>
> That I am advised by S. and do verily believe that on or about December 6th, 1999, J. punched S. and would have hit the child had S.'s arm not been in the way.
> That I am advised by J. that S. was using the baby as a shield in that particular incident.

> That S. has advised me and I do verily believe that on or about December 6th, 1999, J. held a knife to her throat and said I will kill you and bury you and no one will know.
>
> That J. has related to me and I do verily believe that he was taking the child in the stroller in an alley and S. jumped him and a violent incident took place which almost resulted in the stroller being upset.
>
> That as a result of this violence and the tender age of the child, this Agency made the decision of apprehending the child which took place on or about the 6th day of December, 1999.
>
> That as related above, the main concern of the Agency is the violence which takes place between these two parties and their inability or unwillingness to protect the child from this violence.

[3] The subsequent events leading up to an interim consent order, dated January 10, 2000, by which the child A.S.J. was placed in the care and custody of the Agency, including the circumstances of the second apprehension, are set out in the Agency's report of February 22, 2000 as follows:

> C. and S. were both charged with assault and each placed on an undertaking not to have contact with the other.
>
> Due to the repeated violence between the parents in the presence of their infant son, placing him at risk of physical and emotional harm, the Children's Aid Society of Shelburne County apprehended the child. It was felt that risk to the child was significant, due to his close proximity to the violence, and the failure of the parents to assure his safety, when they enter into physical confrontations. Although the parents were separated, there was believed to be a strong likelihood they would reunite.
>
> On December 10, 1999, at an Interim Hearing before the Family Court, the infant [A.S.J.] was returned to S. S.'s custody by consent. S. was ordered to participate in parenting programs at Family and Community Support Services, Shelburne County, Nova Scotia. S. and C. were ordered by the court to not see one another with the infant [A.S.J.] present. C. was given access to see his infant son twice weekly, which was to be arranged by personnel of the Agency. A Protection Hearing was then scheduled for January 31, 2000, to be held at the Shelburne Court House.

> On December 29, 1999, as a result of an RCMP surveillance into criminal matters, C. was observed visiting S. at her apartment. In addition to the Family Court specifying that S. and C. not visit while the infant was present, C. and S. were also under a criminal undertaking to not have contact with one another. Their arrest was imminent.
>
> On December 30, 1999, CAS Shelburne County, Nova Scotia, re-apprehended the infant [A.S.J.]. The infant was taken into the custody of the Children's Aid Society of Shelburne County, and placed in a foster home. On January 10, 2000, the court ordered the infant [A.S.J.] to remain in the care and custody of the Agency.

[4] Since that time, both the mother and the father have been convicted for break and enter and assault. The father is presently serving three years in a penitentiary while the mother, who co-operated with the police, received house arrest and probation.

[5] Subsequently, as the Agency was attempting to provide services, with the possibility of reuniting this family, Elizabeth Cromwell, the case work supervisor for the Agency, testified that it became evident early on that there were issues raised with regard to the appellant's "sincerity and managing and caring for the child". According to Ms. Cromwell, family violence was the main area of concern by the Agency. In this regard, after the respondent father had been jailed, the appellant's former husband, Mr. E., appeared on the scene. The circumstances under which R. E. initially became involved with the appellant is described in the Agency's Parenting Ability and Capacity Assessment as follows:

> At age 16, S. [the appellant] became pregnant and moved out of the family home. The child was named C. H. S. and was born in 1993. According to S., the infant died in his stroller of Sudden Infant Death Syndrome at age 3 months. No further information was volunteered by S.. She did admit to using alcohol and drugs heavily after her son's death.
>
> Over the next few years, S. worked as an exotic dancer. It was during this time that she met a R. E. and married him. S. admits that while with R. she worked as a prostitute. Furthermore, there is an outstanding warrant for her arrest in Toronto, Ontario, jurisdiction.
>
> S. further advises that her relationship with R. was abusive and she feared being killed by him or the drug dealers in her Toronto neighbourhood, whom she claims she reported to the authorities.

> S. indicated that she contacted R. E. and indeed he was present with her as of January 10, 2000, in Shelburne, Nova Scotia. S. indicated that R. would take her and [A.S.J.] back to Toronto with him if [A.S.J.] were to be returned to her.

[6] Ms. Cromwell testified that shortly thereafter the Agency learned that - although contact between the two of them had been prohibited - the appellant was in contact with the respondent father while he was in jail. The father had indicated to the Agency workers that he was still involved with the appellant and that they intended to reunite and provide a home for the child A.S.J. At that point, Ms. Cromwell testified, the Agency became very concerned about working towards a situation that would put the child A.S.J. back in the care of the appellant, if she was to resume a relationship with either the respondent father or her former husband, Mr. E.. Both of these relationships involved violence. As a result of learning this information, Ms. Cromwell requested Dr. Garvey, a psychiatrist, to do an assessment of the appellant, and comment on her ability to change her pattern of living and care for the child A.S.J. in a way that would be risk free.

[7] Dr. Brian Garvey, who has been in the practice of psychiatry for 40 years, met with the appellant, prepared a report dated March 6, 2000, and gave evidence at the hearing. The trial judge considered, among other evidence, the report and testimony of Dr. Garvey. In his decision he said the following concerning this evidence:

> Dr. Brian Garvey, Psychiatrist, was requested to do a psychiatric assessment of the Respondent mother. This request came from the Executive Director of the Children's Aid Society and the mother reluctantly attended. The interview lasted one hour and started off with the clear impression that the mother was not happy to be there. She expressed that parenting classes she took made no difference to her. She has no long term plan, no roots and is a bold, up-front person.
>
> The Respondent's first child C. died in his stroller (S.I.D.S.). He was a grumpy and moody child and "she wished he would die, and he did." She has been a prostitute (4 years) and an exotic dancer off and on although her family was well off and provided for her every need.
>
> While in Toronto she married one R.E. who kept her out working on the streets, but she denies any plan to return to him. She testifies they are

divorced.

In this one hour interview Dr. Garvey makes the following assessment, in summary:

> Assessment:
>
> This young woman fulfills all of the criteria for a diagnosis of an antisocial personality disorder or psychopath. She has a history of willful disregard of social and legal norms from an early age and has apparently, from her earliest years, sought and often achieved a degree of immediate gratification. One could refer to her prostitution, her very early sexual activity at the age of six, her insistence that she has always got everything she wanted and will continue to do so, her irritability and aggressiveness as indicated by her self reports of having stabbed her former partner and the repeated fights attested to by the R.C.M.P. with her recent partner, C., while in Shelburne. She is impulsive and lacks empathy with others. There is a ruthlessness about her which bodes ill for anybody involved with her and her lack of remorse and her ability to rationalize her behaviour towards others is striking.
>
> Summary:
>
> Ms. S.S. has a full blown antisocial personality disorder by any criteria. A recommendation of counselling or psychotherapy of any sort would be a waste of public time and money and of no help to her. As is well known, there is no effective treatment for this condition and most psychiatrists including myself, will refuse to see people with this diagnosis again. They are entirely a matter for the judicial system and correctional services.
>
> I would draw your attention Mr. Hinton, to S.'s comment about her first child, who died of Sudden Infant Death Syndrome while in a stroller, a phenomenon quite unknown to me and in my opinion very suspicious.

[8] In his decision, the trial judge also referred to the following evidence:

(a) An assessment prepared by the Agency, and the position of the Agency in this matter which is as follows:

> It is the Agency's position that S. [the appellant] is unable to provide the necessary protection that [A.S.J.] requires to protect him from physical and emotional harm, and in order for him to thrive. S. has shown a consistent pattern of involvement with persons who are violent, of living a lifestyle that has included being a prostitute as well as involvement in illegal activities that have included being violent towards others.

(b) A psychiatric report prepared by Dr. Deborah Elliott, and while Dr. Elliott's diagnosis does not agree with that of Dr. Garvey, the trial judge noted that Dr. Elliott does not do parenting assessments for the court, and she therefore made no judgment concerning the parenting skills of the appellant mother.

(c) The testimony of the facilitator from the Agency who supervised access by the appellant mother with the child during the periods that access was permitted, including references to certain inappropriate acts by the mother during access and the mother's inappropriate use of language in the presence of the child.

[9] In reaching his conclusion, the trial judge said the following:

> The mother does not have a long term specific plan i.e. where she will reside, who she will reside with, financially how she will cope or how she will continue to control her anger and increase her parenting skills. She admits that at this time she really does not know how to bring up a child.

And further:

> . . . any further services would be inadequate to protect the child . . .

[10] The trial judge decided that the Agency had satisfied the onus upon it

under s. 42(2) of the **Children and Family Services Act**, S.N.S. 1990, c. 5 (the **Act),** and concluded that it is in the best interests of the child (A.S.J.) for permanent care and custody to be granted to the Agency. Further, given the Agency's plan for the adoption of A.S.J., the trial judge decided that no access for the mother or father would be ordered.

[11] Prior to dealing with the merits of the appeal, I will deal with the appellant's application to adduce fresh evidence on the hearing of this appeal. The fresh evidence which the appellant seeks to introduce on this appeal is:

(a) The appellant's affidavit, which sets out an "Action Plan" which she completed on November 24, 2000, just over a month after the trial judge's decision. This action plan deals with her efforts to complete the community service which formed part of her probation conditions, as well as plans to upgrade her education, both in school and through office training; and

(b) The report of a psychiatrist, Dr. Douglas F. Maynes, dated March 16, 2001, less than one week prior to the hearing of this appeal. The appellant suggests that the importance of this report is that it takes issue with the report and evidence of Dr. Garvey, upon which the trial judge relied. The concluding recommendation in Dr. Maynes' report is as follows:

> **Recommendations** - It is very difficult to make a final diagnosis in this young woman. I think a tentative diagnosis would be Personality Disorder with Antisocial Personality Traits. Dr. Garvey has stated that she "fulfills all the criteria for diagnosis for an antisocial personality disorder or psychopath" thus implying that the term psychopath and antisocial personality disorder are synonymous but this is clearly not the case because not all antisocial personality disorders are psychopaths. To determine psychopathy, psychometric testing needs be done by a psychologist in order to make this diagnosis. After interviewing her I can see no clinical evidence of psychopathy. Her behavior, needless to say, has been antisocial in nature and she has shown very poor judgement in men and has been repeatedly abused. I have explained to the patient that a psychiatric assessment is not the same as a parental assessment to determine capacity to parent.

> This has to be made by a professional who assesses the patient interacting with her child. She may have symptoms of post-traumatic stress disorder secondary to abuse but this needs to be confirmed. She has a diagnosis of polysubstance dependence which is now in remission. I do not feel the patient has a major depressive disorder and I do not feel she requires any psychotropic medication. In order to make a diagnosis of antisocial personality disorder, a collateral history is often very useful and obtaining information from the courts also would be useful. I am referring this woman back to you for continued management and I do not feel she requires any psychiatric follow-up. She should continue, however, in therapy with her present therapist, Ms. Nickerson, as I feel she needs further abuse counselling.

[12] The court of appeal has wide latitude in considering an application to adduce fresh evidence on the appeal of a child welfare matter. Such an appeal requires ". . . a sufficiently flexible rule where an accurate assessment of the present situation of the parties and the children, in particular, is of crucial importance." (See **Children's Aid Society of Renfrew County v. L.P.W. et al.** (1989), 32 O.A.C. 394 (C.A.)).

[13] Section 49(5) of the **Act** provides as follows:

> (5) On an appeal pursuant to this Section, the Court of Appeal may in its discretion receive further evidence relating to events after the appealed order.

[14] In **Children's Aid Society of Halifax v. C.M. et al.** (1995), 145 N.S.R. (2d) 161 Justice Bateman of this court, following a review of the case law on this subject, said the following at § 24 and 25:

> The combination of s. 49(5) of the **Children and Family Services Act** and Civil Procedure Rule 62.22, when read in conjunction with the case law, gives this court a wide latitude to receive additional evidence in child welfare matters.
>
> Any fresh or further evidence admitted must, of course, be considered by this court in the context of exercising an appellate function and not as a hearing de novo. (see **Children's Aid Society of Renfrew County v. L.P.W. et al.** (1989), 32 O.A.C. 394 (C.A.)).

[15] We have received and reviewed this additional evidence which the

appellant has put forth. I make the following comments on each of these two matters of evidence.

Report of Dr. Maynes

[16] The report of Dr. Garvey, with which the report of Dr. Maynes appears to take issue in part, was prepared and delivered several months before the trial. The appellant responded to that report, at trial, with a report of Dr. Elliott. No reason is advanced as to why Dr. Maynes could not have prepared a report in advance of the trial.

[17] Further, from the point of view of the appellant's ability to parent, the report of Dr. Maynes is not significantly different from that of Dr. Garvey. While Dr. Maynes appears to take issue with Dr. Garvey's diagnosis of psychopathy, he does conclude that "It is very difficult to make a final diagnosis in this young woman." His tentative diagnosis is "Personality Disorder with Antisocial Personality Traits". Dr. Garvey reached a similar conclusion. The difference between the two diagnoses appears to be only the extent of the antisocial personality disorder. It was certainly Dr. Garvey's diagnosis of antisocial personality disorder which prompted him to conclude:

> . . . a diagnosis of antisocial personality disorder of this severity is almost the only diagnosis in psychiatry which without further qualification precludes the possibility of being a good parent.

[18] Lastly, of paramount importance here is what is in the child's best interests. The report of Dr. Maynes is of no assistance in determining whether the trial judge erred in his assessment of what is in A.S.J.'s best interests.

The Affidavit of the Appellant

[19] As in the case of the report of Dr. Maynes, there is no explanation as to why the matters which the appellant has undertaken since the decision of the trial judge could not have been undertaken before trial. These actions of the appellant appear, in all the circumstances, to be done as a response to the decision of the trial judge.

[20] Of particular significance to me is the lack of any information in the

appellant's affidavit concerning any action plan with respect to A.S.J., and no indication that the appellant has done, or plans to do, anything with respect to parenting skills.

[21] In short, the appellant's affidavit is irrelevant for the purposes of this appeal.

[22] I will now deal with the merits of this appeal.

[23] The appellant's grounds of appeal allege that the trial judge erred in two respects:

(1) In accepting Dr. Garvey's evidence which focused on the past in the face of conflicting evidence of the present.

(2) In not recognizing that the Agency was, also, focused on the past, and failed to provide integrated services to the appellant pursuant to s. 13(2) of the **Act** both before and after receipt of Dr. Garvey's report.

[24] In **Family and Children Services of Kings County v. D.R. et al** (1993), 118 N.S.R. (2d) 1 (N.S.C.A.) Chipman, J.A. said the following concerning the standards by which this court will review decisions of the Family Court made under the **Act**. He said at p. 13:

> I emphasize the unique advantage possessed by the trial judge in carrying out the duties mandated by the **Act**. Family Court judges presiding at trial are best suited to strike the delicate balance between competing claims to the best interests of the child. In the absence of error in law or clearly wrong findings of fact, this Court is neither willing nor able to interfere. See **Nova Scotia (Minister of Community Services) v. S.M.S. et al** (1992), 12 N.S.R. (2d) 258.

[25] With respect to the appellant's first ground of appeal, counsel for the appellant takes issue with the trial judge's acceptance of Dr. Garvey's diagnosis of psychopathy. Counsel contends that Dr. Garvey focused only on the appellant's past history, and made that diagnosis without proper testing, and following only a short interview. The problem with the diagnosis that the appellant is a

psychopath, counsel contends, is that it means the appellant cannot change. Therefore, having accepted Dr. Garvey's evidence, the trial judge would not be receptive to any evidence that the appellant had in fact changed, as she had testified.

[26] There are three points that I wish to make with respect to this ground of appeal.

[27] Firstly, the trial judge is best suited to determine whether Dr. Garvey's evidence should have been accepted, and what weight should be given to it in light of all the evidence presented at this hearing. It is not the role of this court to retry the case.

[28] Secondly, it is clear from the decision of the trial judge that in coming to his conclusion with respect to the appellant's inability to parent, (particularly, her inability to change) he did not rely solely on Dr. Garvey's diagnosis that the appellant was a psychopath. The trial judge noted that the evidence discloses that the actions of the appellant reflect the definition of a psychopath. The trial judge said:

> As mentioned the Doctor says there is no cure, and the evidence discloses the actions of the Respondent mother reflect this definition and is not conducive to raising a child.

[29] No doubt, the trial judge was referring to the words of the appellant herself, which were expressed to Dr. Garvey, and noted in his report as follows:

> The interview opened by Ms. S. informing me that she was not impressed with being sent to see me and she was clearly quite resentful of the trouble she had been put to. When asked if she knew why she was here she said, "I don't have a clue, I have to do parenting classes and I am also doing community hours", she made it very clear that any further demands upon her time, including attending me, were resented. When asked if she felt that the parenting classes were making any difference to her she said, "no it makes no difference to me. I have to build walls, it is never going to change. Counselling to me is no good, I want to live in the future, the past is my past".
> Emphasis added.

[30] And further,

> Her attitude was of a somewhat assertively belligerent tone with considerable impatience. She showed no evidence of guilt, shame or regret over her past life and no evidence of any plans to change it. She was mildly contemptuous of the idea of counselling or psychothcrapy and made it very clear that she would have none of that. She has no insight, in my opinion, into a child's requirement for stability and trusting relationships. She showed no evidence of insight into the deficiencies of her own character, nor any willingness to change them.
> Emphasis added.

[31] Even the witness, Deborah Churchill, who was called to give evidence on behalf of the appellant at the trial, said of the appellant "she is a very angry young woman".

[32] Thirdly, there was no "conflicting evidence of the present" (as counsel for the appellant contends) of any substance which was tendered at the trial of this proceeding except the evidence of the appellant herself who testified that she had changed. The trial judge, obviously, did not accept that evidence.

[33] I would dismiss this ground of appeal.

[34] In the second ground of appeal the appellant submits that the Agency failed to provide integrated services to her, both before and after receipt of Dr. Garvey's report and that the trial judge erred in not recognizing this fact, and that the Agency was also focused on the appellant's past.

[35] The trial judge was well aware of this issue which the appellant now raises. It was put to the trial judge, by trial counsel, in terms of giving the appellant "another chance". The trial judge noted in his decision that "any further services would be inadequate to protect the child".

[36] In any event the obligation of the Agency to provide integrated services to the appellant is not unlimited. Section 13(1) of the **Act** obligates the Agency to take "reasonable measures" in this regard.

[37] I agree with the submission of counsel for the Agency that the main limitation on the provision of services in this case was the appellant herself.

[38] There was ample evidence to support the trial judge's conclusion that any

further services would be inadequate to protect the child. As Ms. Cromwell noted in her evidence it became evident early on in this case that there were issues raised with regards to the appellant's sincerity, when it came to dealing with the Agency. Further the comments which the appellant made to Dr. Garvey, which are noted in his report and which I have referred to in these reasons, speak volumes concerning the attitude, or aptitude, of the appellant towards any measures that would improve her as a person or as a parent.

[39] I would dismiss this ground of appeal.

[40] The paramount consideration in these matters is the best interests of the child. There was evidence to support the trial judge's conclusion that it was in the best interests of A.S.J. that he be placed in the permanent care and custody of the Agency. The trial judge made no error of law in coming to such a conclusion which would warrant the intervention of this court.

[41] I would therefore dismiss this appeal, and confirm the order of Chief Judge Comeau.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.

Oland, J.A.