Date: 19980319 Docket: C.A. 144059

NOVA SCOTIA COURT OF APPEAL
Cite as L.M. v. Children's Aid Society of Cape Breton,
1998 NSCA 3

BETWEEN:

L.M. and B.M.	)	Appellants in person
	)	
Appellants	)	
	)	
- and -	)	
	)	Robert M. Crosby, Q.C.
	)	for the Respondent
CHILDREN'S AID SOCIETY OF CAPE BRETON	)	
	)	
Respondent	)	Application Heard:
	)	February 25, 1998
	)	and March 17, 1998
	)	
	)	Decision Delivered:
	)	March 19, 1998
	)	
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	)	

BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)

The appellants are the natural mother and stepfather of a child, E, who was born on October *, 1994. (*Editorial note- date removed to protect identity*) By an oral decision on October 23, 1997, Judge MacLellan of the Family Court made an order that E be placed in the permanent care of the Children's Aid Society of Cape Breton with no access. Mr. and Mrs. M have filed a notice of appeal from that decision and the appeal is to be heard on April 17th, 1998.

Mr. and Mrs. M have brought an application for an order staying Judge MacLellan's order. The stay application was filed on February 2nd and, with the consent of the parties, was heard by telephone conference on February 25 and March 18th. The stay is sought pursuant to **s. 49(3)** of the **Children and Family Services Act**, S.N.S. 1990, c. 7 which provides as follows:

> **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.

The purpose of the stay application is to obtain increased access to the child pending the decision on the appeal to this Court.

As noted, Judge MacLellan made the permanent care order with no provision for access. Prior to Judge MacLellan's permanent care order in October, there had been weekly access to the child. It appears from Judge

MacLellan's decision that she was concerned that the severance of access as required by her order should be effected so as to cause the least disruption possible under the circumstances to the child. She said in her oral decision:

> Because I have little detail on [E], I am going to order that it be done on the auspices of a child psychologist. Access continue with mother and child to wean the child off in a manner that is appropriate to cause the least disruption to the child. I am sure people have been looking after [E], they just have not been called to advise how she is going to react to not seeing her mother or sister again. While I find it is in her best interest that access be severed, how it is severed will be under the direction of a child psychologist. If further input of the court is required, I will provide same. I would contemplate that access may continue for a one, two or three month period. It must in any event be appropriate. I want the child psychologist to address [E]'s needs for counselling where she will no longer be seeing her sister or her mother. What is the situation as I have been left without that information. These are voids that are left due to a sketchy compliance with s. 41(3). A full compliance with s. 41(3) would not have left this void. However, on all the evidence I am satisfied that access between mother and daughter and sisters must be terminated. The psychologist will mitigate the effect, if any, this severance has on [E]. There shall be no provision for access to the Respondents or [E]'s sister, [J] so that the adoption can proceed.

The formal order of the Family Court dated 26 November contained the following provision:

> 2. There shall be no provision for access for the Respondents to the said child. The Applicant shall, however, engage the services of a child psychologist to assist the parties in discontinuing the present access arrangements between the Respondent, [L.M.] and the child, [E.A.H.] and between the child, [E.A.H.] and her sister, [J].

According to the affidavit of Mairi MacLean, an agent and child protection worker employed by the Agency, a psychologist, Dr. DeClerk, was consulted by the Agency with respect to the decreasing or weaning off of access. This consultation took place in late November of 1997 according to the evidence. Dr. DeClerk recommended a plan for a series of three final visits, hopefully with the co-operation of Mrs. M.

In mid-December, 1997, the Agency was notified that an appeal had been filed and the Agency decided that access would continue on a monthly basis until the appeal process was concluded. There was no evidence before me that this plan for access pending the appeal was formulated with or upon the advice of a child psychologist.

At the initial hearing of this stay application on February 25, the parties agreed to explore obtaining the advice of a child psychologist on what would be in the best interests of the child as regards access pending the hearing and decision on this appeal. However, when the matter came back before me on March 17th, it was reported that it was not possible to obtain an appointment with a child psychologist in whom Mr. and Mrs. M had confidence until June of this year.

Mr. and Mrs. M have filed affidavits outlining what they believe to be a lack of co-operation and inappropriate attitudes on the part of the Agency,

concerns about E's emotional and physical health as well as their concerns with respect to the very restricted access to E since October of 1997.

The overriding consideration on this application to stay the permanent care order is, of course, the best interests of E. It is also important to remember that the stay application relates to what will happen between today, March 17th, 1998, and the hearing and disposition of this appeal scheduled to be heard by the Court on April 17th, 1998.

The present arrangements for access were put in place after Judge MacLellan's oral decision of October 23, 1997. The application to stay the permanent care order was not filed until February 2nd, 1998. The current access arrangements have, therefore, been in place for almost four months and the appeal is scheduled to be heard in a month's time.

As I mentioned during the hearing of this application, the question of access in this case requires a very difficult balance to be struck. My decision on this stay application relates only to what is to happen between now and the decision on the appeal. The result of the appeal will only be known after the panel of the Court which will hear the appeal has heard all of the arguments, reviewed all of the evidence and made its decision. Therefore, my decision on this stay application must look at E's best interests during this period before the appeal decision in light of the possible outcomes of the appeal.

In other words, the question is what is in E's best interests during this period given the uncertainty as to the result of the appeal.

If the M's appeal is not successful, Judge MacLellan's order severing access will remain in place subject, of course, to any new proceedings which Mr. and Mrs. M may initiate to vary that order. If the result of the appeal is that access is terminated, then it does not seem to me to be in the best interests of E during the relatively short period between now and the hearing and disposition of this appeal, to change the pattern of access which has now been in place since late October of 1997. On the other hand, if the M's appeal to this Court is successful, it is probable that, at a minimum, much more liberal access to E will result. If that occurs, there is no evidence before me that maintaining the present access arrangements between now and the hearing and disposition of the appeal would make that transition, if it is to occur, more difficult for E.

It is regrettable that there is no expert evidence before me as to what would be in the best interests of this child under these difficult conditions.

Having carefully considered all of the evidence that is before me and the extensive submissions by Mr. and Mrs. M and by Mr. Crosby, on behalf of the Agency, I am not persuaded that it is in E's best interests to change the pattern of access that has been in place since late October of 1997 having regard to the fact that the appeal in this matter will be heard within a month. As

in many cases involving young children, no decision I can make on this stay application is ideal. Far from it. What I have done is to make the decision which, in my opinion, on the evidence, is the least detrimental alternative for E in all of the circumstances of this case.

The application for the stay is dismissed.

Cromwell, J.A.

C.A. No. 144059

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Appellants

- and -

CHILDREN'S AID SOCIETY OF CAPE BRETON

Respondent

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