19980707 CA No. 147897

**NOVA SCOTIA COURT OF APPEAL**

Cite as: B. M. v. Children's Aid Society of Cape Breton, 1998 NSCA 11

**BETWEEN:**

| | | |
|---|---|---|
| B. M. | ) | Mr. M. appeared in person |
| Applicant/ Appellant | ) | |
| - and - | ) | |
| CHILDREN'S AID SOCIETY OF CAPE BRETON | ) | Robert M. Crosby, Q.C. for the respondent |
| Respondent | ) | |
| | ) | Application heard: June 25, 1998 |
| | ) | Decision delivered: July 7, 1998 |

**BEFORE THE HONOURABLE JUSTICE DAVID R. CHIPMAN, IN CHAMBERS**

**CHIPMAN, J.A.:**

This is an application by the step-father of E.H., a female child born on October *, 1994 (*Editorial note- date removed to protect identity*), to his wife L.M. It is made for an extension of time within which to appeal from two orders of Judge Clare MacLellan of the Family Court dated March 8, 1996 and May 22, 1996 respectively. Both orders were made upon the application of the respondent pursuant to the provisions of the **Children and Family Services Act**, S.N.S. 1990, c. 7, as amended, for an order that E.H. was in need of protective services.

The events leading up to the granting of the two orders and the subsequent history of the disturbed relationship between the applicant and L.M. and the early life of the little girl are set out in detail in the decision of Cromwell, J.A. of this Court, in **L.M. and B.M. v. Children's Aid Society of Sydney**, May 14, 1998, C.A. No. 144059. I will therefore refer to the facts only to the extent necessary throughout the course of these reasons.

The respondent applied to the Family Court for the first order on the basis of information reported by L.M. to it respecting the applicant's alleged abuse of her and E.H. This order, showing in its heading as respondents the applicant and L.M., recites that the proper persons had received notice of the hearing in accordance with the Family Court Rules and the **Act**. The order further recites that the applicant was not present nor represented by counsel. Judge MacLellan indicated that the matter was adjourned for pre-trial and protection hearing to April 29 and that the s. 39 finding "proceeded by consent". The order provided, so far as is material;

> IT IS FURTHER ORDERED that during the adjourned period of time, the child shall remain in the care of the respondent, [L.M.], subject to the following terms and conditions:
>
> (a) that the respondent, [B.M., the applicant], not reside with the respondent [L.M.] and her child [E.H.];
>
> (b) that the respondent, [B.M.], not have any contact directly or indirectly with the respondent [L.M.] or her child [E.H.] without the previous knowledge and consent of the Applicant;
>
> (c) that the respondent , [L.M.], shall cooperate with the Applicant and all pertinent authorities to provide that the respondent, [B.M.], have no contact whatsoever either directly or indirectly with herself or her child, [E.H.], without the previous knowledge and consent of the Applicant.

On April 29, the matter was adjourned to May 7 because L.M. could not be located and on May 7 it was further adjourned to May 22 at which time the second order in generally the same terms was granted. The matter was adjourned to July 22, 1996.

The appellant and L.M. left Nova Scotia in late April or early May 1996, taking the child with them. The matter was further adjourned from time to time while efforts were made to locate them. It turns out that they were first in Massachusetts and then in Florida, where, among other things, they were incarcerated, and the authorities in that state apprehended E.H. and ultimately returned her to the respondent. On November 18, 1996, an order was made in the Family Court that E.H. stay in the temporary care or custody of the respondent where she has remained ever since, with access having been given to L.M. for a time.

The respondent next heard from L.M. in December 1996 or January 1997 when she was in Toronto, not in the company of the applicant. By or about June 1997 both L.M. and the applicant had returned to Sydney. They appeared to have reconciled.

The matter returned to court on July 15, 1997. The respondent applied for a disposition hearing for an order for permanent care pursuant to s. 41 of the **Act** and the matter was set for hearing on October 15, 16 and 17, 1997. The applicant first appeared before Judge MacLellan on this date. At that time he was not represented by counsel, but was represented by counsel at all subsequent court hearings including two pre-trial conferences held on September 10 and September 22, 1997.

Among other things, both the applicant and L.M. agreed at these pre-trial conferences, through their counsel, that no jurisdictional arguments were being raised with respect to the disposition hearing to be held later in October.

The permanent care hearing was held on the scheduled dates in October as well as on one other day. The applicant and L.M. were represented by separate counsel and neither adduced any evidence or argument respecting jurisdictional matters.

In her decision dated October 23, 1997, Judge MacLellan noted that it had been agreed that any jurisdictional issues had been waived and there were no jurisdictional arguments. She reviewed the evidence at length and found that E.H. should be placed in

the permanent care of the respondent. She found that the respondent had offered all services that could have been offered and she concluded on this issue:

> I believe the [M.]s are making efforts now but it is too little, too late; and indeed, they have to have time together to work on: (a) sobriety; (b) their own relationship; and (c) the pregnancy of this new child. This is an incredible amount going on in this home at the present time. The plan they have given is new. Their history is ridden with instability. The court has no assurance whatsoever that any order I could make, if I had the latitude, would be followed. Neither one follows court orders because they state their family is more important than court orders. But what did not following court orders end up with? Being raised in shelters, going to jail and having the child flown back into this country by an absolute stranger. This child was apprehended twice before age three. I have no assurance whatsoever that they will follow any order or any recommendation this court could make.
>
> In any event, I am satisfied that the Agency has met their onus. The evidence is overwhelming both on either version of the facts. I order that [E.] be placed in the permanent care of the Agency.

She addressed the question of access as follows:

> ... I am satisfied after reviewing <u>all the evidence</u> that there is a plan for the permanent placement of this child for adoption. I am satisfied that risks as set forth still exist. I am satisfied the parental situation is unlikely to change in the foreseeable future. On all the evidence I am satisfied that adoption is clearly in [E.]'s best interests. I am ordering that access is not in her best interest and that access be severed.

The appellant had not formerly sought access before Judge MacLellan even though she clearly rejected L.M.'s claim for access and stated that access was not in the child's best interests and that it should be severed.

On November 10, 1997, the applicant applied to the Family Court for an order for access pursuant to s. 47(2) of the **Act**. The log sheet discloses that on December 22,

1997, the applicant, L.M. and counsel for the respondent appeared before Judge MacLellan. The disposition noted on the log sheet was “matter going to Appeal Court”.

The applicant and L.M. appealed to this Court and by reasons of Cromwell, J.A., dated May 14, 1998, the appeal was dismissed. Cromwell, J.A. dealt with the issue of access as follows:

> Mr. M. submits that his lawyer failed him in not carrying out his instructions to file an application for access. He refers to file notes of September 10, 1997. However, the issue of access was considered by the Court at the hearing which began on October 15.

I agree with Cromwell, J.A., that the issue of access was considered by Judge MacLellan in the proceedings at which the applicant was present. The question of access was fully considered and dealt with by Judge MacLellan and that disposition was affirmed by the decision of this Court. The issue of access is not as such before me although in his application for an extension of time to appeal the orders for protective services the applicant asserts that his lawyer failed to apply for access on his behalf, as he had instructed.

What the appellant now seeks to do is attack the two orders deciding that E.H. was in need of protective services. These are a necessary foundation for the Family Court’s jurisdiction to grant a disposition order for permanent care, and dealing with access. See ss. 41 to 47 of the **Act.**

The time for appealing the orders of March 8, 1996 and May 22, 1996 is by s. 49(1) of the **Act** fixed at thirty days from the date of the order. There is the further requirement in s. 49(4) that the appeal be heard within ninety days of the filing of the notice of appeal or such longer time, not to exceed sixty days, as this Court determines.

In appropriate circumstances I have the power by virtue of s. 50 of the **Judicature Act** and Civil Procedure Rule 32.34 to extend the time for appeal. Section 49(4) of the **Act** poses a major concern inasmuch as it cannot now be complied with. For the purposes of these reasons I am prepared to assume that if I set the appeal down the Court has the power to hear the case if it is satisfied that the best interests of the child - the paramount consideration - override the time requirement. I must therefore also be satisfied that in addition to the three part test mentioned below being met, there is an arguable case that the child' best interests would be considered by the Court to prevail over the time limit. See **H.W. v. Children's Aid Society and Family Services of Colchester County et al.** (1996), 155 N.S.R. (2d) 334 at 341 et seq.

The applicant must, in any event, meet a three part test: 1) that there is an arguable ground of appeal; 2) that there was a continuing intention to appeal; and 3) that there is reasonable excuse for the delay in advancing the appeal. In the alternative, an extension can be granted if I am satisfied that in the circumstances justice requires it. See **N.S. (A.G.) v. Mossman, et al.** (1994), 133 N.S.R. (2d) 229 (C.A.); **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173; **G.(D.) v. Family and Children's Services of Kings County**

(1994), 4 R.F.L. (4th) 402; **C.(L.) v. Family and Children's Services of Queens County** (1996), 19 R.F.L. (4th) 436.

As to arguable grounds of appeal, the applicant's principal position is that he received no notice of the proceedings. He maintains that he first became aware of the orders in October 1996 when he was in Florida. I will deal with this contention in addressing the second and third branches of the test. The only other ground advanced is that Judge MacLellan made a finding under s. 22(2)(b) and (g) of the **Act** based solely on allegations and not having the proper evidence or facts before the Court. This bare assertion without more does not establish an arguable ground of appeal.

As to the second and third parts to the test, the applicant's position is that he was never given notice of the hearings which resulted in the two orders. His affidavit states:

> 2. I have never been served any documents to appear at any hearings in relation to the hearings concerning custody, access or protection proceedings in Family Court of Sydney, Nova Scotia, throughout the case as seen in exhibit log of Family Court in Sydney, Nova Scotia; This is marked as Exhibit No. 1 to this affidavit.
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> . . .
>
> 4. . . . the applications filed with the courts named both my wife . . . and myself as parties to the proceedings although I was never served, nor made aware of, nor present in these hearings.

The exhibit log sheets produced show a listing of exhibits, none of which are described as affidavits of service on the applicant. I was advised by counsel for the

respondent that there was in the file an affidavit of service sworn by J. T. indicating that the applicant was served with a protection application and notice of hearing for March 8 on the 6th of March, 1996.

In the factum of the appellants, filed with this Court for their appeal from the decision of Judge MacLellan making the permanent care order, there is included in the court documents reproduced a copy of an affidavit of service by J. T. deposing that he did serve the applicant with a protection application and notice of hearing for March 6, 1996. No exhibits are attached to the copy of the affidavit reproduced in the factum of the applicant. I draw the inference, however, that the applicant was aware of the existence of this document when he presented his appeal to this Court.

I ordered the Family Court file from Sydney. Attached to one of the log sheets, a copy of which the applicant produced as an exhibit to his affidavit is the affidavit of Mr. T.. It was sworn March 6, 1996. Mr. T. deposes that he served B. M. with the protection application and notice of hearing produced and marked as Exhibit “A” to his affidavit and the affidavit of L. B. produced and marked as Exhibit “B” to the affidavit, by leaving a true copy of those documents with him on Wednesday, March 6, before the hour of 2 o’clock in the afternoon at *, *, Nova Scotia. (* *Editorial note- removed to protect identity*) The exhibits consist of a notice of hearing returnable before the Family Court at 360 Prince Street, Sydney, N.S. on Friday, March 8 at 9:30 a.m. and the affidavit of L. B.. This affidavit sets out detailed allegations made by L.M. of abuse committed by the

applicant on her and on E.H. I have no difficulty in drawing the inference that the “B. M.” referred to in Mr. T.’s affidavit is indeed the applicant.

My confidence in the applicant’s assertions to me that he was not notified of these proceedings is anything but unlimited.

I am satified that having been served with the notice of the March 8th hearing, the applicant failed to show up and left the province shortly thereafter. He has thus disabled himself from receiving notice of the May 22nd hearing. He cannot complain that these proceedings took place in his absence.

The order of Judge MacLellan dated March 8, 1996 recites that the applicant was served. In her decision Judge MacLellan found that the applicant “was served and did not appear”. Cromwell, J.A. did not disturb this finding in his decision. I believe the applicant is estopped from further disputing it.

In any event, it is clear that by the time of the pre-trial hearings on September 10 and September 22, the applicant, represented by counsel, had to be aware of the two subject orders as they were the foundation upon which Judge MacLellan could proceed with the disposition hearing for permanent care. Judge MacLellan obviously took pains to ensure that counsel were not raising any jurisdictional arguments. This was covered at the

pre-trial hearings and Judge MacLellan made specific mention in her decision that counsel were not raising any jurisdictional arguments.

To this the applicant and L.M., who appeared with him before me, asserted that counsel “did not do her job” in agreeing that there were no jurisdictional issues. This is not in any way attested to by the applicant in his affidavit and, more important, there is no additional evidence to show that counsel took this position without the appellant’s authority. Counsel had apparent authority to make this commitment to the Court and in the absence of evidence that she was not authorized to take this position, I am not prepared to make a finding that the appellant had not waived all jurisdictional arguments.

Counsel representing the applicant on the disposition hearing for permanent care must, in the absence of evidence to the contrary, be taken to be competent. Such counsel would know that the two orders at issue were the foundation on which the proceedings for permanent care stood. The applicant had an opportunity then to apply for an extension of time to appeal the orders. He did not do so. Indeed, through counsel he indicated to Judge MacLellan that there were no jurisdictional issues. From all of this I draw the inference that the applicant elected to assert his rights with respect to the child E.H. in the proceedings for a permanent care order before Judge MacLellan. He ought not now to be able to reverse direction as it were, and belatedly seek leave to appeal the orders.

I am therefore satisfied that the applicant has failed to demonstrate a continuing intention to appeal. He has also not satisfied me that he was not notified of the proceedings in the first place.

The circumstances likewise fail to provide the applicant with any excuse for the long delay in making the application.

The applicant, therefore, fails the three part test.

The applicant is unrepresented by counsel before me. I therefore wish to address, as well, the question whether justice requires, irrespective of the application of the three part test, that the time be extended. If this issue can be resolved in his favour it would overcome my concerns, at this stage, with s. 49(4) of the **Act**.

The preamble to the **Act** includes the following:

> WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well-being;
>
> AND WHEREAS children are entitled to protection from abuse and neglect;
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> . . . . .
>
> AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;
>
> . . .

> AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;
>
> AND WHEREAS social services are essential to prevent or alleviate the social and related economic problems of individuals and families;
>
> . . . . .

The purpose of the **Act** is stated in s. 2:

> 2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.

The provisions of the **Act** dealing with intervention by the state in the family unit which can lead to the ultimate measure of placement in permanent care are designed to ensure that these objectives are attained where possible. The applicant had a full opportunity to demonstrate his fitness to play a role in E.H.'s future at the trial before Judge MacLellan. She found that the respondent established that adoption was clearly in E.H.'s best interests. Over two years have now elapsed since the orders were granted. In the nearly four years of her life, E.H. has been subjected to an environment of turmoil and uncertainty. The strict time limits for proceedings to be taken under the **Act** are undoubtedly designed to respect the child's sense of time and to avoid protracted litigation becoming a dominant or central event in a child's upbringing.

E.H. is still in foster care. Justice requires that, in view of Judge MacLellan's findings, affirmed by this Court, she be given the benefit of a stable environment without more delay.

I therefore dismiss the application. The respondent suggests that I consider an order for costs against the applicant. I have decided not to do so. The applicant has already undergone much hardship, unrelated to the child. He now loses what may well be his last chance to establish a relationship with the child. He should not be further burdened in getting on with his life, and solving his problems.

Chipman, J.A.