NOVA SCOTIA COURT OF APPEAL

Citation: *S.S. v. Nova Scotia (Community Services)*, 2016 NSCA 4

Date: 20160202
Docket: CA 446435
Registry: Halifax

Between:

S.S.

Appellant

v.

The Minister of Community Services, M.S., S.A. and S.F.

Respondents

Restriction on Publication: s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5

Judge:	Bryson, J.A.
Motion Heard:	January 28, 2016, in Halifax, Nova Scotia in Chambers
Held:	Motion granted. The appeal is dismissed.
Counsel:	S.S., appellant in person Peter McVey, Q.C., for the respondent Minister of Community Services

Restriction on publication: Pursuant to s. 94(1*) Children and Family Services Act,* S.N.S. 1990, c. 5.

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.**

Decision:

Introduction

[1] S.S. is the grandmother of three children aged eight, four, and two, currently in foster care. The children were apprehended by the Minister in August of 2014, owing to concerns surrounding drug use, unfit living conditions, domestic violence and neglect while in the custody and care of their mother, M.S. In September 2015, the Minister applied for an order of permanent care and custody.

[2] S.S. loves her grandchildren and wanted to help. She applied to be added as a party and also sought custody of her grandchildren under the *Maintenance and Custody Act*. But S.S.'s personal circumstances and resources were not equal to her good intentions. Justice Theresa Forgeron denied her application to be joined as a party and dismissed her application for custody, (2015 NSSC 307). S.S. has appealed to this Court, asking that her application for "party status in the child protection proceeding be granted".

[3] The Minister moved to dismiss the appeal on various grounds. The Minister argues that S.S. has no right to appeal under the *Children and Family Services Act* (*CFSA*); that the appeal that she has filed is in the wrong form, is late, and should not be entertained by the Court. An absence of standing renders an appeal "absolutely unsustainable", *R.K. v. H.S.P.*, 2009 NSCA 2 at ¶ 44; *Ingham v. West Hants District (Municipality)*, 2006 NSCA 37.

Procedural Background

[4] Although aware that her grandchildren were apprehended in August 2014, S.S. took no legal steps until September 2015, when the Minister applied for permanent care. S.S.'s application was heard on September 23 and October 5, 2015. S.S. filed an affidavit and was cross-examined for more than a day. She had legal counsel. The Minister filed affidavit evidence on which there was cross-examination. Justice Forgeron reserved and then rendered an oral decision on October 27, 2015. Written reasons followed on October 30, 2015. No order was issued until November 12, 2015.

[5] The application for permanent care proceeded before Justice Forgeron on October 27, 2015. The children's mother consented to the Minister's application for permanent care. Their father did not. On October 28, 2015 she granted the Minister's order. It has not been appealed.

Justice Forgeron's Decision

[6] Justice Forgeron applied this test when considering S.S.'s application for party status:

> [20] In *Nova Scotia (Minister of Community Services) v. S. S.*, 2012 NSSC 293, Jollimore, J., after undertaking a case law analysis, reviewed the factors to be considered when faced with a contested standing motion. These factors are as follows:
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> - Whether the non-party seeking standing has a direct interest in the proceeding's subject matter.
> - Whether the non-party seeking standing has a familial, or some other, relationship with the children.
> - Whether there is a reasonable possibility, when compared to other alternatives, that the children's welfare may be enhanced by granting the non-party standing and hearing the relevant evidence.

This test is not new. It received favourable comment in *R.B. v. Children's Aid Society*, 2003 NSCA 49 at ¶ 30.

[7] Justice Forgeron was satisfied that S.S. had met the first two criteria, but faltered on the last, essentially for three reasons. First, she found a lack of emotional attachment:

> [24] The children lack an emotional connection to SS. SS never met J. [the youngest child]. From J's perspective, SS is a virtual stranger.
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> [25] In addition, there is an insignificant attachment between SS and her other grandchildren, D and C. SS's last personal contact with her grandsons was in June 2013 – over two years ago. Further, prior to 2013, the contact between SS and her grandsons was inconsistent and sporadic for various reasons, including:
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> - The conflict between SS and MS.
> - SS's lifestyle choices.
> - SS's lengthy absences from the area where her grandchildren were living.

[8] Second, she cited S.S.'s "chaotic" and "unsafe" lifestyle:

> [27] SS struggled with mental health and substance abuse issues throughout much of her life. These struggles led to an adoption of an unsafe and chaotic lifestyle. This lifestyle produced child protection risks which resulted in agency involvement for several years. SS has not undertaken sustained and appropriate services to alleviate or moderate the protection concerns associated with her addiction and mental health difficulties. The court therefore finds, on a balance of probabilities, that child protection risks would likely resurface if SS was entrusted with the care of her grandchildren in the future.

[9] Finally, she noted S.S.'s residential instability:

> [30] SS does not have appropriate housing. SS is not eligible to apply for regional housing until her outstanding account in the amount of $2,200 is paid in full. She estimates that it will take about six months to make restitution. In the meantime, SS is going to rent a room in a clean house, which she admits is not suitable for the children.
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> [31] This is not the first time that securing appropriate and affordable housing has been challenging for SS. Her evidence is replete with examples of repeated moves, both within the area, and to and from other provinces. Residential instability is not in the best interests of the children.

[10] Justice Forgeron went further than finding the children's welfare would not be "enhanced" by granting party status to S.S. She actually found that there was a reasonable prospect that the children would be at risk in her care:

> [23] I reject the application of SS because she failed to meet the burden which was upon her. Although SS showed the she held a direct interest in the proceeding, and was involved in a familial relationship, she did not prove the third branch of the test. SS failed to prove, that when compared to other alternatives, that there was a reasonable possibility that the children's welfare would be enhanced by granting her party status and hearing the relevant evidence. To the contrary, concerns surrounding a lack of emotional connection to the children; mental health, addiction and lifestyle issues; and residential instability confirm that there is a reasonable likelihood that the children would be at risk if they were placed in SS's care.
>
> **[…]**
>
> [29] Given SS's past lifestyle choices, her fragmented approach to mental health treatment, and her failure to actively participate in addiction and relapse prevention programming, the court concludes that D, C and J would be at risk should SS be involved in their lives.

S.S.'s Appeal

[11] S.S. filed her appeal on December 14, 2015, challenging Justice Forgeron's November 12, 2015 Order implementing her October 27, 2015 decision rejecting standing. The appeal purports to be brought under the "*Children and Family Services Act*".

[12] S.S. alleges no error of law or principle. She does not claim patent injustice. S.S. appears to challenge Justice Forgeron's factual findings on her health, her history and personal circumstances. S.S. does not now have counsel, but did consult lawyers before starting her appeal.

[13] On her motion, the Minister filed affidavit evidence which describes the adoption process which began in October, but has been put on hold pending disposition of S.S.'s appeal. The children remain in foster care. The Minister wants to get the adoption process moving. She opposes further delay and says S.S.'s appeal is without legal basis. S.S. and the Court also have the benefit of the record before Justice Forgeron.

[14] In response to the Minister's motion, S.S. filed a statement of her intentions regarding her plans for her grandchildren. She filed no evidence. She did provide the Court with some documents - she says she has more - that she would like to use at her appeal by way of "fresh evidence". The documents provided to the Court describe her dealings with counselling and social services in 2008. They do not appear material to Justice Forgeron's factual findings.

[15] During oral submissions, S.S. confirmed that she still lives by herself in a rented room. S.S. has been diagnosed with PTSD. She takes medication for anxiety and depression. She has no employment income. She has no local family support - those she does have are why her grandchildren were apprehended. S.S.'s personal circumstances have not improved since the fall hearing before Justice Forgeron.

Discussion

[16] S.S. has appealed under the *CFSA*, but she has no right of appeal because she is not a party (s. 49(1)).

[17] It may be that S.S.'s "appeal" could be reconstituted under the *Judicature Act*, which permits an appeal from the Supreme Court (s. 38(1)) and Supreme

Court, Family Division (s. 38 (1A)). Each of those sections begins, "Except where it is otherwise provided by any enactment…" So the Court would have to find that the appeal provisions in the *CFSA* were no impediment. Moreover, if Justice Forgeron's decision were interlocutory, as the Minister argues, it would require leave, and should have been filed not later than November 27. Even then, any appeal under the *Judicature Act* in a *CFSA* proceeding should respect *CFSA* principles.

[18] Assuming that a single judge of the Court in Chambers had authority to amend S.S.'s appeal as one brought under the *Judicature Act*, and extend any time that might be required (assuming the appeal to be interlocutory), I would not do so because:

(a) there are no exceptional circumstances, such as a compelling case on the merits, to warrant such amendment;

(b) the appeal is moot;

(c) the children's best interests would not be served by doing so.

Exceptional Circumstances/Merits

[19] Absent "no ground of appeal" (per Rule 90.40), a chambers judge of the Court of Appeal cannot dispense with an appeal on the merits. There is no jurisdiction to do so. Nevertheless, the merits - as in the strength of the case - are frequently considered as a factor in the exercise of discretion; for example, whether to grant a stay or extend time. When extending time, a judge will consider whether "there are compelling or exceptional circumstances … not least of which being that there is a strong case for error … and real grounds for appellate interference (per Saunders, JA in *Jollymore Estate v. Jollymore*, 2001 NSCA 116). If an appellant appears to have a strong case on the merits, that would weigh in favour of preserving the appeal. That is not this case. No error of law is alleged or is apparent in Justice Forgeron's decision. And unlike many cases in chambers, we have the advantage of the record from the court below. It appears to support the judge's factual findings. If there is a palpable and overriding error, S.S. has not provided evidence of it, and it is not obvious on the record.

Mootness

[20] S.S. has not appealed the permanent custody order. She is now asking the Court to give her standing in a matter that has already been heard. That ship has

sailed. That decision has been made. For such an appeal to be effective, the custody order would have to be appealed as well, and S.S. would need standing to do so. Even then, a single judge of the Court of Appeal cannot grant standing:

> [11] If there is an inherent power, derived from English Chancery practice, to add a party for the purposes of bringing an appeal, this preserved inherent jurisdiction is that of the Court, not one judge of the Court. In the New Brunswick case cited earlier, a Court of Appeal Chambers judge decided that under New Brunswick practice, the inherent jurisdiction to add a party for the purposes of appealing should be exercised only by the Court. Assuming (without deciding) that our Court has a similar inherent power, there is no rule or enactment to which I have been referred which authorizes a judge in Chambers to exercise it.
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> (per Cromwell, J.A., 2002 NSCA 108)

Also see *Proposed Appellants v. Griffiths*, 2005 NSCA 85 at ¶ 1 *and G.S. v. Nova Scotia (Community Services)*, 2006 NSCA 4. This, of course, is to be distinguished from a judge's authority to grant intervenor status in an *existing* appeal (Rule 90.19).

[21] Ironically, Justice Cromwell observed that the Family Division is best placed to decide such questions:

> [18] The Family Division not only has intimate knowledge of the permanent care proceedings, but is better equipped to deal with the evidentiary matters which are likely to arise in the course of R.B.'s attempts to place her position before the Court. The Family Division would also be in the position to deal with the permanent care order on its merits whereas this Court, if persuaded that R.B's plan for the child should have been heard and considered, would most likely find it necessary to remit the matter to the Family Division for evaluation of her plan for the child. This would add to delay which the *Children and Family Services Act* tries to avoid.
>
> (2002 NSCA 108)

Of course, in this case, the Family Division has already done so.

Best Interests of the Children

[22] This is the paramount consideration in any exercise of discretion involving the interests of children under the *CFSA*. The *Act* exhorts a speedy process. Justice Fichaud eloquently describes the imperative in *C.O. v. Nova Scotia (Community Services)*, 2010 NSCA 83:

> [16] The children are under 4 years of age. As the *CFSA* recites, their sense of time differs from that of adults. That is why the *CFSA* presumes that the appeal be heard within ninety days of the notice of appeal, meaning at most 120 days from the order under appeal (though the Court of Appeal has discretion to extend for another 60 days). Here, that 120 days would expire next Monday.
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> [17] The trial transcript is not prepared. The applicants' brief for this application says that their grounds of appeal "will likely be extended once the transcripts are reviewed". This would require a chambers application to amend the notice of appeal. The applicants' written submission treats the parties with pertinent interests as just the applicants and the Minister. But in a *CFSA* appeal, the children's interests dominate, and the children's abridged sense of time is incongruent with the leisurely pace, involving adjournments, extensions and lawyer's timetables, that sometimes governs adult litigation. This reality faces a CFSA prospective appellant on an extension application.
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> **[…]**
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> [20] When the litigation started, one child was an infant and the other a toddler. Now the younger is a toddler and the elder an active boy. Twenty months may be an eye blink to a commercial litigant, but cradle to playground is a stage of life to a child. Even the four months since the decision to be appealed is formatively significant. The *CFSA* commands that I examine the children's best interests through the lens of their sense of time. A courtroom is a sorry nursery, and no aspect of the evidence suggests that longer litigation could elevate these children's interests.

[23] In this case, three months have passed since the permanent care order. S.S. says she wants to present fresh evidence for any appeal, which appears to consist of medical and other records, largely from Ontario. That will take more time. The children are running out of time. Their opportunity to bond and develop in a new family setting is indefinitely deferred. The ninety day appeal period under the *CFSA* will be exceeded, although the additional sixty day window may be accommodated. But none of this favours resurrecting S.S.'s case by re-constituting it as a *Judicature Act* appeal. Both the Minister and Justice Forgeron have decided that the children's best interests are served by adoption. More pertinently, Justice Forgeron has determined that the children would likely be at risk if placed in S.S.'s custody.

Referral to a Panel

[24] For similar reasons, I would not exercise my discretion under Rule 90.37(12)(f) to refer this matter to a panel. S.S. would have to apply to extend time to appeal the Permanent Care Order. She would require leave to be made a

party so that she could appeal. The panel would be confronted with diminished timelines and the same issues of doubtful merits and the children's best interests.

[25] It would not be in the best interests of the children to complicate this case, beyond the relief actually sought by S.S., with timelines difficult to meet that would exacerbate the uncertain circumstances they presently endure.

Conclusion

[26] The Court is very conscious that S.S. is a self-represented party to whom considerable latitude is normally extended. But where the best interests of children are concerned, such procedural generosity recedes before those interests. As Justice Cromwell aptly said:

> [10] In many civil cases, extensions of time are often granted quite readily especially where the delay is short and the party seeking the extension is not represented by counsel. However, extensions of time for appealing under the Act call for the consideration of at least two special factors.
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> [11] The first is that, as in all proceedings under the *Act*, the best interests of the child or children are paramount. ***It is not a matter of doing justice simply between the appellants and the respondent, but of serving the best interests of the child who is the subject of the proceedings.*** Secondly, ***the Act makes it clear that time limits are important so that the child's sense of time is respected. Nowhere in the Act is this more clear than with respect to appeals.*** The *Act* has an extraordinary and virtually unique requirement that appeals must be heard by the Court of Appeal in 90 days, with the possibility of a 60 day extension, from the date of the filing of the notice of appeal. The time limit for hearing the appeal runs from the filing of the notice of appeal; it follows that any extension of the time for filing the notice of appeal in effect extends the time for hearing the appeal. In other words, extending the time for filing the notice of appeal accomplishes indirectly what the *Act* does not specifically provide for -- an extension of the time within which the appeal must be heard.
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> (2002 NSCA 62) [Emphasis added]

[27] I am well aware that this decision will profoundly disappoint S.S. She wants to do the best for her grandchildren. She is plainly sincere. But as the record shows, life has been a struggle just looking after herself. It will be infinitely harder with three small children, including a toddler. Justice Forgeron clearly felt it would be an undue burden for S.S. and contrary to the children's best interests to impose on S.S. in this way.

[28] The Minister's motion is granted. The appeal is dismissed.

Bryson, J.A.