Date:19990623
C.A. 154825

NOVA SCOTIA COURT OF APPEAL

Cite as: B. D. v. Family & Children's Services of Kings County, 1999 NSCA 180

Chipman, Flinn and Cromwell, JJ.A.

BETWEEN:

B. D. Appellant	)	Brian V. Vardigans for the appellant
- and -	)	Donald B. MacMillan for the respondent
FAMILY AND CHILDREN'S SERVICES OF KINGS COUNTY Respondent	)	Leonard J. MacKay for T. M.
	)	Appeal heard: June 14, 1999
	)	Judgment delivered: June 23, 1999

Editorial Notice

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

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Chipman and Flinn, JJ.A. concurring.

CROMWELL J.A.:

[1] The appellant, B. D., is the father of two children, aged 3 and 2. They were found to be in need of protective services and placed in the permanent care and custody of the Family & Children's Services of Kings County by Levy, F.C.J. Mr D. appeals the permanent care and custody order. Ms M., the children's mother, supports the position advanced by Mr D. on the appeal.

[2] While numerous grounds of appeal are raised, the essence of Mr D.'s position is that the judge erred in not permitting further exploration at the hearing of the possibility of placing the children with Mr D.'s biological father, Mr W. and his wife, Mrs W.. This possibility was first raised on the final day of a three day hearing.

[3] The order under appeal was the culmination of nearly 2 years of proceedings in the Family Court in relation to these children. They were taken into care in mid 1997. They were then returned to Mr D. in August of 1998 after he had completed psychological assessments, parenting programs, an anger management program and had secured suitable accommodation. Problems were evident shortly after the children were placed with Mr D. and they were finally re-apprehended by the Agency in the late autumn of 1998.

[4] At a hearing in January of 1999 following the re-apprehension, Judge Levy found that there was a substantial risk of physical harm to the children if left in the care of Mr D.. As the judge put it, any reasonable person would have "... a very real fear

that Mr D.'s temper and his anger and his inability to restrain the physical manifestation of that, could indeed cause either or both of these boys substantial harm."

[5] The judge also expressed concern about the length of time the matter had been before the Court and the adverse impact that could have on the children. He stated:

> I reiterate based on what I have at this point, it does not strike me as being a close call at all. There is clearly a substantial risk. ... This is a serious situation in my view, and I propose to treat it as such. It's been before the Court for a long time, I don't intend to adjourn this matter for a lengthy period of time... If Mr D. has a plan, a realistic proposal, and can satisfy the Court that the children are not at risk, then maybe you should hear that sooner rather than later. This is almost two years now, by an unfortunate set of circumstance. ...I don't want to start all over again with a long lengthy proceeding, that strikes me as being antagonistic to the best interests of the children and the clear mandate and directions in the Act. (emphasis added)

[6] After the January, 1999, finding that the children were at substantial risk of physical harm, a further hearing was set for March to consider disposition. The Agency sought an order for permanent care and custody with no access. The Agency Plan set out that three possible placements with relatives had been explored (R. R., T. M. and C. and D. B.) but none was recommended.

[7] Two days were reserved for the hearing commencing on March 2, 1999, but a further day was added after the hearing had started. In accordance with the practice in the Family Court, the hearing was preceded by extensive disclosure.

[8] At the end of the second day of hearing, it was understood by the parties

and the Court that there remained one further witness to be called on behalf of Mr D., and possibly one witness on behalf of Ms M. to be followed by closing submissions. At about 11:30 p.m. on that day, counsel for Mr D. left a message at the office of Counsel for the Agency that it was his intention to call Mr W., Mr D.'s biological father, as a witness.

[9] On resumption of the hearing the next morning, counsel for Mr D. indicated that Mr and Mrs W. were present in court, that they were "more than willing" to have the children in their home, that they had "been interested for some time in this" and that counsel wanted to call them as witnesses to present a family option as an alternative to the permanent care order sought by the Agency. Counsel for Mr D. indicated that he had received instructions from his client to advance this option only the evening before. No affidavit was tendered from the W. and they had previously had no involvement in the proceedings.

[10] After hearing submissions, the judge ruled that he would not allow the introduction of the evidence concerning this new proposal. He noted that the disposition order made in August of 1998 (which returned the children to Mr D.) had been made well outside the time frame provided for in the Statute and that the matter had been before the Court for more than the maximum total allotted time provided for in the **Children and Family Services Act**, S.N.S. 1990, c. 5 as amended. He observed that the children were very young and that "... each passing day made it harder to justify the continuing lack of resolution and permanency in their lives."

[11] The appellant argues in essence that the judge erred by placing undue emphasis on procedural issues and failed to apply or to give sufficient weight to the provisions of the **Act** requiring consideration of family or community placement and that the least intrusive alternative be employed. According to the appellant, the **Act** required the judge to hear the W. The appellant further submits that the Agency failed in its duty, using counsel's words, to "check out" all family and community placements. In the appellant's submission, a delay of only a few weeks would have allowed full exploration of placement with the W., and the children's best interests demanded that be done.

[12] In my view these submissions are wrong in law and unsupported by the record in this case. The judge was required by the **Act** to consider a number of factors. Chief among them is what the **Act** refers to as the paramount consideration, the best interests of the children:

> 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. (emphasis added)

[13] In considering the best interests of the children, the Court is to take account of all the relevant circumstances: s. 3(2). Specific factors of obvious relevance here include the children's development of a positive relationship with a parent (s. 3(2)(a)), the children's relationship with relatives (s. 3(2)(b)), bonding between the children and parents (s. 3(2)(d)), the children's physical, mental and emotional needs (s. 3(2)(e)), the

merits of the Agency's Plan (s. 3(2)(i)), and the effect on the children of delay in disposition of the case (s. 3(2)(k)).

[14] Also central to the Court's determination is the preservation of family and community ties and the principle that the least intrusive alternative consistent with the children's best interests be employed. These considerations are addressed in various places in the **Act**, particularly s. 42(2), s. 42(3) and s. 46(4)(c) which provide:

> 42 (2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.
>
> (3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person. (emphasis added)
>
> .....
>
> 46 (4) Before making an order pursuant to subsection (5), the court shall consider
>
> .....

> (c) what is the least intrusive alternative that is in the child's best interests; .....

[15] The judge addressed himself specifically to s. 42(3) of the **Act**. He stated that the section is mandatory and that there is a positive obligation on the Agency and the Court to see to it that reasonable family or community options are considered. I agree with this statement of the effect of the section. He also considered the impact on the children of starting to explore the possibility of a new placement plan at the late date on which it was first advanced. He concluded:

> ... in order the justify the delay that would inevitably be caused by this last minute proposition I would have to have some basis in fact to believe that the potential benefit of arresting the process to consider the evidence would outweigh the harm done to the children's best interests by the delay. In the circumstances of this case I was unable to draw such a conclusion. (emphasis added)

[16] The judge had been concerned in January, and his concern continued, that the long delay in achieving a stable, permanent arrangement for the children was contrary to their best interests. The record before the judge contained virtually no information about the W.. As far as the evidence disclosed, they had little contact or ongoing relationship with the children. The Agency was aware of the W., but had not pursued them as a possible placement option. The Agency had asked Mr D. about possible family placements but Mr D. did not raise the W. as a possibility in any of his long and extensive dealings with the Agency. Although the W. had some limited contact with the Agency, they had not, prior to the last day of the hearing, indicated to the Agency any interest in assuming care of and responsibility for the children.

[17] The affidavit of Mr Daniels (a child protection worker), sworn in July of 1997,

stated that Mr D., Ms M. and the older child (the younger one not having been born until June of 1997) stayed for a time with Mr W. in the spring of 1997. Mr D. and Ms M. had been asked at that time (nearly 2 years before the order giving rise to this appeal) whether there were any family members they felt could provide temporary care to the child until they found appropriate accommodation and got their financial assistance straightened out. They replied “no”.

[18] That is where matters stood as regards the W. on the morning of the third day of the hearing in March, 1999.

[19] Sections 42(2), 42(3) and 46(4)(c), like all others in the **Act**, must be interpreted and applied in the context of the **Act** as a whole and in light of its paramount purpose. They must also be interpreted in a way that recognizes that the **Act** must be applied through a process of adjudication in a court which, while flexible, requires due regard for fair and orderly procedure. I would respectfully adopt the following words of Williams F.C.J. (as he then was) in **Nova Scotia (Minister of Community Services) v. S.B.** , [1999] N.S.J. No. 144 (Fam Ct) at para 225 - 227:

> The word “possible” [in section 42(3)] must be read in the context of the whole of the **Act** and in a fashion consistent with the stated purpose of the Act, Section 2(1).
>
> Extended family is a placement alternative that is desirable and consistent with the **Act**, as is support for families and alternatives that minimize the intrusiveness of these actions. Any placement alternative, however, must be considered in the context of the needs and best interests of the child.

> Section 3(2) defines family security and relationships as a consideration in determining the child's best interests not an overriding trump to the child's best interests. (emphasis added)

[20] I would also respectfully adopt the following statement of Osborne, J.A., speaking for the Ontario Court of Appeal, in **Children's Aid Society of Peel v. W.(M.J.)** (1995), 23 O.R. (2d) 174 (C.A.) at p. 190:

> The C.A.S. [i.e. the Agency] is not required to investigate any and every placement proposal. It is in the interests of those advocating a competing plan to advance the most persuasive alternative that they can formulate...
>
> It may well be that a plan or placement proposal different from that advanced by the C.A.S. will require further investigation and perhaps the preparation of a home study report. However, not every placement proposal will require such a response.

[21] As noted, the judge stated that in order to justify the further delay that would inevitably be caused by this last minute proposition, he would require some basis in fact to believe that the potential benefit of arresting the process to consider the evidence would outweigh the harm done to the children's best interests by the delay. This seems to me a shorthand but correct way of recognizing that the decision he had to make called for balancing the many considerations required to be taken into account by the **Act** in light of the particular circumstances of the case and the paramount concern for the best interests of the children.

[22] It might well have been preferable for the judge to permit the W. to testify, even if briefly, before reaching his conclusion. Had he done so, he would have been in a better position to assess, on a threshold basis, the plausibility of the new plan.

However, realistically viewed, the request made on behalf of Mr D. on the morning of the third day of the hearing was not simply for a short delay to permit the evidence of two unexpected witnesses. What was advanced was an entirely new plan for the children which had no basis in the evidence before the Court up to that point. Consideration of this possibility would inevitably have entailed adjourning the matter to permit proper disclosure of the anticipated evidence to counsel for the Agency, time for him to prepare the Agency's response as well as time to allow completion of a home study of the W. and then further court hearings to consider whether a placement should be made there. If the Court had concluded at that stage that the W. appeared to be a viable alternative, the next step would have been a further temporary order for placement with the W. and then a further consideration of a final disposition.

[23] Faced with this potential for a considerable period of further uncertainty and lack of stability for the children and virtually no information about the proposed plan, what was required was a judgment call by the judge giving due weight to the numerous relevant considerations under the **Act** in light of the particular circumstances of the case. There was no good answer; what was required was an answer that, all things considered, gave paramountcy to the children's best interests as delineated in the **Act** and applied in the context of an adjudication by a court.

[24] This Court has said many times that the trial judge's decision in a proceeding like this one should not be set aside on appeal unless a wrong legal principle has been

applied or there has been a palpable and overriding error in the appreciation of the evidence: see **Nova Scotia (Minister of Community Services) v. S.M.S.** (1992), 112 N.S.R.(2d) 258 (C.A.) at 268 and **Children's Aid Society of Colchester County v. Maguire and Boutilier** (1979), 32 N.S.R.(2d) 1 (S.C.A.D.) at 7 - 8. This deference is especially appropriate where, as here, the judge has not only presided at the hearing giving rise to the order under appeal, but has been extensively involved in the long process leading up to it.

[25] Having reviewed the record and considered the oral and written submissions of counsel, I conclude that the trial judge did not make any error justifying appellate intervention. He applied proper principles and fully grasped the evidence before him in attempting to balance the numerous considerations relevant to the particular circumstances of the case before him.

[26] I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Chipman, J.A.

Flinn, J.A.