NOVA SCOTIA COURT OF APPEAL
Citation: ***G.M. v. Children's Aid Society of Cape Breton-Victoria***,
2008 NSCA 114

Date: 20081211
Docket: CA 298122
Registry: Halifax

Between:

G.M.

Appellant

v.

Children's Aid Society of Cape Breton-Victoria

Respondent

Restriction on publication:	**pursuant to s. 94(1) of the Children & Family Services Act**
Judges:	Bateman, Oland and Fichaud, JJ.A.
Appeal Heard:	November 14, 2008, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Danielle Morrison-MacNeil, for the appellant Robert M. Crosby, Q.C., for the respondent

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.**

Editorial Note

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

Reasons for judgment:

[1] This is an appeal by the maternal grandfather of four children from an order of Justice M. Clare MacLellan of the Supreme Court of Nova Scotia (Family Division) placing the children in the permanent care of the Children's Aid Society of Cape Breton-Victoria (the Agency).

BACKGROUND

[2] The appellant is the father of D.M. and grandfather to her five children of four different fathers. He is also the joint custodian of the two eldest children. This status came about as a result of the February, 2000 termination of a prior child welfare proceeding involving the two oldest children. As a condition of the termination the appellant was granted joint custody, along with D.M., under the then **Family Maintenance Act**. Of the various fathers, only C.N., the father of two of the children was involved in any significant way in the proceeding. Neither D.M. nor any of the fathers are participating in this appeal.

[3] The five children, whose birth years are 1998, 1999, 2002, 2003 and 2006 were apprehended from D.M.'s care in March, 2007. D.M.'s history with the Agency dated back to 1998.

[4] At the protection hearing on June 20, 2006 the children were found to be in need of protective services as regards D.M. The judge also found that there was a substantial risk that the children would be sexually abused if placed in the care of the appellant. Section 22(2)(d) of the **Children and Family Services Act**, S.N.S. 1990, c. 5 (the **Act**) provides:

> 22 (1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.
>
> (2) A child is in need of protective services where
>
> . . .
>
> (c) the child has been sexually abused by a parent or guardian of the child, or by another person where a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child;

> (d) there is a substantial risk that the child will be sexually abused as described in clause (c);
>
> . . .

[5] The youngest child was ultimately placed in the custody of her paternal grandmother under the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160. That disposition is not on appeal. Hereafter I will refer only to the four oldest children.

[6] The proceedings were protracted involving five counsel and with court hearings on twenty-five days running between May 23, 2006 and February 29, 2008, when judgment was pronounced. Time lines were extended in the best interests of the children.

[7] D.M.'s longstanding issues with parenting and her choice of partners had negatively impacted the children dating back to 1998 when the oldest child was apprehended as an infant and remained in care for eighteen months. At that point D.M. was residing in D., Nova Scotia.

[8] In 1999, the appellant returned to the D. area from T., where he had been working as a * (*editorial note- removed to protect identity*) . At that time he assisted D.M. in putting forward a plan which would forestall apprehension of the second child, who was about to be born, and see the return of the oldest to D.M. According to the plan he was to live with D.M. to assist with the care of the two children as joint custodian.

[9] In early 2001 D.M. and her then partner as well as the appellant moved to Cape Breton to live. In December of that year the Agency learned that the appellant was alleged to have sexually assaulted five nephews when they were children. At that point the appellant was no longer living with D.M. and the children. Consequently, the Agency took no action save to direct that the appellant was not to have unsupervised access with the children.

[10] In November, 2002 the Agency again became actively involved when it was learned that the mother and children were living in squalid conditions. The home was filthy with dog feces on the floor, cat litter boxes overflowing and food and

dirty dishes throughout. Services were provided but D.M. failed to follow through. By March of 2005 there was no lasting improvement and Agency workers found the home smelling of urine, with human and animal faeces on the floor. The children and their clothing were filthy and some of the beds lacked bedding.

[11] Around this time D.M. took issue with the Agency's requirement that the appellant's access with the children be supervised. By June of 2005, however, she had agreed to continued supervision, the condition of the home had improved and the file was closed.

[12] Matters deteriorated again and by December, 2005 Agency oversight resumed. In March, 2006 the Agency apprehended the children and asked the Court to find them in need of protection. The Agency was concerned, not only with D.M.'s deficient parenting and domestic disputes, but also with the fact that she had permitted the appellant to have unsupervised contact with the children, putting them at risk of sexual abuse.

[13] The evidence in the Agency's affidavit in support of the application detailing the appalling living conditions of the children was not disputed by D.M. The Agency sought findings in need of protection in relation to the parenting of D.M. and the fathers of the children but also in relation to the appellant arising from the allegation that he had sexually abused his nephews. As the allegations of neglect by D.M. and her various partners were not in serious dispute, the principal focus of the protection hearing was the claim of past sexual abuse by the appellant.

[14] At that hearing, the five alleged victims of the appellant's assaults, who are now adults, each testified that they had been repeatedly abused by him, some of them being under the age of ten when the assaults commenced. It was one victim's evidence that he was repeatedly anally raped commencing when he was six or seven years old. The appellant was four years his victim's senior, therefore about ten or eleven years old when the abuse commenced. Another testified to repeated, non-consensual mutual masturbation when the victim was between four and twelve years old. The appellant was fifteen years his senior. The evidence of the additional three victims was similar to that of the first two. The assaults started, generally, when the victims were under ten years of age and continued for years; the appellant was between five and fifteen years their senior; the assaults generally stopped, only when the victims were no longer available to the appellant. The

assaults ranged from masturbation, to oral sex to penetration. The most recent assaults ended around 1992 with a victim who was fourteen years younger than the appellant. At that time the appellant, who was born in 1956, would have been thirty-six. The appellant testified, denying all assaults.

[15] In a decision rendered June 30, 2006 the judge found that it had been established, on a balance of probabilities, that the appellant had abused the five victims when they were children. She further concluded that "there is a strong possibility that he will abuse again given the opportunity". As a consequence of that finding the appellant's name was entered into the Child Abuse Register pursuant to s. 63(2) of the **Act**. On February 14, 2007 this Court dismissed the appellant's appeal from the judge's finding in relation to the Child Abuse Register (decision reported as **G.M. v. Children's Aid Society of Cape Breton-Victoria**, 2007 NSCA 20).

[16] Notwithstanding the finding of abuse and potential future abuse, the appellant, who was represented by counsel, fully participated in the proceedings, supporting his daughter's request for return of the children or, in the alternative, asking that the children be placed in his care. The appellant's proposed role with the children evolved over the course of the proceeding from access grandparent to custodian.

[17] In the fall of 2006 psychological and parental capacity assessments were commissioned for D.M., C.N., the maternal grandmother of the youngest child, and the appellant. The scope of the report for the appellant was limited to assessing the attachment between him and the children.

[18] There was compelling evidence that all four children had been physically and emotionally compromised by years of neglect. The appellant, as described in her evidence by protection worker Donna Mikkelsen, was an "erratic access parent" who was there to help D.M. at times when she was in need but not at other times. There was no question that the children were attached to their grandfather and would grieve his absence if no access was ordered. He had not, however, acknowledged the fact of the past abuse of his nephews nor had he sought therapy. This, in the Agency's submission, posed an unacceptable risk to the children.

[19] The Agency plan for the two older children was that they remain in long term foster care with the family with whom they had been placed since apprehension. Because of their ages there was a low likelihood of adoption. The foster family of the younger two wished to adopt them. Neither the Agency, the foster parents of the two older children nor the proposed adoptive parents for the two younger children were supportive of continuing access by the appellant. It was the Agency's position that there was no assurance that the appellant, if granted supervised access with the two older children, would not in future engage in unsupervised access which would put the children as risk. As the children aged, given their attachment to him, there was a real concern that they might clandestinely initiate unsupervised access with him.

[20] The appellant proposed that the children be placed in the joint care of him and his brother, M.M. They would all live in his brother's home. M.M. maintained that he would supervise all contact between the appellant and the children but does not believe that the appellant abused his nephews.

[21] I will not review the judge's findings on the final hearing regarding D.M. and C.N. It suffices to say that the judge concluded that they were incapable of effecting the change necessary to safely parent these children.

[22] As to the appellant's plan to have care of the children, I will paraphrase the judge's findings in her February, 2008 reasons for judgment:

> Although he visited the children in their home while they were in the care of their mother, he left them in squalor and did nothing to intervene;
>
> The children were speech delayed, had severe dental problems, were dirty, missed school and were not supervised yet he did not meaningfully intervene himself nor cause anyone else to intervene;
>
> After the Agency learned of the past sexual abuse and required that his contact with the children be supervised, he successfully pressured D.M. to allow him to have unsupervised access both alone and overnight;

> He undermined the Agency's efforts to help D.M. deal with her parenting deficits;
>
> While the appellant was often in contact with the children he was not, contrary to his view, a "constant" in their lives. He would go missing for weeks at a time and did not put the children's needs first.
>
> The appellant acted in his own best interests, not the best interests of the children;
>
> The fact that the last sexual abuse was about eighteen years ago is not an answer to the present risk in circumstances where the appellant denies the past conduct and has not sought therapy;
>
> Since the June 30, 2006 protection finding that there was a real risk that he would sexually abuse the children, the appellant did not seek treatment and continues to deny the past abuse of his nephews;
>
> The Agency was not deficient in not offering remedial services to the appellant in the face of his denial of the past abuse;
>
> The appellant missed access with the children before these proceedings but not during. While he is a joint custodian (with D.M.) of the two older children he has not lived with them since 2001/2002;
>
> He did not file a plan for the care of the children until a year after the proceedings had commenced. His custody application pursuant to the **Maintenance and Custody Act** came after the close of the proceedings.

[23] On this factual background the judge concluded:

> [135] . . . Based on the evidence provided; that is, the risk of sexual abuse and the general failure to protect the children from the years they spent in squalor, there is no basis on the evidence to grant [the appellant] custody of his five (5)

> grandchildren. If it were legally possible, it would not be in the children's best interests to live with [the appellant], even under the restrictions proposed in his Plan. The children would remain at risk of being sexually abused as their cousins were when those cousins were children. I find that least intrusive methods could not be implemented with [the appellant] because this would be difficult where he denies that there is a problem with the risk of sexual abuse. . . .

[24] The judge further found that continued access would put the children at risk of abuse and would not benefit the children or be in their interests. In reaching this conclusion the judge expressly took into account the children's attachment to the appellant which was countered by the risk of abuse and the devastating effect such abuse would have on these special needs children.

ISSUES

[25] I would broadly summarize the issues raised by the appellant as follows:

> The Agency failed to provide and the judge failed to order services to the appellant pursuant to s. 13 of the **Act** and therefore the judge erred in removing the children under s. 42(2) of the **Act** which required the least intrusive disposition.
>
> The judge erred in declining to order that the two oldest children have continuing access with the appellant.

STANDARD OF REVIEW

[26] In **Children's Aid Society of Cape Breton - Victoria v. A.M.**, 2005 NSCA 58, 232 N.S.R. (2d) 121, Cromwell, J.A., writing for the Court, set out the standard of review in such cases:

> [26] This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and

material error: *Family and Children's Services of Lunenburg County v. G.D.*, [2003] N.S.J. No. 416 (Q.L.) (C.A.) at para. 18; *Family and Children's Services of Kings County v. B.D.* (1999), 177 N.S.R. (2d) 169 (C.A.); *Nova Scotia (Minister of Community Services) v. C.B.T.* (2002), 207 N.S.R. (2d) 109; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 at paras. 10-16.

ANALYSIS

[27] The appellant says that the Agency had a duty to provide remedial services to him failing which, the children could not be placed in permanent care. He says the Agency should have "assessed" his risk to the children and suggested services, or, even in the absence of such assessment, should have offered remedial services.

[28] Section 13 of the **Act** provides:

> 13 (1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.
>
> (2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:
>
> (a) improving the family's financial situation;
>
> (b) improving the family's housing situation;
>
> (c) improving parenting skills;
>
> (d) improving child-care and child-rearing capabilities;
>
> (e) improving homemaking skills;
>
> (f) counselling and assessment;
>
> (g) drug or alcohol treatment and rehabilitation;
>
> (h) child care;

> (i) mediation of disputes;
>
> (j) self-help and empowerment of parents whose children have been, are or may be in need of protective services;
>
> (k) such matters prescribed by the regulations.
>
> (Emphasis added)

[29] I note that s. 13(1) speaks of services which "enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian". At the time of apprehension the children were not residing with, or otherwise in the care of, the appellant (see para. 9, above). They had never been in the appellant's sole care and had not resided in his joint care with D.M. since 2001. The appellant did not address the issue of how providing services to him would facilitate the children remaining with or being returned to the children's parent or guardian. One might argue that the language of the section does not contemplate a placement with a third party in whose care they had not been at the time of apprehension. I make no finding on that issue. For the purpose of this analysis I will accept, without deciding, that the appellant was a person within the ambit of s. 13 to whom the Agency could or should provide services.

[30] Relevant to this issue of service provision, the judge said in her reasons:

> [131] ... the maternal grandfather, was found on June 30, 2006 to pose a risk of sexual abuse to children left in his care. This was found on a balance of probability that [the appellant] posed a real risk of danger to children left in his care, apparent from the evidence. Since that finding [the appellant] has done almost nothing to mitigate this finding. He has participated in a Parental Capacity Assessment, which was favourable to him on the attachment issue. He saw a psychiatrist on two occasions to help with depression, anxiety, attachment and to help him regain his employment.. . .
>
> . . .
>
> [134] [The appellant's] counsel wishes a negative inference to be drawn that [the appellant] was offered no remedial measures. It was noted that Dr. Sheard offered help from the * of the Regional Hospital but that was not accessed by [the appellant]. Services as meant by section 13 of the *Children and Family Services Act* mean services that had the potential to reunite the family. The services must be reasonable and must be capable of affecting change in the problem areas and within the accepted time frame. [The appellant] has never accepted the finding,

> based on the evidence of his nephews, and so the risk remains as real as it was on the day the Protection finding was rendered.
>
> (Emphasis added)

[31] At no time did the appellant request "services" nor acknowledge a need in that regard.

[32] Over the course of this proceeding, notwithstanding the evidence of the five victims of the appellant's assaults, and the finding of the trial judge, the appellant continued to deny his past behaviour. It was the evidence of Agency worker Donna Mikkelsen that remedial services would be futile unless the appellant admitted the past abuse. There was no evidence that remedial services could have had any effect in the face of the appellant's continuing denials.

[33] Even assuming there could be a prospect of progress, notwithstanding the appellant's denials, services must be capable of effecting change within the time limits under the **Act**, as the judge recognized. (See **Nova Scotia (Minister of Community Services) v. L.L.P.**, 2003 NSCA 1 at para. 25) In the face of the appellant's entrenched denial of the past sexual abuse, there was no realistic prospect that services could effect change within the time frames under the **Act**.

[34] The appellant's claim for entitlement to services must be viewed in the context of the proceeding as a whole. At the time of apprehension the children were in the care of D.M. There was no lack of services offered to D.M. over the years of Agency involvement. The appellant had not been involved as the children's caretaker since he ceased to live with D.M. in 2001. The appellant did not acknowledge the abuse of his five nephews, thus necessitating an evidentiary hearing on that issue. Notwithstanding the judge's finding that the abuse had occurred, based upon the testimony of the five victims, now adults, the appellant maintained his innocence. He did not request services from the Agency, nor seek any on his own behalf to address this issue. He did not advance a plan for custody until June of 2007 and made a formal application for custody under the **Maintenance and Custody Act** only after the close of evidence. To suggest that in the months between June of 2007 and February, 2008, when the final decision was rendered, the Agency could have or should have conceptualized some intervention which would have rehabilitated the appellant is unreasonable.

[35] The appellant complains not only of the lack of proffered remedial services but also says his assessment should not have been limited to evaluating his attachment with the children. He says the assessment should have fully explored his parenting capacity. This alleged deficiency in the assessment was canvassed by the parties during the proceeding and is addressed by the judge at some length in her reasons. She concluded that, given the protection finding of the risk the appellant posed to the children, he could not realistically have expected the court to put the children in his care. At best, he could have only hoped that access would be granted. In those circumstances, he was not prejudiced by the lack of a full parental capacity assessment. She further said:

> [120]... I note as well that if [the appellant] feels that he is in any way jeopardized by the absence of completeness in the Parental Capacity Assessment, I should add to the reasons I have already given that he did not make an application for custody until the evidence was complete and he did not file a written Plan indicating that he was interested in custody until June 2007 after the assessment had been completed. The reality is, as I have indicated, that based on the evidence before the Court, he was precluded from being considered able to be a custodial parent of these children, with supervision or otherwise.

[36] The judge, after hearing the evidence of the appellant's five victims and the appellant's denials, found that he had repeatedly and over an number of years abused his five nephews. In child welfare proceedings the judge must predict future behaviour based upon past events. Here the judge was satisfied that there was a future risk that the appellant would sexually abuse his grandchildren. This was a reasonable inference on the evidence. As we said in **M.J.B. v. Family and Children's Services of Kings County**, 2008 NSCA 64:

> [77] The **Act** defines "substantial risk" to mean a real chance of danger that is apparent on the evidence (s. 22(1)). In the context here, it is the real chance of sexual abuse that must be proved to the civil standard. That future sexual abuse will actually occur need not be established on a balance of probabilities (**B.S. v. British Columbia (Director of Child, Family and Community Services)** (1998), 160 D.L.R. (4th) 264, [1998] B.C.J. No. 1085 (Q.L.) (C.A.) at paras. 26 to 30).

[37] In assessing the risk of future harm, the severity of the threatened harm is relevant. I would agree with the comments of Lambert, J.A. in **B.S. v. British Columbia (Director of Child, Family and Community Services)** (1998), 160 D.L.R. (4th) 264:

> 30 In assessing the *risk* of future harm, (which is called the *threat* of future harm in s. 2), there is room for a variable assessment depending on the nature of the threatened harm which is in contemplation. A threat of harm through neglect of the child's hygiene might well have to be much more probable in order to meet the balance of probability test than a threat of serious permanent injury through physical or sexual abuse. Generally speaking, a risk sufficient to meet the test might well be described as a risk that constitutes "a real possibility".

[38] The finding of risk, which was made at the protection hearing in June, 2006 was not appealed. The issue at the time of the final hearing was what, if anything, had changed in that regard between June, 2006 and February 2008. In the absence of any evidence that the appellant had taken measures to ameliorate the risk, the Agency was not obliged to again prove at the final hearing that the appellant posed a risk to the children. In my view the appellant's submission the judge erred in not requiring a "risk assessment" exploring the risk that he would abuse his grandchildren is without merit.

[39] There being a finding that the appellant posed a risk to sexually abuse the children in the future, any access granted to the appellant would require supervision. It was Agency worker Mikkelsen's concern that, as the children grew older, the Agency would be unable to limit their access with the appellant to the supervised visits. The judge accepted this as a reasonable concern.

[40] I am not persuaded that in declining to grant access she erred. The appellant did not acknowledge that he posed a risk to the children; he denied sexually abusing his five nephews; he had pressured D.M. to permit unsupervised access contrary to the Agency's directive; he undermined D.M.'s relationship with the Agency. In the circumstances it was reasonable for the judge to infer that the appellant would not abide by future restrictions on his access and might encourage or countenance the children circumventing the controls on their contact with him.

[41] The appellant's suggestion that the fact that his (non-acknowledged) sexual abuse was perpetrated only on male victims should not dis-entitle him to custody of or access with his three granddaughters (only the oldest grandchild is male) is patently unreasonable.

[42] One final point. At para. 135 of the reasons for judgment (see para. 23 above) the judge comments "If it were legally possible, it would not be in the children's best interests to live with [the appellant] . . .". There she is referring to the question of whether, under s. 42 of the **Act**, the court had the jurisdiction to place the children in the appellant's care or whether a separate application for custody under the **Maintenance and Custody Act** was required. Having found that the appellant was not a candidate for custody, it was unnecessary to determine that issue.

DISPOSITION

[43] I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.