Date: 20010501
Docket: CA 168209

NOVA SCOTIA COURT OF APPEAL

[Cite as: S.G. v. Children's Aid Society of Halifax, 2001 NSCA 70]

Glube, C.J.N.S.; Bateman and Cromwell, JJ.A.

BETWEEN:

S. and S. G. and
L. and P. G.

Appellants

- and -

CHILDREN'S AID SOCIETY OF HALIFAX and
P. and T. D.

Respondents

REASONS FOR JUDGMENT

Editorial Notice

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

Counsel: Tanya R. Jones for the appellants S. and S. G.
L. and P. G. not represented
Thilairani P. Pillay for the respondent Children's Aid Society
William Brian Smith, Q.C. for the respondent D.s

Appeal Heard: April 20, 2001

Judgment Delivered: May 1st, 2001

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Bateman, J.A. concurring.

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.**

CROMWELL, J.A.:

[1] On September 20th, 2000, the Honourable Justice Moira C. Legere ordered B. G., born November * 1998, and K. G., born October * 1999 to be placed in the permanent care and custody of the Children's Aid Society of Halifax. The children's parents, S. and S. G. and the paternal grandparents L. and P. G. appeal. They ask that the permanent care and custody order be set aside and that the children be placed in the custody of the paternal grandparents or alternatively, with the maternal grandparents P. and T. D. who are also respondents on the appeal, or in the further alternative, that the matter be remitted for trial of a **Family Maintenance Act**, R.S.N.S. 1989, c. 160 custody proceeding.

[2] The appeal raises one question which, as expressed by the appellants, is this: Did Justice Legere err in law by ordering permanent care and custody when there were less intrusive measures available and did she place undue emphasis on the possibility of future litigation which she determined would not be in the best interests of the children?

[3] In this Court, the parents have been ably represented by Ms. Jones. Her main submission is that the judge erred in making a permanent care and custody order with the plan for adoption by the D.s rather than the less intrusive alternative of a **Family Maintenance Act** order giving custody of the children to the D.s. The G., Srs., who are also appellants, have not been represented by counsel and have made no submissions.

[4] In approaching the appeal, it is essential to bear in mind the role of this Court on appeal as compared to the role of the trial judge. The role of this Court is to determine whether there was any error on the part of the trial judge, not to review the written record and substitute our view for hers. As has been said many times, the trial judge's decision in a child protection matter should not be set aside on appeal unless a wrong principle of law has been applied or there has been a palpable and overriding error in the appreciation of the evidence: see **Family and Children Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 at § 24. The overriding concern is that the legislation must be applied in accordance with the best interests of the children. This is a multi-faceted endeavour which the trial judge is in a much better position than this Court to undertake. As Chipman, J.A. said in **Family and Children Services of Kings County v. D.R. et al.** (1992), 118 N.S.R. (2d) 1, the trial judge is "... best suited to

strike the delicate balance between competing claims to the best interests of the child."

[5] Justice Legere heard nine days of oral evidence in addition to receiving voluminous reports, assessments and affidavits. She reserved her decision and gave a carefully crafted, 36 page written decision. In light of her thorough summary of the evidence, it is only necessary for me to provide an overview of the basic facts and a summary of her key conclusions.

[6] The child B. was apprehended at the age of 3 months as a result of what the trial judge found to be an incident of excessive discipline of him which occurred while he was in the care of his parents on February 16, 1999. The police were called to the parents' home and the child's father, S. G., was subsequently charged with assault causing bodily harm. That matter is, we understand, before the criminal courts. The child was taken into care and, on consent of all parties, was placed with the D.s, the maternal grandparents. The Agency became aware in October of 1999 that the child's mother, S. G., was 36 weeks pregnant. When that child, K., was born on October *, 1999, a second protection application was initiated and, on consent, she was placed with the maternal grandparents where B. also resided.

[7] Both the paternal and maternal grandparents were permitted to intervene in the protection proceedings. Both, we are advised, also had filed **Family Maintenance Act** applications for custody of the children. Those applications, however, were not joined with the protection proceedings and were not pursued in any formal way. The judge did consider and reject the possibility of a **Family Maintenance Act** custody order.

[8] At the disposition hearing before Justice Legere, there were three plans for the children to be considered. The parents sought immediate return of the children and dismissal of the Agency's application for permanent care and custody. The paternal grandparents (the G., Srs.) were willing to seek custody of the children with the long term possibility that the children could be returned to the parents. The maternal grandparents (the D.), with whom both children resided up to and including the time of the hearing before Justice Legere, were willing to provide long term custody and care for the children. Their primary position at the disposition hearing was to support the Agency's plan for permanent care and custody of the children with the intention of pursuing adoption of the children by the D.. It was suggested in the appellants' factum that the D.s' plan was that the children be placed with

them pursuant to a **Family Maintenance Act** custody order. This is not an accurate statement of their position at the disposition hearing. As confirmed by the record and acknowledged by their counsel in this Court, the D.s' primary position was, and remains, that they support the Agency's plan for permanent care and custody with the intention that they will seek to adopt the children. It will be helpful to summarize the key conclusions of the trial judge in relation to each of these plans.

[9] The judge accepted the Agency's view that the serious concerns about the parents' ability to parent were unlikely to be addressed within the statutory time limits. In her view, to return the children to the parents would expose them to unacceptable risk. She accepted the evidence of Ms. LaTour, who conducted an assessment of the parents' parenting capacity, that they are "high risk" parents and found that this conclusion had "... been more than adequately borne out in the evidence." In summing up her conclusion that the children could not be returned to the parents in accordance with the time limits and purposes prescribed in the **Children and Family Services Act**, S.N.S. 1990, c. 5, as amended, the judge stated:

> This case need not have resulted in a permanent care order. The injury to the child required immediate intervention. Appropriate decisions were made by the Agency to intervene and place the child in a protected environment, moving the child to extended family as soon as possible. Appropriate and liberal access was arranged and made possible. Therapeutic services were offered. This situation could have been turned around by the parents. They could have accepted what was obviously their responsibility and accepted the opportunity offered to learn from this most serious mistake.
>
> This proceeding commenced on February 16, 1999. The permanent care hearing commenced on June 28th, 2000 concluding on July 14, 2000. The parents have been consistent in their refusal to accept the responsibility and lack of commitment to move towards resolution. They have refused to mature individually and as a couple at the expense of their children. The **Act** requires that the best interests of the children be addressed in a timely fashion.

[10] The reference to timeliness in the last sentence of the quoted passage reflects the judge's appreciation of the time limits and maximum duration of disposition orders under the **Children and Family Services Act** and, in

particular, s. 45(1)(a) which, for the purposes of this case, provides that the total period of duration of all disposition orders shall not exceed 12 months.

[11] In my respectful view — and I say this with sadness — the trial judge's conclusion that the children could not be returned to their parents is amply supported by the evidence. I would not disturb it. The quoted passage makes it clear, in my opinion, that the judge's decision was not founded primarily upon the one incident of physical abuse described in the evidence, but on the extensive evidence about the parents' poor ability to parent, their unwillingness or inability to improve their parenting, their failure to put the interests of their children first and the ongoing risk to the children for the foreseeable future if left in the parents' care and custody.

[12] The judge thoroughly considered and rejected placement with the G., Srs. She found that their plan had not dealt frankly with the child's injuries and that they required no responsibility or accountability from the children's parents. She stated:

> I have little confidence that the plan put forward [by the G., Srs.] is anything but a temporary position adopted to facilitate a return to the parents outside the supervision of the Agency.

[13] Even if the G. had been a realistic placement option, which they were not, the judge was well aware of the fact that B. had been in care from the age of 3 months and with the D.s for 15 of his 22 months; and that K. had been with the D. since birth. The judge was also undoubtedly well aware of the opinion of Dr. Blood, who had prepared a further parenting assessment, that it would not be in the children's best interests to remove them from the D. unless there were compelling reasons to do so.

[14] The trial judge's rejection of the G., Srs. as a placement for the children is amply supported by the evidence and should not be disturbed.

[15] That left the judge two options. The first was to accept the Agency's plan for permanent care with the intention of pursuing adoption by the D.. The second was to dismiss the Agency's application and grant custody to the D.. This was, at most, a possibility that might have been considered because the D. did not support this plan and their **Family Maintenance Act** application was not formally before the Court.

[16] The parents' primary argument on appeal is for a disposition of custody to the D. instead of a permanent care order, a disposition which the D. themselves do not support.

[17] The judge did consider whether the best interests of the children would be served by dismissing the Agency's application and addressing their needs by a custody order. In rejecting this possibility, the judge noted that the proceeding had already gone beyond the deadlines set out in the **Children and Family Services Act** and that the children were entitled to permanency planning and stability. She found that:

> ... placing these grandparents [i.e., the D.] in a custodial situation will set them up for ongoing litigation from both paternal grandparents and the parents. ... To fail to protect them from ongoing expense and emotional drain of future litigation on custody and access could destroy the stability and viability of these children's placements. ... I do not see relitigating the custodial situation in the foreseeable future as anything other than a threat to the stability of the maternal grandparents' household.
>
> (emphasis added)

[18] The appellants submit that the trial judge erred in reaching this conclusion because the risk of ongoing litigation is not a factor set out for consideration in the **Children and Family Services Act** and, in any case, the existence of such risk is not supported by the evidence. It is suggested that if we do not reverse this decision, it will stand as a precedent that permanent care and custody should be ordered in preference to a custody order since the possibility of ongoing litigation is not in the best interests of the child.

[19] In my respectful view this submission has no merit. The trial judge was obviously of the view that it was in the children's best interests to be in a stable and permanent arrangement for their care as soon as possible. This was a proper consideration. The preamble to the **Act** notes that children have a sense of time that is different from that of adults and that services provided pursuant to the **Act** and proceedings taken pursuant to it must respect the child's sense of time. The judge's decision also properly takes into account the time provisions established by the **Act** which had, in fact, been exceeded with respect to B. by the time of her decision. Under s. 3(2)(k) of the **Act**, the effect on the children of delay in the disposition of the case is a factor to be considered in relation to the best interests of the children. In my view, the trial judge did not err in considering the children's need for stability in a timely fashion and in giving it appropriate weight. Nor do I accept the submission that there was no basis for the judge's concern about lack of stability resulting from ongoing litigation

about these children. The behaviour of the parents and the dynamics of these proceedings amply justified her concern.

[20] In rejecting family placement as a less intrusive alternative, the judge was entitled to consider, as she clearly did, that the Agency's plan included adoption of the children by the D. subject to successful completion of the adoption process. While it is true, as the appellants suggest, that the making of a permanent care and custody order did not guarantee this result, the trial judge had before her extensive evidence about the D.'s parenting of the children and she was well aware that the children had been with the D. virtually for their entire lives. She also was of the view that there was no other realistic option for these children. There was no reasonable prospect that the children could be returned to their parents, placement with the G.s was not a viable option and, in the circumstances of the case, having regard to the family dynamics which she fully reviewed in her reasons, addressing the needs of these children through a custody and access order was not in their best interests.

[21] As the Court stated in **Family and Children Services of Kings County v. B.D.**, **supra** at § 19, the provisions of the **Act** giving priority to family placement and requiring that the least intrusive alternative be pursued must be interpreted and applied in the context of the **Act** as a whole and in light of its paramount purpose to further the best interests of the children. All placement alternatives must be considered in the context of the needs and best interests of the children. In my view, that is exactly what the judge did.

[22] The appellants rely on **Nova Scotia (Minister of Community Services) v. N.F.A.P. et al.** (1994), 131 N.S.R. (2d) 100 in which Gass, J.F.C. (as she then was) dismissed the Agency's application for permanent care and custody with a view to adoption by the maternal grandmother and, instead, granted the grandmother's application for custody pursuant to the **Family Maintenance Act**. While that case is, on first glance, similar to the present one, on closer examination it is not, in fact, at all similar. In **N.F.A.P.**, and unlike the present case, the judge concluded on the evidence that the mother's parenting ability was salvageable, that there was a strong bond between mother and child developed over the three years which the mother had parented the child prior to her being taken into care and that a custody order was adequate to protect the child. **N.F.A.P.** is an example of the best

interests and least intrusive alternative principles being applied to the specific facts of that case.

[23] In my view, so is the present case. Here, in light of the young age of the children, the fact that they had spent virtually their whole lives with the D., the family dynamics and the multitude of other relevant considerations, the judge concluded that the best interests of these children would not be served by any less intrusive disposition than an order for permanent care and custody. I do not think Justice Legere reached this conclusion on the basis that she thought there was a generally applicable principle that permanent care orders should be preferred to custody orders. She sought to further the best interests of these children with the least intrusive alternative consistent with those interests in all of the circumstances.

[24] The judge concluded that a permanent care order with the strong possibility of adoption by the maternal grandparents was the available option which best addressed the children's need for stability, appropriate nurturing and care and protection from risk. In reaching that conclusion, she did not apply any wrong principle of law or make any reviewable error of fact.

[25] It follows, in my opinion, that the appeal should be dismissed.

[26] The D. have acted throughout in the children's interest at considerable sacrifice to themselves. They are, in my view, entitled to some relief from the financial burden of these proceedings. The appellants, and I refer to all four of them jointly and severally, shall contribute to the D. costs of these proceedings in the amount of $1500 inclusive of disbursements.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.
Bateman, J.A.