NOVA SCOTIA COURT OF APPEAL

Citation: *D. G. v. Family & Children's Services of Lunenburg County*, 2006 NSCA 118

Date: 20061103
Docket: CA 265773
Registry: Halifax

Between:

D.G.

Appellant

v.

Family and Children's Services of Lunenburg County
and T.M.C. and C.L.G.

Respondents

Restriction on publication: Pursuant to s. 94(1) of the *Children and Family Services Act*

Judges:	MacDonald, C.J.N.S.; Bateman and Oland, JJ.A.
Appeal Heard:	October 2, 2006, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Bateman, J.A. concurring.
Counsel:	Appellant in person Wayne Allen, Q.C., for the respondent Family and Children's Services of Lunenburg County Respondent T.M.C. in person Respondent C.L.G. in person

Reasons for judgment:

1. The appellant D.G. and the respondent T.C. are the parents of D.G. and B.G. The respondent C.G. is the children's paternal grandmother. Judge William J. Dyer of the Family Court determined that the children continued to need protective services, and that it was in their best interest that they be placed in the permanent care and custody of the respondent Agency. He also denied the parents access. His decision dated March 30, 2006 ("the 2006 decision") is unreported and his order issued April 7, 2006.

2. The father, D.G., appeals that order. Neither T.C. nor C.G. filed any notice of appeal, and the mother did not participate in the appeal. However, C.G. filed a factum asking that the judge's decision be rescinded and that the children be placed in her care.

3. For the reasons which follow, I would dismiss the appeal.

Issues

4. In his notice of appeal, the appellant set out several grounds of appeal. C.G.'s factum made several arguments. All these can be reduced to a single issue, namely, whether the judge erred by proceeding with the hearing beyond the statutory time limit set out in s. 45(1) of the *Children and Family Services Act* (the *Act*).

Analysis

5. The judge dealt specifically with this issue in a separate proceeding prior to the hearing which resulted in his April 7, 2006 order. The decision pertinent to the issue under appeal was dated December 8, 2005 (written release, September 20, 2006), and is unreported. I will refer to it as the "decision under appeal."

6. I begin by setting out the standard of review, a brief history of the proceeding, and the applicable statutory provision. The standard of review is as stated in *Children's Aid Society of Cape Breton - Victoria v. A.M.*, 2005 NSCA 58:

> [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] NSJ 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. (Emphasis added)

7. This proceeding commenced with the Agency's application for a supervision order. The consent supervision order which issued on March 22, 2004 confirmed care and custody of the children to the parents, subject to the Agency's supervision. That order also authorized parental capacity and psychological assessment of the parents, various therapies, counselling, and other services.

8. That June, following a protection hearing, the children were found in need of protection. In August, it was learned that the parents had separated and that the mother, T.C., and the children were at a transition house. On September 7, 2004, the children were found to be in need of protection and a consent supervision order was granted directing that the parents had joint custody of the children with day-to-day care to T.C., subject to the Agency's supervision, for a period of three months. However, later that month the children were taken into the Agency's care. A further decision followed on September 29, 2004. The September 7, 2004 disposition order was varied so that the children were placed in the Agency's temporary care and custody, pending further order of the court, and the parents were given access. It was in the course of that hearing that it was learned for the first time that the C.G., the paternal grandmother, was seeking to be involved in the proceeding.

9. Several telephone conferences or court appearances were held during the next month. These dealt with, among other things, the withdrawal of counsel, the granting of party status to the paternal grandmother, complications with her application for approval as a restricted foster parent, and delays with the parental capacity assessments authorized back in March. The slow progress of the case and the confusion surrounding the shifting parenting plans put forward by the father, the mother, and the paternal grandmother was such that in December 2004, the judge directed the parties to "regroup" and clarify their position.

10. However, matters continued to move slowly. In ¶ 52 of his decision under appeal, the judge accepted this summary of the reasons for delay:

> ... these include difficulties encountered by the Respondents in retaining counsel, changing solicitors in mid-application, a late request by C.G. to be added to the Parental Capacity Assessment, accompanying request by T.C. and D.G. for assessment updates on themselves, and inconsistent attendance at court by D.G. who has been without counsel throughout.

11. Additional detail in relation to a couple of these, the parental capacity assessments and legal representation, will illustrate the extent of the problems and the delays. By November, 2004, it was known that the parental capacity assessments that had been authorized back in March would be further delayed. The assessor was ill. In May 2005, it was agreed that the parental grandmother should also be assessed, and each of the parents re-assessed. It was not until early October 2005 that the judge finally received the assessments.

12. In addition, the legal representation for each of the parents and the grandmother changed through the duration of proceedings. After initial efforts to obtain Legal Aid were unsuccessful, D.G. represented himself. T.C. had four lawyers before the 2006 decision. Her first lawyer had to withdraw because of a conflict. Two other lawyers who had acted for her either also had to withdraw or ceased to represent her. As for C.G., her lawyer filed a notice to withdraw, and subsequently withdrew that notice.

13. It was the judge who realized that the extensive delays which arose from such complications could give rise to legal issues. In November 2005 he invited submissions on the last substantive order, being the variation order of September 29, 2004. When the matter was heard in early December 2005, D.G. was not present or represented, but each of T.C., C.G. and the Agency were represented. In the decision under appeal, the judge held that he should continue and complete the review of the disposition hearing. He noted that according to its wording, the variation order was effective “until further order of the Court”, all adjournments had been in the children’s best interests and by consent, and that it was in their best interests that the case be concluded on the merits at the earliest opportunity.

14. The matter proceeded to a hearing held over eight days in January and February 2006, which resulted in the 2006 decision and April 7, 2006 order placing the children in the permanent care and custody of the Agency which D.G. appeals.

15. I turn next to the statutory provision upon which the appellant bases his appeal. Section 45 of the *Act* reads in part:

> 45 (1) Where the court has made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed
>
> (a) where the child was under six years of age at the time of the application commencing the proceedings, twelve months; or
>
> (b) where the child was six years of age or more but under twelve years of age at the time of the application commencing the proceedings, eighteen months, from the date of the initial disposition order. (Emphasis added)

16. When this proceeding commenced, both the children were under six years of age. Thus, the applicable provision is s. 45(1)(a) which sets a time limit of 12 months for the duration of all disposition orders. The consent disposition order issued on September 7, 2004 and the final disposition order not until April 7, 2006. The temporary care orders clearly exceeded the maximum duration permitted under s. 45(1)(a).

17. However, the law is clear that exceeding that time limit does not always constitute an error of law. In *Children's Aid Society of Cape Breton-Victoria v. A.M.*, [2005] N.S.J. No. 132, 2005 NSCA 58, in seeking to overturn an order placing her children in permanent care, the appellant parent argued first, that the judge had no jurisdiction to make a permanent care order once the s. 45(1)(a) time limits had been reached, and second, if the judge had discretion to extend the time, he erred in doing so because he failed to consider whether the extension was in the best interests of the children. Cromwell, J.A. for this court stated:

> [28] Turning to the first submission, there was no loss of jurisdiction here. The Court made this clear in **Nova Scotia (Minister of Community Services) v. B.F.** (2003), 219 N.S.R. (2d) 41 (C.A.); [2003] N.S.J. No. 405 (Q.L.) (C.A.) at paras. 57 and 58 and **The Children's Aid Society and Family Services of Colchester County v. H.W.** (1996), 155 N.S.R. (2d) 334 (C.A.). The Act contemplates that there will be a judicial determination of the child's best interests. If a time limit, which is a milestone toward that determination, caused the court to lose jurisdiction to determine the child's best interests it would contradict the purpose of the **Act.** Therefore, the court did not lose jurisdiction by reserving its decision as to disposition for longer than the time limits for temporary care orders under s. 45.

18. As to the second submission, after noting that the judge had failed to determine whether it was in the children's best interests when he reserved his decision beyond the time limits, Cromwell, J.A. concluded that the judge's approach had been consistent with concern for their best interests and that it would not be appropriate to intervene on the basis of that error in law. He continued:

> [31] Of course the delay is regrettable. Of course it would have been better had the judge's reasons made explicit mention of this issue. It would have been better still had the decision respected the time limits. However, it cannot, in my respectful view, be seriously suggested that the judge did not think it in the children's best interests to make the order that he did when he did. It was manifestly in the children's best interests that he do so. Failing to proceed to make a decision could lead to only two results. The first, returning the children to their mother, was regrettably not a realistic option and the second, treating the proceedings as a nullity and requiring them to be restarted would have added more delay than the regrettable delay that had occurred already. As Freeman, J.A. put in **H.W.** at para. 30, "[n]ullification after a child is found in need of protection either deprives a child of that protection or subjects it to the delays inherent in starting proceedings all over again from the beginning. Child protection proceedings become a game of "snakes and ladders." That is precisely the situation here.

19. Here, the judge avoided the error in *A.M.*, supra. In several of the temporary care proceedings, the adjournments were stated to have been made in the best interests of the children, or were made on the joint request of, or with the consent of, the parties. In his decision under appeal, the judge noted that if the matter were dismissed summarily, the Agency would re-apprehend the children, the entire case would have to be relitigated, and there was no assurance from the parties that the matter would be advanced consensually to an early hearing date. He was also conscious that were he to continue the current proceeding, the options regarding the placement of the children would be more limited than if the matter were to start anew. The judge concluded:

> [66] Given that this matter has been under my wing since March of 2004, it seems to me that it is the best interests of the children that there be a final determination. There are too many risks associated with summary dismissal with the <u>hope</u> that the matter might advance itself expeditiously under a new, separate proceeding.

He directed that the matter proceed at the earliest opportunity.

20. In summary, the judge did not lose jurisdiction over the matter on the expiration of the s. 45(1)(a) time limit in the *Act*, nor did he err in law by failing to take into account the best interests of the children in determining to proceed after the maximum duration had been exceeded.

21. In his submissions, D.G. pointed out that because he had had to be away, he was not present at the December 8, 2005 hearing when the matter of the time limit was argued. In my view, while it is regrettable that he was absent, this made no difference to the judge's determination. He heard submissions made by counsel for the other parties, which submissions included full arguments regarding jurisdiction and s. 45(1)(a) of the *Act*.

22. I would dismiss the appeal without costs.

Oland, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bateman, J.A.