<u>NOVA SCOTIA COURT OF APPEAL</u>

Citation: ***C.P. v. Family & Children's Services of Hants County***,
2010 NSCA 9

Date: 20100210
Docket: CA 317041
Registry: Halifax

Between:

C.P.

Appellant

v.

Family and Children's Services of Hants County
and W.R.

Respondents

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

Judges: Bateman, Fichaud and Beveridge, JJ.A.

Appeal Heard: February 1, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Fichaud and Beveridge, JJ.A. concurring.

Counsel: David Baker, for the appellant
Peter C. McVey, for the respondent Minister of Community Services
R. Michael MacKenzie, for the respondent Family and Children's Services of Hants County
Respondent W.R. not appearing

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.**

Reasons for judgment:

[1] This is an appeal by the mother from an order of Sparks J.F.C. placing two of her children in the permanent care of the respondent, Family and Children's Services of Hants County (the "Agency"). The children's father withdrew from the proceedings partway through the final disposition hearing and has not participated in this appeal. The reasons for judgment are not reported.

BACKGROUND

[2] At the time of the final disposition in June 2009, the two children in question were 13 and 11 years of age. I will refer to these two children, together, as the siblings or individually as the son or daughter. The siblings, along with an older sister (then age 14), were taken into the Agency's care on January 30, 2007.

[3] The apprehension occurred in the context of a toxic marriage breakdown and consequent battle between the parents. The parents separated in 2006. At the time of the Agency's intervention the children were residing with their mother, having bounced between parental residences after the separation. In late 2006 the R.C.M. Police received a 911 call from the older sister reporting a physical dispute between the mother and her son. When the police arrived at the mother's home the two younger siblings were displaying out of control behaviour, throwing food and swearing. The son had bitten his mother. The police contacted the Agency. Workers met with the mother to discuss setting up services. While the mother would agree to the children receiving counselling she was of the view that her parenting was beyond reproach and she was not prepared to participate in a parenting or needs assessment.

[4] On January 20, 2007 the police responded to another report of a disturbance at the home to find the house littered with dog feces and urine and the two younger siblings locked in a bedroom and out of control. Upon removing the hinges of the bedroom door to gain access they seized two knives from the siblings. All three children were apprehended that day.

[5] The Agency had past involvement with the family relating to two older children of the mother, from another relationship.

[6] The school reported longstanding and serious behavioural problems with the siblings. Personal hygiene was an issue as well.

[7] It is impossible to adequately chronicle the evidence of dysfunction in this family unit. The parents blamed one another and the siblings themselves for the family's plight. Neither parent accepted any responsibility for the siblings' circumstances. The siblings had apparently learned verbal and physical aggression, confrontation, manipulation and the blaming of others as tools for survival. The parents were completely caught up in a war with each other, attempting to win the children from the other at any cost. Neither saw any redeeming features in the other as a parent. The siblings each had learning disabilities and personality disorders. The mother did not acknowledge the depth of these problems. The father, an alcoholic, initially seemed more amenable to treatment. That proved not to be the case over the long term.

[8] The older sister was apparently able to survive despite the chaos around her. She was not afflicted with the personality and learning deficits evident in the younger siblings. Ultimately she was returned to the mother's care. Consequently, I will not further address her circumstances.

[9] The siblings' behaviour was such that a series of foster placements broke down over a short period of time. Neither would be a candidate for further foster care until his/her behaviour was brought under control. Complicating matters was the fact that the siblings could not be in each other's presence. Their behaviour when together was so out of control that they could not be driven in the same car for access visits with their parents.

[10] While the Agency initially hoped that each of the siblings could be placed in the care of a parent, as matters progressed it became clear that this was not a workable option. Expert assessments of the parties and the siblings were conducted and updated during the proceeding. It was concluded that neither parent had the capacity to address the myriad of behavioural and learning issues which the siblings presented. Both experts involved in the case agreed that the siblings could not live in the same household.

THE GROUNDS OF APPEAL

[11] The appellant alleges that the judge erred in the following ways:

1. That the learned trial Judge erred in legal principle in giving the Agency permanent care and custody of the children since any of the mother's flaws were not sufficient to deprive her of her children on a permanent basis;

2. That the learned trial Judge erred in giving the Agency permanent care and custody of the children by preferring the expert evidence of Dr. S. Gerald Hann, over that of Dr. Risk Kronfli, where the assessment by the latter could have been used as a foundation for a less intrusive Disposition Order;

3. That the learned trial Judge acted upon a wrong principle of law or committed a critical error in appreciating or applying the evidence, or ignored material evidence, in giving the Agency permanent care and custody by preferring the expert evidence of Dr. Hann, considering that a previous plan proposed by Dr. Hann about placement of the children had failed;

4. That the learned trial Judge acted upon a wrong principle of law, or committed a critical error in appreciating or applying the evidence, or ignored material evidence, in giving the Agency permanent care and custody by disregarding the wishes of the children to live with their mother;

5. That the learned trial Judge's decision giving the Agency permanent care and custody of the children is not logical insofar as two children (an adopted grandson and a daughter, S.R., born *), were permitted to remain in the mother' care and custody, suggesting that she does not pose a risk to the children;

6. That the learned trial judge failed to adequately consider possible consequences of non-disclosure of evidence by the Respondent Agency;

7. The Disposition Order placing the children in the permanent care and custody of the Respondent Agency was not made in light of the best interests of the children, as defined in the Children and Family Services Act, supra; and

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

[12] At the outset of the hearing the 4th and 6th grounds were abandoned and no "further and other grounds" were identified.

THE STANDARD OF REVIEW

[13] The standard of review was concisely stated by Cromwell J.A., as he then was, for the Court in **Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58; [2005] N.S.J. No. 132 (Q.L.):

> 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: [citations omitted].

[14] It is apparent from the content of the grounds of appeal and the argument that has been advanced that the mother does not fully appreciate the role of an appellate court. In **McPhee v. Canadian Union of Public Employees**, 2008 NSCA 104, Cromwell J.A., as he then was, provided a detailed and clear explanation of that function. His comments, which I quote at length, are particularly applicable to this appeal:

> [16] The main role of the Court of Appeal is to make sure that the trial judge applied correct legal principles: see, for example, **Housen v Nikolaisen**, [2002] 2 S.C.R. 235 at para. 9. If the trial judge misstates the law, or applies it in such a way as to show that he or she relied on a wrong legal principle, the appellate court must intervene and find that a legal error has been committed.
>
> [17] With respect to questions of fact and mixed questions of fact and law that do not reveal any underlying error of legal principle, the role of the appellate court is entirely different. An appeal to the Court of Appeal is not an opportunity for three judges to retry the case on the basis of a written transcript. Finding facts and drawing evidentiary conclusions from them are roles of the trial judge, not the Court of Appeal: see **Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at 121. An appellant cannot challenge a trial judge's findings of fact simply because the appellant does not agree with them . . .

[18] Appellate intervention on questions of fact is permitted only if the trial judge is shown to have made a "palpable and overriding error": see, e.g. **Housen, supra** at para. 10. Sometimes the standard has been expressed in different words, such as "clear and determinative error", "clearly wrong" and "hav[ing] affected the result." (emphasis added): see, e.g. **H.L. v. Canada (Attorney General)**, [2005] 1 S.C.R. 401 at para. 55; **Delgamuukw v. British Columbia, supra** at paras. 78 and 88. However expressed, courts of appeal must accept a trial judge's findings of fact unless the judge is shown to have made factual errors that are clear and which affected the result.

[19] This deferential approach on appeal applies to all of the trial judge's findings of fact, whether or not based on the judge's assessment of witness credibility and whether based on direct proof or on inferences which the judge drew from the evidence: see, e.g. **Housen, supra** at paras. 10-25; **H.L., supra** at para. 54.

[20] This deferential approach also applies to the judge's findings which apply the law to the facts - that is, to questions of mixed law and fact - unless the finding can be traced to a legal error: **Housen, supra** at paras. 26-37.

[21] The trial judge, as the trier of fact, must sort through all the evidence and decide which to accept and which to reject so as to piece together the more plausible view of the facts. Many considerations properly influence this decision, including the nature of any unreliability found in a witness's testimony, its relationship to the significant parts of the evidence, the likely explanation for the apparent unreliability and so forth. The trial judge may find that some apparent errors of a witness have little or no adverse impact on that witness's credibility. Equally, the judge may conclude that other apparent errors so completely erode the judge's confidence in the witness's evidence that it is given no weight.

[22] Making these judgments is the job of the trial judge. The Court of Appeal should not and will not substitute its own judgment on these matters. An appellant alleging an error of fact must show that the trial judge's finding is clearly wrong.

[23] Not every error in findings of fact permits appellate intervention. As Lamer, C.J.C. said in **Delgamuukw, supra** at para. 88:

> ... it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. **The error must be sufficiently serious that it was "overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue**". (emphasis added)

> Where credibility is in issue, only errors that fundamentally shake the appeal court's confidence in the trial judge's findings of fact justify appellate intervention.
>
> [24] I have gone on at length about the standard of review of factual findings. I have done this because most of the appellants' submissions on appeal relate, not to any misstatement by the judge of the relevant legal principles, but to his findings of fact or his application of correct legal principles to those facts.

(Emphasis added)

[15] At the hearing of the appeal, counsel for the mother acknowledged that he cannot point to an error of law. Nor in the factum or the oral submissions is a material error of fact identified. None are evident on the record. The mother is simply seeking a retrial.

ANALYSIS

[16] The finding in need of protection was ultimately made on consent, three days into the protection hearing. It was not appealed.

[17] By the time of the final disposition hearing the question before the judge was whether the siblings remained in need of protection.

[18] In lengthy and detailed reasons the judge made key findings of fact:

> The children were exposed to a combative, toxic and abusive relationship between the parents who pitted the children against one another.
>
> Long before Agency involvement the siblings were exhibiting misbehaviour at home and at school that cried out for intervention to protect them from self harm and mutual harm. Neither parent meaningfully addressed these issues.
>
> The tension between the siblings did not subside after apprehension and was exhibited even during supervised visits

with the parents. During such visits the mother would not intervene, even in the face of physical aggression by one sibling toward the other.

The mother was hostile with access supervisors.

Neither parent was able to meet the substantial emotional needs of either child.

Throughout the proceedings the mother was focussed upon exposing the father's parenting deficiencies rather than taking steps to prepare herself to meet the needs of the children. This persisted even after the father withdrew from the proceedings. She does not accept that she has any parental shortcomings.

The mother failed to acknowledge the depth of the siblings' emotional suffering and her role in their impairment. She minimized the seriousness of the siblings' condition and projected blame onto others.

The mother's evidence was not credible in many areas.

The Agency provided a multitude of resources. Although the mother maintained she was receptive to such services, that was not borne out on the evidence.

The mother's engagement with services of her choosing was too little and came too late, nor was the treatment she chose to receive of the kind that would likely benefit her parental functioning.

The children's wishes about which parent they wanted to reside with had varied over the course of the proceeding. The children were subject to manipulation. Their wishes were unreliable and not a measure of what would serve their best interests.

> The mother's plan of care was not realistic. She proposed that the siblings would reside with her, which was contrary to the recommendation of both experts. She said she would voluntarily access services and communicate effectively with the father.

[19] The above findings are all sustained by the record.

[20] The judge concluded that the evidence "overwhelmingly" supported an order for permanent care. She ordered bi-weekly supervised access with each child, individually.

[21] As was recognized by the trial judge, these proceedings are about what is best for the siblings. At issue is not how they came to be in such distress, but given that they have extraordinarily complex and entrenched emotional issues, how to move forward in their best interests.

[22] The mother's view that the Agency has worked against her from the outset is not supported on the record. As was found by the trial judge, the mother lacked insight into the siblings' problems and her own parenting issues. She was resistant to the services offered by the Agency. As the judge observed, without that insight, remediation could not happen.

[23] The judge was entitled to weigh the assessments of Dr. Hann and Dr. Kronfli. She gave cogent reasons for accepting the substantially more thorough and well researched opinion of Dr. Hann. The fact that the son's interim placement with the father, as Dr. Hann had recommended, had broken down was not a reason to discount his opinion. Indeed that placement had occurred with the consent of all parties.

[24] Contrary to the mother's submission, it was not inconsistent for the judge to leave the fourteen year old child in her mother's care while ordering permanent care of the younger siblings. The judge specifically addressed that child's placement, providing reasons for her decision. According to the evidence, the older daughter had somehow coped with the family chaos and did not suffer from the personality and learning deficits of her younger siblings.

[25] During the proceeding the judge was critical of the Agency's handling of the case - particularly what she termed as "non-disclosure". In fact, much of the non-disclosure, so-called, was actually disorganized disclosure. Where necessary the judge adjourned the proceeding to allow the parties time to address the disclosure issues. Nothing in the record demonstrates that any such disclosure issues prejudiced the right of the mother to a fair hearing.

[26] Although the mother asserts that the Agency did not discharge its duties to the family, she is unable to identify any particular failure which impacted the result or the fairness of the process. Essentially, it is her submission that the siblings should have been returned to her to punish the Agency for what C.P. asserts was its ineptitude in handling the case. The same argument was made to the trial judge and, quite properly, rejected.

FRESH EVIDENCE

[27] Shortly before the hearing the mother tendered an affidavit as further evidence pursuant to s. 49(5) of the **Children and Family Services Act**, S.N.S. 1990, c. 5. The affidavit provided her perspective on how the siblings were doing in Agency care since the permanent care order. The Agency filed a responding affidavit. Neither party objected to our receiving the affidavit of the other. It suffices to say that the siblings' behavioural difficulties have not abated and, consequently, they cannot yet be placed in foster care. That is not surprising given the complexity of their problems as identified during the proceeding.

[28] The new evidence from the mother contains nothing to suggest that she has gained any insight into the siblings' situation. Her blaming has simply shifted from their father to the Agency.

[29] The fact that the siblings' trauma and dysfunctional behaviour has continued only underscores the need for them to be in Agency care where the widest array of services are available and will be accessed. Their individual circumstances will only be remedied, if at all, with long term intervention. The mother has neither the insight, inclination nor ability to act in the sibling's best interests.

DISPOSITION

[30] While I have attempted to address some of the mother' complaints about the proceeding, the short answer to this appeal is that she has not demonstrated reviewable error by the trial judge, either factual or legal. I would dismiss the appeal, without costs.

Bateman, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.