NOVA SCOTIA COURT OF APPEAL

Citation: L.D. v. Children's Aid Society of Cape Breton-Victoria, 2010 NSCA 64

Date: 20100723
Docket: CA 325921
Registry: Halifax

Between:

L.D. and B.S.

Appellants

v.

The Children's Aid Society of Cape Breton-Victoria

Respondent

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

Judges: MacDonald, C.J.N.S., Hamilton and Farrar, JJ.A.

Appeal Heard: June 29, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Hamilton, J.A. concurring.

Counsel: The appellants, in person
Lee Anne MacLeod-Archer, 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 Notice

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

Reasons for judgment:

I. BACKGROUND:

[1] The appellants are the parents of two children, S.M.D. and S.M.S.. For ease of reference, I will refer to S.M.D. as (D) and S.M.S. as (S). S is the subject of this appeal. D was born prematurely on March *, 2007. She was apprehended by the Children's Aid Society and, by Order dated October 25, 2009, placed in the permanent care of the Agency, without ongoing access by the parents. It was found that D had suffered non accidental injuries while in the care of the appellants.

[2] The appellants appealed D's permanent care order to this Court. The appeal was dismissed by decision dated March 19, 2010 [2010 NSCA 20].

[3] S was also born prematurely in November 2007. She had a number of life threatening complications after birth and remained in the hospital where she was apprehended by the Agency in May 2008. She has remained in foster care since then. By written decision dated February 15, 2010 and by order dated February 25, 2010, the Honourable Justice Darrell W. Wilson found that S continued to be a child in need of protection, and ordered S to be placed in the permanent care and custody of the Agency with no access to the appellants. This is an appeal of that decision. For the reasons set out below, I would dismiss the appeal without costs.

II. PRELIMINARY MOTIONS:

[4] Prior to the appeal hearing, the Agency filed two preliminary motions seeking to have the appeal dismissed on the basis that:

1. The appellants have unduly delayed the perfection of their appeal; and

2. The appeal of the appellants' is frivolous, vexatious and/or abuse of process.

[5] These motions were heard at the commencement of oral argument and dismissed with written reasons to follow. What follows in paragraphs 6 to 15 are those reasons.

Perfection of the Appeal:

[6] The Agency filed this motion as a stand alone motion seeking to have the appeal dismissed on the basis the appellants failed to properly perfect their appeal within the time limits provided for in the *Civil Procedure Rules*.

[7] However, in oral argument, the Agency, appropriately, acknowledged it would be very difficult to argue that the appeal should be dismissed, solely on the basis that the appeal was not perfected, when the motion to dismiss the appeal is taken after the appeal is perfected. Instead it argued the failure to perfect in a timely manner went to the vexatiousness of the appellants in the conduct of this appeal. I will, therefore, address the timing of the perfection of the appeal when addressing the Agency's motion to dismiss for abuse of process.

Frivolous, vexatious and/or an abuse of process:

[8] The Agency argued the appellants were not seriously pursuing an appeal with respect to S but were rather looking for a retrial of the issues involving their other daughter, D. This, it says, is an abuse of process. In support of its position the Agency pointed to the following:

- very little effort was put into the grounds of appeal. The grounds of appeal in this case are essentially the same as those in D;
- the factum filed, with very few changes, is the same as was filed in D;
- they delayed in the perfection of the appeal without justification. The factum was very similar to their previous appeal and would not have required any additional time to file.

[9] The Agency says it is prejudiced by the actions of the appellants in the sense it does not know what the real issues and arguments are on this appeal.

[10] The Agency, again appropriately, acknowledged that the appeal was not frivolous but, rather, the manner in which it was conducted was vexatious and an abuse of process.

[11] The Supreme Court of Canada in **New Brunswick (Minister of Health and Community Services) v. G.(J.)**, [1999] 3 S.C.R. 46. (J.G.) commented that child protection hearings will have varying degrees of seriousness depending on the interests at stake. A proceeding in which a child may be permanently taken away from its parent engages the most serious of issues.

[12] The decision under appeal involves the placement of a child in the permanent care of the Agency the deprivation to the parents of any contact with the child. It is, as G.(J), *supra*, says, at the most serious end of the spectrum. For this reason, an appeal from a permanent placement order, involving parental decision-making and other attributes of custody involving the liberty rights of parents, will rarely, if ever, be dismissed, summarily, on the grounds that it is vexatious or an abuse of process. It would require very cogent evidence of misconduct or bad faith on the part of the appellants. The assertions of the agency and the incidents it cites in support of its position fall far short of this threshold.

[13] It is somewhat surprising, with respect, that the Agency would make such an application. The appellants have a statutory right of appeal, they are exercising that statutory right of appeal and, although there may be some issues with respect to the timing of the filing and content of their factum, it has to be recognized that they are self represented. Any deficiencies can be explained by their lack of legal training and unfamiliarity with the process. We do not attribute any wrongdoing to the appellants in the conduct of this appeal. Nor do we see it as an attempt to retry the issues on D's hearing. We see the appellants' conduct as an appropriate exercise of their rights.

[14] The Agency's suggestion that it is prejudiced by the appellants' conduct , respectfully, rings somewhat hollow. A review of the Agency's factum clearly shows that it was aware of the nature and type of issues this Court could and would consider on this appeal.

[15] For these reasons the motions were dismissed.

III. ISSUES:

[16] The appellants argue that there were a number of errors made by the trial judge which entitle them either to a new trial or, alternatively, S being placed in the custody of the child's paternal grandmother, J.S.. The issues may be summarized as follows:

1. Whether the trial judge erred in his consideration of the evidence of Dr. Kajetanowicz?

2. Whether the trial judge erred in taking into consideration the charges laid against L.D. and B.S. for which they were subsequently acquitted?

3. Whether the trial judge failed to properly consider granting custody to J.S.?

4. Whether the trial judge erred in failing to consider the maternal grandmother as an option?

5. Whether the trial judge failed to properly recognize services that were completed by the appellants?

6. Whether the trial judge failed to consider or give proper weight to the polygraph examination?

[17] I will address the alleged errors by the trial judge, individually, after discussing the standard of review.

Standard of review:

[18] This is an appeal from a trial judge's decision. Although it may be difficult for laypersons to understand, this Court's role is not to embark upon a fresh assessment of the evidence or to substitute its own exercise of discretion for that of the trial judge. This Court may only intervene if the trial judge erred in legal principle or is shown to have made a clear error with respect to a factual finding that has materially affected the result (**Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58 at ¶ 26; **Staples v. Callender**, 2010 NSCA 49 at ¶ 6).

[19] It is on this standard that we must review the appellants' allegations of errors by the trial judge.

Analysis

1. Whether the trial judge erred in his consideration of the evidence of Dr. Kajetanowicz?

[20] The appellants argued that the trial judge made a fatal error in relying on the evidence of Dr. Kajetanowicz, which evidence was in error. In particular, B.S., in argument, referred to the evidence of Dr. Kajetanowicz in the hearing involving D (which was entered as an exhibit in S's trial). In giving evidence at that hearing, he relied upon a discharge report from the IWK which estimated the gestation of D at 34 weeks. The appellants pointed out, in fact, that the gestation was only 30 weeks and asserted all premature babies are born with the type of fractures observed in D.

[21] The appellants' argument on this point fails for a number of reasons:

- The trial judge was aware of the proper gestation of D. He correctly notes it as being 30 weeks (trial decision ¶ 5);

- Dr. Kajetanowicz gave evidence in the proceedings relating to S. He was specifically asked whether the error in the IWK discharge report had any impact on his opinion that the injuries were non accidental. He testified it did not.

- Dr. Kajetanowicz was not the only doctor who gave evidence with respect to the origin of D's injuries. Two other specialists, qualified to give expert evidence, Dr. Ilses and Dr. Bird testified that the injuries to D were non accidental. Dr. Ilses, in particular, gave evidence as to the type of force which would have to be exerted in order to create the type of injuries suffered by D.

- There was no evidence that all premature babies have injuries similar to those suffered by D.

[22] A review of the trial judge's decision and the record discloses he had ample evidence before him to conclude that her injuries were not accidental.

2. Whether the trial judge erred in taking into consideration the charges laid against L.D. and B.S. for which they were subsequently acquitted?

[23] The appellants argue that the trial judge should not have taken into consideration the charges which were laid against L.D. and B.S. arising from an incident involving an assault on L.D.'s sister in June 2008.

[24] With respect, the trial judge did not use the criminal charges as a basis for finding that S was a child in need of protective services. He makes mention of the altercation in his decision (¶ 41), however, he does so simply reciting the evidence with respect to the incident and the Agency's position that it was an example of the inability of the appellants to benefit from anger management counselling.

[25] The trial judge heard direct evidence about the conduct of the appellants with respect to this incident and did not err in referencing it in his decision. It was entered as evidence of their conduct; whether charges were laid and the parties subsequently acquitted was not what was being considered by the trial judge. The evidence was properly before the court and the trial judge was entitled to consider it.

3. Whether the trial judge failed to properly consider granting custody to J.S.?

[26] The appellants argue that the trial judge failed to give any consideration to J.S., S's paternal grandmother, as an alternative to permanent care. The appellants argue that there is no reason why J.S. should not be granted custody.

[27] Again, the appellants' argument on this point must fail.

[28] J.S. was represented at trial by independent counsel. She gave evidence during the hearing and that evidence was considered by the trial judge. He concluded that, although J.S. was well intentioned, she was not in a position to provide long term, stable care for S. The trial judge cited the following reasons (¶ 62):

- because of her own health issues and age, J.S. could not provide care on her own without the aid of family members.

- S has a number of serious medical problems and she would need a great deal of care in the future.

- J.S. could not ensure the child's safety because she did not believe the appellants were in any way responsible for the harm suffered by D.

[29] The burden of proving that J.S. was a reasonable option is upon the proponents. (**T.B. v. Children's Aid Society of Halifax**, 2001 NSCA 99, ¶ 52) The trial judge heard and evaluated the evidence; he was not persuaded J.S was a viable alternative. He clearly set out his reasons for reaching his conclusion. In doing so, he did not commit an error.

4. Whether the trial judge erred in failing to consider the maternal grandmother as an option?

[30] The appellants argue that L.D.'s mother had, to the Agency, expressed an interest in custody of S early on in the proceedings. They argue it was incumbent upon the Agency to follow up with L.D.'s mother to determine whether she was an appropriate alternative.

[31] Neither the trial record nor the trial judge's decision, make any mention of the maternal grandmother being put forward to the trial judge as a custodial option. The appellants acknowledged in oral argument that it was not an option before the trial judge .

[32] The Agency is not obligated to consider all alternatives. The obligation is on the proponents, in this case the appellants, to put forward the alternatives to show that they are sound, sensible, workable, well conceived and have a basis in fact. (**T.B.**, *supra*, ¶ 36)

[33] If the appellants wanted the Court to consider the maternal grandmother as a viable option it was incumbent upon them to adduce evidence to establish it would be in the child's best interest to be placed with her grandmother. Although the

appellants are self represented on this appeal, they were represented by senior and experienced counsel at trial. Indeed, they lead evidence with respect to the paternal grandmother (albeit unsuccessfully) being a viable option for custody. They chose not to do so with respect to the other grandmother. The failure of the trial judge to consider something which was not presented to him cannot form the basis of a successful appeal.

5. Whether the trial judge failed to properly recognize services that were completed by the appellants?

[34] The appellants argue that the trial judge failed to take into account the services that they had completed and, therefore, erred in placing the child in permanent care. They argue the services completed enable them to parent the child.

[35] At trial there was a significant amount of evidence about the services which were provided and which had been completed (or not completed) by the appellants. The trial judge spends no less than eight pages of his decision addressing those services. He made particular reference to the evidence of Michael Bryson, a clinical psychologist, who testified it would have to be shown that their behaviours, attitudes, and emotional responses to different situations have changed. In his assessment of March 2009 he felt additional time would be needed to assess whether there was a pattern of enduring change to their behaviour.

[36] The services provided by the Agency intended to preserve or reunite the child with the family must be ones which can effect acceptable change within the time permitted in the Act. (**L.L.P. v. Nova Scotia (Community Services)**, 2003 NSCA 1, ¶ 25)

[37] The trial judge was not satisfied that a stable and safe level of parental functioning had been achieved by the parents at the time of his final disposition nor was he satisfied that acceptable change had been effected within the time permitted in the Act. There was certainly evidence before him upon which he could come to that conclusion and in so concluding he did not err.

6. Whether the trial judge failed to consider or give proper weight to the polygraph examinations?

[38] The appellants argue that the trial judge failed to properly consider or to take into consideration they had passed a polygraph examination relating to D's injuries. They argue there was no evidence that they harmed their first child, therefore, the proceedings were fundamentally flawed from the outset.

[39] This submission fails, again for a number of reasons. First of all, the parents are seeking to challenge the protection finding on this appeal from the final disposition order. The protection order was not appealed and is not open to review on this appeal.

[40] Secondly, the medical evidence is D suffered non-accidental leg fractures while in the care of her parents. This evidence was accepted by the trial judge in finding that the second child S was in need of protection. While each parent denied causing the injuries, at a minimum they failed to protect D from harm and did not accept she was injured in their care. The issue was whether they failed to protect her from harm.

[41] They have continuously refused to recognize that D suffered non accidental injuries while in their care. This was the issue before the trial judge and one which he addressed head on in his decision. He concluded that the degree of risk of future harm to S was high (¶ 64) having regard to all of the evidence presented to him. In reaching this conclusion he did not err .

CONCLUSION:

[42] The trial judge heard and evaluated a significant amount of evidence in this proceeding. The appellants were represented by senior, experienced counsel throughout the proceeding who canvassed all of the issues, including the issues that have been raised on this appeal. As previously noted, it is not for us to retry the case. The issues were considered by the trial judge and there was ample evidence to support his conclusions.

[43] For these reasons I would dismiss the appeal.

COSTS:

[44] The Agency seeks costs on a solicitor/client basis. This request is somewhat surprising, to say the least. From a practical point of view, the Agency is aware of the financial circumstances of the appellants; even if such an award were made, it is questionable whether the costs could be recovered.

[45] However, more importantly, these parents are appealing an order that forever deprives them of their parental rights with respect to S. The Act grants them a right of appeal. They have exercised that right and, although they have been unsuccessful, they or any other parent should not be reticent to exercise their rights of appeal for fear of a prohibitive award of costs against them. It would be a very rare circumstance where costs, of any kind, would be awarded in a case such as this.

[46] I would not award costs to the Agency.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Hamilton, J.A.