NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Community Services) v. T.H.,
2010 NSCA 63

Date: 20100727
Docket: CA 325503
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

T.H. and D.B.

Respondent

Editorial Notice

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

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

Revised decision: The text of the original decision has been corrected according to the erratum dated October 6, 2010. The text of the erratum is appended to this decision.

Judge(s): MacDonald, C.J.N.S., Fichaud and Farrar, JJ.A.

Appeal Heard: June 16, 2010, in Halifax, Nova Scotia

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

Counsel: Peter C. McVey and S. Raymond Morse, for the appellant
Lisa Bevin, for the respondent T.H.
Stephanie Hillson, for the respondent D.B.

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

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] Two brothers, N.B. and J.B., are 10 and 8 years old. They were first apprehended for protection by Family and Children's Services in 2004, and have been in and out of protective care since. After a hearing in July 2008, a judge determined that the boys needed protective services under the *Children and Family Services Act*, S.N.S. 1990, c. 5 (*CFSA*). After a disposition hearing, the Family Court judge placed the boys in the Minister of Community Services' permanent care and custody but said that adoption would be "ruled out". The disposition judge added conditions to the permanent care and custody order directing that foster care continue indefinitely and suggesting return to the mother. The Minister appeals this aspect of the disposition ruling and says that the Family Court had no jurisdiction to restrict the Minister's authority over children in the Minister's permanent care and custody.

Background

[2] At the disposition hearing, the Minister applied to the Family Court for permanent care and custody of N.B. and J.B.,with a view to adoption. The boys' mother T.H., supported by their father D.B., sought return of the children to her care with access to D.B. The hearing before Judge Levy lasted 13 days in November and December, 2009. There were 28 witnesses, 400 pages of expert reports, 3 volumes of affidavits, lengthy reports on each boy by the IWK Hospital's Children's Response Program, 6 DVDs of access visits, and transcripts of 5 days of hearing on a related matter involving D.B.'s interim access.

[3] I will summarize the judge's findings from his disposition decision dated January 18, 2010. As the decision may be unreported, I will quote key passages.

[4] T.H. is about thirty years old, and D.B. in his early sixties. They met when she was 16, married, and lived in M.. He used drugs and abused her physically and sexually. D.B. had sexual relations with T.H.'s 13 year old sister, for which D.B. was convicted of an offence. D.B. and T.H. both were convicted of sexually exploiting D.B.'s 10 year old grandson.

[5] Their sons, N.B. and J.B., were born on May *, 2000 and August *, 2001.

[6] By 2004 the family had moved to Cumberland County. After the Family and Children's Services Agency of Cumberland County learned of the offence involving D.B.'s grandson, the Agency apprehended N.B. and J.B. The children were found in need of protective services, and lived in foster homes until returning to their mother in 2005. The Agency reapprehended the boys in November 2006, and they resumed foster care. After an assessment by a psychologist, they were returned to their mother in the summer of 2008. The boys were uncontrollable and T.H. could not cope. The social worker described their circumstances as a "meltdown".

[7] The judge recited what happened next:

> What happened that summer is a core issue. The Minister maintains that there were intensive, indeed unusually so, services provided in the form of intensive in-home support workers. The support worker and Ms. McQuigan cited suspicions of substance abuse, ineffective and inconsistent parenting, Ms. H. absenting herself from the home when she should have been there, swearing at the children or in response to what they had done, and periodic admissions by Ms. H. that she simply could not cope with the children. The Respondents reply that the return of the boys did not occur as planned (lack of sufficient preparation), that the Applicant failed to provide all of the services that were part and integral to the plan (for example, an alternative worker). The Respondents further cite the failure to provide respite service and the botching by the Minister of assuring the supply of necessary medications for the boys.
>
> Succinctly put, the Respondents argue that the Minister botched the return, failed to provide the contemplated and essential services, and gave Ms. H. no indication that there were any problems of consequence with how things were going. Then came September 6.
>
> Briefly stated, Ms. H. left the children with her partner and went over to the house of friends for some socializing. The friends had been drinking all day. As she tells it they were later joined by another gentleman whom she knew but not well. She says they all resolved to go over to his place to carry on their socializing, and she, anticipating the other couple would be coming right along, went with this other gentleman in his vehicle. She says the other couple never arrived. This other man then, wielding a machete, proceeded to terrorize her, assault her, sexually impose himself on her and threaten to kill her over the course of many hours until well past midnight. Eventually, about 4:30 a.m. he relented and agreed to drop her off at what she told him was her house.

On arrival at her home she was very upset, an upset that quickly spread to the children despite what she maintains, credibly, was her best efforts not to involve them. The children rapidly became, and remained, utterly out of control. The police and ultimately the Minister became involved. The children were removed from the home for the day, but then the Minister came back several days later and apprehended the children for a third time. They have remained in care since then and the Minister abandoned any idea of returning the children to her.

[8] Judge Levy described the boys' situation as follows:

THE BOYS

The boys are not ordinary little boys by any stretch. The reports of Dr. Hann from both 2007 and 2009 go into great detail as to their problems and what each requires by way of assistance. So too the records of the C.R.P. and the testimony of other witnesses are full of reports of serious and deep-seated problems and associated misbehaviours. None of the professionals seemed particularly optimistic about their futures.

N. has a history of violence over the years, at school, and, if one accepts the evidence from the 2006 apprehension, around other children. He assaulted a little girl this past summer and did what he could with a purloined lighter to set a neighbor's porch on fire. In addition to the encopresis and enuresis, he has a history of extreme night terrors. He still has difficulty in socializing with peers. He has in the past been unduly fixated upon sex. He [has] a knowledge of things sexual that one wouldn't think a child his age would have and has a history of acting out sexually. This seems to have come out strongly during his stay at the C.R.P. at the IWK where he is reported to have made a graphic sexual drawing which is included in Exhibit #16.

The evidence does allow for a somewhat less pessimistic view of his prospects. There have been no indications of sexual impropriety for at least six months or more and one might hope that this preoccupation has faded to within manageable limits. He is described by his foster mother and his alternative care worker, M, A., in very positive and affectionate terms. He is said by his foster mother and her daughter to have been quite well behaved, or relatively so, over the past several months. Similarly he hasn't had any major problems in school this year and he graded last spring on his own merits.

J., on the other hand does not seem to be doing so well. He has been diagnosed with a number of conditions including attachment disorder, (as has N.), ADD, oppositional defiance disorder and he may have developmental delays. He has been moved from foster home to foster home many times. He is reported to be

still given to spontaneous outbursts of rage and twice this year has hit his teacher. Like N. he has few friends. His foster mother is keeping him out of organized activities until his temper gets under control. His foster mother reports that he has a real fear of being adopted. His last known attempt at sexual aggression was at Christmas time, 2008, but this was nipped in the bud by an alert adult.

Each of the boys are on medications to stabilize their moods and moderate their volatility. Dr. Hann decried the focus on medications, and what he called the "adult dosages". Dr. Dauber, the psychiatrist who assessed J. disagrees. Dr. Hann is also critical that no counsel[l]ing or therapeutic programming have been utilized. The psychiatrists held to their positions that the medications were but a part of what was necessary for the boys but that the other part was simply a secure, stable and predictable home. They did not feel that the boys would benefit from the types of therapies that Dr. Hann was advocating. The divide between the professions was quite evident.

[9] After reviewing the evidence respecting T.H., the judge observed:

I wonder how stable her abstinence from alcohol is or might be expected to be. I am concerned, although not unduly, by her frequent recourse to marijuana to cope with stress. I accept that she has a history of 'reactivity' that has gotten her in trouble and has not served her, or those around her, well. I do accept that [she] (*sic*) recognizes that is a problem she has to deal with and that she has learned to apply some lessons to extract her from situations that might get out of hand. Lastly, and most importantly, I worry about her ability, day in and day out, to handle these two boys along with the stresses and anxieties of every day living.

There can be no denying her tenacious commitment to her children. She has spent the last number of years seeking out and trying to absorb parenting advice and counselling. She has attended access faithfully under less than ideal circumstances, and has put up with, indeed welcomed, child welfare workers in her home watching and documenting her every move. Notable was the evidence of J.'s foster mother when she said that Ms. H., alone among all the natural parents of all the children she has fostered over many years, has made a point of buying clothing for the boy and making sure that he gets it. She faithfully attended every court session and paid the closest, respectful attention to what was being said and what was going on. (The same, in fairness, can be said for Mr. B.)

I was impressed by what I observed on the DVD's of the access visits. There was a few minutes on the May 7th, 2009 visit when she was momentarily chippy and chaffing at a directive of the social worker. Beyond that I felt that she endured with remarkable stoicism the multiplicity of stifling and fussy little conditions imposed on her and the humiliation of being corrected, in front of her

> children, for some perceived transgression. I reject out of hand Ms. Walker's characterization of these visits as having been positive only maybe fifty percent of the time. I base that not only on the DVD's that I watched but on a careful reading of her extensive and meticulous notes. I thought that her professed concern, echoed to some extent in the evidence of another or others, that Ms. H. was somehow crossing some sexual boundary by giving the boys occasional kisses on the lips, calling them "my little man", and once having given N an enthusiastic full-body hug, was officious and, frankly, somewhat ridiculous.
>
> More important even than her willingness to bite her tongue for the sake of having contact with her children, I was impressed by her unfailingly gentle and positive interactions with her boys and by her willingness and, no less, her ability, to respond to the boys' anxieties about what lay ahead for them. I call to mind the spontaneous statement by N. on the May 28th, 2009 visit when he said: "I want this visit to be a million hours, to be the rest of my life." She reciprocated his tender affection and at the same time tried to defuse his anxiety by assuring him that it wasn't up to him, but rather it was something for a judge to decide. At that moment there wasn't a trace of Dr. Hann's bleak assessment of her, rather the nurturing reassurance of a wise and caring mother who needed no lessons from anyone on how to manifest love and ease a child's troubled mind.

[10] Judge Levy characterized T.H. as a "sympathetic person", with "remarkable strength", for whom he had "come to have genuine respect". She had struggled with poverty, mental health issues and marital abuse while "attempting to do everything possible to regain care of her children".

[11] Nonetheless, the judge decided that the boys' best interest was in the permanent care of the Minister. He found:

> I simply believe, as Drs. Hann and Moss said, that even with their professional skills the needs and challenge of parenting both boys together would be beyond them. And if they can't do it, I believe that it is beyond Ms. H. as well. The summer of 2008, the Applicant's perceived failings and all, leave little room for optimism that she can parent these boys together. And even if she could, it would require ongoing and substantial supports indefinitely. The evidence leads to the inevitable and heartbreaking conclusion that the return of these boys to their mother's full-time care at this point, or in the near future, would almost inevitably would [*sic*] lead to the tragedy and trauma of yet a fourth apprehension.

[12] Normally the permanent care and custody order ends the disposition hearing. Section 47(1) of the *CFSA* says that the Agency (i.e. the Minister) is then the

child's legal guardian, and the *CFSA* directs how the Minister may then proceed with adoption. Later I will review these statutory provisions.

[13] Judge Levy's decision added what he described as "conditions on the permanent care and custody order". The conditions' bottom line was that the boys would remain in foster care and not be adopted. The decision said:

> The issue is not with the need for security and permanency. Far from it. The issue is where is the most likely place one would find it. Does permanency necessarily mean adoption? If one accepts that permanency, stability, familiar surroundings, attachment security are crucial why would one resort to wrenching these boys out of homes that are offering just that and which the evidence reveals will be available to them as long as they need it. Not every home, best intentions notwithstanding, would be able to tolerate the challenges these boys present to their foster parents on a constant basis. There is evidence that the boys have developed a real attachment to their foster parents. Is this just another attachment to be severed? How many such upheavals do we believe these children can absorb? The professionals agree that removing these boys from their present homes will be a real setback.
>
> Not every home, very few homes in fact, can offer the experience and training of these exceptional 'therapeutic' foster homes. Is the expectation honestly that the boys can be better served than they are at present? Is the road to stability and security for these boys to be achieved by 'rolling the dice' with more placements? Does jettisoning the familiar and good in favour of the elusive perfect offer anything but homage to the Minister's 'philosophy and belief'?
>
> There is no guarantee that the boys will be placed in the same adoptive home. There is no guarantee for that matter that they, or either of them, will find adoptive placements at all. Notwithstanding Ms. Moffat's professed optimism, there is evidence elicited during cross-examination that at a case conference of the Applicant's personnel in, I believe, this past September, there was universal pessimism that an adoptive home will ever be found for them. Breakdowns in adoptive placements do occur even with all the best planning and care having taken place. It is an unknown at this point how long J. might last in a placement as any number of his foster placements have fallen through. Who knows as well how many adoptive homes would put up with N. and his feces smearing and urination all over the house. And this is to say nothing of the risk they pose for aggression, physical and sexual.
>
> . . .

> I hold that there is overwhelming evidence that these boys **need** [Judge Levy's emphasis] to remain where they are, which means that adoption has to be ruled out as an option. . . .
>
> Similarly I am aware of the provisions of section 47(2) and the caselaw on it. It may in fact not apply since this order will preclude the children being placed for adoption, although a 'permanent placement' is contemplated.

[14] As authority for the conditions, Judge Levy relied on s. 2(2) of the *CFSA*, which says the best interests of the child govern all proceedings and matters under the *Act*, *Nova Scotia (Minister of Health) v. J.J.*, [2005] 1 S.C.R. 177, and *Blois v. Blois* (1988), 83 N.S.R. (2d) 328 (Ap.Div.). Judge Levy did not refer either to the *CFSA*'s provisions that expressly govern the determination of the child's best interest respecting adoption or to caselaw under the *CFSA*.

[15] The judge's reasons, quoted above, say that "adoption has to be ruled out as an option" and "this order will preclude the children being placed for adoption". The actual orders of March 4, 2010, one for each child, say:

> 1. Subject to the conditions set forth herein, the child:
>
> **[N.B. and J.B.]**
>
> be and hereby is placed in the permanent care and custody of the Applicant, the Minister of Community Services.
>
> 2. In the event the existing foster placement should no longer be available, prior to the Minister arranging another foster placement for the child, if time permits, appropriate notice shall be provided to the Respondent, [T.H.], and the Minister shall also give serious consideration to placing the child in the care of the Respondent, [T.H.], having regards to the best interests of the child and other relevant factors, including any risks associated with placement of the child in an unfamiliar foster placement as well as the circumstances of the Respondent, [T.H.].
>
> 3. This Order is predicated upon the Minister maintaining the child in his current foster home so long as possible, in association with continued provision of all necessary supports, as well as the continued facilitation of sibling access contact between the child, [J.B.] (DOB August *, 2001) and the child, [N.B.] (DOB May *, 2000), to the extent that such sibling access contact is consistent with the best interests of the children.

[16] Judge Levy also ordered that T.H. have access to her sons.

Issue

[17] The Minister appeals. The Minister's submission is that the judge erred in law or jurisdiction by attaching these conditions to a permanent care order, and in particular conditions that inhibited the children's placement for adoption. The Minister does not appeal the judge's findings of fact or the access order.

Standard of Review

[18] In *Children's Aid Society of Cape Breton-Victoria v. A.M.*, 2005 NSCA 58, Justice Cromwell said:

> [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.

[19] The issue here is purely legal, for which the standard of review is correctness.

Analysis

[20] I begin with the Supreme Court of Canada's decision in *J.J.*.

[21] Nova Scotia's *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 3 defines an adult in need of protection as one who, because of mental or physical disability, is unable to protect himself or herself or provide for his or her own adequate care and

attention. Section 9 entitles the Minister to apply to a judge for an order declaring the individual to be in need of protection. A judge declared that J.J. was an adult in need of protection and approved the Minister's plan that J.J. be placed for care in her own apartment in Halifax. After the Government denied funding for this placement, the Minister applied for court approval of a new plan of care to include J.J.'s placement at a facility outside Halifax. The judge declined to approve the placement outside Halifax because, in the judge's view, the move from Halifax would be contrary to J.J.'s welfare. The Court of Appeal allowed the Minister's appeal and ruled that the judge's power was restricted to accepting or rejecting the Minister's plan in total, and the judge could not amend that plan.

[22] The Supreme Court of Canada unanimously allowed the appeal. Justice Abella for the Court quoted the statute and said:

> [15] This appeal centers on the Family Court's jurisdiction under s. 9(3)(c) of the *Adult Protection Act* of Nova Scotia to impose terms and conditions on plans proposed by the Minister for a vulnerable adult's care. The following provisions of the Act are relevant to ***the interpretive exercise***:
>
> > 2 The purpose of this Act is to provide a means whereby adults who lack the ability to care and fend adequately for themselves can be protected from abuse and neglect by providing them with access to services which will enhance their ability to care and fend for themselves or which will protect them from abuse or neglect.
> >
> > 3 In this Act,
> >
> > ...
> >
> > (b) "adult in need of protection" means an adult who, in the premises where he resides,
> >
> > (i) is a victim of physical abuse, sexual abuse, mental cruelty or a combination thereof, is incapable of protecting himself therefrom by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his protection therefrom, or
> >
> > (ii) is not receiving adequate care and attention, is incapable of caring adequately for himself by reason of physical disability or mental infirmity, and refuses, delays

> or is unable to make provision for his adequate care and attention;

7 Where, after an assessment, the Minister is satisfied that a person is an adult in need of protection, the Minister shall assist the person, if the person is willing to accept the assistance, in obtaining services which will enhance the ability of the person to care and fend adequately for himself or will protect the person from abuse or neglect.

9 (1) Where on the basis of an assessment made pursuant to this Act the Minister is satisfied that there are reasonable and probable grounds to believe a person is an adult in need of protection, he may apply to a court for an order declaring the person to be an adult in need of protection and, where applicable, a protective intervention order.

...

(3) Where the court finds, upon the hearing of the application, that a person is an adult in need of protection and either

> (a) is not mentally competent to decide whether or not to accept the assistance of the Minister; or
>
> (b) is refusing the assistance by reason of duress,

the court shall so declare and may, where it appears to the court to be in the best interest of that person,

> (c) make an order authorizing the Minister to provide the adult with services, including placement in a facility approved by the Minister, which will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect;

...

(6) An application to vary, renew or terminate an order made pursuant to subsection (3) may be made by the Minister, the adult in need of protection or an interested person on his behalf, or a person named in a protective intervention order upon notice of at least ten days to the parties affected which notice may not be given in respect of a protective intervention order earlier than three months after the date of the order.

> (7) An order made pursuant to subsection (3) may be varied, renewed or terminated by the court where the court is satisfied that it is in the best interests of the adult in need of protection.
>
> ...
>
> 12 In any proceeding taken pursuant to this Act the court or judge shall apply the principle that the welfare of the adult in need of protection is the paramount consideration.

[16] The ***interpretation to be given to s. 9(3)(c)*** of the Act must be consistent with the Act's purpose as set out in s. 2: to provide adults who cannot protect or care for themselves with access to services which are in their best interests and will enhance their ability either to look after or protect themselves. The governing consideration, found in s. 12, is the welfare of the adult. Responsibility for ensuring the welfare and best interests of the vulnerable adult is legislatively assigned to the Family Court.

[17] The ***legislative scheme recognizes*** that a review is required of the state's decisions which may, however well intentioned, be incompatible with the best interests of those adults who have lost the right to make decisions for themselves.

[18] After declaring an adult to be in need of protection under either s. 9(3)(a) or (b), ***the court is given the discretion under s. 9(3)(c) to authorize the Minister to provide services in the adult's best interests***, including placement in a government-approved facility, that will enhance his or her ability to care for or protect himself or herself.

[19] This means that the court is not only the gatekeeper to state intervention, it is also, having approved the adult's loss of autonomy, responsible for assessing whether the services to be provided by the state are consistent with the adult's welfare and best interests.

[20] While it is true that the Minister, and not the Family Court, is responsible for developing plans for a vulnerable adult, this does not mean that the Minister can unilaterally dictate the nature of the services or placement. ***The Act assigns to the court the responsibility*** to authorize only those services that are in the best interests of the adult because they "will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect". It is inherent in that obligation that the court be able to assess whether those proposed services comply with the requirements in s. 9(3)(c). This in turn requires the court to be able to indicate to the Minister what aspect of the plan the

> court, as the ***statutorily designated guardian*** of the adult's welfare, finds acceptable or unacceptable based on whether it meets the statutory test.
>
> [21] To meaningfully fulfil its ***statutory duty*** to measure the proposed services against the best interests standard, the court's jurisdiction must of necessity include the ability to amend proposals suggested by the Minister. [emphasis added]

[23] The Minister's factum suggests that "the principles in *J.J.* are not applicable to the different statutory regime of child protection matters".

[24] I disagree with the Minister that *J.J.*'s reasoning dissolves just because the *CFSA* is a different statute. The Supreme Court of Canada (¶ 15) described its reasoning as an "interpretive exercise". Justice Abella gave an "interpretation" (¶ 16) of the broad words in s. 9(3)(c) that assigned to the court a "statutory" (¶ 21) responsibility to measure services against best interests. *J.J.*'s approach is interpretive, and the Supreme Court's reasoning pivots on the Legislature's intent. *J.J.*'s message for the *CFSA* is that the relevant statutory provisions be interpreted to determine how the Legislature intended to channel the promotion of the child's best interests. I will turn now to that interpretive exercise.

[25] Section 2 of the *CFSA* states the statute's purpose and paramount consideration:

> 2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child. 1990, c. 5, s. 2.

[26] Section 2(2) directs that child's best interests be paramount in "all proceedings and matters pursuant to this *Act*". The disposition proceeding here under s. 42, the disposition order under s. 43, the permanent care and custody order under s. 47, and the adoption provisions in ss. 67-87 are "proceedings and matters pursuant to this *Act*". So their governing statutory provisions are to be interpreted consistently with the child's best interests as stated in s. 2 (2).

[27] That conclusion does not end the analysis. In *J.J.* the *Adult Protection Act*, a brief enactment, did not specify how the welfare of the adult in need of protection

should be determined regarding her placement. So s. 12's statutory mandate to promote J.J.'s welfare infused the judge's general powers under s. 9(3)(c) with a judicial discretion to fashion conditions for J.J.'s welfare. In *Blois v. Blois*, the other authority considered by Judge Levy, the Appeal Division considered the former *Family Maintenance Act*, S.N.S. 1980, c. 6, the predecessor to the current *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. The *Family Maintenance Act* similarly lacked specific statutory direction on the matter in issue (residence restrictions for custody). Here the *CFSA* is a comprehensive statute with specific provisions defining how, when, by whom, and the criteria by which the child's best interests are to be determined and promoted respecting adoption. These provisions belong in the interpretive exercise. Judge Levy's decision did not consider them. As I will explain, in my respectful view this led to an error of law.

[28] A walk through the *CFSA*'s processes and standards for children in care will spotlight the Legislature's intentions respecting the child's best interests.

[29] Section 33(1) permits the Minister's agent to take a child into care when there are reasonable and probable grounds to believe the child needs protective services. Section 39(1) requires that within five days, the "agency [i.e. the Minister - s. 3(1)(a)] shall bring the matter before the court for an interim hearing". Section 39(4)(e) says that the court's interim order may place the child in the "care and custody of the agency". Section 39(8) then says that, when the child is so placed in the Agency's care and custody, the Agency "shall, where practicable, in order to ensure the best interests of the child are served, take into account" listed factors that include, in clause (b), "the need to maintain contact with the child's relatives and friends".

[30] Section 40 then directs that the court hold a protection hearing to determine whether the child is in need of protective services. If the court's answer is yes, section 41(1) requires the court to hold a disposition hearing. At the disposition hearing, the court, under s. 41(3), considers the Agency's plan for the child's care. Section 41(3)(e) says that, when the Agency proposes taking the child into the Agency's permanent care or custody, that plan should include "a description of the arrangements made or being made for the child's long term stable placement". Section 41(5)(a) says that, with its disposition order, the court shall state "the plan for the child's care that the court is applying in its decision".

[31] Section 42(1) lists the possible disposition orders. These are: return of the child to the parent, with or without Agency supervision; care and custody by someone other than the parent with Agency supervision; temporary care and custody by the Agency; and "permanent care and custody of the Agency, in accordance with section 47". Section 42(4) directs that the court not order permanent care and custody to the Agency "unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits" stated in s. 45(1). Section 45(1) states that "the total period of duration of all disposition orders, including any supervision orders, shall not exceed" twelve months if the child was under six at the date of application or eighteen months if the child was between six and twelve at that date.

[32] Section 43(1) provides that, in a disposition order involving mere Agency supervision (i.e. not permanent care and custody of the Agency), the "court may impose reasonable terms and conditions relating to the child's care and supervision". These terms and conditions include, in clauses 43(1)(b) and (h), "the place of residence of the child and the person with whom the child must, with the consent of the person, reside" and "any other terms the court considers necessary".

[33] Section 44 governs disposition orders for Agency temporary care and custody (i.e. not Agency permanent care and custody). Section 44(1) says that, in the disposition order, "the court may impose reasonable terms and conditions" including listed items and, in clause (f), "any terms the court considers necessary". Section 44(3) says that, for a child in its temporary care and custody, the "agency shall, where practicable, in order to ensure the best interests of the child are served, take into account" listed factors, including, in clause (b), "the need to maintain contact with the child's relatives and friends".

[34] Section 46(1) entitles a party to “apply for review of a supervision order or an order for temporary care and custody” (i.e. not an order for permanent care and custody). Section 46(5)(a) says “on the hearing of an application for review, the court may, in the child's best interests, ... vary or terminate the disposition order made pursuant to subsection (1) of section 42, including any term or condition that is part of that order.” Sections 46(5)(c) and 46(6) reiterate, for variation orders, the maximum time limits from s. 45(1) that I discussed earlier.

[35] Section 47 governs orders for permanent care and custody (i.e. the orders Judge Levy issued for N.B. and J.B.). Section 47(1) says:

> (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.

Sections 47(2) and 47(3A) permit the court to order access, in specified circumstances, and s. 47(3) permits a variation of access.

[36] There are critical differences between the *CFSA*'s provisions governing orders for Agency permanent care and custody and the provisions, mentioned above, for other disposition orders involving Agency supervision or temporary care and custody.

[37] Section 47 says nothing, except respecting access, to authorize terms or conditions in the order for Agency permanent care and custody. In this respect, s. 47 differs from ss. 43(1) and 44(1) of the *CFSA*, discussed above, that expressly authorize the court to include "terms and conditions" in the disposition orders for supervision or Agency temporary care and custody. Earlier I mentioned s. 43(1)(b), authorizing a condition respecting the child's residence and the person with whom the child must reside during a supervision order. The Legislature chose not to express that power for a permanent care and custody order. Instead, the Legislature in s. 47(1) assigned to the Minister the "status of legal guardian of the child" with "all the rights, powers and responsibilities of a parent or guardian for the child's care and custody". The Minister has no such status outside permanent care and custody.

[38] Placement is a "matter" under s. 2(2), meaning the Minister's paramount consideration must be the child's best interests. But that does not mean the court has a plenary authority to pre-empt the exercise of the Minister's functions as legal guardian. This court has said that, unless there is bad faith or breach of the duty of fairness, the *CFSA* intended that placement decisions for children in permanent care and custody rest with the Minister, under the Minister's status as guardian under s. 47(1). *N.N.M. v. Nova Scotia (Minister of Community Services)*, 2008 NSCA 69, ¶ 63-74, 86 and 98 and authorities there cited. Judge Levy's decision

referred to s. 47, but did not mention *N.N.M.* or any authority that discusses the *CFSA.*

[39] Sections 47(4) and (5) provide that, where practicable, a child in Agency permanent care and custody shall be placed in a home with the child's own religious faith and with a family of the child's own culture, race and language. The provisions also state that where such a placement is not feasible, the child may, "with the approval of the Minister", be placed in the most suitable home that is available. Section 47 says nothing about court approval for these matters.

[40] Section 47 differs from the *Adult Protection Act*, considered in *J.J.* The *Adult Protection Act* did not assign guardianship, with its rights, powers and responsibilities, to the Minister. Rather, s. 9(3)(c) authorized the court to assess the qualitative sufficiency of the Minister's services to the protected adult. Then ss. 9(5) through (8) provided that the adult protection orders will expire every six months unless renewed by further court orders. The *Adult Protection Act* expressly contemplated a continuing judicial supervision over the conditions of the protected adult's evolving care. This cannot be said of the *CFSA.*

[41] Section 48 of the *CFSA* permits the court, in specified circumstances, either to terminate the order for permanent care and custody or to vary the access conditions of that order.

> (a) **Variation -** Earlier I mentioned that s. 46(1) authorizes an application to court for review of conditions in an order for supervision or temporary care and custody. Section 48 includes no provision for review and variation of any conditions, other than access, in the order for permanent care and custody. This is consistent with the absence of authority expressed in s. 47 for insertion of such conditions in the first place.
>
> (b) **Termination -** Section 48(8) lists the court's five options on an application to terminate permanent care and custody. To paraphrase, these are (1) dismissal of the application, (2) adjournment for medical or psychiatric assessment, (3) adjournment and temporary return of the child to the parent with Agency supervision, (4) adjournment and temporary placement of the child with someone other than the parent with Agency supervision, and (5) termination of the order for permanent care and custody

> and return of the child to the parent. Placement for adoption is not one of the court's options on a termination application.

[42] If Judge Levy's order is affirmed by this court, (1) s. 48 would not authorize a variation of the conditions that preclude adoption, and (2) s. 48(8) would not authorize Agency placement for adoption as an option for the court on an application for termination of the permanent care and custody order. Judge Levy's reasons said "this order will preclude the children being placed for adoption" (above ¶ 13). His order, providing indefinite foster care except for an option of the boys' return to their mother, would achieve that end.

[43] Various provisions in the *CFSA* confirm the Legislature's changed focus respecting the child's best interests after a permanent care order.

[44] As noted earlier, s. 41(3)(e) requires that the Agency's plan to the court in support of a permanent care and custody order propose arrangements for "the child's long term stable placement." The Legislature intended that, after the expiry of supervision and temporary care, the best interests of a child in permanent care should involve the goal of long term stable placement.

[45] As mentioned, ss. 39(8)(b) and 44(3)(b) state that, under interim orders and temporary care orders, the child's "best interests" require that the Agency consider "the need to maintain contact with the child's relatives". Section 47(3A), on the other hand, says that after a permanent care order, when a child is residing with someone who has given notice of proposed adoption, "no application for an order granting access may be made during the continuance of the adoption placement" until the adoption application is dismissed or discontinued or involves undue delay. Section 47(2)(a) says that "the court shall not make ... an order" for access in an order for permanent care and custody "unless the court is satisfied that ... permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement". In *A.J.G. v. The Children's Aid Society of Pictou County and J.G.*, 2007 NSCA 78, ¶ 33, and *Children's Aid Society and Family Services of Colchester County v. E.Z. and J.M.*, 2007 NSCA 99, ¶ 56, this court confirmed the *CFSA*'s priorization of long term stable placement over parental access, that would prejudice such a placement, after an order for permanent care and custody.

[46] The Legislature has, after permanent care and custody, de-emphasized family contact and instead priorized long term stable placement, including adoption, in the criteria governing the child's best interests. There are exceptions, of course, including access in limited circumstances under s. 47(2) and openness agreements after adoption under s. 78A.

[47] I said earlier that s. 45(1) states maximum time limits for temporary care and supervision, after which the options are either permanent care and custody [with or without access under s. 47(2)] or return of the children to the parent. Section 42(4) permits the court to issue an order for permanent care and custody only when the court is satisfied that the circumstances justifying that order are unlikely to change before the expiry of those maximum time limits. From that statutory perspective, Judge Levy directed Agency permanent care and custody for N.B. and J.B. His decision said:

> Another aspect of the argument presents a real dilemma. With time running out, even if the Applicant's failures were more profound, what do we do? We simply cannot go beyond the end of April. All of the Applicant's shortcomings real or perceived, or those of the Respondents for that matter, can not be meaningfully rectified within that period of time. These children have been in and out of temporary care (more in than out) for going on six years. If we say that the Applicant's efforts fell short, do we keep these boys in temporary care longer while we start all over again, or if not all over again, if we just try to re-do all the things that went astray? I hold that we are at, or more likely past, the point where we simply have to bring this proceeding and the attendant uncertainty for all concerned to an end.

[48] The judge's reasons use the nomenclature of permanent care and custody. But the judge's "conditions on the permanent care and custody order", directing indefinite foster care and, in ¶ 2 of the order, exhorting return to the mother without adoption, replicate the substance of temporary care. There are two difficulties with this, both sourced in the *CFSA*. First, s. 45(1)'s outside time limit for temporary care, discussed earlier, has passed. This time limit is mandatory, not directory: *Nova Scotia (Minister of Community Services) v. B.F.*, 2003 NSCA 119, ¶ 65-68, leave to appeal denied [2004] 1 S.C.R. v.; *A.J.G. v. C.A.S. of Pictou (County)*, 2007 NSCA 78, ¶ 20; *T.B. v. C.A.S. of Halifax*, 2001 NSCA 99, ¶ 24, 26; *C.A.S. of Cape Breton - Victoria v. A.M.*, 2005 NSCA 58, ¶ 32; *Nova Scotia (Minister of Community Services) v. L.L.P.*, 2003 NSCA 1, ¶ 24. Second, as discussed, the Legislature intended that permanent care and custody involve an

opportunity for long term stable placement. The principal option for long term stable placement is adoption, according to the *CFSA*'s prescribed standards and procedures that I will address next.

[49] The definitional section of the *CFSA* confirms the Legislature's repriorization of criteria for the child's best interests in adoption. Section 3(2) defines the factors for determining the child's best interests, "except in respect of a proposed adoption":

> (2) Where a person is directed pursuant to this Act, **except in respect of a proposed adoption**, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
>
> (b) the child's relationships with relatives;
>
> (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
>
> (d) the bonding that exists between the child and the child's parent or guardian;
>
> (e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
>
> (f) the child's physical, mental and emotional level of development;
>
> (g) the child's cultural, racial and linguistic heritage;
>
> (h) the religious faith, if any, in which the child is being raised;
>
> (i) **the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian**;
>
> (j) the child's views and wishes, if they can be reasonably ascertained;
>
> (k) the effect on the child of delay in the disposition of the case;

> (l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
>
> (m) the degree of risk, if any, that justified the finding that the child is in need of protective services;
>
> (n) any other relevant circumstances. [emphasis added]

Then section 3(3) alters those factors for a proposed adoption:

> (3) Where a person is directed pursuant to this Act **in respect of a proposed adoption** to make an order or determination in the best interests of a child, the person shall take into consideration those of the circumstances enumerated in subsection (2) that are relevant, **except clauses (i), (l) and (m) thereof.** [emphasis added]

[50] Of particular interest in s. 3(3) is the exclusion of clause 3(2)(i) from the criteria that govern adoption. A judge is not to consider, in his analysis of the "best interests of the child" respecting adoption, the "merits of ... a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian". Judge Levy's decision did not mention ss. 3(2) or (3), or their revised criteria for determining the child's best interests respecting adoption. Yet the decision said that "this order will preclude the children being placed for adoption", and clause 2 of the order (quoted above ¶ 15) directs that, if the existing foster placement ceases, "the Minister shall also give serious consideration to placing the child in the care of the respondent, [T.H.], having regard to the best interests of the child". The judge compared the Agency's plan for adoption with the merits of returning the boys to their mother, then chose to encourage the latter and preclude the former.

[51] Sections 67 to 87 of the *CFSA* govern the process of adoption. Section 67(1)(c) defines "child in care", for the purposes of ss. 67-87, as including "a child in respect of whom there exists an order for permanent care and custody". Under section 70(1)(a), a child may not be placed for adoption except in specified circumstances, one being that "the child is a child in care". Section 74 states who must consent to an adoption. The judge on the disposition hearing is not mentioned. For children in care, ss. 74(7) and (8) say:

> (7) No order for the adoption of a child in care of the Minister shall be made without the written consent of the Minister and no order for the adoption of a child in care of an agency shall be made without the written consent of the agency or the Minister.
>
> (8) Subject to subsection (1) and pursuant to subsection (7), where a child proposed to be adopted is a child in care, the written consent of the agency or the Minister is the only consent required.

[52] Sections 76 and 77 define what the statutory heading describes as "prerequisites to adoption". Approval by the judge in the proceeding for the disposition order under s. 42 is not one of them. Section 76(1)(c) states that the court shall not order adoption unless "the child sought to be adopted has for a period of not less than six months immediately prior to the application, lived with the applicant under conditions that, in the opinion of the court, justify the making of the order". Section 76(2) permits the Minister, in writing, to shorten or dispense with this period of residence. Section 77(2) says:

> (2) Where the application is for the adoption of a child in permanent care and custody or a child that is the subject of an adoption agreement, the Minister may submit a written recommendation to the court respecting the adoption.

[53] Section 73 says:

> 73 An application for adoption shall be made to the court.

So the Legislature intended that a court would have jurisdiction over an adoption proceeding independently of any earlier judicial jurisdiction at a disposition hearing. Then s. 78(1) states:

> (1) Where **the court is satisfied**
>
> (a) as to the ages and identities of the parties;
>
> (b) that every person whose consent is necessary and has not been dispensed with has given consent freely, understanding its nature and effect and, in the case of a parent, understanding that its effect is to deprive the parent permanently of all parental rights; and

> (c) **that the adoption is proper and in the best interests of the person to be adopted**,
>
> the court **shall make an order** granting the application to adopt. [emphasis added]

[54] In s. 78(1)(c), the Legislature expressed its intent that the adoption court designated by s. 73 consider whether adoption is "in the best interests of the person to be adopted", in this case N.B. and J.B. If that answer is yes, and the other prerequisites exist, that court “shall make an order granting the application to adopt”. The Legislature intended that, before that court makes this determination, the applicable consents in s. 74 be given and the applicable prerequisites in ss. 76 and 77 occur. The Legislature considered that the court would be better able to assess the child's best interests with the benefit of both the Minister’s recommendation for a child in care under s. 77(2), and evidence of actual residence with the proposed adoptive family under s. 76(1)(c). As mentioned earlier, the court would assess the child’s best interests according to the criteria in s. 3(3) of the *CFSA*, without the three criteria that s. 3(3) excludes from judicial consideration in adoption matters.

[55] These provisions respecting adoption are, in my respectful view, the key difference between the *CFSA* and the *Adult Protection Act* considered in *J.J.* The *CFSA*’s processes and standards specifically channel the Legislature's intentions for promotion of the child’s best interests respecting adoption. They are not just an alter ego to the child’s best interests under s. 2(2), leaving a judge on the disposition hearing with an option to choose one or the other. Rather they flesh out “best interests” in s. 2(2) and, together with s. 2(2), embody the Legislature’s prescription to satisfy the child’s best interests respecting adoption.

[56] The decision under appeal would preclude these legislated processes and standards for adoption. The role of the adoption court under ss. 73 and 78(1) would be eliminated. There would be no determination of the child's best interests under s. 78(1)(c). There would be no application of the adjusted adoption criteria for best interests in s. 3(3). There would be no opportunity for a ministerial recommendation to the adoption court under s. 77(2) or, for that matter, a ministerial consent under ss. 74(7) and (8). There would be no real people for the adoption court to appraise as potential parents, and no evidence of residence with the prospective adoptive family for the court to weigh, when the court decides

whether adoption is in the child's best interests. In *Nova Scotia (Community Services) v. C.B.T.*, 2002 NSCA 101, at ¶ 12 this court adopted the trial judge's statement, in a ruling after a disposition hearing, that "[t]his court does not have jurisdiction over adoption". That is because the *CFSA* assigns that jurisdiction to another court at a later juncture.

[57] Section 2(2) is not abrogative, like s. 52(1) of the *Constitution Act, 1982*. It does not invalidate other sections in the *CFSA*. Rather s. 2(2) is to be construed consistently with other provisions in the *CFSA*. That is the interpretive exercise directed by *J.J.* In my respectful view, the judge erred in law by contravening the Legislature's expressed intent respecting the process and standards according to which the best interests of children in the Minister's permanent care and custody are considered for adoption.

Conclusion

[58] I would allow the Minister's appeal and delete clauses 2 and 3 of the orders. The parties should bear their own costs.

Fichaud, J.A.

Concurred in:

MacDonald, C.J.N.S.

Farrar. J.A.

NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Community Services) v. T.H., 2010 NSCA 63

Date: 20100727
Docket: CA 325503
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

T.H. and D.B.

Respondent

Revised judgment: The text of the original judgment has been corrected according to this erratum dated **October 6, 2010**.

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

Judge(s): MacDonald, C.J.N.S., Fichaud and Farrar, JJ.A.

Appeal Heard: June 16, 2010, in Halifax, Nova Scotia

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

Counsel: Peter C. McVey and S. Raymond Morse, for the appellant
Lisa Bevin, for the respondent T.H.
Stephanie Hillson, for the respondent D.B.

Erratum:

[1] In ¶ 16, remove the initials “T.M.” and replace them with “T.H.”

[2] In ¶ 29 where it refers to Section 39(3)(e), replace it with Section 39(4)(e).