NOVA SCOTIA COURT OF APPEAL

Citation: N.L. v. Nova Scotia (Community Services), 2010 NSCA 84

Date: 20101029
Docket: CA337308
Registry: Halifax

Between: N.L.

Applicant

v.

Minister of Community Services

Respondent

Restriction on publication: **Section 94(1) of the *Children and Family Services Act***

Judge: The Honourable Justice Fichaud

Motion Heard: October 28, 2010, in Chambers

Held: Application for extension of time to file Notice of Appeal is dismissed, without costs.

Counsel: Alan Stanwick, for the applicant
Peter McVey, for the respondent

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.**

Decision:

[1] This is a motion to extend the time to file a notice of appeal in a child disposition case under the *Children and Family Services Act*, S.N.S. 1990, c. 5 ("*CFSA*"). The proceeding involves a girl born in September 2005. The applicant N.L. is the child's mother.

[2] For the motion I have the affidavits of N.L. and Paul Moore, the Child in Care Worker for the child since February 2009.

[3] On February 21, 2007, the child, then 17 months old, was taken into care by the Children's Aid Society of Cape Breton - Victoria, whose functions have now been assumed by the Minister of Community Services ("Agency"). On March 12, 2007, the child was returned to N.L.'s interim care with Agency supervision. Two weeks later the Agency again took the child into care, and she has remained in Agency care since then.

[4] In May 2007 after a protection hearing, the court found that the child needed protective services because of substantial risk of physical harm. In July 2008, after a contested disposition hearing, the court ordered that the child be in the Agency's permanent care and custody with access by her parents. The Agency consented to access because the child's paternal grandparents had indicated an interest in adoption. Since then, it has become apparent that the grandparents are not willing to adopt the child.

[5] In July 2009, the Agency applied under s. 48(3) of the *CFSA* for termination of the parental access, to facilitate the child's adoption. In September 2009, N.L. counter-applied to terminate the Agency's permanent care and custody. Justice Forgeron of the Supreme Court (Family Division) heard the applications over six days of trial from December 2009 through May 2010, and issued a decision on August 18, 2010 with an order dated August 27, 2010. The court granted the Agency's application to terminate the parental access and dismissed N.L.'s application to end the permanent care (2010 NSSC 328).

[6] Section 49(1) of the *CFSA* permits an appeal to the Court of Appeal "within thirty days of the order", meaning before September 27.

[7] On September 17, N.L.'s counsel wrote to the Agency's counsel stating N.L.'s intent to appeal. But N.L.'s counsel erroneously believed that the time period for an appeal was the 25 clear days (without weekends and holidays) stated for general civil appeals by *Civil Procedure Rules* 90.13(2) and 94.02(1). That would have permitted filing up to October 4. So N.L.'s counsel faxed a notice of appeal to the Court of Appeal on October 1, four days after the expiry of the appeal period under s. 49(1) of the *CFSA*.

[8] On October 7, N.L.'s counsel filed this motion to extend the time for filing a notice of appeal from the Supreme Court (Family Division)'s order of August 27, 2010.

[9] The general principles governing extensions were stated by Justice Saunders in *Jollymore v. Jollymore*, 2001 NSCA 116, ¶ 22:

> [22] In this province, reference is often made to the so-called three part test for extensions of time in cases such as this. It is said that in order to qualify for such relief the court must be satisfied that:
>
> (1) the applicant had a *bona fide* intention to appeal when the right to appeal existed;
>
> (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
>
> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

[10] In *CFSA* cases, the third *Jollymore* principle, respecting the merits, is adjusted to conform with the statute's objective. In *Nova Scotia (Minister of Community Services) v. S.E.L.*, 2002 NSCA 62, Justice Cromwell said:

> [10] In many civil cases, extensions of time are often granted quite readily especially where the delay is short and the party seeking the extension is not represented by counsel. However, extensions of time for appealing under the **Act** call for the consideration of at least two special factors.

> [11] The first is that, as in all proceedings under the **Act**, the best interests of the child or children are paramount. It is not a matter of doing justice simply between the appellants and the respondent, but of serving the best interests of the child who is the subject of the proceedings. Secondly, the **Act** makes it clear that time limits are important so that the child's sense of time is respected. Nowhere in the **Act** is this more clear than with respect to appeals. The **Act** has an extraordinary and virtually unique requirement that appeals must be heard by the Court of Appeal in 90 days, with the possibility of a 60 day extension, from the date of the filing of the notice of appeal. The time limit for hearing the appeal runs from the filing of the notice of appeal; it follows that any extension of the time for filing the notice of appeal in effect extends the time for hearing the appeal. In other words, extending the time for filing the notice of appeal accomplishes indirectly what the **Act** does not specifically provide for -- an extension of the time within which the appeal must be heard.

[11] In *R.K. v. Family and Children's Services of Cumberland County*, 2006 NSCA 19, after quoting this passage from *S.E.L.*, I said:

> [5] The two principles cited in *S.E.L.* flow from the *CFSA* and are complementary. The *CFSA* s. 2(2) states:
>
> > In all proceedings and matters pursuant to this *Act*, the paramount consideration is the best interests of the child.
>
> The "proceedings" in s. 2(2) include this extension application. The *CFSA*'s preamble states:
>
> > Children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time.
>
> A delay that impacts the parent only minimally may exhaust a full formative term for an infant. So s. 49 of the *CFSA* strictly limits the time for appeal. Respect for the child's sense of time sustains the child's best interest.
>
> [6] In other civil proceedings the named litigants may be the only parties whose interests are relevant to an extension application. In a disposition proceeding under the *CFSA*, the child's interests trump the interests of the parents and Agency. So I should first consider the children's interests in the extension application before folding in the components of the standard *Jollymore* test. This essentially is what was done in *S.E.L.*, at ¶ 12-28.

[12] *C.O. v. Nova Scotia (Minister of Community Services)*, 2010 NSCA 83, ¶ 14-21, reiterated these principles.

[13] Clearly, *Jollymore*'s first two principles are satisfied here. Within the appeal period, N.L. had a *bona fide* intent to appeal. The notice of appeal was filed a few days late because of an innocent error as to the calculation of the appeal period.

[14] But, as stated in *S.E.L.*, *R.K.* and *C.O.*, in *CFSA* cases there is another determinative factor. To allow the extension, the chambers judge must be satisfied that the extension is in the child's best interest. That is not to say the chambers judge applies the same standard to the merits as the panel would apply if the appeal were to proceed. But there must be particulars of evidence, beyond mere conclusory allegations, on this application indicating that the potential consequences of an extension would be better for the child than the potential consequences of the extension's denial.

[15] The only evidence from N.L. on this point is ¶ 12 of her affidavit:

> That I do verily believe that it would be highly prejudicial to [the child] if the time to file a notice of Appeal is not extended.

[16] The trial judge's decision contains the following findings relevant to the "best interests" issue:

> [30] I find that child protection concerns still exist because there have been few significant changes in circumstances. N.L. continues to struggle with many personal issues from her past, including sobriety, violent relationships, stress, and anxiety. N.L. continues to lack healthy, coping skills which will allow her to effectively and responsibly confront her many challenges. In the past, this lack of skills lead to ongoing addiction problems, violent relationships, and poor parenting decisions. I find, on the balance of probabilities, such will continue in the future. The temptation to use alcohol and drugs to alleviate stress and anxiety continues to be a constant battle for N.L.
>
> [31] N.L. has taken many courses and engaged in much therapy. However, such knowledge has not translated into permanent changes. Even after N.L. filed her application in September 2009, she continued to abuse alcohol and breached the terms of her probation. In January 2010, N.L. chose to enter a local bar, and chose to become so intoxicated that she had no recollection of what had occurred the night before, or why she had been jailed. N.L. characterized the January

incident as a "slip." I do not. This, unfortunately, is but an example of the ongoing saga of N.L.'s dysfunctional and unhealthy life.

[32] Since the permanent care order issued in July 2008, many of N.L.'s choices confirm this finding. Examples include the following:

a) In March 2009, N.L. was once again assaulted by W.M. She had previously advised the court that this relationship had ended. Cst. Johnson noted that N.L. was intoxicated at the time. N.L. had previously advised the court that she was no longer drinking. Further, N.L. was arrested that day because there were two outstanding warrants and because she had breached the terms of her release.

b) N.L. was incarcerated between April 15, 2009 and July 14, 2009. In her affidavit, N.L. stated that she had used this time to take courses, reflect, and set her priorities. Nonetheless, just days after her release, N.L. was intoxicated at a wedding dance and threatened an Agency worker who was also at the dance.

c) In July 2009, N.L. was once again brutally assaulted by W.M. Just a few days earlier, N.L. had advised the Agency that she had ended her relationship with W.M. N.L. told the investigating police officers that W.M. was her boyfriend of eight years. Further, N.L. had once again been drinking alcohol at the time of the assault.

d) N.L. was convicted of various criminal charges after G.M. was placed in the permanent care of the Agency. The charges include theft; two failures to appear; three breaches; mischief (damage to property); operating a vehicle while impaired; and driving while disqualified.

[33] Although N.L. remains motivated, she fails to make consistent and long term progress in the areas which were identified at the permanent care and custody hearing. It is not safe to return G.M. to N.L.'s care, either on a supervised basis or otherwise. G.M. remains a child in need of protective services for essentially the same reasons which existed in July 2008.

[34] *Best Interests of G.M.*

[35] It is not in G.M.'s best interests to terminate the permanent care order given her current circumstances. I find that G.M. will, on a balance of

probabilities, have developmental issues which will require special commitment, skill, and knowledge from the primary care parent.

[36] It is probable that G.M. was affected by the cocaine and alcohol consumption which occurred prior to her birth. In making this finding, I am not assigning blame, rather I am articulating G.M.'s reality as it currently exists: **S.G. v. Children's Aid Society of Cape Breton**, [1996] N.S.J. No. 180 (C.A.), para. 37.

[37] Drs. Vitale and Lynk provided expert opinion on whether G.M. is on the FAS spectrum. Both examined the physical and behavioural characteristics of G.M. Dr. Vitale examined G.M. when she was three years, nine months. Dr. Lynk examined G.M. when she was four years, three months. Dr. Vitale concluded that G.M. had FAS disorder with ADHD, impulsivity, and oppositional traits. In contrast, Dr. Lynk stated that G.M. could have a borderline or mild case of FASD, if at all, but that more testing would be appropriate as G.M. grew older, so that a final diagnosis could be made.

[38] Because FAS is a spectrum disorder, and because of G.M.'s young age, I agree that it may be difficult to pin point an exact diagnosis. However, I find that G.M. has some form of FAS. G.M.'s brain development was harmed when N.L. ingested cocaine and alcohol while pregnant. This has caused G.M. to experience behavioural and executive functioning challenges. G.M.'s behaviours have improved because of the consistent, knowledgeable, and skilled parenting of the foster mother. If G.M. is to maximize her potential, she will require such dedication and parenting skills from her primary care parent.

[39] I find that N.L. is not capable of providing the type of parenting that G.M. requires because of N.L.'s ongoing struggles with substance abuse, domestic violence, and criminal activity. Further, N.L. will experience many challenges because of J.'s return. Although intelligent, J. is oppositional, demanding, and troubled. Counseling has just commenced between J. and N.L.

[40] Given G.M.'s unique needs, it is not in her best interests to be returned to the care of N.L. N.L. has failed to prove the second part of the s.48(10) test. N.L.'s application must therefore fail.

. . .

[50] I find it is in G.M.'s best interests to terminate all access with N.L. and W.M. G.M. needs a permanent home with loving parents who can provide an environment free from child protection concerns. Time limits have expired. N.L. has not effected permanent and lasting lifestyle changes. N.L. lacks the ability to

> provide for G.M.'s special needs. Adoption is not possible if access continues. G.M., a child with special needs, cannot have her emotional, physical, and psychological needs met by N.L. whose life is filled with chaos, confusion, and poor parenting choices. Access will, therefore, be terminated immediately in G.M.'s best interests. The Minister is, thus, free to pursue adoption as the Agency stated was its plan.

[17] N.L. submitted a draft notice of appeal with grounds that allege the trial judge made errors of fact and weight. But there are no particulars of evidence on this application to the effect that these findings are palpably erroneous under the appellate standard of review, or even to indicate that the findings are simply wrong.

[18] Mr. Moore's affidavit says that nobody has been found among the homes available to the Agency's Cape Breton-Victoria District Office who would be willing to adopt this child with her special needs. The child's needs derive from Fetal Alcohol Syndrome resulting from N.L.'s cocaine and alcohol consumption before the child's birth (findings in the trial judge's decision ¶ 35-40 - see above ¶ 16). There is, however, another child protection agency with a family interested in adopting a special needs child. This family has said they will attend the Special Needs Adoption Day to be held on October 30, 2010, two days after the hearing of this extension application. Mr. Moore's affidavit elaborates:

> 46. The Nova Scotia Council for the Family is a registered charity which organizes Special Needs Adoption Days twice per year in the Province of Nova Scotia.
>
> 47. At a Special Needs Adoption Day, children who are legally eligible for adoption are presented by short video and social worker presentation to adoptive parents willing and interested in adopting children with "special needs".
>
> 48. Special Needs Adoption Days are a usual and ordinary means by which children with special needs are placed for adoption in this province, by matching what might be harder to place children with adoptive parents willing and wishing to take such children.
>
> 49. As noted above, the next Special Needs Adoption Day is scheduled for October 30, 2010. One such event is normally held in the Fall each year and one in the late Spring.

> 50. I am informed by Leona Fitzgerald, from the Nova Scotia Council for the family, that after October 30, 2010, there will not be another Special Needs Adoption Day until April 2, 2011.
>
> 51. As a child who is currently the subject of a legal proceeding (this Motion to Extend Time, which may result in an appeal hearing being scheduled), [G.M.] cannot be presented at the Special Needs Adoption Day on October 30, 2010.
>
> 52. If this Motion were dismissed on October 28, 2010, that the Agency is prepared to present [G.M.]'s circumstances at the Special Needs Adoption Day on October 30, 2010.
>
> 53. The prospective adoptive family identified by the Agency as a possible match for this child, has not been told that they are a possible match for this child, as [G.M.] is not legally free for adoption at this time. They cannot be so informed under Agency policy.
>
> 54. This prospective adoptive family has said they will attend the Special Needs Adoption Day on October 30, 2010. I believe it is possible that they will decide to adopt another child legally available for presentation, if not contacted about [G.M.] before then.

[19] If I deny this extension application, there is potential that, two days from now, the child might connect with an adoptive family. If I grant the extension, the child cannot be presented at the Special Needs Adoption Day on October 30, the next such event is April 2, 2011, and there is no other apparent prospect for adoption. There is a finding by the trial judge, backed by evidence, that the child's long term best interests rest with adoption, not return to N.L. The reasons include N.L.'s past substance abuse, abusive relationships and incarceration. Her substance abuse likely contributed to the child's Fetal Alcohol Syndrome. There is no evidence on this application from N.L. to counter the judge's findings related to these factors.

[20] Section 2(2) of the *CFSA* directs that "[i]n all proceedings and matters pursuant to this *Act*, the paramount consideration is the best interests of the child". This application is a "proceeding and matter pursuant to this *Act*", and my paramount consideration must be the child's best interest. On the evidence before me, the child's interest would be better served by striving to cement the current opportunity for adoption by a family willing to take on a special needs child, than

by an appeal seeking the child's return to the conditions that contributed to her special needs.

[21] I dismiss the application for the extension, without costs.

Fichaud, J.A.