NOVA SCOTIA COURT OF APPEAL

Citation: *G. L. v. Children's Aid Society of Cape Breton-Victoria,* 2003 NSCA 112

Date: 20031021
Docket: CA 203933
Registry: Halifax

Between:

G.L.

Appellant

v.

The Children's Aid Society of Cape Breton - Victoria

Respondent

Restriction on publication:	**Publication ban pursuant to s. 94(1) of the Children and Family Services Act**
Judges:	Roscoe, Chipman and Hamilton, JJ.A.
Appeal Heard:	October 17, 2003, in Halifax, Nova Scotia
Held:	**Appeal dismissed per reasons for judgment of Chipman, J.A.; Roscoe and Hamilton, JJ.A. concurring.**
Counsel:	David Campbell, Q.C., for the appellant Robert Crosby, Q.C., 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.**

Reasons for judgment:

[1] Having heard counsel for the parties on the argument before us, the Court indicated that the appeal was dismissed with reasons to follow. These are those reasons.

[2] This is an appeal from a decision of Justice Clare MacLellan of the Supreme Court, Family Division whereby she ordered that the appellant's daughter, M., born on August (*editorial note- date removed to protect identity*), 1999, be placed in the permanent care and custody of the respondent Agency, pursuant to s. 42(1)(f) of the **Children and Family Services Act**, S.N.S. 1990, c. 5, and that there be no provision for access.

[3] The appellant, a native of Newfoundland, arrived in Sydney, Nova Scotia, in August 2001 and took up residence at Transition House to escape M.'s father, an abusive partner. She requested the assistance of the respondent.

[4] By September, 2001, staff at Transition House had concerns regarding the appellant's ability to parent M. On October 26th, 2001, M. was placed in the temporary care and custody of the respondent.

[5] An attempt to place M. with the appellant's sister in December 2001 was singularly unsuccessful due to the appellant's hostile reaction to the situation.

[6] In January, 2002, Dr. Reginald Landry, a psychiatrist, completed an assessment of the appellant's parenting capacity. He noted that she suffered panic attacks and had been diagnosed with a generalized anxiety disorder. He made a number of recommendations, including that the appellant be assessed by a psychiatrist, that the child remain in the temporary care of the respondent and that the appellant might benefit from psycho therapy to deal with a variety of issues including anxiety and depression and her maladaptive interpersonal relationships, particularly anger and hostility.

[7] Dr. M.A. Mian, a psychiatrist, saw the appellant 16 times in 2002 between March 8th and November 13th and once in 2003 on February 6th. His diagnosis was that the appellant suffered from borderline personality disorder and post traumatic stress disorder which could not be cured but could, with appropriate medication and support, be managed. He stated that she still had difficulties in many areas. It

was very difficult to state her capacity for caring for a young child. In his opinion, the respondent would be the best judge of that.

[8] On March 19th, 2002, a consent order of the court provided that M. was in need of protective services pursuant to s. 22(2)(b) of the **Act**. Since that time, M. has resided with a foster family through the arrangement of the respondent.

[9] Although there were occasional signs of progress in the appellant's relationship with M., the respondent also observed many negative behaviours of the appellant and moved for an order for permanent care. The Agency's plan for the child's care dated January 31st, 2003, detailed the appellant's inability to parent M., as evidenced by several incidents. Various attempts to reintegrate the child with her mother failed. Various supports provided to the appellant resulted in no improvement in her parenting ability. Insufficient progress was made with the appellant's mental health. The Agency's conclusion was that although it was prepared to work with a plan for extended family members, previous efforts to do so had not been successful, and the Agency recommended that M. be placed in its permanent custody with no provisions for access.

[10] The application for permanent care was heard by MacLellan, J. on April 14th and 15th, 2003. In her decision rendered orally on April 15th, 2003, MacLellan, J. referred to the evidence in its entirety and reviewed portions of it. It was clear that the appellant did not, in fact, manage her condition successfully. At the time of the hearing, M. was over 3½ years of age and the twelve month period of duration of all disposition orders directed by s. 45(1) of the **Act** had expired.

[11] MacLellan, J., prior to reaching her decision, made the following preliminary observations:

> [32] The Court must follow the child's sense of time as required in **The Children and Family Services Act**. This is reflected by the shorter time periods for families with young children to implement remedial measures. The younger the child, the shorter the time period, the rational, is best put forward for parents and professionals in the writings of the late Dr. Paul Steinhower, The Least Detrimental Alternative, who advises that numerous upheavals on young children is very detrimental to their emotional well being.
>
> [33] Children need a strong primary attachment or a sufficient secondary attachment if they're going to achieve their potential. These writings and **The**

> **Children and Family Services Act** illustrate there is a window of opportunity which is between age 0 and 3 years of age for children to settle and begin to develop in age appropriate ways. After that time their ability to form meaningful relationships with people is detrimentally impacted. The children's ability to form real relationships and to reach emotional and developmental milestones is compromised. The opportunity for a child to achieve full potential is the definition of best interests. We try different ways to define best interests, **The Children and Family Services Act** Section 3(2) and the definition in **King v. Low** (1985), 44 R.F.L. (2d) 113 (S.C.C.), McIntyre, J. (p. 126) require the child to have the opportunity to grow physically, psychologically, mentally and spiritually. Best interests basically means providing a child the environment for full potential to develop.

[12] MacLellan, J. then referred to the reports of Dr. Mian and Dr. Landry and case notes, the plan, the affidavits and the consensual protection finding as well as the *viva voce* evidence before her. She concluded on the basis thereof as follows:

> [47] Unfortunately for Mrs. [L.] love is not enough to raise a child. A parent must have sufficient emotional health and she simply has not. I accept, based on opinion evidence that her health is not going to improve in the foreseeable future. Basically the time period available has lapsed for improvements. I am unsure if sufficient improvements can ever happen given her diagnosis. She is to be commended for her consistent efforts, unfortunately her improvements are insufficient to permit her to parent [M.] even with further assistance from the Applicant.
>
> [48] Realistically there are no other services the Agency could put in place. Least intrusive avenues have been tried and failed. I can't see any alteration in the situation in the foreseeable future. I order that the child be placed in permanent care.

[13] MacLellan, J. further concluded that access would not be in M.'s best interests.

[14] The appellant's argument before us consisted of nine grounds, eight of which related to the weight the trial judge placed on the evidence and the associated weight she attached to the requirements in the **Act**.

[15] It was further submitted that the trial judge erred in giving weight and, in effect, judicial notice to the writings of Dr. Steinhower when no evidence was before the court respecting his writings.

[16] Finally the appellant submitted that the trial judge erred in denying access on the part of the appellant to the child.

ISSUE I

[17] The eight points relied on as instances where the trial judge assigned improper weight to the evidence all relate to the fact-finding process carried out by the trial judge. Counsel are agreed that in this process the standard of review in this Court is to determine whether there was an error in principle or whether the trial judge disregarded material evidence.

[18] Having reviewed the record and read and heard the submissions of counsel we are satisfied that there was no such error. It was not necessary for the trial judge in giving reasons to make specific mention of every piece of evidence. She stated that she had considered the entire body of the evidence and we are satisfied that the findings of the trial judge are fully supported by that evidence. It is important to remember that the function of this Court in dealing with appeals of this nature is a limited one. We do not have the power to retry the case as the appellant has, in effect, requested us to do. In the absence of an error mandating appellate intervention, we must defer to the findings of the trial judge who has seen and heard the evidence and who is in the best position to assess the appellant's parenting skills and the effect on the child that continued exposure of her to the mother would have. See **Children's Aid Society of Colchester Co. v. Macguire and Boutilier** (1979), 32 N.S.R. (2d) 1.

ISSUE II

[19] The trial judge's reference to Dr. Steinhower's writing appears in the introductory comments respecting the nature and scope of the **Act**. These writings were not in evidence before the trial judge.

[20] Sopinka, *The Law of Evidence in Canada*, 2nd ed. states at para. 19.13:

> 19.13 Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of the particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and

> accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party. ...

[21] The respondent submits that the principles stated by the trial judge as appearing to flow from the writings of Dr. Steinhower are essentially the same as those set out in the **Act**. There is no direct quotation from the works of Dr. Steinhower. In a general sense, the trial judge's comments can find support in the recitals to the **Act** as well as the circumstances to be considered in making a determination of best interests of a child spelled out in s. 3(2)(a)(c)(e)(k) and (l) thereof. That said, there is no specific support in the **Act** to be found for such statements apparently attributed to Dr. Steinhower relating to numerous upheavals on young children as being very detrimental to their emotional well being, and the window of opportunity between age 0 and 3 for children to settle and begin to develop in age appropriate ways. The **Act** does not contain such an explicit provision and it is not, in our opinion, appropriate to rely on a general reference to an author's work to support specific conclusions. The two statements at issue cannot be said to be capable of immediate and accurate demonstration by resorting readily to accessible sources of indisputable accuracy.

[22] On the other hand, the general principles contained in the **Act** to which we have referred emphasize the child's sense of time and the importance of removing the child from adverse influences. That degree of urgency to the process is also clear from the time limitation contained in s. 45. In **Children's Aid Society of Cape Breton v. L.M.**, (1998), 170 N.S.R. (2d) 65; N.S.J. No. 288 (Q.L.), a decision of this Court in Chambers, the Chambers judge, in affirming a decision of MacLellan, J. said at para. 37 after referring to the purpose of the **Act** as set out in s. 2:

> **[37]** The provisions of the Act dealing with intervention by the state in the family unit which can lead to the ultimate measure of placement in permanent care are designed to ensure that these objectives are attained where possible. ... The strict time limits for proceedings to be taken under the **Act** are undoubtedly designed to respect the child's sense of time and to avoid protracted litigation becoming a dominant or central event in a child's upbringing.

[23] Accordingly, although it was unnecessary to refer to the writings of Dr. Steinhower we cannot in general disagree with the statements contained by MacLellan, J. in her preliminary remarks having regard to the fact that she clearly based her decision on the evidence which supports it. The reference to Dr.

Steinhower can be said to have had but a minimal impact and does not require appellate interference in the result arrived at. See **R. v. Desaulniers** (1994), 93 C.C.C. (3d) 371 (Que. C.A.), leave to appeal to S.C.C. refused (1995), 93 C.C.C. (3d) vi (note) [1995] 1 S.C.R. vii (note).

ISSUE III

[24] No specific argument was directed to us respecting the trial judge's denial of access to the child. It has not been shown that she erred in this respect having regard specifically to the limited circumstances under which access is contemplated by s. 47(2) of the **Act**.

[25] The appeal is dismissed without costs.

Chipman, J.A.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.