NOVA SCOTIA COURT OF APPEAL

Citation: ***L.I. v. Mi'kmaw Family and Children's Services of Nova Scotia***, 2011 NSCA 104

Date: 20111123
Docket: CA 351902
Registry: Halifax

Between:

L.I. and B.L.

Appellants

v.

Mi'kmaw Family and Children's Services of Nova Scotia
and Minister of Community Services

Respondents

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

Judge(s):	Oland, Fichaud and Farrar, JJ.A.
Appeal Heard:	October 21, 2011, in Halifax, Nova Scotia
Held:	Appeal is dismissed except for the issue of access which is allowed per reasons for judgment of Oland, J.A.; Fichaud and Farrar, JJ.A. concurring.
Counsel:	Coline Morrow, for the Appellant L.I. Sam Moreau, for the Appellant B.L. (not participating) Robert Crosby, Q.C. for Mi'kmaw Family and Children's Services Peter C. McVey (intervener status), for the Minister of Community Services

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] This appeal concerns the care and custody of two little girls, a three year old and a two year old. On April 27, 2011, Justice M. C. Legere Sers granted orders of permanent care and custody of both these children to the respondent Mi'kmaw Family and Children's Services (“the Agency"). No access was ordered.

[2] The appellant L.I., mother of the children, and B.L., their father, appealed from the Orders dated June 7, 2011. Although a party at trial, Mr. L. abandoned his appeal before the appeal was heard. The mother argues that she has good parenting skills and the judge made procedural and other errors in reaching her decision.

[3] For the reasons which I will develop, I would allow the appeal in regard to access and dismiss all other grounds of appeal.

Facts

[4] The facts are thoroughly set out in the judge’s detailed and lengthy decision reported in 2011 NSSC 161. A summary sufficient for the purposes of this appeal follows.

[5] L.I. and B.L. (ages 20 and 21 respectively when the decision was issued) had been in a relationship since she was 14. During those years, the couple broke up and got back together numerous times. Incidents of domestic violence, alcohol abuse by each of them, and threats by the father to commit suicide led to Agency intervention.

[6] In August 2009, several months after it was first involved with the family, the Agency applied for a supervision order in respect to the children. The objective of the Agency’s intervention was to provide services to remedy the risk to the children, and for the parents to obtain knowledge and skills and to make the parenting and lifestyle changes necessary for them to meet their children’s needs.

[7] On August 28 and September 23, 2009 the Court granted Interim Supervision Orders leaving the children in the care and custody of the appellant mother but subject to the supervision of the Agency. These Orders contained

conditions including ones restricting contact between the parents, and between the mother's new boyfriend C.J.M. (a person known to be a risk to children) and the children. On September 30, 2009 the children were apprehended from their mother's care because of her failure to comply with those supervision conditions.

[8] On October 26, 2009, a finding was made pursuant to s. 22(2)(b) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 as amended (substantial risk of physical harm) that the children were in need of protective services. After being taken into the Agency's care, they were placed in a foster placement with their father's aunt and her husband. Except for a brief return to their mother in October 2010, the children have remained in that kinship placement.

[9] On January 18, 2010, the Court granted the Agency's application for an Order that the children remain in the Agency's temporary care and custody while counselling services were implemented and parent capacity assessments undertaken. The parents were to refrain absolutely from the use of alcohol and non-prescription drugs, not to associate with individuals suspected or known to use alcohol or such drugs, and to participate in random drug and alcohol testing. They were given supervised access to their children. The couple separated again. Pursuant to s. 45(1)(a) of the *Act*, with the granting of this Order, the maximum time limit for disposition review was fixed at January 18, 2011.

[10] Psychologist Michael Bryson completed parental capacity assessments of each of the parents in April 2010. By then, the parents had reunited again. Mr. Bryson described their relationship as one which had experienced "several chronic stressors: mutual violence, many separations, difficulties arising from substance misuse, attempts at self harm, infidelity, unclear parenting roles, and perceived lack of parenting support." However, the assessor believed that it was "possible the parents could, with appropriate intervention and services make the changes necessary to adequately care for the children."

[11] Mr. Bryson recommended that the children remain in the temporary care of the Agency. Among other things, he also recommended that the mother abstain from alcohol and psychoactive substances such as marijuana; attend relationship counselling, parenting courses, and counselling to assist with anger and stress management; and have supervised visits with her children.

[12] Following reports of domestic violence during the summer of 2010, the Agency arranged separate supervised access visits by the mother and the father with their children. This progressed to unsupervised overnight visits in August.

[13] A family group conference was held on October 8, 2010. According to the affidavit evidence and testimony of Katy Michael, a social worker with the Agency, the Agency discussed the importance of a drug and alcohol free lifestyle and repeatedly asked the parents if they had drunk alcohol. Both parents said that they hadn't drunk alcohol or used any drugs. When asked at the final disposition hearing about this group conference, the appellant testified that she had denied using alcohol even though she knew that about a week earlier she had done so.

[14] The Agency subsequently applied for an order placing the children in the care and custody of their mother, subject to Agency supervision. Their father was to have access and both parents were to continue working with certain service providers and counsellors, and to cooperate with random drug testing. As previously, the Supervision Order which was granted on October 21, 2010 required complete abstention from the use of non-prescription drugs and alcohol. The Agency asked for a further review prior to January 18, 2011.

[15] On October 25, 2010, the children were returned to their mother's care under that Supervision Order and those conditions. Within a month, the Agency received two toxicology reports relating to urine samples taken on October 2, 2010 and September 21, 2010 that tested positive for alcohol and benzodiazepines respectively. According to Katy Michael, the mother first denied that she drank alcohol but then said she did drink because she felt like it. She had no explanation for the positive drug result. On December 1, 2010 the Agency re-apprehended the children and returned them to the kinship placement.

[16] On December 6, 2010 counsel for the Agency advised the Court that it would seek an Order for Permanent Care and Custody in relation to the children. While the Agency's plan had not been completed, counsel predicted it would include provision for an access order. On December 10th, the appellant mother filed her plan of care asking that the children be placed with her. Three days later, the father filed his plan, asking that the children be placed with him. Neither of the parents' plans of care specifically sought an access order should permanent care and custody be granted to the Agency.

[17] On December 21, 2010, the Agency filed its revised plan. It did not include a provision for access by either parent after all. Instead, the Agency took the position that such a provision would impair an opportunity for the children to be placed for adoption.

[18] The final disposition hearing had been scheduled to begin within the January 18, 2011 deadline stipulated by s. 45 of the *Act*. But the December 1, 2010 re-apprehension of the children meant that there would now be a contested hearing. For reasons which are not challenged on this appeal, the final disposition hearing had to be twice adjourned. It did not begin until March 15th, almost two months beyond the timeline.

[19] At the commencement of that hearing, the Agency sought an adjournment to obtain a follow up psychological report to determine whether the parents had made sufficient progress. Although both parents supported that request, the judge denied the motion. The father withdrew his plan and supported the mother's plan to have the children returned to her care. The Agency sought a permanent care order with no order as to access. The kinship placement was prepared to adopt the children.

[20] At the final disposition hearing, the judge heard three days of evidence and submissions. She was satisfied that the Agency had provided sufficient evidence on the balance of probabilities to prove that the children continued to need protective services, and issued Orders for Permanent Care and Custody without access to allow for adoption. The parents appealed. The father having withdrawn, the mother is the sole appellant on the appeal.

Grounds of Appeal

[21] In her Notice of Appeal, the appellant mother set out no fewer than fifteen grounds of appeal. She largely argues that the judge erred by failing to give proper weight and consideration to certain evidence, or in making findings of fact or inferences from those factual findings from which the judge concluded that the appellant had made insufficient progress so that her children could be returned to her care. The appellant submits that had the judge not committed these errors, she would not have concluded that the Orders for Permanent Care and Custody without access were in the children's best interest. In addition, she argues that the judge

erred in not allowing an adjournment of the final hearing as agreed by all parties, and in not including an access provision in the Orders.

[22] The multiple grounds of appeal can be condensed and reworded into three issues:

a) did the judge err by refusing to grant an adjournment at the beginning of the final disposition hearing?

b) in ordering the children into the Agency's permanent care, did she commit a palpable and overriding error in appreciating the evidence before her?

c) did she err in refusing to grant post-permanent care access to the appellant?

Analysis

Adjournment

[23] Michael Bryson's parental capacity assessments of the children's parents which were completed in April 2010 set out recommendations for each of them, including abstinence from alcohol and psychoactive substances, attendance at relationship counselling, individual counselling, parenting courses, and counselling regarding the abuse of alcohol. When, after two adjournments, the final disposition hearing commenced in March 2011, counsel for the Agency, with the support and consent of counsel for the parents, asked for an adjournment for some six to eight weeks to obtain an update of those assessments to determine whether the parents had made sufficient progress. Mr. Bryson testified that he had felt that, with appropriate treatment, the parents could make the changes necessary to parent effectively. He would need to meet with them and conduct a reassessment.

[24] The judge denied the motion for an adjournment of several weeks' duration for this purpose. She recognized that the adjournment request came when the case was almost two full months past the deadline for permanency planning. The judge stated:

> ...[T]he question is what insight have they [the parents] gained [through services] and that is a matter of fact finding for the court. It is not necessary to adjourn it to get an updated assessment.
>
> ...I don't think it is appropriate to delegate the responsibility of the court to Mr. Bryson at the risk of overextending the deadlines so that we can go on a fact finding mission as to what happened and whether in Mr. Bryson's eyes this is sufficient to meet the conditions of the legislation because that would be the court's job to determine whether the evidence supports the Agency's case or whether the evidence would allow the court to opt for one of the options that is set out at final disposition and those options, if a return is warranted, do not allow for conditions or extension for any lengthy period of time.
>
> ...
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> ...[M]y view of the evidence put forward is that we're adjourning to get more evidence and that's not the purpose of the adjournment and it does not meet the best interest of the children's test. ... [F]urther delaying this in my view I cannot conclude is in the best interest of the children, nor can I conclude that it will put me in any better position as a trier of fact...

[25] Whether or not to grant an adjournment is a matter of judicial discretion. The test is whether the trial judge erred in principle in directing herself in the exercise of that discretion or the result is so clearly wrong as to amount to an injustice. See *K.B. v. Nova Scotia (Community Services)*, 2010 NSCA 75 at ¶ 15.

[26] In my view, in refusing the adjournment, the judge made no such error. She recognized that the appropriate test was whether the adjournment would be in the best interests of the children. She found that further delay would not enhance her role as fact finder since witnesses including the parties were available to testify as to courses, counselling, and outcomes. She exercised her discretion judicially, and the denial of the adjournment was not so clearly wrong as to amount to an injustice.

[27] I would dismiss this ground of appeal.

Material Errors of Fact

[28] The appellant argues that the judge failed to give certain evidence appropriate weight and consideration, and erred in concluding on the evidence that she was not able to parent her children unconditionally. She submits that she was cooperative, participated in the random drug and alcohol testing, and benefited from courses and counselling. The appellant points out that she and the children's father are no longer together, she had progressed to weekend and overnight visitations which had gone well, and the Agency recognized her ability to parent her children safely when it sought their return to her in October 2010. The appellant argues that the judge overlooked her efforts and progress with regard to alcohol abuse and that there was no evidence she took drugs.

[29] The appropriate standard of review was set out in *Children's Aid Society of Cape Breton-Victoria v. A.M.*, 2005 NSCA 58:

> [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 Conuty 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.

[30] In her decision, the judge reviewed the evidence with regard to courses and counselling, relationships, the results of random testing for drugs and alcohol, and the analysis of hair test samples taken on December 9, 2010 which tested positive for marijuana. Here is what the judge said:

[218] There is no evidence to illustrate that the mother understands or has insight into the effect of alcohol use in her life and relationships.

[219] The mother and father have not engaged significantly in educating themselves in order to effectively address her lack of insight. It would be a fair conclusion to suggest the mother attended the addictions counselling services in order to comply with the order in form and not in substance.

. . .

[224] There were significant drug and alcohol testing that showed no alcohol or drugs detected. There were periods of missed and incomplete testing. If the results prove anything, they show the parents can abstain when they choose to.

[225] The considerable exposure to soft drug usage (according to the expert) demonstrates at the very least that the mother associates with those who are frequent users of cannabis.

[226] This demonstrates a considerable lack of judgement and insight. The children had been out of their parent's care since September 30, 2009. The stakes were as high as they can get. The children were returned with the parents promise to absolutely abstain from alcohol or drug use.

[227] The testing of September 21st and October 2nd produced positive unexplained results. The return of the children was done under false pretext.

[228] The parents lied to the agency during the family conference when they assured the agency they were drug and alcohol free and had been for some time.

[229] More critically, the mother shows no insight into the necessity to remain drug and alcohol free. Nor does she articulate a desire to do so. Without the testing, she told the assessor she might use again. She drank because she wanted to even when the consequences of doing so could result in the loss of her children. She associates with those who use cannabis frequently.

. . .

[233] The children were apprehended in September, 2009. The mother finally attended six sessions with an addictions counsellor in April, 2010. When she attended, she did not represent to the addictions counsellor insight or accuracy regarding the effect of alcohol in her life.

[Emphasis added]

[31] The statement in ¶ 229 that, without testing, the mother would continue to use alcohol, came from the April 2009 parental capacity assessment. The appellant argues that since then, she has gained insight. She reiterates that there was no indication that she drank during the short period between the return of her children to her care and their re-apprehension, and emphasizes that her failures, as evidenced by the positive alcohol and drug results, were on days before the issuance of the October 21, 2010 Supervision Order with its requirement to abstain. She also points to her own testimony regarding addictions counselling, that she only drank "a few times" in 2010, and that she doesn't plan to drink again as it is affecting her children. This, urges the appellant, shows that the judge erred in stating in ¶ 218 of her decision that there was no evidence that the mother has insight into the effect of alcohol use in her life and relationships.

[32] With respect, I cannot agree with the appellant's submissions. The last Supervision Order was not the first which stipulated that the parents absolutely refrain from the use of non-prescription drugs and alcohol. This condition had been constant since the January 18, 2010 Supervision Order. Abstention from alcohol and drugs had been emphasized time and again, including at the family group conference in October 2010 before the children's return to their mother. The appellant had to know the importance of meeting this condition. Not only did she not absolutely refrain, but she lied when confronted with the test results. As a result, the judge's telling comment that "The stakes were as high as they can get" and yet the mother did not comply, and her statements that the appellant lacked judgment and insight, were justified.

[33] It is clear from the judge's decision that she listened carefully to the evidence, including that of the appellant. She appreciated that the mother had attended counselling and addiction sessions and parenting and other courses. The issue was not attendance or compliance but insight and self-awareness. A judge is not required to deal with every bit of evidence in her decision. In any event, the judge referred to the appellant's testimony when she stated in her decision that she had no other sources which confirmed the appellant's progress. She was in the best position to assess what insight and skills the appellant had gained since the parental capacity assessment, and whether she was then in a position to parent her

children safely without intervention. The judge decided that the appellant had not reached that goal.

[34] Here is what the judge concluded:

> [236] The mother's affidavit and testimony provide scant detail that would assure the Court that placement of the children in her care could occur without conditions.
>
> [237] There is no evidence before me that would address the on and off again relationship between the parents and the domestic violence.
>
> [238] While they currently present as separate, this has been a long term relationship with many separations. The therapist concluded they could not parent together, presented as immature and lacking in insight regarding their relationship.
>
> . . .
>
> [241] The relationship issues between the parents and the mother's choice of other partners has been a major cause of conflict and chaotic lifestyle to which the children have been exposed.
>
> [242] I cannot conclude with any confidence that the mother has the insight and motivation to address her relationship issues sufficiently such that the children will not in future be exposed to violence, substance abuse and the fathers (sic) mental health issues.
>
> [243] The mother's testimony did not address with certainty any insight into her selection of partners who expose her to unhealthy circumstances.
>
> [244] The negative testing does suggest the parents can remain drug free while being tested. There are sufficient missed testing; such that I cannot conclude this issue has been addressed by the father or that the mother understands how important abstinence is. However, this is not the major factor.
>
> [245] <u>The most serious impediment is the clear lack of insight and understanding regarding how the parents lifestyle issues, domestic violence, and instability affects the children</u>. This was something that Mr. Bryson said the mother could develop.

> [246] Unfortunately, after 20 months there is little evidence to see that this intervention has made a difference. **That is not to say it can't happen for the mother.** It is simply to say, currently it has not happened in this case with these children.
>
> [247] These children have been in a kinship placement for in excess of 15 months. I have only the evidence of the parents to support their belief that they understand and have made significant progress.
>
> [248] I have no evidence from any other source indicating that these children could be placed in the care of the mother without conditions and they would be free of the risks identified at the beginning.
>
> [249] I have no doubt, whatsoever, that these parents love their children as they can at this point in their lives. The parents have not reached a sufficient maturity to address the need for change.
>
> [250] They individually still need care to address their own victimization from the past, a lifestyle of domestic violence and serious impediments to providing a risk free environment to their children.
>
> [251] Full time care of the children would simply be placing on this mother expectations that she cannot meet.
>
> [252] These parents have dreams and hopes for their future. There are recommendations in the Plan of Care that they need to seriously address, to parent without intervention.
>
> [253] The description of the courses offered did not create proof that the issues have been addressed. More critically, there is a lack of evidence that the mother has gained sufficient insight to effect the necessary cognitive and behavioural changes such that these children can safely return to their mother's care.
>
> [Emphasis added]

[35] Having heard and weighed the evidence, the judge was not persuaded that the appellant mother had gained the insight necessary before the children could be safely returned, without conditions, to her care. She accepted that the Agency had met its burden of demonstrating that the children remained in need of protective services at the time of final disposition. There is a factual basis for her conclusions and no palpable and overriding errors in appreciating the evidence before her that

would change the outcome, which warrant appellate intervention. I would dismiss this ground of appeal.

Access

[36] The judge's decision dealt with access in a single paragraph which reiterated the argument of the Agency:

> [258] Access to the parents by way of court order will impair the adoption process. Accordingly, no order authorizing access will be made.

[37] Section 47(2) of the *Act* sets out when an access order can be made:

> 47(2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
> (a) 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;
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> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.

[38] The appellant argues that the judge erred in law in not allowing her access in the Orders of Permanent Care and Custody. The children are with a kinship placement, and will likely be seeing their parents in the Mi'kmaw community. She also says that there was no evidence that they would not be adopted if access were ordered.

[39] The Agency suggests that access is not granted when adoption is contemplated. It also points to the evidence of Katy Michael and the appellant regarding the appellant's concerns about the children's care in the kinship placement and bickering between them and the foster/prospective adoptive mother.

This, says the Agency, may show that they are not willing to co-operate constructively in the lives of the children. The Agency emphasises this passage pertaining to s. 47(2) from *Children and Family Services of Colchester County v. K.T.*, 2010 NSCA 72:

> 38. ... in special circumstances, post-placement care access is possible although given the stark change in focus, such circumstances are rare and limited to those that would not jeopardize the new focus, namely an alternate stable placement. Thus, it is not surprising that the provision allowing for such access is highly restrictive.

[40] The Minister of Community Services, who has intervener status in this appeal, points to procedural matters which support dismissal of the appellant's request for access:

(a) the amended Notice of Appeal did not contain any ground pertaining to access, nor did the relief sought include an access order;
(b) *Civil Procedure Rule* 90.11 requires this Court's permission to rely on a ground not in the Notice; and
(c) the appellant did not request access in her plan of care, her oral evidence or her post-trial submissions.

[41] However, as set out in the summary of the facts, the Agency originally advised that its plan of care would include access. Only after the appellant filed her plan did the Agency file its revised plan which did not include any provision for access. In these circumstances, particularly the rapidity with which events unfolded from the unexpected re-apprehension of the children until the final disposition hearing, it is not surprising that the appellant did not formally seek to amend her Notice of Appeal or seek access in her plan of care.

[42] Section 2 of the *Act* states that its purpose is to "protect children from harm, promote the integrity of the family and assure the best interests of the children". There is no analysis in the judge's decision on the issue of access. According to the evidence at the final disposition hearing, the children and their mother share a warm attachment and a strong bond which, if disrupted, may present a risk of harm to the children. Section 47(2) does not impose a blanket prohibition against access. Rather, a judge must consider factors such as the likelihood of impairment of

opportunities for permanent placement and whether there are special circumstances which would justify making an access order.

[43] In K.T. at ¶ 39-40, Chief Justice MacDonald suggested that a 'special circumstance' under s. 47(2)(d) may include a permanent placement with a family member, with a view to adoption by that family member, but involving some ongoing contact with the natural parent that was satisfactory to the adopting parents and which would not deter the adoption. Here, no notice of adoption has been filed. The judge in this case did not consider whether or not access by these children to their mother, the appellant, would jeopardize their placement, whether the potential adoption by the kinship caregivers might qualify as a special circumstances, or other special circumstances exist, or access would be in these children's best interests. In my view, those matters should be addressed.

[44] The judge having erred in principle, I would allow this ground of appeal.

Disposition

[45] I would dismiss the appeal against the Orders for Permanent Care and Custody dated April 27, 2011 which pertain to each of the children, except for the provision that there shall be no provision for access. I would remit the issue of access by the appellant mother to the same judge for rehearing. Whether this will be done on the evidence presented to her at the final disposition hearing or with the calling of additional evidence will be a matter for the judge to determine, perhaps with the assistance of the parties.

Oland, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.