NOVA SCOTIA COURT OF APPEAL

Citation: *D.B. v. A.B.,* 2016 NSCA 74

Date: 20161025
Docket: CA 450219
Registry: Halifax

Between:

D.B. and C.B.

Appellants

v.

A.B. and K.B. (by way of their guardian ad litem, Sonya Paris),
Minister of Community Services, C.B. and L.M.

Respondents

Restriction on Publication: s. 94(1) *Children and Family Services Act*

Judges:	MacDonald, C.J.N.S., Hamilton, Bryson, JJ.A.
Appeal Heard:	September 9, 2016, in Halifax, Nova Scotia
Held:	Motion for fresh evidence denied and appeal dismissed per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. and Bryson, J.A. concurring
Counsel:	Eugene Tan, for the appellants Peter McVey, Q.C. and Patricia McFadgen for the Minister of Community Services Tammy MacKenzie for the respondents A.B. and K.B. (not participating) C.B. and L.M., respondents in person (not participating).

Restriction on publication pursuant to s. 94(1) ***Children and Family Services Act*****, S.N.S. 1990, c. 5.**

PUBLISHERS AND OTHER READERS 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] Associate Chief Judge S. Raymond Morse of the Nova Scotia Family Court ordered that two children, BB (DOB August, 2007) and GB (DOB October, 2008), the adopted children of the appellants, DB and CB, be placed in the permanent care and custody of the Minister of Community Services. The care and custody of two older children, KB and AB, who had also been adopted by the appellants, were also dealt with by the judge. With the consent of the parents, an Order for Permanent Care and Custody was issued with respect to KB and a Custody Order pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, and a Termination Order were issued with respect to AB, resulting in AB living elsewhere.

[2] Thus, the motion to admit fresh evidence and the appeal before us related only to the two younger children, BB and GB. The parents applied to have the complete diary of the eldest child, AB, and an expert report dated January 15, 2016 of psychologist, Dr. Stephen Porter, admitted as fresh evidence. They argued this fresh evidence would establish that the portions of the children's out-of-court statements that the judge admitted and found ultimately reliable were, in fact, unreliable. They argued that even without this fresh evidence, the judge erred by failing to consider all of the evidence before him, specifically that there was nothing in AB's diary indicating physical discipline by the parents.

[3] At the end of the hearing, we indicated that our unanimous decision was that the fresh evidence motion was denied and the appeal dismissed with reasons to follow. These are our reasons.

Background

[4] The parties agreed it was in the best interests of the children that they not be called as witnesses at the trial. At the commencement of the trial, a *voir dire* was held pursuant to s. 96(3)(b) of the *Children and Family Services Act*, 1990 S.N.S., c. 5, ("*Act*"). Its purpose was to determine the threshold reliability of the children's out-of-court statements which indicated, among other things, the use of physical discipline by the parents by means of a wooden spoon, a spatula, a stick, a wooden rod, a broom and by "clawing" the back of one of the children. These statements included video/audio statements made by the children during interviews conducted by RCMP officers and social workers in connection with the criminal investigation

of the parents, essentially arising out of the same facts that gave rise to the child protection matter. They also included statements made by the children to Agency social workers and to their foster parents.

[5] At the conclusion of the *voir dire*, the judge gave an oral decision which occupied 78 pages of the trial transcript. He correctly reviewed the applicable law and dealt with each statement individually. In assessing the threshold reliability of the statements, he made many references to the evidence indicating that several of the interviewers had received training in the Step-Wise interview procedure and used it when dealing with the children:

> She has taken the StepWise training program. She explained StepWise is the use of open-ended questions to get information from a child. Part of the process includes building a rapport with the child.
>
> [. . .]
>
> During this training program, she learned the principles of the StepWise interview process. She confirmed that it is her practice to always use the StepWise method when interviewing children.
>
> [. . .]
>
> She used the StepWise principles for purposes of the interview.
>
> [. . .]
>
> The meeting was not a formal interview, but she noted that she used the StepWise process.

[6] In assessing each statement the judge considered whether components of the Step-Wise approach were applied:

> Open-ended or non-leading questions:
>
> With some exceptions, the questions utilized during the course of AB's second video interview were non-leading.
>
> [. . .]
>
> Open-ended or non-leading questions were generally used during the interview, with some exception.
>
> [. . .]
>
> He acknowledged he has not received in-depth training regarding the interviewing of children, however, he emphasized that his training had recommended the use of open-ended questions in preference to leading ones.

> [. . .]
>
> During Cross-examination, Cst. LeBlanc agreed that the training that she participated in with respect to interviewing had confirmed the importance of open-ended and non-leading questions. She also agreed that her training emphasized the use of simple language when interviewing children.
>
> Rapport:
>
> He appeared to have a reasonable rapport with the interviewers; that is, he seemed fairly comfortable with both of them.
>
> [. . .]
>
> She maintained a co-operative demeanour throughout. She was not evasive in responding to questions.
>
> [. . .]
>
> AB presents as co-operative throughout the interview. She did not appear to be nervous or anxious. She answered questions readily, and without hesitation.
>
> The difference between a truth and a lie:
>
> BB was generally co-operative throughout the interview. At the outset of the interview, there was a brief discussion about the difference between a truth and a lie. BB appeared to indicate an understanding of the distinction.
>
> [. . .]
>
> When asked why she had not had a discussion with the child about truth and lies at the outset of the interview, as opposed to the middle, Ms. Cowan expressed her understanding that such a discussion need not necessarily take place at the beginning of the interview.
>
> [. . .]
>
> There was a discussion with respect to truth and lies at the outset of the interview in which KB seemed to demonstrate a somewhat unusual and almost textbook understanding, or appreciation of the difference between a truth and a lie. However, the fact that the child was able to provide such definitions certainly cannot support or justify the conclusion that she doesn't have an appreciation, her understanding of the difference between a truth and a lie.

[7] The judge commented on the importance of non-leading questions and a discussion of truth and lies at the outset of an interview:

> The Court appreciates and understands the difficulties and challenges associated with interviewing children, especially younger children such as [GB]. The Court acknowledges that there will be some use of leading questions during the interview of younger children, however, the Court certainly believes that it's important to make every effort to limit the use of leading or closed questions.
>
> Similarly, the Court believes that it would be appropriate in most instances for the discussion of truth and lies to occur at the outset of the interview rather than the midpoint. Failure to do so, however, does not automatically mean that the statement is to be regarded as unreliable. Each case will have to be determined based upon its particular circumstance. . . .

[8] After considering the Step-Wise method and its components, together with the consistencies and inconsistencies within and among the statements, whether the children had a motive to lie and whether there was collusion among them, the judge admitted a majority of the out-of-court statements. However, he redacted from several of the statements portions he determined did not meet the test of threshold reliability. Several of these redactions were made on the basis that leading questions were used by the interviewer:

> This portion of the video is inadmissible, and the associated portion of the transcript is redacted because of the leading question posed by Cst. Gagnon at that point in the interview.
>
> [. . .]
>
> I would confirm that there are portions of his statement that are to be excluded based upon the use of leading questions by the interviewers, which effectively negates the reliability of the responses provided by BB, in my opinion.
>
> [. . .]
>
> I have redacted these excerpts based upon the use of leading questions which I believe negated the reliability of the child's responses.

[9] Following the ten day trial, the trial judge wrote a very thorough 66 page decision (2016 NSFC 4). He commenced his written reasons with a summary of the unfortunate situation before him:

> [2] The children were the subject of prior protection proceedings involving their biological parents which resulted in orders for permanent care and custody. Only two of the children, KB and BB, are biological siblings. The children were initially placed with the [appellants] as foster parents and subsequently adopted by the [appellants].
>
> [3] It is unfortunate and disturbing that these children have experienced so much trauma and turmoil in their lives. Their adoption by the [appellants] was

> obviously intended to afford the children the opportunity to be members of a loving family, in a safe and secure home environment. This is a fundamental premise of the adoption system currently utilized in Nova Scotia, when a child is placed in the permanent care and custody of the Minister and the long term plan is premised upon adoption placement.
>
> [4] The Minister maintains that the children are in need of protective services due to the [appellants'] use of inappropriate discipline. The Minister's case relies heavily on the out-of-court statements made by the children. The [appellants] have consistently denied the children's allegations and maintain that they did not use physical discipline other than infrequent spanking of the two youngest children, utilized, according to the children's mother DB, as a last resort.

[10] He reviewed the proceedings, the law and the submissions. Several times he referred to the paramount consideration being the best interests of the children. He recognized the need to consider **all** of the evidence in determining whether BB and GB should be placed in permanent care and custody or returned to the parents (45). He analyzed in detail in 58 paragraphs why he found the children's redacted out-of-court statements ultimately reliable, again making extensive reference to the Step-Wise interview method and its components. He reviewed the evidence of the parents and the other witnesses, noting several times that he was summarizing the evidence, not providing a comprehensive review of it (46, 71).

[11] The judge accepted the children's evidence respecting the parents' use of physical discipline in preference to the parents' evidence of denial (253), pointing to inconsistencies in the parents' evidence and earlier reports by their biological children of physical discipline. He found that an Order for Permanent Care and Custody would be in the best interests of BB and GB.

Fresh Evidence Motion

[12] I will first deal with the parents' fresh evidence motion.

[13] As indicated, the parents seek to have two specific pieces of evidence admitted: the complete diary of AB and the January 15, 2016 expert report of Dr. Stephen Porter.

[14] The first thing to note is that neither the diary, nor Dr. Porter's expert report, is the type of evidence s. 49(5) of the *Act* authorizes us to consider on appeal. That section authorizes the Court to admit evidence "relating to events after the appealed order", which is not the case here. The diary was in the hands of both parties before the Minister filed her June 25, 2014 Protection Application and

Notice of Hearing. Dr. Porter's report deals with interviews conducted on September 24, 2014 and is dated January 15, 2016, prior to the judge's February 12, 2016 written decision and his March 9, 2016 orders for permanent care and custody of BB and GB.

[15] The test we apply when considering a motion for fresh evidence on appeal, when the evidence is directed to an issue decided at trial as here, is set out in *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43:

> [77] Moving to the fresh evidence motion itself, the test stems from *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, at p. 775. Admission is governed by four factors: (1) whether there was due diligence in the effort to adduce the evidence at trial; (2) relevance to the issue at trial; (3) credibility of the new evidence; (4) whether the evidence could reasonably have affected the result. The test applies to civil as well as criminal cases: *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2 (CanLII), [2000] 1 S.C.R. 44, para 8; *United States of America v. Shulman*, 2001 SCC 21 (CanLII), [2001] 1 S.C.R. 616, para 44; *May v. Ferndale Institution*, 2005 SCC 82 (CanLII), [2005] 3 S.C.R. 809, para 107.
>
> …
>
> [82] In a child welfare matter, relevance may be viewed through a wide angled lens. This Court has exercised a broad discretion to admit fresh evidence of the child's circumstances: e.g. *Children's Aid Society of Halifax v. C.M. et al.* (1995), 1995 CanLII 7522 (NS CA), 145 N.S.R. (2d) 161 (C.A.), at p. 167, per Bateman, J.A.; *Children's Aid Society of Cape Breton v. L.M. and B.M.*, (1998), 1998 CanLII 16351 (NS CA), 169 N.S.R. (2d) 1 (C.A.), at para 43, per Cromwell, J.A.. A child's welfare is ongoing and fluid, an undammed stream, and usually it is better that the Court have the full context.

[16] I will first deal with the admission of AB's entire diary.

[17] While the parents acknowledged that the Minister's position at trial was that AB did not describe any physical discipline in her diary, they argued the admission of the complete diary as fresh evidence was required. They suggested the detail with which AB described in her diary such things as her appreciation of a particular teenage boy and her infatuation with a teacher indicated she would have written about any physical discipline had it occurred. They suggested the admission of the entire diary would confirm that there was no mention of physical discipline in it and strengthen their argument that the absence of any reference to physical abuse in AB's diary (a negative) proves it did not occur (another negative).

[18] In reaching his decision, the judge had significant other evidence before him in addition to the parties' agreement that there was no mention of physical discipline by the parents in AB's diary and the inconsistency between the children's evidence of physical discipline by the parents and the parents' denial of same. There was evidence that: BB and GB were fearful of the parents; the parents did not have the capacity to provide for the "emotional, psychological and physical or developmental needs of the children"; there was little prognosis for the parents to change; the parents failed in the past to provide the required therapy to the children; the parents' past parenting included physical discipline with implements and BB refused to attend access with the parents from January 2014 onward.

[19] Thus, there was ample evidence on which the judge could make a finding that BB and GB were in need protective services.

[20] In denying the parents' motion to admit AB's entire diary as fresh evidence, it was not necessary for us to consider the first, second or third prongs of the so-called *Palmer* test. We were satisfied the motion to admit AB's complete diary should be denied on the fourth prong, i.e. that it could not reasonably have affected the result. In addition to there being ample evidence on which the judge could make his finding, the evidence that there was no mention of physical discipline in AB's diary was already before the judge. Regardless of its detail, the admission of the entire diary would add nothing to this evidence. The lack of mention of physical discipline in the diary does not prove the non-occurrence of the physical discipline. The admission of the entire diary could not reasonably have affected the result.

[21] Next I will deal with the admission of Dr. Porter's expert report as fresh evidence.

[22] Dr. Porter's expert report was prepared at the request of the lawyer who represented the parents with respect to the criminal investigation against them. In the report, Dr. Porter indicated he was requested to provide his "psychological opinion regarding whether the investigative interviews conducted by the RCMP and social workers with the alleged victim and her child siblings were conducted in a proper manner, either in whole or in part. Further you requested my opinion regarding whether the evidence elicited is likely to be reliable based on the interviewing methodologies."

[23] In explaining the reasons for his opinions in his report, Dr. Porter relied heavily on the Step-Wise interview procedure applied by the judge. He described

the "Step-Wise Interview" as being widely accepted as the "gold star" approach for effectively interviewing children. He noted the components of the Step-Wise approach included rapport building; using non-leading, open-ended questions; a discussion of truth and lie-telling; eliciting elaboration of responses to open-ended questions; restating responses in a non-leading way; direct questions following up from responses to open-ended questions and final clarification. He stated the avoidance of leading questions is paramount.

[24] He analyzed the manner in which each of the children was interviewed on September 24, 2014 in connection with the criminal investigation, in light of the Step-Wise interview method, and gave his opinion on the positive and problematic aspects of those interviews and their effect on the reliability of the children's statements.

[25] It is not certain from his report, but it appears to be the case, that Dr. Porter reviewed the whole of the videotapes, together with the transcripts of the whole of these interviews, without the redactions ordered by the judge in his *voir dire* decision. As such, it is likely that his opinions failed to take into account the many redactions to the statements ordered by the judge.

[26] The parents argued that it was important to admit Dr. Porter's report because it would have assisted the judge in analyzing the ultimate reliability of the children's out-of-court statements.

[27] Even assuming the report was admissible, given the question of whether it addressed the ultimate reliability of evidence, a question reserved for the judge, we refused to admit Dr. Porter's report as fresh evidence, again on the fourth prong of the *Palmer* test, as we were satisfied it could not reasonably have affected the result.

[28] As indicated previously, the judge's decisions make it clear he was aware of and applied many of the Step-Wise considerations when he assessed the threshold and ultimate reliability of the children's out-of-court statements.

[29] It is noteworthy that the judge was particularly critical of the interviewing technique of one social worker who interviewed GB, noting especially her inappropriate use of leading questions. The same criticism was made by Dr. Porter in his report. Similarly, the judge was critical of the timing of the truth/lie telling inquiry during the investigation of GB, as was Dr. Porter.

[30] In light of the fact that Dr. Porter's opinions appear to be based on the unredacted statements and that the judge considered the reliability of all of the children's out-of-court statements in light of many of the components of the Step-Wise process, along with the consistencies and inconsistencies within and among the children's statements and all of the other evidence before him, we were satisfied the admission of Dr. Porter's report as fresh evidence could not reasonably have affected the result.

Standard of Review

[31] The standard of review to be applied to the appeal is as set out in *Mi'kmaw Family and Children's Services of Nova Scotia v. O(H)*, 2013 NSCA 141:

> [26] Questions of law are assessed on a standard of correctness. Questions of fact, or inferences drawn from fact, or questions of mixed law and fact are reviewed on a standard of palpable and overriding error. As Justice Bateman observed in *Hendrickson v. Hendrickson*, 2005 NSCA 67 (CanLII) at ¶6:
>
> > [6] ... Findings of fact and inferences from facts are immune from review save for palpable and overriding error. Questions of law are subject to a standard of correctness. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness. ...
>
> [27] Experienced trial judges who see and hear the witnesses have a distinct advantage in applying the appropriate legislation to the facts before them and deciding which particular outcome will better achieve and protect the best interests of the children. That is why deference is paid when their rulings and decisions become the subject of appellate review. Justice Cromwell put it this way in *Children's Aid Society of Halifax v. S.G.* (2001), 2001 NSCA 70 (CanLII), 193 N.S.R. (2d) 273 (C.A.):
>
> > [4] In approaching the appeal, it is essential to bear in mind the role of this Court on appeal as compared to the role of the trial judge. The role of this Court is to determine whether there was any error on the part of the trial judge, not to review the written record and substitute our view for hers. As has been said many times, the trial judge's decision in a child protection matter should not be set aside on appeal unless a wrong principle of law has been applied or there has been a palpable and overriding error in the appreciation of the evidence: see *Family and Children Services of Kings County v. B.D.* (1999), 1999 CanLII 18565 (NS CA), 177 N.S.R. (2d) 169 at ss. 24. The overriding concern is that the

> legislation must be applied in accordance with the best interests of the children. This is a multi-faceted endeavour which the trial judge is in a much better position than this Court to undertake. As Chipman, J.A. said in *Family and Children Services of Kings County v. D.R. et al.* (1992), 1992 CanLII 4823 (NS CA), 118 N.S.R. (2d) 1, the trial judge is "... best suited to strike the delicate balance between competing claims to the best interests of the child."

Erred by Ignoring the Evidence

[32] The parents argued that even without the admission of the entire diary and Dr. Porter's expert report, the appeal should be allowed on the basis the judge erred by ignoring the evidence that there was nothing in AB's diary indicating physical discipline by the parents. We do not agree.

[33] The fact the judge did not specifically refer to this evidence in his written reasons does not mean he did not consider it in reaching his decision. His reasons specifically state that he considered **all** of the evidence (250, 266) even though he did not specifically refer to all of it in his summary of the evidence. He is not required to refer to every bit of evidence in his reasons, especially in a situation like this where the parties agreed that there was nothing in AB's diary about physical discipline by the parents.

Disposition

[34] We dismissed the appeal without costs, none having been requested.

Hamilton, J.A.

Concurred in:

MacDonald, CJNS

Bryson, J.A.