Date: 19971212 Docket No. CA 140513

NOVA SCOTIA COURT OF APPEAL
Cite as: Children's Aid Society of Cape Breton v. B.S., 1997 NSCA 191

Clarke, C.J.N.S.; Roscoe and Bateman, JJ.A.

BETWEEN:	)	
	)	
THE CHILDREN'S AID SOCIETY OF CAPE BRETON	)	Lee Anne MacLeod for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
B. S. and J. N.	)	No one appeared on behalf of Ms. S.
	)	
Respondents	)	
	)	
	)	Cheryl I. Morrison for the Respondent, J. N.
	)	
	)	
	)	Appeal Heard: December 3, 1997
	)	
	)	
	)	Judgment Delivered: December 12, 1997

Editorial Notice

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

THE COURT: The appeal is dismissed without costs as per reasons for judgment of Roscoe, J.A.; Clarke, C.J.N.S. and Bateman, J.A., concurring.

ROSCOE, J.A.:

This is an appeal from a decision of Judge Darryl Wilson of the Family Court made after a hearing to determine whether two children were in need of protective services pursuant to s. 22 of the **Children and Family Services Act**, S.N.S. 1990, c.5, as amended. The appellant agency alleged that the children, a three year old girl and a seven year old boy, were in need of protection as defined in s. 22(2) (a), (b), (g) and (i) of the **Act**. Judge Wilson found that they were in need of protection pursuant to s. 22(2) (b) and (g) but made no finding in relation to s. 22(2)(a) and (i). His order in that respect is dated February 12, 1997.

The incident which precipitated the court application was one in which Mr. N., during an argument with Ms. S., on October 11, 1996, smashed the window of the car she was sitting in with the two children, which caused broken glass to cut the face of the male child. The respondents have been separated since March 1996. Mr. N. is the natural father of the female child, but the male child is the child of a previous relationship of Ms. S.'s.

The disposition hearing took place in April and June. On July 22, 1997, a disposition order was issued whereby the children were left in the mother's care under supervision. Several conditions respecting the continuation of counseling and therapy were also imposed, access by Mr. N. to the male child was suspended and his access to the female child was ordered to be supervised. That order has not been appealed. On August

11, 1997 the agency filed a Notice of Appeal, appealing the protection order made in February.

The relevant sections of the **Act** are:

3 (1) In this Act,

. . .

(r) "parent or guardian" of a child means

(i) the mother of the child,

(ii) the father of the child where the child is a legitimate or legitimated child,

(iii) an individual having the custody of the child,

(iv) an individual residing with and having the care of the child,

(v) a step-parent,

(vi) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child,

(vii) ...

but does not include a foster parent;

22 (2) A child is in need of protective services where

(a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;

> (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);
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> . . .
>
> (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> . . .
>
> (i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child's parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence;

Judge Wilson, in the decision under appeal, after reviewing the evidence before him, found that Mr. N. did not intend to harm the children when he broke the window but that he was angry and his actions were reckless. He generally determined that:

> . . . there is the potential for physical conflict in the future between the Respondents and therefore I am satisfied there is a substantial risk the children could suffer physical harm as a result of the nature of the conflict between these parties.

In referring to the specific subsections of s. 22 of the **Act**, he dealt first with 2(g) and concluded that in respect of the female child, who was suffering from depression, that she was in need of protective services because she needed treatment with which Mr. N. was not fully supportive. He later found that 2(b) was also applicable to the female child.

In respect to ss.2(i), the trial judge found that although the parties had exposed the children to repeated domestic violence, they were willing to undertake programs and services of the agency to alleviate the harm and to avoid contact with each other. He therefore decided that it was not necessary to make a finding under s. 22(2)(i).

The trial judge next considered the issue of whether s.s. 2(a) applied to the male child, since Mr. N. "does not appear to be a 'parent or guardian' as defined by Section 3(1)(r) of the **Act**, **unless** one considers the Court Order dated September 4, 1996 which provides" ... that Mr. N. have access to the male child, with the child's consent. Without really finding whether he was a parent or not, the trial judge proceeded to discuss the fact that there was no intentional harm inflicted on the child and concluded: "I am not sure this section was intended to cover this type of circumstance."

In considering the applicability of subsection 2(b) to the male child Judge Wilson concluded as follows:

> I am prepared to make a finding under Section 22(2)(b), although I have the same concerns with respect to whether Mr. N. is a parent or guardian. Based on the past history of conflict between the parties and the assessments of Doctor Rajkhowa, I find there is a substantial risk of physical harm to [J.] when [J.] consents to visit with Mr. N.. The nature of [J.'s] enmeshed relationship with his mother in which he overly identifies with her concerns and Ms. S.'s explosive relationship with Mr. N. place him at risk of physical harm.
>
> I also find there is substantial risk that [J.] will suffer emotional harm; that is, severe anxiety which could be exasperated by the conflict between the Respondents.

Having found both children in need of protective services, pursuant to s. 22(2)(b) and (g), Judge Wilson adjourned the matter for a disposition hearing and ordered that the respondents have no contact with each other and that counseling continue. As indicated, the disposition order made several months later after further evidence has not been appealed.

The agency submits on appeal that the trial judge erred in failing to find that Mr. N. was a "parent" as defined in the **Act** and by not finding that Mr. N. inflicted physical harm on the male child. The relief sought is that this Court make a finding "that the child [J.] suffered physical harm inflicted by a parent, namely, Mr. N. on October 11, 1996, for purposes of section 22 (2) (a)."

The issues raised by the appellant are, in my opinion, moot, and the appeal should accordingly be dismissed. I base this opinion on this Court's decision in **Children's Aid Society of Halifax v. L.H.** (1989), 90 N.S.R. (2d) 44. In that case the agency appealed a decision of a judge of the County Court reversing, in part, a decision of the Family Court judge regarding the admissibility of documents as business records in a child protection matter. By the time the matter came to this Court, the trial before the Family Court had concluded with an order for the committal of the children to the care of the agency. Justice Chipman, for the court, referred to the test established in **Borowski v. Attorney General of Canada**, [1989] 1 S.C.R. 342 beginning at paragraph 8:

> [8] In **Borowski v. Canada (Attorney General)** the Supreme Court of Canada's decision dated March 9, 1989 [now reported [1989] 3 W.W.R. 97] dealt with the doctrine of mootness. Sopinka, J., speaking for the court stated that the general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. Such controversy must be present not only when the proceeding is commenced, but at the time the court is called upon to adjudicate. If these conditions are not met, the court will decline jurisdiction unless it decides to exercise its discretion. At p. 7 [p. 105] Sopinka, J. said:
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> > The approach in recent cases involves a two step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.
>
> [9] In the case before us, it could not seriously be questioned that there was no longer a concrete legal dispute in existence relating to the issues raised in the factums of counsel. The controversy over Judge Roscoe's decision disappeared completely or at most was subsumed in her decision following trial and may or may not be continued by the avenue of an appeal therefrom.

In this case, as in the **L.H**. case, since the appellant has already "won the day", that is, it has been successful in obtaining all the conditions it sought in the disposition order, it can get no useful relief from this appeal. There is no live controversy at this point

respecting the type of protective services required by the children. The finding that the children were in need of protection was required in order to proceed to the next stage, that is, the disposition hearing. After the disposition hearing is concluded, it matters not which subsections of s. 22 were initially relied upon at the protection hearing. The appellant submitted that since Mr. N.'s name would have been automatically entered on the child abuse register pursuant to s. 63(2)(a) of the **Act** if the finding in need of protection pursuant to s. 22(2)(a) had been made, there is still a live controversy affecting the rights of the parties. However, that was not the focus of the hearings before Judge Wilson and since no application in that respect was made to the trial judge that avenue is still apparently open. The trial judge found at the protection hearing that there was domestic violence and emotional harm that needed to be addressed, and presumably since the disposition order has not been appealed, that order satisfactorily dealt with those concerns. As in **L.H.**, the controversy over the protection order "has been subsumed" in the disposition order.

As expressed in **Borowski**, **supra**, and as cited in **L.H.** the second consideration in a case of this nature is whether the court will, notwithstanding mootness, exercise its discretion to hear the appeal. The issues raised on this appeal do not raise critical questions that require answers by this Court because of conflicting trial decisions or because of the implications for future cases. The findings in issue by the trial judge in this case were very fact-specific and cannot even be said to be definitive rulings of law, rather he expressed reluctance to make a conclusive finding in relation to s. 22(2)(a), saying: "I am not sure whether this section was intended to cover this type of

circumstance."

In summary, the appeal is moot and there are no special circumstances requiring that we exercise our discretion to hear the appeal. Accordingly, I would dismiss the appeal. Since Mr. N.'s costs will be paid through a Legal Aid Certificate, there will be no order for costs.

Roscoe, J.A.

Concurred in:

Clarke, C.J.N.S.

Bateman, J.A.