NOVA SCOTIA COURT OF APPEAL

Citation: ***J.M. v. Nova Scotia (Community Services)***, 2012 NSCA 72

Date: 20120710
Docket: CA 384102
Registry: Halifax

Between:

J.M.

Appellant

v.

The Minister of Community Services

Respondent

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

Judges: Oland, Farrar and Bryson, JJ.A.

Appeal Heard: June 15, 2012, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bryson, J.A.; Oland and Farrar, JJ.A. concurring.

Counsel: Christine Black, for the appellant
Peter C. 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.**

Reasons for judgment:

[1] J.M. appeals the decision of the Honourable Justice Theresa Forgeron and her consequent order granting permanent care and custody to the Minister of Community Services ("Minister") with respect to J.M.'s two children (2012 NSSC 19).

[2] The introduction to the trial judge's decision poignantly describes the horrific circumstances of J.M.'s youth and her admirable efforts to transcend them:

> [2] Ms. M was born and raised in a family where violence, instability, substance abuse, and dysfunction were commonplace. Although possessing academic capabilities, Ms. M dropped out of school because of the ongoing family dynamics. Not surprisingly, she became involved with alcohol, drugs, and crime. She began to live on the streets of * as a teenager. . . . Somehow, Ms. M survived. It is a testament to her spirit that she was able to do so.
>
> [3] Ms. M became pregnant in 2007. Ms. M wanted to give her child a different life than she had endured. Because of this insight, and out of love for her child, Ms. M contacted child protection authorities before her daughter, J1, was born in March 2008. She reached out for help. Services were initially implemented on a voluntary basis, and then by way of court order. The * agency continued their involvement with Ms. M after the birth of her second daughter, J2, who was born in May 2009. At the time, child protection concerns related to substance abuse and family violence.
>
> [4] Ms. M arrived in Nova Scotia in March 2010, with the permission of the * agency, under a supervision order, which was to be monitored by the local protection office. By that time, it appeared that the risks to the children had resolved to a great extent. Ms. M was no longer using drugs or alcohol. Ms. M was no longer involved in an abusive relationship with her former partner, Mr. S.
>
> [5] Things did not evolve as expected after Ms. M moved to Nova Scotia. As a result, in May 2010, protection workers apprehended the children after receiving a referral from the police. The children have remained in the care of the Minister since that time.

[3] The trial judge had extensive experience with this case. She made a protection finding with respect to both children on August 19, 2010. Following a contested disposition hearing on November 8, 2010, the trial judge placed the children in the temporary care and custody of the Minister (2010 NSSC 441).

[4] The trial judge noted that following the temporary care and custody order, J.M. began to make poor decisions. She found:

> [14] These decisions involved disjointed and ever changing plans. At one point, Ms. M only intended to stay in * for the Christmas holidays. Then, she proposed that she would remain in * and reconnect with services there. Under this plan, Ms. M intended to file a motion to transfer the file back to *. A third option involved Ms. M living and taking services in *, while having telephone access and returning to Nova Scotia once a month to visit with her children. Another plan proposed that the children be placed with her mother, or her former pastor in *. The final plan involved Ms. M's reunification with Mr. S, and their joint move to Nova Scotia to eventually parent as a family unit. Ms. M and Mr. S would engage in services in the Sydney area.
>
> [15] Ms. M and Mr. S moved to CBRM in March 2011. Upon her return, Ms. M connected with various service providers. The relationship between Ms. M and Mr. S soon turned violent. As a result, Ms. M ended the relationship; Mr. S returned to * in mid-June 2011. Ms. M continued to engage in services, and exercise supervised access. Access was temporarily cancelled due to trauma the children experienced because of Ms. M's belief that one of them had been sexually abused by the foster father. Access was eventually reinstated.

[5] The contested permanent care hearing resulted in a five-day trial. The trial judge heard from 12 witnesses including J.M. She acknowledged and was complimentary about J.M.'s progress, including:

- That J.M. had not been abusing substances for about a year prior to trial;
- J.M. had begun to use healthy conflict resolution techniques and anger management skills;
- J.M. had a clean and stable home in the CBRM;
- J.M. was an intelligent, capable and caring woman who had made "commendable gains", despite "an unthinkable background";
- J.M. had neglected the court order regarding access, attendance, meeting with protection agency workers, but otherwise being

> cooperative with the agency. Visits of J.M. with her children were usually “positive and healthy”.

[6] Notwithstanding J.M.’s progress, the trial judge concluded that her children remained at substantial risk of physical harm owing to J.M.’s inability to supervise and protect them adequately. The trial judge was satisfied that less intrusive alternatives would not be adequate to protect J.M.’s children. Specifically, the trial judge found:

> a. Although Ms. M is getting better at regulating her emotions and applying safe conflict resolution skills, she continues to react inappropriately on occasion to the detriment of J1 and J2. This finding is exemplified in Ms. M's handling of the sexual abuse allegation. Ms. M's reaction caused significant harm to the children. Further work is needed in this area.
>
> b. Ms. M has not concluded the therapeutic counseling that was ordered to deal with the substantial trauma that she suffered throughout her life, including past physical, sexual, emotional, and domestic violence. Mr. Burke noted that this will be a long process. Mr. Burke also expressed his frustration with the legislation that provides only one time line, despite the progress and sincere efforts of Ms. M. Mr. Burke and Ms. M are only in the initial stages of the trauma counseling. Once Ms. M has a better insight into her past trauma, she will be better equipped to make healthy choices in the future.
>
> c. Ms. M has a limited ability to problem solve and make choices that do not place her children at risk at present. Three examples in support of this finding include the following:
>
> > i. Ms. M's decision to leave J1 and J2 to return to * for about three months commencing in December 2010 was not a healthy choice. Ms. Virick, the protection supervisor, explained the difficulty that the children were experiencing because of her absence. This did not deter Ms. M. Further, Ms. M also lost precious time by failing to implement the court's plan in a timely fashion.
> >
> > ii. Ms. M met Mr. S in February 2011, and decided to reunite with the hope of creating a family unit for

her children. She did so despite the unanimous caution from professional supports. These professionals questioned the wisdom of the decision, and discussed potential consequences associated with the decision to reunite with Mr. S. The professionals included Mr. Parenteau, agency workers in Nova Scotia, and Mr. Burke. Although aware of the likely negative consequences, Ms. M persisted with her plan. Not surprisingly, reunification did not end well.

iii. Ms. M continues to make poor choices in respect of companions. Ms. M's step father was violent with her when she was young. He also abused substances. He has not changed. Yet, Ms. M continued to seek him out as late as the fall of 2011. She stayed with him after he had an operation, and also met with him at other times. The relationship is conflictual. There was police involvement. The stepfather should be avoided, as should all people like him. Ms. M does not fully appreciate why this type of relationship is dangerous.

d. Although Ms. M has consistently participated in courses and services since the children were born, she has been unable to sustain permanent lifestyle changes. Child protection agencies have been involved with Ms. M since 2007, before J1 was born. Many programs and services were concluded. Ms. M does well for a period of time and then relapses. This circular pattern will continue until the trauma counseling has been successfully concluded. Until this occurs, Ms. M remains at a high risk of associating with people who have abused her in the past or who will abuse her in the future. She remains at a high risk to abuse alcohol and drugs as a means of coping with the anxiety and stress of her past. The successful completion of the trauma counseling is key. Because the trauma counseling has not been completed, J1 and J2 remain at a substantial risk of harm.

ISSUES

[7] J.M. appeals arguing that:

(a) the trial judge erred by giving inappropriate weight to the fact that J.M.'s therapeutic counselling had not been concluded;

(b) the trial judge erred in para. 33(c)(iii) of her decision in finding that the stepfather she stayed with in 2011 was the same stepfather who was violent with her when she was young.

[8] J.M. does not allege any errors of law by the trial judge. She recognizes that the grounds of appeal require her to establish that the trial judge made a "palpable and overriding error" of fact; that is to say that she made an error that was clear or obvious and material to the outcome.

Standard of Review:

[9] In *Children's Aid Society of Cape Breton-Victoria v. A.M.*, 2005 NSCA 58, Justice Cromwell, as he then was, set out the standard of review in child protection cases:

> [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 County 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.

Issue 1 - the trial judge erred by giving inappropriate weight to the fact that J.M.'s therapeutic counselling had not been concluded:

[10] In her written and oral submissions, J.M. expanded this ground of appeal and alleged that Justice Forgeron did not "adequately consider the progress that Ms. M has made and continued to make" and erred because "there is no evidence to suggest that the child has been severely or permanently harmed by her mother's reaction as Justice Forgeron suggested in her findings".

[11] With respect, J.M.'s submissions are unpersuasive. First, as her submissions acknowledge, Justice Forgeron made no error of law or error of fact with respect to this issue. Rather, she argues that Justice Forgeron did not give "sufficient weight" to J.M.'s progress when deciding to grant an order of permanent custody and care. But J.M.'s "progress" is not an element of the legal test. And unless that progress is sufficient to ensure that the children are no longer at risk, it cannot meet the legal test.

[12] With respect to the second point, it is unnecessary as J.M. alleges, to establish that a child has actually suffered harm. Rather the question is whether a child remains in need of protective services (s. 41(1)). That need includes whether there is a "substantial risk" that the child will suffer physical harm caused by the failure of a parent or guardian to supervise and protect the child adequately (s. 22(2)(a)& (b)). That is precisely what the trial judge found (Decision, para. 33). There was ample evidence to sustain that finding (para. 6 above). It is not the place of this Court to re-weigh that evidence.

Issue 2 - the judge erred in fact by finding that the stepfather with whom J.M. stayed with in 2011 was the same stepfather who was violent with her when she was young:

[13] J.M. points out that she has two stepfathers, Mr. M., who had been abusive to her when she was a child and a Mr. H. who had not. J.M. complains that the trial judge confused the two.

[14] There are two responses to J.M.'s submissions here. First, it is not at all clear from the trial judge's decision that she made a mistake of fact. More fundamentally, this alleged error of fact was not material.

[15] With respect to the alleged error of fact, it suffices to repeat the Minister's submission at para. 107 of his factum:

107. The Trial Record regarding the Appellant's step-fathers included the following:

a. In the parental capacity assessment of the Appellant completed November 4, 2010, it is noted that, "her mother had a seven-year relationship with **M.H.** **J.M. reports that** 'I don't remember much about that I try to block it' since the [sic] **there was a great deal of violence in the relationship**." Appeal Book, Vol 1, p. 299, emphasis added

b. During the same assessment, Ms. MacPherson described her mother's subsequent relationship with **G.M.**, in which "She reports that there was a lot of violence in the relationship but there was 'a lot of good'." She described having a "close" relationship with G.M., "despite [what the assessor called] the persistent violence"; Appeal Book, Vol 1, p. 299, emphasis added

c. Finally, during the same assessment, "J.M. reported that she does not believe that her history of trauma including assaults by G.M. and sexual assaults have affected her as a parent." Appeal Book, Vol 1, p. 305

d. In June 2010 - July 2010, the Appellant was staying with her step-father, G.M. "There were discussions of some **drug trafficking** that had been going on in the home, and her step-father (or "father") eventually "kicked her out". Appeal Book, Vol 2, p. 274, line 8, to p. 275, line 15; see Appellant's evidence

Appeal Book, Vol 2, p. 811, lines 3 - 7; Appeal Book, Vol 2, p. 895, lines 10 - 14

e. The Appellant's counselor, Ed Burke, later discussed these negative associations with the Appellant, including a step-father involved in the drug trade whom was discussed without naming the particular step-father; Appeal Book, Vol 2, p. 679, line 16 to p. 680, line 16

f. On June 16, 2011, the Appellant was staying with her step-father, **M.H.**;

Appeal Book, Vol 1, p. 102 - Affidavit at para. 75; Appeal Book, Vol 2, p. 278, line 21 to p. 279, line 12

g. On August 19, 2011, the Appellant called the Agency Caseworker from the home of **M.H**.;

Appeal Book, Vol 1, p. 165 - Affidavit at para. 155

h. On September 1, 2011, the Agency Caseworker met with the Appellant at the home of **M.H.**;

Appeal Book, Vol 1, p. 166 - Affid.. at para. 66; Appeal Book, Vol 2, p. 281, line 1-2

i. On September 19, 2011, the Appellant informed her counselor, Johnena Kennedy, that she and her step-father (**M.H.**) were not getting along as "**he is drinking** and every time she goes to his house he calls the police". The Appellant said she was going there because she had no money or cigarettes. Her counselor suggested the Appellant "look at what the cost is to her";

Appeal Book, Vol 1, p. 216 - AP&TS Record; Appeal Book, Vol 2, p. 749, lines 14 to p. 750, line 22

j. The Appellant in her evidence described this step-father (**M.H.**) as "my sister's father", who was "really **intoxicated on three different occasions**" and called the police on her. She admitted "he was a negative thing pulling me back".

Appeal Book, Vol 2, p. 818, line 16 to p. 819, line 15

k. On October 3, 2011, the Appellant continued to inform her counselor, Johnena Kennedy, that she was having difficulties with her step-father (**M.H.**). Johnena Kennedy noted, "I have encouraged her to stay away from him at this time due to the fact that she is trying to maintain a positive living environment."

Appeal Book, Vol 1, p. 215- AP&TS Records

l. On October 12, 2011, the Appellant again informed her counselor, Johnena Kennedy, that she was "not getting along with her stepfather [**M.H.**] and that she believed he was making allegations against her. I reminded J.M. that on several occasions I suggested that perhaps she shouldn't be spending time with him and especially **when he is under the influence of all call [alcohol]**."

Appeal Book, Vol 1, p. 214 - AP&TS Records

m. The Appellant described the time spent with **M.H.** in her submissions.

Appeal Book, Vol 2, p. 994, line 14 to p. 995, line 15

[16] With respect to the materiality of the alleged error, one only need refer to para. 33(c)(iii) of the trial decision (para. 6 above). This was but one example of the larger issue, J.M's limited ability to problem solve identified by the trial judge. An error with respect to this example, would not diminish the trial judge's more fundamental finding that J.M. had a limited ability to problem solve. Further, and with respect, neither stepfather in question appears to have been a model of probity with whom it was appropriate for J.M. to associate, in any event.

CONCLUSION

[17] J.M. does not allege and has not identified any errors of law by the trial judge. She has not established any palpable and overriding error of fact warranting this Court's intervention.

[18] The appeal should be dismissed.

Bryson, J.A.

Concurred In:
Oland, J.A.
Farrar, J.A.