NOVA SCOTIA COURT OF APPEAL

Citation: *M.S. v. Children's Aid Society of Cape Breton-Victoria* , 2004 NSCA 129

Date: 20041027
Docket: CA 225615
Registry: Halifax

Between:

M.S. and E.S.

Appellants

v.

The Children's Aid Society of Cape Breton-Victoria

Respondent

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

Judges: Bateman, Hamilton and Fichaud, JJ.A.

Appeal Heard: October 15, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Hamilton and Fichaud, JJ.A. concurring.

Counsel: Appellants, in person
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] This is an appeal by E.S. and M.S. from an order of Justice M. Clare MacLellan of the Family Division of the Supreme Court of Nova Scotia directing that their three children be placed in the permanent care of the respondent, Children's Aid Society (the "Agency").

[2] The children, "D.", "R." and "E." were born August *, 1998, November *, 1999 and March *, 2001 respectively. (* *Editorial note- dates removed to protect identity*) The Agency first became involved with the family in September 2001 when the youngest, "E.", then only six months old, was diagnosed with cancer. A family support worker was assigned and the appellants referred to counselling.

[3] A formal protection proceeding was commenced in September of 2002. At that time there was escalating stress in the home, violence by the father, E.S., directed toward the oldest child and the mother, M.S.'s, mental health and ability to cope were deteriorating. The children were taken into care on September 27, 2002. At further court appearances there were consent findings that the children were in need of protective services. It was the Agency's initial position that the children should eventually be returned to the appellants if remedial measures improved their personal circumstances and parenting abilities. By February of 2003 the Agency had concluded that the family could not be reunited and sought permanent care. Despite intervention and support by the Agency, the parents had made little or no progress. At that time the judge ordered an additional period of temporary care to provide the appellants a further opportunity to work through their problem areas. The children remained in care with access by the parents.

[4] Over the ensuing months parental capacity assessments were completed and the matter came on for final hearing on June 10, 2004, with the order for permanent care granted on June 11, 2004. In her decision the judge noted that both assessors had found the children to be very damaged emotionally and with an overwhelming need to be stabilized. The appellants lacked insight into the children's needs and their own parenting deficiencies. Neither parent exhibited the desire or ability to improve to a degree that would permit him/her to parent effectively. The risk to the children had remained unaltered over the two years of Agency involvement, despite the provision of all reasonable services. The older children were compromised to such a degree that it would require better than average parents to cope with their needs. The appellants had undermined the foster care

arrangements at every turn and exhibited an inability to exercise meaningful access with the children. There was no prospect that the appellants could parent these children in the foreseeable future. Permanent care was the only option. The judge found that to continue access by the parents would prevent the children from stabilizing in a new family setting. The permanent care would be without access by the parents.

[5] The grounds of appeal all raise matters of process and can be summarized as follows:

> 1. The judge erred in allowing the apprehension hearing to continue after the parties discharged their lawyers;
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> 2. The proceeding exceeded the maximum time frames allowable under the **Children and Family Services Act**, causing the Court to lose jurisdiction;
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> 3. The trial judge erred in declining to recuse herself from hearing the matter when the parties raised issues of real or apprehended bias;
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> 4. The judge erred by declining to order that the Society make full and timely disclosure of relevant material to the appellants;
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> 5. The judge erred by reading certain psychological assessments in advance of the hearing.

Legal Representation:

[6] The appellants were individually represented by counsel from the commencement of the formal proceedings in the trial court until each advised the court on March 31, 2003 that he/she had terminated counsel's services. The appellants say that the judge erred in not granting an adjournment to enable them to arrange for alternate counsel.

[7] On March 31 the judge inquired of the appellants whether they intended to retain new counsel. Each was firm in his/her stated position to self-represent. E.S. said he intended to have Mr. William O'Neil, a lay person, advise him. The judge cautioned that Mr. O'Neil was not a lawyer nor qualified to give advice on permanent care under the **Children and Family Services Act**, S.N.S. 1990, c. 5 ("**CFSA")**. She recommended that he reconsider his position. Similarly, the judge encouraged M.S. to seek alternate counsel. Neither expressed a wish to do so. At each of the parties' next court appearances (May 19 and June 10, 2004), the judge again asked

if either wished to have counsel for the permanent care hearing and urged them to make arrangements for counsel. Each again advised of his/her intention to continue without a lawyer.

[8] The judge clearly discouraged the parties from proceeding without a lawyer and offered to accommodate should either wish to seek counsel. Each party was clear that he/she chose to self-represent, as is their right (see **R. v. Mian** (1998), 172 N.S.R. (2d) 162; N.S.J. No. 398 (Q.L.) (C.A.)). Neither sought an adjournment nor the assistance of the judge in engaging new counsel. This ground of appeal is without merit.

Exceeding the Statutory Time Frames:

[9] The original order for temporary care was made March 31, 2003. Permanent care was ordered on June 11, 2004. The appellants say that the Court was without jurisdiction to order permanent care because the mandatory time limits had been exceeded. They rely upon s. 45(1)(a) of the **CFSA** which requires that the total duration of all disposition orders not exceed twelve months from the date of the original order, when a child is under six years of age, as is the case here.

[10] An order which contains a disposition that exceeds a statutory time limit in the **CFSA** may constitute error in law and be altered on appeal; but the court does not lose jurisdiction merely by exceeding the **CFSA**'s time limits leading up to the trial or to the court's decision. In deciding whether the judge erred at law in exceeding the time limits leading up to the final disposition, the appeal court will consider whether the judge found that exceeding those limits was in the best interests of the children. (**Children's Aid Society and Family Services of Colchester County v. H.W.** (1996), 155 N.S.R. (2d) 334 (C.A.) at para. 30; **Nova Scotia (Minister of Community Services v. B.F.)** (2003), 219 N.S.R. (2d) 41; N.S.J. No. 405 (Q.L.)(C.A.) at paras. 57-58).

[11] In March of 2003 the judge had ordered a parental capacity assessment. That assessment was prepared by psychologist, Michael Bryson. The appellants disagreed with the assessor's opinions and, at a pre-trial conference on October 20, 2003, requested a second court-ordered assessment. It was agreed that the assessor would have access to the Court file but not to the full Agency file nor to the first assessment. There were difficulties finding an assessor who would be acceptable to the appellants. In January, 2004, the court learned that the second report would not be

available for some months. The appellants, through their counsel, requested and received an adjournment to await that report. When that assessment became available in March, 2004, the appellants objected to its admission based upon their concern that, contrary to the understanding of all parties, the assessor, Dr. Landry, had accessed the Agency file. The judge ruled that the Landry report would not be admitted. It was agreed by counsel that a mediator would be appointed under s. 21 of the **CFSA** to assist the parties in selecting a new assessor and in determining to what material the assessor would have access. Anticipating the appointment of a mediator the judge stayed the proceedings for a period of three months to allow time for the preparation of this third assessment. In so-doing she noted that a stay of the process was preferable to re-commencing proceedings and in "everybody's best interest". Section 21(3) provides that "[w]hile a stay of proceedings pursuant to subsection (2) is in effect, any time limits applicable to the proceedings are extended accordingly".

[12] According to s. 21(2) of the **CFSA**, a stay may only be granted where a mediator is appointed. We are advised that a mediator was not appointed because, only days after this court appearance, the appellants dismissed their lawyers. A third assessment was, however, prepared. This required additional time. While the stay did not, therefore, extend the time limits, the judge had determined that a delay in the proceedings to allow time for the preparation of the further assessment, as was requested by the parents, was in the best interests of, *inter alia*, the children. I am not persuaded that in so concluding the judge erred. Accordingly, the fact that the permanent care order was made beyond the statutory time limit is not, here, reversible error. (see **H.W.**, **supra**, at para. 34).

Bias:

[13] On June 10, 2004 Mrs. S. asked that the judge recuse herself. The two bases for the request were: (i) the judge, while at the Bar, had represented the Childrens' Aid Society on occasion; and (ii) the judge had decided in favour of the Agency in all past rulings in this case. The judge recessed to consider the request and ultimately ruled that she would not step down. The appellants say that in wrongly refusing to recuse herself the judge lost jurisdiction.

[14] The test for recusal was canvassed in detail by the Supreme Court of Canada in **R. v. S. (R.D.)**, [1997] 3 S.C.R. 484. Cory, J. described the test as follows:

> 111. . This test . . . contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case . . .

[15] This Court in **Children's Aid Society of Cape Breton v. L.M. and B.M.** (1998), 169 N.S.R. (2d) 1; N.S.J. No. 191 (Q.L.) addressed what is essentially the same argument as that made here by the appellants. Paragraphs 45 to 50 of that judgment provide a complete answer to the appellants' complaint here. Cromwell, J.A., writing for the Court, said:

> **[45]** The appellants argue that the Family Court judge should not have heard the case because she acted as a lawyer for the Agency prior to her appointment as a judge and had a professional association with counsel representing the Agency in this matter. This, as the appellants put it in their factum "...presents an obvious (not perceived) conflict of interest on the part of the learned judge and lending bias (sic) to the proceeding." . . .
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> **[46]** The appellants have provided no evidentiary basis for their allegations of conflict of interest and it is difficult to understand their argument in this regard. A conflict of interest exists when an individual has duties to be performed or interests to serve that conflict with each other. Simply put, a conflict of interest exists where an individual, improperly, has divided loyalties. There is no evidence of any such thing in this case. The judge had no conflict of interest.
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> **[47]** With respect to the allegation of bias, it is common ground between the parties that the trial judge acted as a lawyer for the Agency and had a professional relationship of some description with counsel for the Agency prior to her appointment to the Bench. The record is silent, however, with respect to the nature, extent, duration and timing of these activities.

> **[48]** The total absence of evidence in this regard is significant. The threshold for a finding of real or perceived bias of a judge is high. The onus of demonstrating it lies with the person who is alleging its existence. There is a presumption that judges will carry out their oath of office: see **R. v. R.D.S.**, [1997] 3 S.C.R. 484; 218 N.R. 1; 161 N.S.R. (2d) 241; 477 A.P.R. 241 per Cory, J. at 552.
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> **[49]** The appellants allege that the judge's conduct of the proceeding displayed bias. I do not agree. While the judge conducted the hearing in an, at times, robust manner, she did not say or do anything capable of suggesting to the mind of a reasonable and fully informed person that she was not approaching the case with an open mind. As stated in **Commentaries on Judicial Conduct** (Canadian Judicial Council, 1991) at 12:
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> > "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."
>
> **[50]** As for the judge's professional activities prior to appointment, the record, as noted, leaves us in the dark as to their nature, extent, duration and timing. There was no suggestion that the trial judge had previous involvement as Agency counsel with these appellants. The fact that a judge, at some time prior to appointment, acted as a lawyer for a party before the court or had a professional association with a lawyer before the court, does not, on its own, give rise to a reasonable apprehension of bias. There is no settled principle that judges must not hear cases involving former clients or former associates in practice. Frequently, judges will allow some period of time to elapse after their appointment before doing so: see **Committee for Justice and Liberty Foundation et al. v. National Energy Board et al.**, [1978] 1 S.C.R. 369 at 388; 9 N.R. 115. There is no evidence that such a period did not elapse before the judge heard this case. There is nothing in this record to rebut the presumption that a judge will carry out his or her oath of office to render justice impartially: see also **R. v. Smith & Whiteway Fisheries Ltd.** (1994), 133 N.S.R. (2d) 50; 380 A.P.R. 50 (C.A.) at 60.

[16] The appellants could provide no evidence of actual bias on the part of the judge, save for their submission that her denial of their request for interim access exhibited bias. As in **L.M.**, there is no evidentiary basis nor foundation here for the allegations of conflict of interest or actual bias. This ground of appeal is without merit.

Disclosure:

[17] The appellants allege that the judge erred in not ordering the Agency to make full disclosure of videotapes of access visits by the appellants with the children. The tapes had been made by the Agency at the appellants' request. It was the appellants' position that the Agency was misrepresenting the events that transpired between the parents and the children during access. The Agency made the tapes, not for introduction into evidence, but to assist in remediating the parents' interaction with the children by showing the parents what was occurring. The Agency had offered the appellants an opportunity to view the tapes at the Agency offices but did not want the tapes duplicated or distributed. It was the Agency's concern that release of copies of the videotapes to the appellants could compromise the privacy interests of the foster families who were caring for the S. children and the interests of the other foster children in those homes who were mentioned on the tapes.

[18] The judge ordered that the Agency provide the appellants with unrestricted access to view the tapes. She further advised the appellants that she would view any parts of the tapes that the appellants felt were relevant to the proceedings.

[19] This was a reasonable resolution of the need to balance the interests of the appellants against those of the foster families and other children who were not involved in this proceeding. I am not persuaded that the appellants were disadvantaged by not having copies of the tapes in their possession. Only a part of one tape was ultimately admitted into evidence. It was a tape that had been viewed by the appellants. There is no merit to this ground of appeal.

Assessments:

[20] The final submission of the appellants is that the judge erred in reading the Bryson and Landry parenting assessments prior to a decision being made on each report's admissibility. While the appellants disagreed with the contents of the Bryson report, it was admitted into evidence without challenge. The appellants have presented no factors on this appeal which would militate against that report's admission.

[21] The judge read the Landry report which she ultimately determined would not form part of the record. Judges commonly inspect or hear evidence prior to ruling upon its admissibility and must disregard evidence not admitted. While the judge did read the report there is no indication in the

record that she made any use of it. There was ample support for the judge's permanent care order in the reports of Bryson and Rule (the assessor who replaced Landry). Both assessors concluded that the parents were not emotionally equipped to attend to the needs of these children. This ground of appeal is without merit.

Conclusion:

[22] The appellants have not directly challenged the judge's finding that the children should be placed in the permanent care of the Agency. Because the appellants are self-represented, we have reviewed the record more broadly than is dictated by the grounds of appeal raised by them. I am satisfied that the order made here was the only option open to the judge on the facts and was made in the context of a fair trial process.

Disposition:

[23] I would dismiss the appeal but without costs.

Bateman, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.