C.A. No. 124678

NOVA SCOTIA COURT OF APPEAL
Cite as: L.C. v. Family & Children's Services of Queens County, 1996 NSCA 95

Roscoe, Matthews and Flinn, JJ.A.

BETWEEN:	)	
L. C.	)	Robert D. Chipman for the Appellant
Appellant	)	
- and -	)	
FAMILY & CHILDREN'S SERVICES OF QUEENS COUNTY	)	Alan G. Ferrier for the Respondent
Respondent	)	
	)	Appeal Heard: April 18, 1996
	)	Judgment Delivered: May 14, 1996

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.; Matthews and Flinn, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal by the mother of three children from a disposition in

the Family Court granting an order for permanent care and custody of the children to the respondent, Family and Children's Services of Queens County (the Agency).

The children, who were born in 1990, 1991 and 1992 were taken into care by the Agency pursuant to s. 33 of the **Children and Family Services Act**, 1990, c. 5, on November 4, 1993, after having been in the Agency's care pursuant to a voluntary agreement for the previous three months. By consent, a finding that the children were in need of protective services as defined in s. 22(2) of the **Act** was made by the Family Court on January 21, 1994. Specifically, it was found that protective services were needed because the children had suffered harm caused by the failure of the appellant to supervise and protect the children and that there was a substantial risk that the children would suffer physical harm. After numerous review applications, temporary orders and orders extending the temporary orders, the final disposition hearing was held, pursuant to an agreement between counsel that allowed for an extension of time, on May 15, 16, 17, and 24, 1995, and the decision under appeal herein was rendered on June 5, 1995. By decision of Justice Bateman of this Court, dated February 9, 1996, (see: [1996] N.S.J. No.64, (Q.L.)) a further extension of the time allowed for appeal was granted. No application for a stay of the Family Court judge's order or application for access was made, so the children have been in the care of the Agency, without any contact with or access to the appellant since June 5, 1995, a period of eleven months.

The grounds of appeal are as follows:

1. THAT the learned trial Judge failed to properly apply the evidence before the Court in determining/evaluating the progress made by the Appellant during the time the children were in care;

2. THAT the learned trial Judge misunderstood the evidence presented regarding the involvement of the

> Appellant with the Agency and the children during the time the children were in care;
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> 3. THAT the learned trial Judge made specific findings which were based on evidence which was not presented at the Disposition Hearing and, therefore, misunderstood the totality of the evidence presented;
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> 4. THAT the learned trial Judge made his finding based on incorrect assumptions and findings which were not supported by the evidence presented at the Disposition Hearing;
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> 5. THAT the learned trial Judge failed to properly apply or refer to expert evidence adduced at the Disposition Hearing in relation to special needs of the child [M.] and the impact separation from the Appellant would have on the three infant children;
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> 6. THAT the learned trial Judge erred in law by not properly complying with Section 41(5)(b)(ii) of the Children and Family Services Act by not properly stating the reasons why the children could not be adequately protected while in the care and custody of the Appellant.

Since the appellant claims that the trial judge misunderstood the evidence and submits that there was a failure to consider all the relevant factors contained in the **Act**, when determining what was in the best interests of the children, it is necessary to review the evidence in detail. Counsel agreed at the hearing of the appeal that there were very few factual disputes in the evidence.

This case concerns the distressing situation which arose when an unmarried teenager, herself an abused child, became the mother of three children. The appellant was 15 years old when her first child was born, 16 when the second was born and 18 when the third was born. Each child has a different father, none of whom were providing any kind of support to the appellant when the children were first apprehended by the Agency.

The appellant first came to the attention of the Agency in February

1993, when her youngest child, then six weeks old, was hospitalized at the children's hospital as a result of a serious head injury. It was determined that the oldest child, then aged three, dropped the baby out of his crib and fell on top of him. This happened while the appellant was sleeping. The children were taken into care, but the application to the court was withdrawn and the Agency and the appellant entered into an agreement which stipulated that the Agency would provide help and instruction to the appellant and she undertook not to leave her children unsupervised at any time. For several months the appellant was assisted through in-home child care instruction for seven hours a day, five days a week. The purpose of this instruction was so that the appellant would learn how to feed and handle the newborn baby, how to manage the behaviour of the hyperactive toddlers without resort to tying them in their beds, how to manage her finances so as to provide nutritious meals, and how to properly supervise the children to prevent further injury. Additionally, the Agency provided respite and assistance with transportation to the appellant throughout this period of time. Despite the guidance respecting nutrition, the appellant's infant was diagnosed as "a failure to thrive" baby in June, 1993.

In August, 1993, the appellant voluntarily placed her children in temporary care for a three month term because she was unable to cope and was suffering severe stress requiring counselling. Although the plan had been that she would have frequent access during this term, the appellant did not at first, initiate regular contact, so the Agency insisted that she participate in activities with the children, including the play therapy that had been established for the eldest child. It was during a play therapy session that this child disclosed that she had been sexually abused. The abuse did not happen while she was in the appellant's home.

In September, 1993, the appellant was hospitalized briefly because of a suicide threat. The Agency received numerous complaints of alcohol consumption and partying respecting the appellant and her premises while the children were in temporary care. During an overnight visit by one of the children with the appellant, a pot of fat on the stove caught fire. The appellant was encouraged to buy a fire extinguisher in case of another accident; after two more kitchen fires, she did buy an extinguisher. During another visit, the baby fell out of his stroller and suffered a head injury which required medical attention. The Agency also expressed concern that the children would burn themselves on an electric heater that the appellant used, but she dismissed their views in that respect.

The Agency social workers were of the view that despite the provision of intense assistance, over ten months, the appellant remained unable to responsibly parent her children and therefore the Agency apprehended the children at the end of the three month voluntary agreement in November, 1993.

From January to March, 1994 a comprehensive psychological assessment of the appellant was undertaken by Dr. Susan Hastey who concluded that the appellant had the intellectual capacity to learn appropriate parenting and household management skills to provide a safe and nurturing environment for her children. Dr. Hastey recommended that the children be returned to the appellant under supervision "through a process of gradual integration over a period of three months." Dr. Hastey's report, dated April 8, 1994 also concluded:

> . . . The Family and Children's Services of Queens County and the various professionals involved with this case over the past 18 months deserve a great deal of credit for their efforts and abilities in dealing with these three children. The ongoing supervision and assistance of the Agency are required if [L.C.] is to successfully regain the care and

> custody of her children. [L.] needs supportive counselling to address issues concerning her abusive past and for recent involvement in abusive relationships. [L.C.] has a very positive attitude toward this attempt to regain the care of her children but she needs to fully understand the seriousness of the implications if she returns to a lifestyle or parenting attitude which would result in her children once again being at risk. The [C.] children range in age from 1 to 4 years. **It is crucial that children of this age not be allowed to 'drift' in and out of Foster Care. Their developmental needs are highly sensitive to time and further delays and confusion in the adoption of Primary Caregiver roles would be extremely detrimental to each child. If the following recommendations cannot be successfully adopted within the next six months, a further plan for the permanent placement of the children may be necessary**.

(emphasis added)

The recommendations of Dr. Hastey that there be a gradual return of the children over a period of three months were, by consent of the Agency and the appellant, incorporated into a Family Court order. During the three months the Agency provided the assistance of a family skills worker three hours a week where instruction was provided to the appellant in matters such as developmental stages of children, safety precautions, nutrition and household management. In addition, the Agency hired an access facilitator - parent aide to drive the appellant to visit her children and to help her during the visits. The appellant also participated in a ten week self-esteem workshop and individual counselling over this period of time. The oldest child continued with her play therapy and the appellant attended these sessions as well.

The play therapist, Lise Godbout, testified that during this period, the eldest child was regressing into a serious emotional crisis that was, in her view, related to her contact with her mother which was gradually increasing. It was noted

by several professionals involved in the matter that the eldest child's stability and improvement while in foster care, was, as the time spent with her mother expanded, becoming "completely eroded." It was discovered that the appellant had permitted contact between her boyfriend and the child, contrary to the court order, and then encouraged her to lie to the Agency workers. It was decided to slow the reintegration process with respect to the oldest child.

In August, 1994, a week before the two youngest children were to be returned to her care, the appellant reported that she cancelled a scheduled weekend visit because she was suffering from anxiety and crying spells. The two younger children were returned to the appellant's care in August, 1994 at which time another in-home nurturing program was commenced. This consisted of weekly one and one half hour sessions and written homework assignments concentrating on positive parenting techniques including praise of positive behaviour and discouragement of misbehaviour by the use of warnings of the consequences, such as loss of a treat, and "time-outs". The use of physical force and threats was strongly discouraged. The teacher of this course, Tanya Connor, testified that although the appellant did the homework and seemed to understand the theory, she had difficulty actually applying the strategies with her children.

As the time approached for the return of the eldest child, the Agency also retained Dr. Hastey to provide weekly transitional therapy to the appellant. On February 16, 1995 the child was returned to live with her mother and younger siblings. The next day the appellant moved in with her new boyfriend, J., who lived in an adjacent county. Over the following two weeks, the Agency noted several safety concerns, including a report that the three year old child had walked from the

house to a nearby river and her clothing was wet on her return to the house, that the two year old boy had fallen down the stairs on more than one occasion and that the appellant was having difficulty controlling the behaviour of the children.

On March 1, 1995 during the visit of Ms. Connor, several incidents happened which caused the Agency to take the three children back into care. First, it was revealed that the appellant, who had never had a driver's licence drove the three children in her boyfriend's car to the daycare centre a distance of approximately 25 kilometres. Secondly, when she returned with the two year old she left him asleep in his car seat in the car which was parked, according to the appellant's evidence, 34 feet from the house. He was there by himself for more than 45 minutes. One of the few disputes in the evidence concerned whether the baby was visible from the room in which the appellant and Ms. Connor were sitting. Another was whether the car was locked or not. According to the appellant, the vehicle was locked and she checked on him by looking out the window several times. The temperature on the day in question was around zero degrees and there had been reports that the roads had been covered with black ice in the morning.

The third troubling circumstance of that day involved the appellant's reaction to the children's poor behaviour. Although she initially attempted to use the time-out method of discipline, she quickly became frustrated and resorted to chasing them, screaming, and threatening to hit the eldest child with an "attitude stick", when the time-out did not have the desired effect. At the trial, the appellant testified that she hit her children with the stick approximately four times and that her boyfriend J. had also used it four times. The children had only lived at J.'s house 12 days before they were re-apprehended on March 2, 1995.

The Agency sought an order for permanent care and custody because its workers were of the view that the concerns that existed in February 1993 were, despite the enormous commitment of assistance, still in existence over two years later. It was their opinion that the appellant "has repeatedly proven that she is unable to apply what she has learned to the day to day care of her children and exhibits no common sense when it came to their safety." Dr. Hastey, who had initially believed that the appellant would learn how to properly parent changed her opinion and testified that the children would continue to be at risk if placed in the care of the appellant because of her lack of common sense.

The plan tendered by the Agency proposed that the children be placed for adoption together in one home if possible and if not, that the oldest child be placed in a long term placement with the same foster parents she had been with since 1993 and that the other two children be adopted by the family with which they had lived during most of their time in care. The plan called for continued access among the children if they were placed in separate homes.

The trial judge, in his decision, summarized the history of the proceeding and briefly reviewed the key evidence before concluding that:

> It would appear that the evidence before the Court determines that the Respondent has been unable to adopt effective parenting techniques while a teenager herself. She also had to curtail her education at the grade 10 level. It would appear the Respondent has been unable to supervise the proper raising of her children in a manner such as to avoid emotional and physical harm to them.
>
> I would refer to the case of **Children's Aid Society of Halifax v. M.A.** (1986) 76 N.S.R. (2d) 18 and quote Niedermayer, J.F.C. at Page 21, Paragraphs [16] and [17]:
>
> > It is a serious and important decision to remove a child from his or her parent:

Children's Aid Society of Halifax v. Lake (1981), 45 N.S.R. (2d) 361; 86 A.P.R. 361 (N.S.C.A.). But the object of such a result is to protect children from inappropriate parenting or conditions. Ultimately, it is how a judge perceives, from the evidence, that the welfare of a child can be best served: section 76 **Children's Services Act**.

> The courts are never called upon to wait until physical injuries have been received or minds unhinged. It is sufficient if there be a reasonable apprehension that such things will happen, and the courts should interfere before they have happened if that is possible:

Dauphin v. Director of Public Welfare (1956), 5 D.L.R. (2d) 275 (Man. C.A.).

> The test is: What is in the best interests of these children and not merely whether the mother has seen the light and is now prepared to be a good mother, while in the past, on her own admission, she was not such. The test is whether the mother has in fact turned a new leaf and whether she is now able to give to the children the care which is in her best interests. Good intentions are not sufficient. As the Chief Justice of this court, speaking in a unanimous decision in another case stated so ably: 'to give this mother another chance is to give these children one less chance in life':

per Monin, J.A., **C.A.S. of Winnipeg v. Redwood** (1980), 19 R.F.L. (2d) 232 (Man. C.A.).

> Love, devotion and good intentions are not the sole ingredients to sound parenting. They are important elements, possibly even essential, and without them very poor results can occur in a child's development into adulthood. What has to be coupled with the emotional connection a parent has for a child is the ability to carry out the difficult job of parenting. When a child has special needs, such as J. has, then it is even more taxing upon the parent's ability.

> The Court can easily apply the above words to the case at hand. Taking the evidence into consideration the Court finds that the Respondent has exhibited she is unable to effectively parent her three children in a responsible manner. Therefore the Court believes it is in the best interests of the children for them to reside separate and apart from their mother.

The first five grounds of appeal raise questions of fact. The test on appeal involving findings of fact is well settled: this Court will not interfere unless the findings cannot be supported by the evidence, or the trial judge has acted on wrong principles. This Court cannot substitute its opinion of the weight to assign to the evidence for that of the trial judge. See **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 12 N.S.R. (2d) 258 and **Family and Children's Services of Kings County v. D.R. et al.** (1992), 118 N.S.R. (2d) 1 (S.C.N.S.A.D.). In **S.G. v. Children's Aid Society of Cape Breton** (1995) 142 N.S.R. (2d) 57, Justice Freeman, expressed the test in the following manner:

> . . . The weight of evidence is a matter for the trial judge in his assessment of the facts. His decision is entitled to deference by an appeal court, which has not heard nor seen the parties and the witnesses. ... In child welfare matters the deference to be shown the decision of the trial judge, and the assessment of errors of law and fact, must be determined in the light of the best interests of the child as defined by the **Children and Family Services Act** . .

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In the appellant's factum, the first five grounds of appeal are combined as one submission that the evidence did not support the finding that the appellant was unable to parent her children. The appellant submits that the trial judge misapprehended, ignored or failed to properly evaluate the evidence that the appellant had made some progress in parenting skills, that she knew how to supervise the children, and that she had the support and assistance of her mother and J..

While it is true that the trial judge did not specifically refer to the evidence of Camilla MacCarthy, the child protection worker, Dr. Hastey and Ms. Connor that the appellant had made some improvement at various times over their two year involvement, there is no question that the unanimous conclusion reached by those experts was that the improvements were only temporary.

Although it is evident that the appellant did use the time-out method of discipline on March 1, 1995, she was apparently unable to use it effectively and when the children tested her, she quickly lost the control necessary to deal with them. The other two incidents of March 1, that of driving the car and leaving the baby unattended were sufficient proof that the appellant lacked the common sense necessary to care for her children. Considering that the lapses occurred while the appellant's actions were being monitored by Ms. Connor, it is distressing to contemplate what might happen if she were unsupervised. It was clear that the intense attempts to teach her proper parenting skills were unsuccessful.

Although the trial judge incorrectly stated that two sets of foster parents testified, nothing turns on that misstatement in my opinion. The incorrect reference

was made in the context that the children had adapted to their foster home environments. The evidence in respect to the second set of foster parents was tendered to the trial judge by Camilla MacCarthy.

The appellant submits that the trial judge should have found that the appellant had a supportive mother who could help her with the children. The evidence does not support such a finding. The appellant's mother did not testify. The appellant's mother was a negative and disruptive influence on the appellant and the children. The appellant in fact testified that she preferred if her mother was not involved in the lives of her children at all.

In my opinion, the most significant of the trial judge's failures to comment on important evidence was that of Lise Godbout, a child psychologist, and there is nothing there of assistance to the appellant in her testimony. In answering a question about the attempt to reintroduce the oldest child to her mother in 1994, she said: (p. 406)

> I voiced my concerns very early on, even when the process was being considered, and I believe I said very specifically that if it was tried this one time and failed, that in my mind, they could forget trying again, because I knew it was going to be risky trying it with her. I didn't, I knew that if she made it this time, all right, but if she didn't make it this time, that it would be, it would be almost inhuman to try it again. Her ego is just too fragile. She comes across as a tough little cookie, but she's not. She's not at all.

Earlier in her testimony, she described the child as "exceedingly fragile" emotionally.

The first five grounds of appeal must, in my opinion, be dismissed. There is overwhelming evidence that supports the conclusions reached by the trial judge. Although the trial judge did not provide, with precision, his reasoning in

drawing some of his conclusions it is not evident that he acted on any wrong principle or disregarded any material evidence. I have examined and assessed the evidence carefully and agree with the ultimate findings of fact made by the trial judge that the appellant was unable to properly care for her children at the time of the disposition hearing. The passage quoted from Niedermayer, J.F.C. by the trial judge demonstrates that he was mindful of the proper test and that it was not necessary for the Agency to prove lasting physical injury to the children, nor were the good intentions of the parent a sufficient basis for exposing them to the substantial risk of further harm from lack of supervision or adequate parenting.

The sixth ground of appeal raises the issue of whether the trial judge provided adequate reasons for the disposition decision or whether he erred in law by failing to comply with s. 41(5)(b)(ii) of the **Act**. That section is as follows:

> 41 (5) Where the court makes a disposition order, the court shall give
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> . . .
>
> (b) the reasons for its decision, including
>
> . . .
>
> (ii) where the disposition order has the effect of removing or keeping the child from the care or custody of the parent or guardian, a statement of the reasons why the child cannot be adequately protected while in the care or custody of the parent or guardian.

The appellant relies on **Lowe v. Tramble** (1980), 42 N.S.R. (2d) 481 (T.D.) for the submission that the trial judge erred in law by failing to give adequate reasons. The statute at that time required that a judge making an order "shall give

written reasons". In that case the Family Court judge said, in a very brief oral decision, that he would provide written reasons "as to why" he was making the decision, but later advised the parties that he would not be filing further reasons. Upon granting the application for **certiorari**, the Supreme Court judge held that the trial judge had refused jurisdiction by not giving written reasons and had thereby committed error on the face of the record.

Here, the trial judge provided reasons, the issue is one of sufficiency of those reasons considering the directions contained in the **Act**. The crux of the matter is that although the trial judge provided reasons for the finding that the children were at risk while in the appellant's custody, he then arrived at the conclusion that it was therefore necessary to order a permanent committal to the Agency without explaining why other alternatives would not be in the best interests of the children. What is missing is an analysis of why possible less intrusive measures might have provided the protection required. Section 42(2) of the **Act** provides:

> 42 (2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
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> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.

Although the trial judge did not specifically state that these preconditions

had been met, or why, in his view, there was no other option for the care of the children than to grant the permanent care order, it is obvious in this case that the Agency provided numerous services to the appellant pursuant to s. 13 and that despite the various and extensive professional efforts to teach the appellant to look after her children, ultimately, all the less intrusive methods failed to provide adequate protection for the children.

The appellant in her cross examination agreed that the Agency did all that they could to help her, as indicated in the following passage:

> Q. And when issues of safety need to be confronted, you don't confront them until after you've been confronted? That's been the pattern, hasn't it? Why should we think that it's going to be any different three months from now, six months from now, a year from now? You have tried your best, haven't you?
>
> A. Yes. I . . .
>
> Q. . . . and it hasn't gotten any better in the sense of believing that you can be trusted to do these things before you get confronted about what's inappropriate? Right? You've been through, you can't say the Agency hasn't tried to help you?
>
> A. No.
>
> Q. They've spent a lot of time, a lot of effort to try to help you with your parenting skills?
>
> A. Yes.
>
> Q. And these things still keep happening?
>
> A. Yes.
>
> Q. And you know how crucial time is for your children? That they don't have a lot of time left to do the right things, given their ages?
>
> A. Yes.

> Q. And you've known how crucial that's been for the last year?
>
> A. Yes.
>
> Q. And it still hasn't made an impression enough on your head to cause you to act differently?
>
> A. (No answer heard)
>
> Q. You're still doing inappropriate things and they're being brought to your attention and you say, okay, I won't do them anymore?
>
> A. Yes.
>
> Q. Do you sometimes think maybe it was just too much to handle? Your age and too many kids?
>
> A. The age I was, it was, it was tough, with three small children all under the age of three, or four. It was hard.
>
> Q. Especially when you add into that mix [the eldest child], who needed special care, and maybe . . .?
>
> A. I knew that they were my responsibility and wanted to do the best I could.
>
> Q. Right. And the Agency has given you every opportunity to improve yourself?
>
> A. Yes.

In **Family and Children's Services of Kings County v. D.R., et al., supra**, Justice Chipman discussed the various factors that are to be taken into account in the following passage at paragraph 31:

> I recognize that the **Act** is characterized by long lists of factors to be taken into account at every stage of the proceedings. Many of them have no relevance to the case at hand, and the trial judge can hardly be faulted for failing

> in all cases to verbalize the various factors in their entirety in reaching a conclusion. It is the substance that counts, and as long as the agency plan and the Family Court judge address and evaluate the applicable factors in s. 41(3), as they apply to the circumstances of the case, that section of the **Act** has been complied with. The many other factors directed for consideration in various parts of the **Act** (eg. s. 3(2) and 13(2) - a total of 25) need not all be spelled out. Only those relevant to the case need be specifically addressed by the court in reviewing the plan and arriving at the decision. Central to all of the concerns is the paramount consideration, which is the best interests of the child (s. 2(2)) . . .

It is the substance, not the form, that matters most in this instance as well. There is no doubt that the Family Court judge was guided by the paramount consideration of what was in the best interests of the children and that the disposition was in their best interests. Having heard the evidence of Dr. Hastey and Ms. Godbout, that it would be dangerous and "almost inhuman" to allow the children to remain in “legal limbo” any longer or to return them to their mother, and having the admission of the mother that she had been given every possible opportunity to improve herself, and having noted that the proceeding involving three young children who had at that point been before the court for more than two years, the Family Court judge really had no option other than to make the disposition that he did. The appellant presented no other viable, less intrusive plan to the court. The continuation of her care of the children, in the circumstances, would not provide for adequate protection of the children. Despite all of the help and instruction, she continued to demonstrate her inability to properly save them from harm, to supervise them and to dispense discipline without resort to physical force. Almost another whole year has passed and there is still no alternative plan offered by the mother to this Court.

While agreeing with the appellant that it would have been preferable for the trial judge to specifically provide more detailed reasons for the conclusions he reached, I find no error in law in the circumstances. The appeal is therefore dismissed, without costs.

Roscoe, J.A.

Concurred in:

Matthews, J.A.

Flinn, J.A.