C.A. No. 131706

NOVA SCOTIA COURT OF APPEAL

Pugsley, Hart and Flinn, JJ.A.

Cite as: J. C. v. Nova Scotia (Community Services), 1997 NSCA 34

BETWEEN:

J. C. and C. C. Appellants - and - MINISTER OF COMMUNITY SERVICES Respondent	)	David A. Grant for the Appellant Gordon R. Kelly for the Respondent Appeal Heard: January 24, 1997 Judgment Delivered: February 17, 1997

Editorial Notice

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

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Hart and Pugsley, JJ.A. concurring.

LINN, J.A.:

This is an appeal from the decision of Judge Williams of the Family Court of Nova Scotia wherein he refused to terminate an order, which he had previously made, for the permanent care and custody of a female child, pursuant to the

provisions of s. 42(1)(f) of the **Children and Family Services Act**, S.N.S. 1990, c. 5.

Background

The child is presently six years of age. She continues to suffer from the effects of a great deal of physical and emotional abuse, inflicted upon her by her mother, from the time the child was born until the respondent intervened, when the child was approximately three years of age.

I will refer to the appellants as the child's grandparents. The female appellant is the maternal grandmother of the child. She has lived for some time with the male appellant. The two were married in May, 1995.

There is a lengthy, litigious, history here. The proceedings, involving this child, started in November 1993 just before the child's third birthday. An interim order was issued by a judge of the Family Court, on November 15th, 1993, which provided that the child be placed in the care and custody of the respondent.

Following a series of proceedings, including a lengthy review hearing in September and October, 1994, and to which the grandparents were parties, Judge Williams ordered that the child be placed in the permanent care and custody of the respondent. Judge Williams' decision is reported in (1995), 138 N.S.R. (2d) 243. In coming to his conclusion Judge Williams said the following at p. 267:

> "The evidence does not support a conclusion that [the child's mother] will be in a position to parent [the child] by April 1995. [The child's] needs and [the mother's] limitations make this clear.
>
> Nor does the evidence support the view that the [grandparents] are or will be. Again [the child's] needs mitigate against such a conclusion. Further, the [grandparents] plan indicates they have failed to recognize or accept [the child's]

> needs and the actions of [the child's mother]. They have not been forthright - or have lied - to collateral support services such as Dartmouth Social Services and the Commission on Drug Dependency. They each have had personal problems that raise questions as to their ability to provide [the child] the type of care she requires - stress, violence, criminality, difficulty getting along with others (boarders, co-workers). The nature of their relationship with [the child's mother] should they have [the child] has not been explored. I cannot conclude that they could work honestly, constructively and in a manner sensitive to [the child's] needs with Dr. Carolyn Humphreys."

And further at p. 270:

> "I conclude that [the child] was physically abused, emotionally abused and neglected over an extended period of time. She remains a child at high risk of further abuse.
>
> The "obligations" that her mother and extended family had to her were not met while she was in their care - nor have they been met since the intervention of the agency. Denial of problems, though understandable in some contexts, brings delay to their resolution. Lies or half-truths do not allow a court to make positive conclusions about understanding, commitment or stability. The parental and family preferences within the Children and Family Services Act are there to protect the interests of the child. They are important, even vital, considerations. Reliance on these preferences must, however, carry with it a responsibility to act in a fashion consistent with the child's overall best interests."

The child's mother appealed Judge Williams' Order to this Court, and the appeal was dismissed in February, 1995. See (1995), 138 N.S.R. (2d) 241.

In December 1995, the grandparents made application pursuant to s. 48 of the **Act** to terminate Judge Williams' Order for permanent care and custody of the child. Section 48(8) and (10) of the **Act** provide as follows:

"48 (8) On the hearing of an application to terminate an order for permanent care and custody, the court may

(a) dismiss the application;

(b) adjourn the hearing of the application for a period not to exceed ninety days and refer the child, parent or guardian or other person seeking care and custody of the child for psychiatric, medical or other examination or assessment;

(c) adjourn the hearing of the application for a period not to exceed six months and place the child in the care and custody of a parent or guardian, subject to the supervision of the agency;

(d) adjourn the hearing of the application for a period not to exceed six months and place the child in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency; or

(e) terminate the order for permanent care and custody and order the return of the child to the care and custody of a parent or guardian or other person.

. . . . .

(10) Before making an order pursuant to subsection (8), the court shall consider

(a) whether the circumstances have changed since the making of the order for permanent care and custody; and

(b) the child's best interests."

The Decision of the Trial Judge

Following a hearing, Judge Williams dismissed the application. After referring to the recent decision of this Court in **S.G. v. Children's Aid Society of Cape Breton et al** (1996), 151 N.S.R. (2d) 1, Judge Williams correctly set out the test for considering the application of the grandparents to terminate the order for permanent care and custody.

He said in his decision:

> "The test in this proceeding is essentially a twofold test:
>
> (1) have the circumstances changed so that there is no longer any need for protection, and that the parent is a proper person to care for the child? .....
>
> (2) when the application is made, is it in the best interests of the child to terminate the order?"

Judge Williams then went on to apply that test to the application which was before him and decided that the application of the grandparents failed to meet the burden of proof with respect to both prongs of the test. The grandparents appeal Judge Williams' decision.

Grounds of Appeal

Counsel for the grandparents advances two grounds of appeal:

1. That the trial judge erred in determining that the grandparents had not met the burden of proof set out in s. 48(10)(a) of the **Act**. In this regard, counsel for the grandparents says the following in his factum:

> "The [appellants] are grandparents against whom no finding has been made and consequently that a far lower standard of evidence of

> change should be required to be produced by them to meet the burden.
>
> It is submitted that the burden has been met and that the matter should be remitted to the Family Court for further hearing."

2. That the trial judge erred in deciding that it was not in the child's best interest to be placed with the grandparents. In this regard counsel for the grandparents says in his factum:

> "In coming to that conclusion, he appears to have failed to take into account the [grandparents] love for [the child], their clear ability to deal with her day to day needs and if supported by the department, her special needs."

Standard of Review

This Court's power on the hearing of an appeal under the **Act** is contained in s. 49(6) which provides as follows:

> "49 (6) The Appeal Division of the Supreme Court shall
>
> (a) confirm the order appealed;
>
> (b) rescind or vary the order; or
>
> (c) make any order the court could have made."

In **Family & Children Services of King's County v. D.R. et al** (1993), 118 N.S.R. (2d) 1 (N.S.C.A.) Chipman, J.A. said the following concerning the standards by which this Court will review decisions of the Family Court made under the **Act**. He said at p. 13:

> "I emphasize the unique advantage possessed by the trial judge in carrying out the duties mandated by the **Act**. Family Court judges presiding at trial are best suited to strike the delicate balance between competing claims to the best interests of the child. In the absence of error in law or clearly wrong findings of fact, this Court is neither willing nor able to interfere. See **Nova Scotia (Minister of Community Services) v. S.M.S. et al** (1992), 12 N.S.R. (2d) 258."

Disposition

The grandparents first ground of appeal ignores the fact that in the first hearing, when Judge Williams ordered the child to be placed in the permanent care of the respondent, he did make findings against the grandparents. I have quoted from Judge Williams' decision in this regard in the Background to these reasons.

As to whether the grandparents had met the burden of proving a change in circumstances "so that there is no longer any need for protection, and that the parent is the proper person to care for the child", Judge Williams said the following:

> "The [grandparents] have asserted that the following changes have taken place:
>
> (1) they are married;
> (2) they have moved;
> (3) their rent is less;
> (4) their attitude to their daughter, [the child's mother], to people working with [the child], to the [child's] needs, and to the Department of Community Services has changed; and
> (5) that their household is, in their words "calmer"."
>
> They have stabilized their own lives and are to be commended for that. They have not, in making or presenting this application, explored or resolved their relationship with "their" daughter, [the child's mother], who abused the child."

Judge Williams concluded that the application of the grandparents was

more indicative of "their absolute resolve to do everything they can to get [the child] back" ... "than any change that could be seen in the circumstances before the court as they concern [the child] or [the child's] needs or, for that matter, [the grandparents] ability to react and deal with [the child's] needs."

Judge Williams correctly pointed out that while the grandparents effected change which stabilized their own lives, it is necessary to show change in circumstances so that the child is no longer in need of protection. It is the welfare of the child that is paramount.

In **Tefler v. Family and Children's Services of Annapolis County** (1982), 50 N.S.R. (2d) 136 (N.S.C.A.) Jones, J.A. said the following at p. 154:

> "I agree that on an application for termination the primary consideration must be the best interests of the child. A judge must be satisfied the parent's circumstances have changed so there is no longer any need for protection and that the parent is a proper person to care for the child, and when the application is made that it is in the best interests of the child to terminate the order."

Judge Williams accepted the fact that the grandparents loved the child, and have exhibited commitment and persistency in their efforts to get the child back from the respondent. Judge Williams, however, concluded as follows:

> "[The child's] need for protection arose from abuse. It arose from what could be considered to be serious abuse. I have no reason to believe that [the grandparents] are in any better position to recognize or deal with [the child's] extraordinary and, indeed, profound needs now than they were in 1994.....
>
> Sadly, I cannot help but conclude that [the child's] needs exceed their grasp. I concluded that in 1994. I do not have evidence that would justify me concluding otherwise at this time."

In their second ground of appeal, the grandparents submit that the trial judge erred in deciding that it was not in the child's best interests to be placed with

the grandparents. In his decision Judge Williams said the following:

> "Dr. Carolyn Humphreys is [the child's] therapist. She is of the opinion that [the child] should have absolutely no contact with her mother. [The child's mother] supports [the grandparents] application, seeing it, clearly from her evidence, as a vehicle that could potentially reunify her with [the child] and at least provide her with some contact. Dr. Humphreys' view is essentially that [the child's] care will have to be therapeutically monitored indefinitely. Dr. Humphreys supports the Department plan of subsidized adoption. The psychological sensitivity required to deal with this profoundly disturbed child cannot, according to Dr. Humphreys, be found in the plan put forward by [the grandparents]."

Judge Williams had reason to be concerned about possible future contact between the child and her mother. While at one point in his testimony, the grandfather testified that he would not permit contact between the mother and the child, at another point in his testimony he said:

> "Q. What about contact with [the child's mother]?
> A. [The child's mother] would have to understand that if [the child] didn't want to see her that was going to be it. She was -- we'd have to see [the child's mother] outside our home. I mean that's all there is to it."

In her affidavit in support of the application to terminate the order of permanent care, the grandmother said:

> "That we do not suggest that [the child] have any contact whatsoever with [the child's mother] at this time."

The child's mother testified in support of the grandparents' application. In direct testimony, after indicating that she was aware of the application that the grandparents were making to terminate the order for permanent care, she testified as follows:

> "Q. And have you discussed that with [the grandparents] at any point in time?
> A. Yes.

Q. And what's your view of the application?
A. My view is that my parents are going to get permanent care and custody with limited visitation at first if they got my daughter.
Q. Sorry?
A. If they got my daughter [the child] that my visitations were going to be very limited at first and that I told them that whatever they have to do to get her to go ahead and proceed with it.
Q. And you're in agreement with whatever is required --
A. Yes.
Q. -- that they should get custody of the child?
A. Yes."

And in cross-examination the mother testified as follows:

"Q. You would like to see [the child], wouldn't you?
A. Yes, I would.
Q. And I understand that the -- when this application was discussed with your mother that your understanding is that there would be limited visitation at first?
A. If any at all.
Q. And the reason for that was is that if the application is granted [the child] goes to live with [the grandparents] and I take it the idea was is to have it limited at first and then see how it goes?
A. Yes.
Q. And then they would make decisions later on as to how extensive that access would be, depending upon how the situation went, is that correct?
A. Yes."

The mother then testified in response to Judge Williams as follows:

"Q. So that if [the child] went with [the grandparents] you would see there being a possibility that she would ultimately come to you or no possibility whatsoever?
A. I'm hoping there might be a possibility I can get her back."

The trial judge said in his decision:

"I conclude that [the child's] best interests insofar as they are attainable by anybody at this time remain in the pursuit of the agency plan which was adopted in 1994."

In summary, Judge Williams rejected the grandparents' application

because: (i) there was no change in circumstances, which concerned the needs of the child, or the grandparents' ability to deal with those needs; (ii) he accepted the recommendation of Dr. Humphreys, the child's therapist, that the child should have no contact whatsoever with her mother; and he was concerned, on the basis of the evidence, that there was a lack of clarity with respect to the role of the child's mother; and, (iii) he decided that the psychological sensitivity, required to deal with the child, who was extremely disturbed because of abuse, is beyond the grasp of the grandparents. For that reason he decided that it was in the child's best interests that her future remain in the control of the respondent.

In coming to his conclusion, Judge Williams made no error in law. His findings are clearly supported by the evidence which was before him, and there is no basis upon which this Court should interfere with his decision.

I would, therefore, dismiss this appeal, in the circumstances, without costs.

Flinn, J.A.

Concurred in:

Hart, J.A.

Pugsley, J.A.

C.A. No. 131706

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

J. C. and
C. C.

Appellants

- and -

MINISTER OF COMMUNITY SERVICES

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.