

NOVA SCOTIA COURT OF APPEAL

Citation: E.A. v. Family and Children's Services of Yarmouth County.
2005 NSCA 41

Date: 20050302

Docket: CA 235372

Registry: Halifax

Between:

E.A. and S.D.

Appellants

v.

Family & Children's Services of Yarmouth County

Respondent

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

Judge(s): Hamilton, Freeman & Fichaud, JJ.A.

Appeal Heard: February 11, 2005, in Halifax, Nova Scotia

Held: Appeal allowed, as per reasons for judgment of Hamilton, J.A.;
Freeman & Fichaud, JJ.A. concurring

Counsel: Hugh Robichaud, for the appellant Sid DeViller
Marci Melvin, for the appellant, E A.
Gregory Barro, 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] The appellants, S.D. and E.A., appeal the October 12, 2004 order of Chief Judge John D. Comeau of the Family Court wherein he ordered that their son, J.A., born April (*editor's note- birthdate removed to protect identity*), 1998, be placed in the permanent care and custody of the respondent, Family and Children's Services of Yarmouth County, for the purpose of adoption pursuant to the **Children and Family Services Act**, S.N.S. 1990, c.5, as amended.
- [2] This protection matter has been before this court previously. The same judge made an order for temporary care and custody dated April 2, 2004 that was previously appealed to this court by the agency. The appeal was dismissed. Those earlier decisions are reported at [2004] N.S.J. No.18 (Q.L.) and [2004] N.S.J. 300 (Q.L.) respectively.
- [3] The judge's earlier order provided that J.A. be placed in the temporary care and custody of the agency for a period of six months in compliance with s. 45(2)(b) of the **Act** and continued:
- A. The Respondent father, S.D., shall continue to have access in accordance with the Agency's guidelines;
 - B. Family and Children Services of Yarmouth County shall assist and arrange for the Respondent father, S.D., to take parenting courses with particular emphasis on discipline;
 - C. That Family and Children Services of Yarmouth County investigate and provide such other services outlined in Section 13 of **The Act** as would assist the Respondent father, S.D., in parenting J.A. so as to adequately protect him;
 - D. That the Respondent father, S.D., will with the cooperation of the Agency continue with nutritional counselling for J.A. which he had already started at Southwest Health;
 - E. That if the Respondent father, S.D., is convicted of any of the child related criminal charges against him, this Court shall immediately be notified by any or all of the parties. Consequently, the

Respondent S.D. will be entered on the Child Abuse Register and upon review an Order will issue [from] the Court granting permanent care and custody of J.A. to the Agency.

F. That the Respondent, E.A., is not to have any contact with the child unless she participates and completes counselling and/or parenting courses satisfactory to the Agency.

1. THAT this Order for Temporary Care and Custody shall be reviewed by the Court at a hearing to be held on the 8th day of September, A.D., 2004 at the hour of 9:00 in the forenoon [or] sooner upon the Application from any party of this proceeding upon notice to the other parties.

(Emphasis mine)

- [4] Sometime after this order and before September 8, 2004 S.D. was found guilty of assaulting one of E.A.'s sons and of sexually assaulting one of E.A.'s daughters.
- [5] The court was not notified of these convictions as required by clause E. of the order as it should have been. The temporary care and custody order returned to court on September 8, 2004 for review pursuant to the last paragraph of the order. At that time the judge was informed by the agency's counsel that S.D. had been convicted of the child related criminal charges referred to in paragraph E of the order. S.D.'s counsel indicated S.D.'s conviction for sexual assault was being appealed and sought an adjournment of the review of the temporary care and custody order until the appeal was decided. The judge refused to grant an adjournment.
- [6] Without giving counsel for the parties an opportunity to present evidence or make submissions on any factors relevant to a review of a temporary care and custody order, including the factors set out in s.46(4) of the **Act**, and without giving E.A.'s counsel an opportunity to speak, the judge made his decision:

Well I can't, you know, sit around here and think about pending appeals. I have to follow my own order that I made and it's agreed on the public record that he's been convicted of child sexual assault so; therefore, the child should be made a permanent - be placed in permanent care and custody as per my order.

(Emphasis mine)

- [7] After counsel for E.A. spoke up, indicating he was supporting S.D.'s request for an adjournment until the criminal appeal was decided and raising the separate issue of E.A.'s access to J.A. that was also outstanding in accordance with paragraph F of the order, the judge again stated, “. . . it doesn't change the decision I just made to follow my own order.”
- [8] Counsel for S.D. indicated at the hearing before us that the appearance before the judge on September 8, 2004 lasted only eight minutes. The eight page transcript supports this.
- [9] The issue in this appeal is whether the judge erred by not conducting a review on September 8, 2004, before he ordered that J.A. be placed in the permanent care and custody of the agency.
- [10] The standard of review is as set out in this court's decision dismissing the previous appeal:

[20] Unless the judge has acted upon a wrong principle of law or committed an obvious and critical error in appreciating or applying the evidence, this court will not interfere: *T.B. v. CAS* (2001), 194 N.S.R. (2d) 149 (C.A.) at para. 15.

- [11] I am satisfied the appeal should be allowed because the judge erred in law when he failed to conduct a review on September 8, 2004 before ordering that J.A. be placed in the permanent care and custody of the agency.
- [12] The judge's and this court's previous decisions provided that there was to be a review of the temporary care and custody order on September 8, 2004.
- [13] In his prior decision the judge stated at ¶ 51:

It would be in the child's best interest, if possible, to continue a relationship with his father. The type and extent of that relationship has yet to be determined. **One factor** in particular would be any conviction on the criminal charges against the Respondent, S.D. These charges consist of offences with respect to a child. A conviction would result in his name being placed on the Child Abuse Register and the consequences are self-evident. (Emphasis mine)

- [14] Thus the judge's decision indicates “one factor in particular” to be considered at the September 8, 2004 review would be any conviction against S.D., but it does not restrict the review to that one factor alone.

[15] The judge's order was more categorical in paragraph E. as to what would happen if S.D. were convicted, but even paragraph E. used the word "review" in describing what would occur when the temporary care and custody order returned to court six months later:

E. That if the Respondent father, S.D., is convicted of any of the child related criminal charges against him, this Court shall immediately be notified by any or all of the parties. Consequently, the Respondent S.D. will be entered on the Child Abuse Register and **upon review** an Order will issue [from] the Court granting permanent care and custody of J.A. to the Agency. (Emphasis mine)

[16] The word "reviewed" was also used in the last paragraph of the order as can be seen in ¶ 3 above.

[17] This court's prior decision made it clear a review was required even if S.D. were convicted:

[26] In his decision the trial judge referred to the criminal charges faced by S.D, noting that none involved J.A. He stated that any conviction on the criminal charges would be a factor in the determination of the type and extent of the relationship between father and son. In his order, placing J.A. in the temporary care of the agency for six months, he was careful to include a condition requiring that the court be immediately notified by any or all of the parties should S.D. be convicted of any of the child related criminal charges against him, and to provide for a review by the court. His order also emphasized that it could be reviewed prior to its expiration. The incorporation of such terms and conditions in his order is within the jurisdiction of the trial judge, according to s. 43(1) of the *Act* which provides that the court may impose reasonable terms and conditions in relation to the child's care and supervision including any which it considers necessary.

[27] In the circumstances of this case, the conditions contained in the order are appropriate safeguards. We would rely on the trial judge to closely review his order whenever and however it returns for review. (Emphasis mine)

[18] Despite the expressed intention of the judge himself in his earlier decision and order to conduct a review when the temporary care and custody order returned to court, the importance of which was emphasized by this court's decision on appeal, I am satisfied no adequate review was held.

[19] Section 46(4) of the **Act** mandates that certain matters be considered on a review:

(4) Before making an order pursuant to subsection (5), the court shall consider

(a) whether the circumstances have changed since the previous disposition order was made;

(b) whether the plan for the child's care that the court applied in its decision is being carried out;

(c) what is the least intrusive alternative that is in the child's best interests; and

(d) whether the requirements of subsection (6) have been met.

(5) On the hearing of an application for review, the court may, in the child's best interests,

(a) vary or terminate the disposition order made pursuant to subsection (1) of Section 42, including any term or condition that is part of that order;

(b) order that the disposition order terminate on a specified future date; or

(c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 43 for supervision orders and in Section 45 for orders for temporary care and custody.

(6) Where the court reviews an order for temporary care and custody, the court may make a further order for temporary care and custody unless the court is satisfied that the circumstances justifying the earlier order for temporary care and custody are unlikely to change within a reasonably foreseeable time not exceeding the remainder of the applicable maximum time period pursuant to subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 46.

[20] The transcript of the proceedings before the judge on September 8, 2004 shows that he did not consider any of these mandatory factors. It indicates he did not provide the parties a chance to address these factors with evidence or submissions. He did not give them an opportunity to address the then current best interests of J.A. or the changes, if any, in the parents' circumstances as a result of any services provided to them in the six months following his prior order.

- [21] Reading the transcript satisfies me the judge did not in fact conduct a review on September 8, 2004. With respect, what he did was simply rubber stamp a permanent care order with respect to J.A. upon hearing that a provision he included in the order he granted six months earlier had been met. His decision reproduced in full in paragraph 6 above makes this clear.
- [22] What was required before an important decision such as this was made was a review of the then current situation, considering the factors set out in s. 46(4). This did not take place. I am not suggesting the decision of the judge would necessarily have been different if such a review had been held. Convictions on child related offences are serious matters to be taken into account when determining whether permanent care should be ordered. However it is trite to say that placing a child in the permanent care and custody of the agency is a fundamentally important matter that should only be done after a current review as required by s. 46(4). I appreciate that counsel and the judge were working under time constraints. It would not have taken long however to have conducted a review given the judge's extensive knowledge of J.A. and the parties.
- [23] Given the judge's familiarity with J.A. and the parties, he is in the best position to conduct the required review to determine as quickly as possible whether or not J.A. should be placed in the permanent care and custody of the agency.
- [24] I would allow the appeal without costs, as none were sought, and order that J.A. remain in the temporary care and custody of the agency on the terms and conditions set out in paragraphs A., B., C., D., and F. of the April 2, 2004 order, as set out in paragraph 3 above, until such time as the judge is able to conduct the review that ought to have been held on September 8, 2004, which review should be conducted as soon as possible.

Hamilton, J.A.

Concurred in:

Freeman, J.A.

Fichaud, J.A.