NOVA SCOTIA COURT OF APPEAL

Citation: A.M. v. Children's Aid Society of Cape Breton-Victoria , 2005 NSCA 58

Date: 20050407
Docket: CA 236563
Registry: Halifax

Between:

A.M.

Appellant

v.

The Children's Aid Society of Cape Breton-Victoria

Respondent

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

Judges: Cromwell, Oland and Fichaud, JJ.A.

Appeal Heard: March 18, 2005, in Halifax, Nova Scotia

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

Counsel: Ann Marie MacInnes and Jill Perry, for the appellant
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:

I. INTRODUCTION:

[1] Wilson, J.S.C. (F.D.) ordered the appellant's two boys, now aged 5 and 8, to be placed in the permanent care of the respondent agency with no provision for access. The appellant appeals asking alternatively for a new hearing in the Family Division or an order granting access to her children. She submits that the judge exceeded his jurisdiction by not adhering to the time limits under the **Children and Family Services Act**, S.N.S. 1990, c. 5 and erred in the circumstances of this case by ordering permanent care without access.

II. OVERVIEW OF FACTS AND DECISION UNDER APPEAL:

[2] Before turning to the history of the proceedings, it will be helpful to remember two features of the **Act** which are at the heart of the appeal.

[3] The first is that the **Act** contains statutory time limits for the duration of disposition orders. It is common ground that the time limit set out in s. 45(1)(a) of the **Act** applies here. It provides that where the court makes a temporary care order, "... the total period of duration of all disposition orders ... shall not exceed .... twelve months."

[4] The second feature of the **Act** concerns orders for access by a parent after a permanent care order has been made. When a permanent care order is made, the agency becomes "... the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody" : s. 47(1). The court may make an order for access by a parent in relation to a child in the permanent care of an agency. However, the court is directed by the statute not to make an order for access unless (and I will consider only the provisions relevant to this case): (1) it is satisfied that a permanent placement in a family setting has not been planned or is not possible and access will not impair the child's future opportunities for placement; (2) the child has been placed or will be placed with a person who does not wish to adopt the child; or (3) some other special circumstance justifies making an order for access: s. 47(2). In addition, the **Act** provides that no child in permanent care and custody with a provision for access may be placed for adoption unless the order for access is terminated: s. 70(3).

[5] The appellant's case turns on these two features of the **Act** because she says the time limits were exceeded and an order for access was wrongly denied.

With that context in mind, I turn to the history of the agency's involvement with the children and the judge's decisions.

[6] At the outset, I emphasize that, unlike so many child welfare cases that we see, this is not a case of a neglectful or uncaring parent. Quite the opposite. Everyone agrees that the appellant has tried her very best to parent her special needs children, that she can tend to their basic needs and that there is a loving bond between her and them. The unfortunate truth is that, due to no fault of her own and despite her best efforts and lots of help, she has been unable to develop the capacity to parent her two special needs sons.

[7] The agency became involved in early 2002 after the older boy was assaulted by his father. The appellant and the two children stayed temporarily with family and later at Transition House. The older boy in particular was a challenge, having been diagnosed as having Attention Deficit Hyper-Active Disorder. The younger boy, too, has special needs.

[8] Concerns about the appellant's parenting surfaced. These included that she reacted inappropriately when the older boy misbehaved, that she stayed in bed while others cared for her children and that she showed obvious favouritism to the younger boy.

[9] The appellant was willing to accept agency services and other community assistance. She joined Parents Together, a support group, and an agency family support worker provided parent education. The Child and Adolescent Services Unit of the Cape Breton Regional Hospital provided guidance with child management techniques and medication for the older boy.

[10] Problems with the appellant's parenting persisted. The agency was concerned, in particular, by reports that the appellant verbally abused and struck the boys and that the older boy was displaying aggressive and even violent behaviours which she could not manage. A parent aid was provided for nine hours per week and, at the same time, a worker to help with the children's behaviour was placed in the home for up to nine hours per week. A summer student was provided to help with activities for the children and the younger boy was placed in daycare. The appellant continued to attend support groups at Transition House and Parents Together.

[11] No one doubted that the appellant was trying very hard. But in spite of her efforts, concerns about her parenting were not allayed.

[12] In mid September of 2002, the appellant called the agency because she could not manage the older boy. She asked that he be placed in foster care and the younger boy left with her. The agency felt that both boys were at

risk and both were apprehended and taken into care. Eventually, both boys were found, on consent, to be in need of protective services under s. 22 (2)(g) of the **Act** on the basis that there was a substantial risk that they would suffer emotional harm demonstrated by severe anxiety, depression, withdrawal or self-destructive or aggressive behaviour and the parent or guardian did not provide, or refused, or was unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.

[13] The agency was concerned that despite the appellant's best efforts, the assistance she had been given was not improving her ability to parent. It requested, and the appellant agreed, that an assessment be carried out to identify what might be contributing to her difficulty in acquiring the skills necessary to manage the children's behaviour.

[14] Dr. Landry, a psychologist, carried out this assessment. He concluded that the appellant has significant intellectual impairments with cognitive abilities in the border-line range compared to her peers. She had difficulty, he found, remembering new information, could be easily side-tracked, had deeply rooted dependency needs and experienced significant stress with respect to her role as a parent. Dr. Landry opined that the best way for the appellant to learn parenting skills was by means of behavioural training in which a trainer working with the appellant would identify skills and demonstrate them visually. The appellant could then practise these skills in the presence of the trainer who could provide feedback to her.

[15] An initial disposition hearing was held on March 7, 2003. This is an important date because a disposition order was made that day which marks the beginning of the one year time limit on the total duration of disposition orders under s. 45 of the **Act**.

[16] The agency's plan for the children was permanent care. However, the parties consented to a temporary care order on March 7. That order was thereafter extended on consent and a disposition hearing took place on July 29 and 30, 2003, followed by submissions on August 7, 2003. In an oral decision given on September 4, 2003, the judge refused to make the permanent care order sought by the agency but rather made a further temporary care order. He was not persuaded that appropriate, less intrusive alternatives had been tried and had failed. In particular, he wanted to see if the appellant could develop her parenting capacity through coaching in the manner proposed by Dr. Landry. As the judge put it:

> ... What it comes down to is that one of the requirements before the court considers in making a permanent care and custody order, is that less intrusive services have been attempted and failed and I am unable to conclude based on the information before me, given the short time in which the services, the most appropriate services for [the appellant], that is visual instructions, hands-on model[l]ing, as it were, the limited amount of time in which that was provided to [the appellant] I cannot conclude that the services have failed and therefore I am not prepared to order, make an order for permanent care and custody at this particular time. That is not to say that there aren't difficulties. The evidence has raised a number of concerns about [the appellant's] behaviour towards the children, the challenging the special needs of the children, the difficulties [the appellant] has in [acquiring] the appropriate skills to care for these children. ... She hasn't been given sufficient amount of time in order to see whether she can acquire these skills.
>
> I am not prepared to order that the children be returned to her care subject to supervision, but that they remain in temporary care. There will have to be for a period of time, I am recommending that a parent aid be continued to provide intensive hands-on instructions to [the appellant]. There is going to have to be some adjustment to the access regime, so that the children will be with [the appellant] on a length of ... longer period of time in order to receive this instruction in the home. There will have to be an assessment of her parenting capacity after four months of parent aid instruction. There should be some consultation between the Children's Aid Society and counsel for Mr. and Mrs. [M.], and if there is Dr. Landry or someone they can access to determine if there are other services that [the appellant] can access to assist her in parenting her children. ...

[17] The temporary care order was extended, ultimately into March of 2004. The court and the parties were anxiously concerned about the statutory time limit on the duration of temporary care orders. The initial temporary care order was made, as noted, on March 7, 2003, so that the time limit would expire in March of 2004.

[18] In the meantime, Dr. Landry completed a Psychological Assessment of Parental Capacity . He recommended that the boys be placed in the permanent care of the agency but with access by the appellant. The agency plan continued to be for permanent care without access so as to permit adoption. As matters developed, access became a significant issue with the agency proposing no access to facilitate adoption and the appellant urging that access be ordered and dealt with, if necessary, when adoption became a realistic option.

[19] On March 5, 2004, with the one year limit about to be reached, the parties agreed to the appointment of a mediator. The effect of this, as provided for under s. 21(2) of the **Act,** was to permit the court to stay proceedings for up to three months which, in turn, had the effect, under s. 21(3) of the **Act** of extending the time limits. The results of the mediation were reported to the court on April 7, 2004. The parties had agreed that even if a permanent care order without access were to be made, the agency would facilitate access until the hoped for adoption of the children actually occurred.

[20] A final disposition hearing was held on April 19, 2004 with the agency plan still being for permanent care with no access. The appellant opposed this plan and asked that either both children or, alternatively, the younger boy be returned to her or that if permanent care was to be ordered, it be with access. The judge reserved his decision.

[21] On September 30, 2004, the judge advised the parties by letter that his decision was to order permanent care with no access with respect to both boys. His written reasons were issued on November 19.

[22] After recounting the background facts and history of the proceedings, the judge found that both children had educational, mental and emotional needs that are compromised and that the appellant was not able to provide the appropriate care or treatment to meet those special needs. He accepted Dr. Landry's opinion that returning the children to the appellant would have a very detrimental effect on their well-being. After reviewing the services which had been provided and less intrusive options, the judge concluded that the circumstances which justified the removal of the children from the appellant's care were unlikely to change within a reasonably foreseeable time frame. He accepted that the agency's plan of permanent care with no order for access was in the children's best interests. He found that it was in their best interests that there be continuity of care for the children and that they were likely to suffer physical or emotional harm if returned to the appellant's care. As the judge put it:

> [40] The children ... are at substantial risk of physical and emotional abuse. The [parents] have been unable to overcome the risk factors which led to this finding despite services being put in place to assist them for the past year and one-half. The children continue to be in need of protective services. They can not be returned to the care of their parents and to be adequately protected in the foreseeable future. It is not possible to place them with relatives. It is in their best

> interests that they be placed in the permanent care of the Agency in accordance with the Agency's Plan.

[23] The judge considered the issue of access. He noted that most of the access visits had gone well. He observed, however, that the goal of the visits had been to have the appellant perform skills independently and consistently and that had not happened. The appellant had not been able to demonstrate that she could identify the children's cues for distress and had not been able to intervene quickly to remove the stress of the child and provide comfort. While the children are comfortable with the appellant during access visits, the judge noted that:

> [24] ...[The appellant] still has a difficult time managing the children's behaviour. [The older boy] can be physically aggressive with [the appellant] when she tries to discipline him. In the opinion of Dr. Landry [the older boy] responds negatively to his mother because of a past history of inconsistent parenting. [The younger boy] has a non-verbal learning difficulty which will be harder to manage when he enters school and will place greater demands on [the appellant]. ... Although [the appellant] is a very loving person she is easily frustrated and responds inappropriately both verbally and physically to both [the older boy] and [the younger boy] when they are acting out.

[24] The judge acknowledged that the children's ages and needs may make finding a permanent placement difficult, but he accepted the agency's position that the children ought to be given the opportunity to be placed for adoption. He recognized that an order for access would impede such a placement but acknowledged the mediated agreement that the agency would continue access in the event adoptions were not possible. He declined to make an order for access, summing up his conclusions this way:

> [42] The argument is made on behalf of [the appellant] that it may be difficult to place the children for adoption given their special needs. However the Agency has satisfied the Court that it is important that the children have continuity in care and that they be given the opportunity to be placed permanently in a home where their needs would be met. An access order would impede this placement. It is in the children's best interests that they be given every opportunity to have a stable home life in the future where their needs can be met on a consistent basis. I find that a Court order for access is not appropriate and not in their best interests and I deny the application for access.

III. ISSUES:

[25] The appellant raises 3 issues:

1. Whether the Learned Trial Judge did exceed his jurisdiction by not adhering to the mandatory time limit within the *Children and Family Services Act (N.S.)* both for the purposes of holding a hearing and also the issuing of the Order awarding permanent care with no access.

2. Whether the Learned Trial Judge erred in law in his application of the principles of the *Children and Family Services Act (N.S.)* to the facts of this case.

3. Whether the Learned Trial Judge erred in law and in fact, in making the dependent, [D.C.M.] born December 7, 1999 and [B.A.M.] born April 26, 1996, permanent wards of the Children's Aid Society of Cape Breton-Victoria and granting no access to the Appellant.

IV. ANALYSIS:

1. Standard of Review:

[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 Conuty 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.

2. The Time Limits:

[27] It is common ground that the temporary care orders in this case exceeded the maximum duration permitted under s. 45 of the **Act**. With that as the starting point, the appellant makes two related submissions. First, it is argued that the judge had no jurisdiction to make a permanent care order

once the time limits had been reached. Second, if the judge had discretion to extend the time to permit him to make his decision as to disposition, he erred in doing so here because he failed to consider whether the extension was in the best interests of the children and his refusal to order access should therefore be set aside.

[28] Turning to the first submission, there was no loss of jurisdiction here. The Court made this clear in **Nova Scotia (Minister of Community Services) v. B.F.** (2003), 219 N.S.R. (2d) 41(C.A.); [2003] N.S.J. No. 405 (Q.L.) (C.A.) at paras. 57 and 58 and **The Children's Aid Society and Family Services of Colchester County v. H.W.** (1996), 155 N.S.R. (2d) 334 (C.A.). The **Act** contemplates that there will be a judicial determination of the child's best interests. If a time limit, which is a milestone toward that determination, caused the court to lose jurisdiction to determine the child's best interests it would contradict the purpose of the **Act**. Therefore, the court did not lose jurisdiction by reserving its decision as to disposition for longer than the time limits for temporary care orders under s. 45.

[29] That leaves for consideration the second point, whether the judge erred in law by reserving his decision beyond the time limits without expressly addressing whether it was in the children's best interests to do so. **H.W**. dealt with this point at para. 41. There, Freeman, J.A., for the Court, stated that before reserving his decision for a period outside the time limits, the judge should have done two things. First, he "... should have determined whether a time extension for a reserve decision was in the best interests of the children, and made a further finding." Second, he should have ensured that "... the length of any extension [was] ... strictly constrained by the principles of the **Children and Family Services Act** ...". However, while the failure to do these things is an error of law, it does not follow that such an error requires the judge's ultimate order to be set aside. Freeman, J.A. went on to note that provided the judge did not err by failing to make an order that was in the children's best interests, it would not be appropriate to interfere with that decision notwithstanding the error associated with the extension of time: at para. 47.

[30] Following Freeman, J.A. in **H.W.**, I would conclude that the judge erred in law by failing to determine, at the time he reserved his judgment, that it was in the best interests of the children to do so and by failing to address his mind to the constraints on the length of such added delay. However, like Freeman, J.A. in **H.W.**, I would conclude that the judge's approach was

consistent with, and indeed infused with, concern for the best interests of the children and that it would not be appropriate to intervene here on the basis of this error.

[31] Of course the delay is regrettable. Of course it would have been better had the judge's reasons made explicit mention of this issue. It would have been better still had the decision respected the time limits. However, it cannot, in my respectful view, be seriously suggested that the judge did not think it in the children's best interests to make the order that he did when he did. It was manifestly in the children's best interests that he do so. Failing to proceed to make a decision could lead to only two results. The first, returning the children to their mother, was regrettably not a realistic option and the second, treating the proceedings as a nullity and requiring them to be restarted would have added more delay than the regrettable delay that had occurred already. As Freeman, J.A. put in **H.W.** at para. 30, "[n]ullification after a child is found in need of protection either deprives a child of that protection or subjects it to the delays inherent in starting proceedings all over again from the beginning. Child protection proceedings become a game of "snakes and ladders." That is precisely the situation here.

[32] To summarize my conclusions:

1. Surpassing of a time limit in the **Act** to determine the child's best interests does not result in the loss of jurisdiction: **H.W**. and **B.F**. However, as noted in **B.F.**, this principle does not apply to time limits which govern the contents of the order after that determination is made: **B.F**. at para. 58.

2. Time limits should not be extended in order to permit a determination to be made of the child's best interests unless, at the time they are extended, the judge determines that it is in the best interests of the child to do so: **H.W**. at para. 41.

3. Such extensions should not be open-ended but rather strictly constrained in accordance with the principles in the **Act**: **H.W**. at para. 41.

4. Failure to observe the approach set out in points 2 or 3 above is an error of law, but will not lead automatically to interference with the judge's ultimate determination. Intervention will follow only when it is shown, according to the applicable standard of appellate review, that the judge's decision to proceed, notwithstanding the expiration of the time limit, was not in the children's best interests.

5. In this case, the judge erred by reserving judgment beyond the time limits without, at the time, finding that it was in the children's best interests to do so and without constraining the time for reaching a decision. However, his decision to proceed was manifestly in the children's best interests in the circumstances of this case and his decision should not be interfered with on appeal as a result of this error.

3. Access:

[33] The appellant's second and third grounds of appeal relate to one question: did the judge err in refusing to order access in the circumstances of this case?

[34] There was evidence that the appellant's access to the children was beneficial and Dr. Landry recommended that it continue even though he also recommended the children be placed in permanent care. There was also little evidence to suggest that there was a strong likelihood of these two, special needs children finding adoptive homes. There was little evidence of what their realistic prospects of adoption were.

[35] In these circumstances, the appellant submits that it was wrong for the judge to refuse to make an order for access because the likelihood of adoption was unknown and the benefits of maintaining access were clear. The appellant says that the judge wrongly took into account the mediated agreement that access would be allowed to continue even absent an order for access.

[36] These submissions must be considered in light of three important legal principles. First, I would note that once permanent care was ordered, the burden was on the appellant to show that an order for access should be made: s. 47(2): **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, [1998] 2 S.C.R. 534 at para 44 and authorities cited therein. Second, I would observe that, as Gonthier, J. said in **L.M** at para. 50, the decision as to whether or not to grant access is a "... delicate exercise which requires that the judge weigh the various components of the best interests of the child." It is, therefore, a matter on which considerable deference is owed to the judge of first instance for the reasons I have set out earlier. I would note finally that, in considering whether the appellant had discharged her onus to establish that access ought to be ordered, the judge should consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access.

[37] In the present case, the choice facing the judge was not as drastic and stark as it, regrettably, often is. Here, the judge knew that, as a result of the mediated agreement, access would continue if adoptive placements were not found, even if he did not order it. The appellant submits that this knowledge somehow led the judge into error because it resulted in his not addressing the consequences of refusing to order access. However, it seems

to me that this was a perfectly proper matter for him to take into account. If, as is the case, he was obliged to take into account the benefits of access, he surely must be able to take into account that it was the agency's intention and agreement that, absent adoptive placements, access would continue whether ordered or not.

[38] The judge also considered the importance of adoption and the admittedly scanty evidence about the prospects for adoption. He did so in the context of his finding that the children could not be returned to the care of their parents in the foreseeable future. He concluded that it was necessary that there be continuity in their care and that it was important that they be given the opportunity to be placed permanently in a home where their needs would be met. He acknowledged the appellant's submission that it may be difficult to place the children for adoption given their special needs. He also concluded that it was in their best interests to be given every opportunity to have a stable home life in the future where their needs can be met on a consistent basis and that an access order would impede such a placement.

[39] In my view, this was indeed a delicate exercise which required the judge to weigh the various components of the best interests of the children. But in my view, the judge did not make any reviewable error in the way he conducted it. Contrary to the appellant's submission, he was entitled, if not obliged, to consider the reality of the situation which was that access would continue until adoptive placements became available. He recognized the fact that an order for access would impede finding such placements. He concluded that it was in the children's best interests that they be given every opportunity to have a stable home life which could best be achieved through adoption. In short, he was in the unusual situation of providing these children with continuing access to their loving mother without impeding the search for a permanent and stable home. With great respect to the appellant's able submissions, I see no error in legal principle and no palpable and overriding error of fact in the judge's reasons. On the contrary, given the sad reality that these children were not ever likely to go back into their mother's care, his decision in all of the circumstances seems to me to have been wise and just.

V. DISPOSITION:

[40] I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.