NOVA SCOTIA COURT OF APPEAL
Citation: ***K.B. v. Nova Scotia (Community Services)***, 2013 NSCA 69

Date: 20130607
Docket: CA 412854
Registry: Halifax

Between:

K.B.

Appellant

v.

Minister of Community Services

Respondent

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

Judges: MacDonald, C.J.N.S., Beveridge and Bryson, JJ.A.

Appeal Heard: May 23, 2013, in Halifax, Nova Scotia

Held: Appeal is dismissed, per reasons for judgment of Beveridge, J.A.; MacDonald, C.J.N.S. and Bryson, J.A.

Counsel: Appellant, in person
Michele Archibald-Hattie, interested party
Amy Sakalauskas, 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 Honourable Judge John D. Comeau dismissed an application to terminate an order that had 'permanently' placed the appellant's children in the care and custody of the Minister. His reasons are reported (2013 NSFC 5).

[2] The appellant is now self-represented. Her notice of appeal sets out five grounds of appeal. They are as follows:

> #1. My son, LB, did not have his own Legal Counsel. At the hearing he was 12 and should have had his own counsel.
> #2. Errors made by the judge referring on page 5 (3) as for myself and my ex-husband as I know*[sic]* longer am in a relationship with him and do not intend to regain a relationship with him.
> #3. The recommendations made by Olga Komissarova a registered Psychologist were not followed or taken into consideration in the decision handed down by the judge.
> #4 I feel that I was not given a fair chance to show that I can parent my children just because I have a learning disability and I do not feel that I would need the support of the agency for a long period of time. I do have the support of my family and other community support other than the agency.
> #5. In his decision section 39 I feel that when he states "be only for the benefit of the Applicant" is false because I do have the best interests of my children at heart because they are my children and I love them very much and care about their well-being. I have made mistakes but I have learned from them.

[3] The appellant's first complaint raises a legal error, a defect in the process. The remaining four allege errors by the trial judge in his appreciation of the evidence. In order to properly understand the appellant's complaints, some background is necessary.

BACKGROUND

[4] The appellant is the mother of three children: LB her son, now 12 years old; her daughter, SB, now 11 years old; and her son, AB, now nine years old. All three children were apprehended on January 26, 2011 on the basis that there was a substantial risk that they will suffer physical harm by the parents' failure to supervise the children adequately. Since 2004, numerous services have been offered to the parents through state involvement.

[5] On Feburary 23, 2011, the Court found that the children were in need of protective services. They have thereafter remained in foster care. The reasons for the apprehension are set out in the decision of Judge Comeau of August 24, 2011 (2011 NSFC 20) on the issue of permanent care and custody.

[6] Judge Comeau ordered the children be placed in the permanent care and custody of the Minister pursuant to s. 47 of the *Children and Family Services Act*, S.N.S. 1990, c. 5 (as amended). He relied on a parental assessment which described the need for long term support in order to enable the parents to be able to properly care for the children. This could not be accomplished in the time frames mandated by the *Act*. The order for permanent care was not appealed.

[7] Section 48 of the *Act* permits a party to apply to terminate an order for permanent care and custody or vary access. There are restrictions on when a party, other than the Minister, can bring such an application. The appellant, with the assistance of counsel, filed her application to terminate on June 1, 2012. The timing of the application is important because, as of that date, LB was not yet 12 years old. He was almost four weeks shy of his 12th birthday. That chronological milestone has significance, which I will discuss later.

[8] Counsel for the appellant secured funding for another parental assessment. Judge Comeau agreed to adjourn the hearing to permit the assessment to be done. The children would be included.

[9] Dr. Olga Komissarova, a registered pyschologist, prepared the new assessment. She was of the opinion that the appellant appeared to be capable of parenting SB and LB, but expressed some reluctance on the appellant's ability to adequately parent AB due to a number of factors. Nonetheless, Dr. Komissarova recommended if care and custody would be returned to the appellant, that continued services and supervision be provided by the Minister.

[10] The appellant, and others, testified about the steps she had taken to change her life. She separated from her abusive husband. She was involved in upgrading her education, attending counselling and accessing available supports. These steps were said to have led to her acquisition of insight into the negative consequences of her former violent domestic relationship with her husband, better self-esteem, and improved parenting skills.

[11] The Minister was skeptical that the appellant had actually ended the relationship with her husband. The appellant was emphatic that they were just friends. She cited the advice she had from a counsellor, and others, that it is healthy to be on friendly terms with an ex-partner. The friendship involved frequent outings to Tim Hortons for coffee, but nothing more. Even that contact, the appellant said, she ended on December 2, 2012.

[12] However, despite her evidence that she had ended the relationship in October 2011, the Minister called evidence that in a May 2012 meeting the appellant had admitted that she was in a relationship with her ex-husband – they were "seeing how things were going to go". The appellant (and her mother) testified that they could not recall this comment.

[13] The appellant knew the test she had to meet under s. 48 of the *Act*: a significant change in circumstances since the making of the order for permanent care and custody; and it is in the best interests of the child to terminate the order. She argued she had met it. Judge Comeau concluded that there had not been a significant change in circumstances to warrant termination of the permanent care and custody order, nor would it be in their best interests to do so.

DID THE TRIAL JUDGE ERR IN NOT GIVING LB HIS OWN LAWYER?

[14] The *Act* (s. 37(1)) says that a child who is sixteen years of age or more is a party to a proceeding (unless the court orders otherwise), and is entitled to counsel upon request. A child who is twelve or more must be given notice of a proceeding. Then, if the child asks, the court may order that he or she be made a party to the proceeding, and be represented by counsel. But in order to exercise these discretionary powers, the court must determine that it is "desirable to protect the child's interests".

[15] In this case, when the proceeding was commenced, LB was not yet twelve years of age. There was no need to give him notice. Once he turned twelve he should have been given notice. He was not. It hardly escaped anyone's attention that he was twelve. That fact was discussed during the hearing. No one suggested that LB should be given formal notice, or that the trial judge consider making him a party and have counsel.

[16] The appellant argues that it was necessary for a proper decision to be made for LB to have had his voice heard. There are two problems that undermine the argument; both are based on the speculative nature of the complaint.

[17] First, it is by no means certain that had LB been given notice, he would have been made a party to the proceeding, and have counsel. LB would have to make those requests. Judge Comeau would then be called on to exercise his discretion – but only if he were satisfied that it would be desirable in order to protect LB's interests.

[18] Second, what different input would have resulted had LB had counsel? The appellant submits that LB would have been able to tell the judge what he wanted to have happen. Judge Comeau did express interest in knowing the children's wishes. He asked Dr. Komissarova for her evidence on this point. She testified that she "didn't want to put my words into their mouth". She added that the children still have emotional attachment to their mother.

[19] But there is no evidence what LB's actual wishes were then, or even now. I fail to see how the failure to give notice impacted on the fairness of the proceeding, nor could have realistically affected the outcome. I would not give effect to this ground of appeal.

DID THE TRIAL JUDGE ERR IN HIS ASSESSMENT OF THE EVIDENCE?

[20] An appeal is not a re-trial. We are not permitted to interfere with trial decisions on assessments of evidence unless there has been legal error, or if a trial judge has made palpable and overriding errors in his findings of fact or mixed law and fact. In *A.M. v. Children's Aid Society of Cape Breton-Victoria*, 2005 NSCA 58 this Court wrote:

> [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 County v. G.D.**, [2003] N.S.J. 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.

[21] It is with these principles in mind, I turn to the appellant's complaints.

[22] The appellant cites what the trial judge said at para. 3 of his decision as demonstrating error. What he said was:

> [3] The Applicant and her husband J.B. are living separate and apart. She says they only have a friendly relationship, something which is disputed by the Minister, indicating that a pattern of evidence would tend to show they are in a relationship. They spend time together and are seen at Tim Horton's. A relationship between the two

> would be a negative aspect to the return of the children because of the history of domestic violence when they were together.

[23] The appellant stressed in oral argument that she was not, and never will be, in an intimate or romantic relationship with JB. However, I am far from convinced that the trial judge made a finding she was in such a relationship.

[24] The judge's comments in para. 3 are an accurate reflection of the appellant's evidence, including her insight into the negative consequences of a romantic relationship with JB, and of the Minister's arguments on this issue.

[25] The trial judge recited elsewhere the evidence about the relationship between the appellant and JB (paras. 6, 11). In neither does the trial judge find as a fact that her alleged relationship with JB was romantic. Judge Comeau seemed to accept that the appellant had presented evidence of a change in circumstances; in particular, that she was no longer in a romantic relationship with JB. In his "Conclusion/Decision" section of his reasons, he wrote:

> [31] There has been evidence of a change in the Applicant's circumstances. She says that her and her husband do not have a relationship, although evidence has been presented that might contradict that. It is clear they do not live together, but do spend a lot of time together and communicating over the phone. The Applicant does indicate she understands that when they were together with the children their domestic disputes which were violent were contrary to the children's best interests.

[26] Although not specifically mentioned by the appellant, it cannot be denied that the trial judge was concerned about the close relationship between the appellant and JB. It was one of the factors he mentioned in expressing his conclusion that he was not satisfied there had been a significant change in circumstances warranting termination of the permanent care and custody order. He said this:

> [38] Considering the recommendations of the assessor, section 48(8)(c) would have to be relied on. This is a six month supervision period during which the Court would have to be satisfied no more services would be required by the parent. **It is conceded that the Applicant had made progress but considering the evidence of her relationship with the father of the children and the further requirement of services suggested by the assessor, there is no significant change in circumstances to warrant termination of the permanent care and custody order.** As in the past six months, provided by section 48(8(c) of the *Act*, is not enough time to achieve adequate parenting. It may require a lifetime.
>
> [my emphasis]

[27] I see no error by the trial judge expressing his concern about the potential risk of harm to these children in light of the evidence about the appellant's close relationship with JB.

[28] The remaining complaints of error by the trial judge ask us to re-try the case, reweigh the evidence and come to different conclusions than those of the trial judge. That is not our role. Appellate intervention requires demonstration of legal error, misapprehension of evidence or palpable and overriding error.

[29] The trial judge considered the evidence and recommendations of Dr. Komissarova. The trial judge referred to her assessment where she had concluded that the appellant "appeared to be capable to parent S. and L. as Dr. Chandler, psychiatrist, has noticed improvement in L.'s mental health status" (para. 35). The trial judge accurately referred to this as "a vague recommendation" (para. 36).

[30] More importantly, the recommendation was qualified by Dr. Komissarova's evidence that if the children were to be returned to the appellant, the listed services found in s. 13(2) of the *Act* would be necessary. Dr. Komissarova was aware of the existence of family and community supports for the appellant. The appellant's counsel specifically acknowledged at trial her need for services along with her sincere commitment to following through with any services that the court may direct.

[31] The appellant also criticizes the judge for his comment that return of the children would "be only for the benefit of the Applicant" . She argues that the trial judge was wrong because she loves her children, and she has their best interests at heart. No one doubted at trial, or in this court, that the appellant loves her children and wants the best for them; nor her sincere belief that the best interests of the children are with her.

[32] The appellant's assurances that she has learned from her mistakes, and that will put their needs above her own shows appropriate insight and a strong emotional bond – but that is only part of the myriad of factors that a trial judge must consider in a best interests analysis as mandated by s. 3(2) of the *Act*.

[33] To put the trial judge's impugned comment into context, what he said was:

> [39] The *Act* is child centered and returning the children to the Applicant would, in light of the evidence, be only for the benefit of the Applicant.

> [40] The children have progressed well in foster care and they are happy and content. It would be contrary to their best interests to terminate the order for permanent care and custody.

[34] The appellant points to no error in the trial judge's assessment that the children have indeed progressed well in foster care, and that they are happy and content. The trial judge's conclusion that it would be contrary to their best interests to terminate the order for permanent care and custody is fully supported by the evidence. I would therefore dismiss the appeal.

[35] Before concluding my reasons, it is appropriate to acknowledge the uncontradicted evidence of the considerable efforts, and progress, achieved by the appellant in terms of improving her life through education and counselling. It is hoped she will continue to do so with the same dedication.

Beveridge, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bryson, J.A.