NOVA SCOTIA COURT OF APPEAL

Citation: *C.F. v. Nova Scotia (Minister of Community Services)*, 2017 NSCA 56

Date: 20170615
Docket: CA 458841
Registry: Halifax

Between:

C.F. and B.S.

Appellants

v.

The Minister of Community Services

Respondent

Restriction on Publication: pursuant to s. 94(1) of the Children and Family Services Act, S.N.S. 1990, c. 5

Judges:	Farrar, Bryson and Bourgeois, JJ.A.
Appeal Heard:	May 30, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs per reasons for judgment of Farrar, J.A.; Bryson and Bourgeois, JJ.A. concurring.
Counsel:	Appellants in person Peter C. McVey, Q.C., for the respondent

Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

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:

Overview

[1] This appeal arises out of an oral decision of Justice Deborah Gass dated November 17, 2016, where she ordered the couple's three children be placed in the permanent care and custody of the Minister of Community Services.

[2] The appellants were self-represented on this appeal. At the trial below B.S. was represented by Jonathan Hughes and C.F. was represented by Raymond Kuszelewski. J.S. (Sam) West acted as the litigation guardian for the two oldest children; he was represented by Peter Katsihtis. Mr. West is not a party to this appeal.

[3] The only ground of appeal raised by the appellants is the ineffective assistance of counsel at trial. In support of their position, the appellants filed an affidavit from C.F. In response, the Minister filed the affidavit of Mr. Hughes. Mr. Kuszelewski did not file any evidence.

[4] For the reasons that follow I would dismiss the appeal.

Background

[5] A protection proceeding was first commenced on July 31, 2014 and subsequently terminated that year in the hope that C.F. would be more amenable to working with the Agency if an active court proceeding was not hanging over her (trial decision, p. 2). At that time, C.F. was not in a relationship with B.S.

[6] The children have been in the physical care and custody of the Minister since May 28, 2015. At the time the children were taken into care, the oldest, B. would have been 11, J. was 8 and L. only 4 years old. At the time of trial they were 13, 10 and 5 respectively.

[7] A new proceeding was commenced on June 2, 2015.

[8] There is a significant history which predates the 2015 proceeding. However, for the purposes of this appeal, I will start with the procedural history in 2015 and set it out in some detail to illustrate the time and difficulties associated with setting this matter down for trial. It will also show the involvement of counsel and their interaction with C.F. and B.S.

[9] On July 10, 2015, this matter was before the court for a pre-hearing conference prior to the protection hearing. At that time, C.F. was represented by Eugene Tan; B.S. was unrepresented. The parties agreed to J.D. (Sam) West acting as a litigation guardian for the two older children and the matter was set over for a pre-hearing conference. The matter was set down for a Protection Hearing to be held over six days in November 2015.

[10] On the first scheduled trial day in November 2015, the parties reached an agreement. The terms of the agreement, among other things, provided that the original proceeding was terminated and recommenced on the same day (restarting the 90 day time limit for the Protection Hearing).

[11] On January 4, 2016, the matter returned to court for a pre-hearing conference. C.F. discharged Mr. Tan on this date due to a breakdown in the solicitor-client relationship.

[12] On January 25, 2016, the parties appeared for the contested Protection Hearing. Neither appellant appeared with legal counsel. They had not filed any affidavits or materials as previously directed by the Court, and had not requested any agency witnesses for cross-examination. The Minister moved for a protection finding on the basis of the materials filed by the Minister and the absence of any evidence in reply.

[13] Rather than make the protection finding, the Court extended the time limit for holding the protection hearing, and set new trial dates. The Court cautioned the appellants that if they did not file materials as directed, they would be viewed as having no evidence to offer. The protection hearing was adjourned to February 1, 2016.

[14] On February 1, 2016, C.F. reported she had retained Raymond Kuszelewski (who was not present at the commencement of the conference but joined by telephone following a recess). Jonathan Hughes appeared as counsel for B.S. New deadlines were set for the filing of evidence, witness lists, and for advising the Minister of witnesses required for cross-examination. The protection hearing dates were set for February 16, 17 & 18, 2016.

[15] On February 16, 2016, the parties appeared for the first day of the contemplated protection hearing. The parties had exchanged witness lists, but the appellants had decided to consent to, rather than contest, the protection finding. The Court found the children in need of protective services as admitted, namely

due to substantial risk of emotional harm (s. 22(2)(g)), and continued the terms and conditions as contained in the Interim Order.

[16] The appellants failed to appear at a meeting with the Agency scheduled for March 3, 2016. As a result, the Minister determined that Orders for Permanent Care and Custody should be sought for the children. An Agency Plan for the Child's Care was filed on March 9, 2016, and the case returned to the Court on March 21, 2016.

[17] On March 21, 2016, the appellants appeared with their counsel. Counsel indicated C.F. and B.S. were seeking the return of the children to their care under a supervision order. There was a lengthy discussion between counsel and the court with respect to some of the issues the appellants needed to address before the children could be returned to them. The parties also discussed the number of witnesses and days required for a contested disposition hearing, as well as the time for a contested motion for production of further files and records.

[18] On May 6, 2016, the parties returned for a pre-hearing conference for, what were anticipated to be, July hearing dates for the Disposition Hearing. Those dates had to be rescheduled due to the unavailability of the Minister's agent assigned to the file. An Order for Temporary Care and Custody was granted with the consent of Mr. Kuszelewski and Mr. Hughes. The appellants also confirmed their consent to the order was voluntary. The matter was adjourned for a contested motion hearing on orders for production, which was later resolved by consent.

[19] Up to this point, most of the appearances were before Justice Mona Lynch.

[20] On August 22, 2016, the parties appeared before Justice Deborah Gass for the first time. The appearance was for an organizational pre-trial conference prior to the disposition hearing. Mr. Hughes attended on behalf of B.S., Laura McCarthy, in Mr. Kuszelewski's stead, appeared for C.F. By this point, counsel had been provided with the Minister's witness list. The Court gave direction to the appellants on their reply to the witness list of the Minister, and the filing of their own witness list and affidavits. The Court set filing deadlines as follows:

(a) The appellants were to identify those persons on the Minister's witness list required for cross-examination, by no later than September 12, 2016;

(b) The appellants were to file affidavits from all of their witnesses by September 20, 2016;

(c) The older children's guardian *ad litem* was to file his final report by October 21, 2016;

(d) The trial was to be held October 31, 2016, and November 1- 4, November 7-10 & November 14, 2016.

[21] The appellants were both present when the filing dates were set.

[22] At the time of the appearance on August 22, 2016, B.S. was serving an intermittent (weekends) sentence which commenced on August 10, 2016. He failed to report on August 12, 2016, and was arrested. He failed to report again on August 19, 2016, and was arrested, again, on September 6, 2016. B.S. then opted to serve straight time (rather than weekends) to clear his custodial sentence. He was released from jail on or about October 12, 2016. He did not contact Mr. Hughes until October 28, 2016.

[23] On October 20, 2016, the trial judge convened a pre-hearing conference with legal counsel because of concerns she had about the upcoming trial. Once again Ms. McCarthy attended for Mr. Kuszelewski. Mr. Hughes was present for B.S. C.F. and B.S. were not in attendance. Justice Gass noted that a ten-day trial was to commence October 31, 2016, and nothing had been filed by C.F. and B.S. The Court asked counsel why nothing had happened.

[24] Mr. Hughes explained why the deadlines had been missed and no affidavits filed:

(a) He had a lack of correspondence with B.S. since the August 2016 appearance;

(b) Both he and his office had made numerous attempts to contact B.S., without success, in relation to the two deadlines set for September 2016;

(c) When they last spoke, B.S. intended to rely on an earlier witness list, although his own (Mr. Hughes') assessment was he would not call those listed witnesses;

(d) B.S. wished to cross-examine Darcy Borden, an Agency worker, but this was in relation to his (B.S.'s) previous relationship with a different intimate partner.

[25] Laura McCarthy advised as follows:

(a) She had tried to contact C.F. regarding that day's appearance, which had been set down the day before, without success;

(b) Her firm's file did not reflect C.F. contacting her office at all;

(c) She did not know whether C.F. had contacted Ray Kuszelewski directly, but it was her understanding there had been no contact;

(d) The previous number her office had for their client was not working.

[26] As a result, the judge ruled that the trial would proceed, the appellants would be permitted to give evidence, and the Agency's main workers on the file would be present.

[27] The judge elaborated on her reasoning as follows:

> So we're going to go ahead with this. The children have been languishing for a very long time. This matter -- it's in their best interests, and I have to consider that as the priority here, to have this matter determined one way or the other because of the extreme length of time that this has been before the court. And, again, I – we do give a lot of leeway to parents in situations because of -- recognizing all the challenges that stand in their way of sometimes getting to see lawyers and getting into court and getting their stuff together. But I think we've extended this one far enough that we have to, in the interests of these three children, have some kind of a resolution and everybody has to be prepared to deal with it on that date.
>
> [Emphasis added]

[28] The first three days of the scheduled ten-day trial were then released, and the trial commenced on what would have been the fourth scheduled day, November 3, 2016.

[29] The appellants were both present with their legal counsel. The Minister's counsel advised that she had compelled the attendance of those witnesses directed by the Court at the previous appearance: the children's two therapists (Dianne Wheeler and Wendy Green), an access supervisor (Michael Holton), and the Minister's two primary social workers (Kristin Nickerson and Anne Simmons). The Minister's Exhibits, also including the guardian *ad litem* reports, were pre-marked with the consent of all parties. There were no other preliminary matters identified by any party and the trial commenced.

[30] I do not propose to go into any great detail about the evidence at the trial. The focus of my review will be on the conduct of Mr. Hughes and Mr. Kuszelewski.

[31] The first witness to give evidence was Diane Wheeler, an expert in child therapy. She provided therapeutic services to B. only. She gave evidence that he presented as "guarded with a tough persona". She was cross-examined by both Mr. Hughes and Mr. Kuszelewski, who both attempted to attribute B's presentation with other issues in his life, other than his family situation, including being bullied at school.

[32] The second witness, Wendy Green, had provided therapy to J. for approximately a year before testifying at trial. She gave evidence that when she first started counselling J. he presented as behaviorally difficult, at times out of control. He had difficulty following guidance or structure. However, he improved considerably, was doing very well in school and was even going on playdates with other children. Once again, Ms. Green was cross-examined by Mr. Hughes and Mr. Kuszelewski and as well, Mr. Katsihtis. She acknowledged in cross-examination that some of his initial behaviors may have been caused by separation from his parents; that he wished to return home and the possibility that being bullied in his old school may have had an impact on his presentation.

[33] The next witness, Michael Holton, testified concerning his observation of the appellants and their children during access visits. He was cross-examined by both of the appellants' lawyers on those visits, particularly with respect to "adult talk" which was an issue during access visits. Counsel sought to establish that there may be differences in the exercise of discretion by Agency workers when addressing the issue. What one worker may find unacceptable another may not. This was a legitimate line of questioning aimed at minimizing the impact of evidence on this issue.

[34] Kristin Nickerson testified as the child-in-care social worker. Her duties related to the children's medical, educational and social needs. She met regularly with the children and those providing their day-to-day care. She was of the view that after 18 months in the Minister's care all three children showed substantial improvement and progress.

[35] Ms. Nickerson was vigorously cross-examined, particularly with respect to her role in the decision that brought the children into care. She was also cross-

examined on other aspects of the children's presentation including weight and physical appearance.

[36] The final witness called by the Minister was Anne Simmons, a 33-year veteran with the Department, including 23 years as a long term protection worker. She expressed her concerns with the family including lack of medical follow-up, poor dental hygiene, unfit living conditions, substance abuse by B.S. and the emotional harm suffered by the children.

[37] She was thoroughly cross-examined on the identified child protection concerns by Mr. Hughes on behalf of B.S. as well as in relation to specific events and Agency records. Mr. Hughes sought to minimize the seriousness of the issues which the Agency had identified as concerns.

[38] Counsel for C.F. cross-examined the witness on his client's use of a community-based "parenting journey" worker, the proposal of a psychological assessment, the state of the home, the use of physical correction, the condition of the children on coming into care and "adult talk". Again, attempting to minimize the impact of the evidence on these issues.

[39] Both C.F. and B.S. gave evidence.

[40] B.S. testified in direct examination and was the subject of lengthy cross-examination. Similarly, C.F. testified in direct examination and was also subject to lengthy cross-examination. During their direct examinations it is clear that counsel for both parties had developed a theory of the case which would give the parents the best chance of having the children returned to their care. They sought to establish that it would be in the best interests of the children if they were returned to the care the parents with continued supervision by Community Services.

[41] Finally, the litigation guardian for the two older children testified and was cross-examined.

[42] All parties made oral submissions. Mr. Hughes addressed the child protection concerns, substance abuse and criminality on the part of his client, the living conditions in the home, and service participation by the appellants.

[43] Mr. Kuszelewski addressed the challenges his client faced in working with the Agency, school participation, her engagement with the community-based services, school bullying, "adult talk", and the absence of violence in the

appellants' relationship. He forcefully argued for an opportunity for his client to parent the children under Agency supervision.

[44] After hearing argument the trial judge reserved her decision.

[45] An oral decision was rendered on November 17, 2016. The Court reviewed the history of the proceedings, as well as of C.F.'s involvement with child protection agencies. The Court noted that some of the Minister's concerns, taken in isolation, may be insufficient to warrant the order sought, but taken together and in combination, those concerns became significant and serious (p. 11). She repeated this observation while reviewing each of those concerns (pp. 17-22).

[46] Of perhaps the greatest concern to the trial judge, however, was the children's emotional and social conditions at the time they went into care (p. 22). The trial judge found that not just one witness, but many witnesses noted the children's significant delay in their schooling, and problematic personal and dental hygiene (p. 11-12). She reviewed each of the children's needs and presentation (pp. 13-14 & 24-25). It was, however, the significant changes noted in the children once in the Minister's care, that caught the trial judge's attention; this evidence, she noted, came from a number of witnesses (pp. 14-15). She did not overlook the fact that the older children expressed their desire to return home (p. 27).

[47] The trial judge then posed the question, do the circumstances that gave rise to the children coming into care still exist and are they likely to change? (p. 24) She found the appellants' lack of cooperation with agency services, and their behavior concerning access visits, were both important considerations in answering this question. The trial judge considered that the lack of progress of the appellants must be juxtaposed with the significant progress the children had made in care, the children having "progressed in leaps and bounds during the last 18 months" (pp. 25-27).

[48] As a result, the trial judge concluded:

> It's clear from the evidence before me that the circumstances that gave rise to the children coming into care have not changed in any way, so that, should they be returned to their parents, they would lose the progress that they have made and revert, in all likelihood, to being antisocial, maladjusted, isolated children with serious risk of mental health issues, addictions and criminal behavior. At the very least, their education would be compromised, …. It would be unlikely that they would be able to continue on this positive trajectory and would lose the

> opportunity to live their lives to their fullest potential, which they're clearly doing now with their hopes and aspirations of things they want to do as adults. (p. 27)
>
> [Emphasis added]

[49] The trial judge considered the two plans before her for the children's care. The Court noted twice more the progress the children had made in care, before considering the requirements for an Order for Permanent Care and Custody in Section 42, subparagraphs (2), (3) & (4) of the *Children and Family Services Act*, S.N.S. 1990, c. 5. She concluded that Orders for Permanent Care and Custody, without access and with a plan of adoption, were in the best interests of the children (pp. 28-30).

[50] On January 3, 2017, the Appellants filed a Notice of Appeal alleging ineffective assistance of counsel.

[51] On April 18, 2017, the appellant, C.F., filed an Affidavit in support of the allegation.

[52] In response, the Minister filed an Affidavit of Mr. Hughes on May 11, 2017.

Issues

[53] The only ground of appeal advanced by the appellants is the ineffective assistance of counsel. In order to address this ground of appeal I must consider:

(i) Whether the evidence contained in the affidavit of C.F. should be admitted into evidence for the purposes of this appeal, in whole or in part;

(ii) Was representation of the appellants by their former legal counsel ineffective and, if so, did this representation cause a miscarriage of justice in this case?

Standard of Review

[54] As the allegation of ineffective assistance of counsel is raised for the first time on appeal, it does not give rise to a standard of review analysis.

Issue #1 Whether the evidence contained in the affidavit of C.F. deposed to on April 18, 2017, should be admitted into evidence for the purposes of this appeal, in whole or in part

[55] Much of the evidence in C.F.'s affidavit is irrelevant to the allegation of ineffective assistance of counsel. For the most part, it contains evidence which was already introduced at trial in one form or another. The affidavit is more of an attempt to reargue the case and have us overturn the trial judge's findings of fact. There is very little in the affidavit that addresses the allegation of ineffective assistance of counsel. I will isolate those portions of the affidavit later in these reasons.

[56] At this point, it is important to understand the role of this Court. As has been reiterated on many occasions, an appeal is not an opportunity to have us re-weigh the evidence and come to a different conclusion than the trial judge.

[57] The often quoted passage from Justice Cromwell's reasons in *A.M. v. Children's Aid Society of Cape Breton-Victoria*, 2005 NSCA 58 describes our role:

> [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: [Citations omitted]

[58] With this in mind, I will turn to the allegation of ineffective assistance of counsel.

[59] The appellants, when advancing this allegation, have the burden of establishing that the representation was ineffective and that it resulted in a miscarriage of justice (*M.O. v. Nova Scotia (Community Services)*, 2015 NSCA 26, ¶18).

[60] A miscarriage of justice arises if a trial is not, in fact, fair, or if something happens during the trial that is so significant that it would "shake the confidence of the public in the administration of justice" (*R. v. G.K.N.*, 2016 NSCA 29, ¶39).

[61] The traditional test for the introduction of fresh evidence stems from *Palmer v. The Queen*, [1980] 1 S.C.R 759. *Palmer* identifies four characteristics which the

evidence must have in order to be admitted for the first time on appeal: it must be fresh; it must be relevant; it must be credible; and it must be compelling (p. 775).

[62] However, if the evidence speaks only to an issue of procedure (which would include ineffective assistance of counsel) rather than to the factual subject-matter of the hearing itself, the test is modified to reflect this reality. In such a case, the above criteria is replaced by a test which asks whether the evidence is "credible and sufficient, if uncontradicted, to justify the appellate court making the order sought" (*Nova Scotia (Community Services) v. T.G.*¸2012 NSCA 43, ¶79). The evidence must still be in an admissible form.

[63] To the extent that the affidavit of C. F. touches on the conduct of her counsel at trial, I will admit it for the purposes of addressing the allegation of ineffective assistance.

[64] The remainder of the affidavit relates to issues decided by the trial judge. As there is no allegation of error on the part of the trial judge, it is inadmissible as fresh evidence.

C.F.'s affidavit relating to her counsel

[65] The first allegations of ineffective assistance appear at ¶5 of her affidavit. I will summarize it:

(i) She and B.S. did not get an opportunity to put evidence before the court;

(ii) She provided Mr. Kuszelewski with evidence which she thought would be important;

(iii) C.F. had taken a video of Anne Simmons when she was visiting their home. Throughout the trial she tried to give the video to Mr. Kuszelewski but he refused to take it;

(iv) Mr. Kuszelewski did not attend at a case conference on May 20, 2016 (C.F. acknowledges that he had a good reason for not being there as he was ill);

(v) On another court appearance, Mr. Kuszelewski had Ms. McCarthy sit in for him. Ms. McCarthy said she would put some paperwork together but when C.F. called about it she got nowhere;

(vi) She spoke with Mr. Kuszelewski two or three times on the phone before the trial but did not meet with him until the date of the trial.

[66] In ¶6 of the affidavit C.F. refers to that portion of the trial judge's decision where she says, when referring to the case conference of October 20, 2016:

> … At that time, the court was advised that counsel had been unable to file the necessary documentation as there had been difficulty in making contact with their clients. There was some confusion about Ms. F.'s contact with Mr. Kuszelewski or anyone else in his office. …

[67] To that, C.F. says that she left messages for Ms. McCarthy who never called her back and that Mr. Kuszelewski had her cell phone number and he could have called her at any time.

[68] C. F., in ¶32 of her affidavit again refers to the trial judge's decision where she says:

> When I look at the parents' plan of care, their evidence is that they intend to move out of the neighbourhood they're in. They realize or feel that that is not a good environment for the children, and they would be willing to work with the Agency. …

[69] To this C.F. says that she was never told that they needed a plan of care for their children and that B.S. only found out a week and a half before court when he met with his lawyer.

[70] Finally, Exhibits 40, 41, 42 and 43 to her affidavit, C.F. includes notes from Dr. Janet Howard with respect to each of the three children. The first three are dated June 15, 2014 and make very brief comments with respect to the health of the three children. Of particular significance, says C.F., is that they refute the Agency's concern that the children were undersized.

[71] The fourth is a note from Dr. Howard dated August 13, 2014, which summarizes the three previous notes with C.F. and the children:

> These are the visit histories from the last visit with C. and her children. The concerns addressed with the children would be considered "normal" concerns that would be present in these children. They are small for their age but normal in BMI. They have some of the developmental concerns which are prevalent throughout their family. Learning disabilities are genetic in nature.

[72] In addition to her affidavit, C.F. says that Mr. Kuszelewski failed to keep her informed as matters progressed and that he failed to discuss potential witnesses with them and to explain the benefits and/or weaknesses in their testimony with her.

[73] B. S. did not file an affidavit nor did he provide any evidence about what he considered to be the failings in Mr. Hughes' representation of him.

[74] I would categorize the alleged failings of counsel and address them in this order:

(i) failure to introduce relevant evidence;

(ii) failure to call witnesses;

(iii) failure to communicate.

Failure to introduce relevant evidence

[75] C.F. specifically references a video which she took of a visit of Ms. Simmons to her house and Dr. Howard's notes as evidence which ought to have been admitted.

[76] She does not indicate how the introduction of the video showing the visit of Ms. Simmons would have any impact on the trial process. The Agency kept detailed records and notes of what occurred during home visits and meetings with the appellants. Those were introduced by consent at the trial. The appellants have not identified what would change with the introduction of that evidence or how the video would show something different than recorded in the notes.

[77] With respect to the notes of Dr. Janet Howard, C.F. says that would show that the children, at or about the time they were taken into care, were normal in light of their genetic make-up.

[78] There was a significant amount of evidence before the trial judge as to the children's condition at the time they were taken into care and how that changed over time. The trial judge addresses it specifically in her decision.

> The first one being physical neglect, and that speaks for itself in the sense of the way the children were described when they were taken into care. There were also issues with regard to their stature, their weight, and one of the things that Mom suggested was, well, she's a tiny person too, so it would be not unreasonable for these children to perhaps be smaller than the average child because she's a petite

> person as well. But it's interesting to note, and I believe it was Mr. West who used the words, "they are more robust," they appear healthier, they have gained weight, they have grown. Again, this significant change in their general physical presentation was very clearly brought out during the course of this proceeding.
>
> [Emphasis added]

[79] As can be seen from this passage, C.F. gave evidence that because she was a tiny person it would not be unusual for the children to be smaller. The trial judge clearly rejected that evidence.

[80] The trial judge had before her the evidence of C.F. as well as a number of other witnesses. The suggestion by C.F. that the evidence of Dr. Howard would prove the children were "normal" at or about the time they were taken into care is just not credible in light of the other evidence, including their improvement in the 18 months that they were in care. I am not satisfied the failure to introduce this evidence even comes close to showing ineffective assistance of counsel.

[81] C.F. says, generally, she and B.S. were unable to introduce evidence. I think what she actually meant to say was that she and B.S. did not put in the evidence that they wanted to put in.

[82] It is easy to second guess counsels' performance at trial once the trial has been completed and suggest that there ought to have been evidence put in that was not. However, that is not proof of ineffective assistance of counsel. Both C.F. and B.S. were given ample opportunity to give evidence. C.F.'s direct and cross-examination spans almost 200 pages in the transcript. B.S.'s evidence, both in direct and cross-examination, takes up approximately 100 pages.

[83] They were present for the Minister's evidence and were given an opportunity to refute it and they did so. As I outlined earlier, it is clear from the direct examination of both B.S. and C.F. that their counsel had a theory of the case and were presenting the evidence in a manner which they thought would give them the best chance of getting the result they desired.

[84] As I noted in my review of the trial evidence, both C.F. and B.S. gave evidence and there was no indication they were precluded from saying or introducing any evidence that they may have wished to introduce.

[85] I see no deficiencies in either counsels' conduct in putting forward the evidence on behalf of the appellants.

Failure to call witnesses

[86] Mr. Hughes' affidavit specifically addresses the issue of witnesses that B.S. wished to call. For context he is referring to a telephone conversation which took place on August 16, 2016:

> 41. During the telephone correspondence, I also discussed what each of the witnesses he wished to call would testify to. His ultimate purpose for the civilian witnesses was to speak to their own negative experiences while in the care of Community Services, or effectively how the boys were in no better care with the foster care than with [B.S.] and [C.F.]. I advised [B.S.] that such evidence would likely not be admitted, and even if the evidence were admitted, it would likely have little value to his case, as these hearings are not about whether parents or protective custody are the "lesser of two evils". I advised him that his best chances of success were to highlight the positive changes he had made since the file began, and not to simply make disparaging remarks about the Ministry.

[87] Mr. Hughes also indicates that he advised B.S. that he would need to indicate to him the names of any other witnesses he wished to call.

[88] B.S.'s witness list was due on September 19, 2016. Mr. Hughes says in his affidavit that he advised B.S., and B.S. agreed that he would have to set up an appointment before that date to discuss the witnesses.

[89] We now know that B.S. never made that appointment and did not contact Mr. Hughes until October 28, 2016, long after the witness list was due.

[90] Perhaps more importantly on this point, there is no evidence other than Dr. Howard (which I have addressed) that there were other witnesses that the appellants wished to call at trial. Further, even if there were witnesses identified, there is no indication of how their evidence would have impacted the conduct of the trial.

[91] Once again, I am not satisfied the evidence establishes that there was any failure to call a relevant witness.

Failure to communicate

[92] It is apparent from Mr. Hughes' affidavit that he had detailed records of his interaction with both B.S. and C.F. It is also apparent that C.F. and B.S.'s defence to the Minister's application was very much a joint effort on behalf of the two

counsel. This can be seen by the discussion on the record, their conduct at trial and the final submissions.

[93] Mr. Hughes' affidavit details the number of meetings that he had with B.S. and a number of the meetings also included Mr. Kuszelewski and C.F.

[94] It also details his attempts to get in touch with B.S. in the fall of 2016, without success, resulting in the trial judge ordering the hearing would proceed on *viva voce* evidence.

[95] It is clear from the pre-trial conference of October 20, 2016 and the trial judge's decision, there were challenges with respect to communications, but those challenges cannot all be laid at the feet of counsel. Both Mr. Hughes and Ms. McCarthy on the October 20, 2016 date put on the record the difficulties they were having contacting B.S. and C.F. With respect to B.S. it was not surprising as he was in jail. However, even upon getting out of jail, knowing the deadlines, he did not contact Mr. Hughes until October 28.

[96] I certainly do not fault Mr. Hughes for failing to communicate with his client. He made extensive efforts to do so. Any lack of communication stems from B.S.'s unavailability, not Mr. Hughes' conduct of the case.

[97] With respect to C.F., I do not have Mr. Kuszelewski's side of the story (other than Ms. McCarthy's statement on the record on October 20, 2016). In spite of this, I am not satisfied that any lack of communication is sufficient to rise to the level of ineffective assistance of counsel.

[98] I will address one specific issue which C.F. identified as an example of a failure to communicate. She said they did not know they needed a plan of care until a week and a half before the hearing. B.S. found out as a result of a conversation with Mr. Hughes. To this I say two things: first, as early as March 21, 2016, the appellants, through counsel, made it known to the court that they wished to have the children returned to them under a supervision order. That is precisely the plan that went forward at trial. Secondly, there is no evidence they were prejudiced by this alleged late notice. In fact, the evidence is to the contrary, the appellants were able to put forward their plan at trial. Forcefully, I might add. The trial judge referenced their plan of care in her decision and considered it before rejecting it.

[99] Although there may have been some difficulties with communications between the appellants and their counsel, the difficulties in communication are not significant enough to rise to the level of ineffective assistance of counsel.

Conclusion

[100] I have reviewed the record in its entirety, including the cross-examinations and submissions by counsel, and I am satisfied, even in the absence of an affidavit from Mr. Kuszelewski, that counsels' representation of the appellants was far from ineffective. Nor did it impede or restrict the ability of the appellants to put forward their case.

[101] C. F. and B.S. were provided with a robust defence to the Minister's application. Their counsel had a theory of the case and their direct, cross-examinations and submissions to the trial judge attempted to convince her that their clients' plan of care of the children was in the best interests of the children. Unfortunately for the appellants, the trial judge disagreed.

[102] For all of these reasons, I am not satisfied that there was any ineffective assistance of counsel in this proceeding.

[103] I would dismiss the appeal without costs to any party.

Farrar, J.A.

Concurred in:

Bryson, J.A.

Bourgeois, J.A.