NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Community Services) v. V.A.H.*, 2019 NSCA 26

Date: 20190328
Docket: CA 486201
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

V.A.H. and B.W.H.

Respondents

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

Judge:	Van den Eynden, J.A.
Motion Heard:	March 28, 2019, in Halifax, Nova Scotia
Written Decision:	April 8, 2019
Held:	Motion granted
Counsel:	Peter McVey, Q.C. and Patricia McFadgen, for the appellant Jessica Drohan-Burke, for the respondent V.A.H. Shawnee Gregory, for the respondent B.W.H.

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.

> 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:

Introduction

[1] The respondents' children had been in the temporary care of the Minister of Community Services (Minister) for some time. The Minister sought permanent care and custody. The judge in the court below dismissed the protection proceedings, resulting in a return of the children to parental care. The Minister appealed and brought a motion to stay pending appeal.

[2] I heard and granted the stay motion with reasons to follow.

Background

[3] The Honourable Judge Marci Lin Melvin of the Family Court presided over the final contested disposition hearing. The Minister applied to have the respondents' children placed in her permanent care and custody.

[4] Although the final disposition hearing was briefly started before the statutory end date mandated by the *Children and Family Services Act*, S.N.S. 1990, c. 5 (*CFSA*), the final hearing did not take place until January 23 and 24, 2019, well beyond the statutory period. These delays are never ideal. The various circumstances which caused the delay are not relevant to this stay motion.

[5] The children's mother wanted the children returned to her sole care and to have the protection proceedings dismissed. The respondent parents are separated, and the father supported the plan to have the children returned to their mother. The father saw himself playing a supportive, but limited, parenting role.

[6] Due to the statutory timelines, the judge had two choices: (1) dismiss the protection proceedings; or (2) place the children in the permanent care and custody of the Minister. There were no other alternatives.

[7] Although the judge released her decision in writing on March 15, 2019 to the parties, it remains unreported. Judge Melvin concluded that the Minister did not prove on a balance of probabilities that there still existed a real chance of danger that was apparent on the evidence. She found that an Order for Permanent Care and Custody was not in the best interests of the children and dismissed the Minister's application. The children were to be returned to parental care.

[8] The Minister filed an appeal with this Court on March 18, 2019 together with a motion to stay pending appeal. On March 15, 2019, the Minister also sought a short-term stay motion in the Family Court. Pursuant to s. 49(2) of the *CFSA*, a judge of the lower court can grant a ten day stay. Judge Melvin heard that motion on March 19, 2019 and being satisfied that it was in the best interest of the children to grant a stay, she stayed her order until noon on March 29, 2019. The respondent parents consented to the stay without prejudice to their position to the Minister's motion to stay pending appeal, which I heard on March 28, 2019.

[9] Given the pending expiry date of the short-term stay order and the need to act timely in the best interests of the children, I delivered my decision to the parties on March 28, 2019, with reasons to follow.

[10] For the stay motion, I had the benefit of extensive affidavit evidence. Affidavits were submitted by the children's social worker, family support worker, foster mother and the respondent parents. The Minister's solicitor also filed an affidavit which appended the trial exhibits. I also had the benefit of a post-hearing report from one of the children's professional service providers. The service provider was qualified as an expert to provide evidence respecting "the clinical treatment needs of children in care". Her qualifications were acceded by the respondents. The expert was cross-examined on her report. The respondent mother was cross-examined on her readiness and transition plan for the children to her care. Later, I will address the evidence in more detail.

[11] Returning to the protection proceedings in the court below, the two children, now 6 and 10 years of age, were taken into the care of the Minister on December 2, 2016. The protection hearing was completed on February 27, 2017. The court below determined the children were at substantial risk of physical harm, had already suffered emotional harm, and were at substantial risk of emotional harm. The children remained in temporary care.

[12] The disposition hearing was held on May 17, 2017 and review disposition hearings were held on July 31, 2017, October 16, 2017, January 9, 2018 and March 3, 2018. Further orders for temporary custody were granted at each review hearing.

[13] The Minister filed a Plan of Care seeking orders for permanent care and custody of both children on March 20, 2018. The trial commenced on May 2, 2018, with brief evidence, and then adjourned to August 22 and 23, 2018. However, the trial dates were further adjourned to November 14 and 15, 2018 and

yet again adjourned to January 23 and 24, 2019. As noted, the decision was rendered on March 15, 2019. The children remained in temporary care until the proceedings concluded.

[14] Based on the available record, the protection concerns were serious. The parents were overwhelmed, their relationship was failing, and they were unable to meet the needs of their children. Both children have very high and complex needs which are challenging to manage and increases their vulnerability. Their parents acknowledged their high needs and their struggle to meet these needs.

[15] Both parents have their own challenges and limitations. The expert reports contained in the record indicate diminished intellectual and cognitive abilities. The parents have had brief child protection involvement prior to these most recent proceedings. Both parents had the benefit of some remedial services. They indicate they are now able to better communicate and support each other as parents. Although they have made some gains since separating and living independently, they did not advance beyond limited, supervised access during the entire length of these protection proceedings.

[16] The record contains extensive professional reports respecting the children. By way of a summary only, the youngest child (age 6) suffers from Fragile X syndrome which is known to cause intellectual disability, language delays, behavioral problems, autism, hyperactivity and delayed motor development, all of which this young child seems to be contending with. He requires and is receiving extensive developmental intervention and specialized care and assistance together with many other daily supports. He requires a highly structured routine and a high degree of supervision. While in care, his needs appear to be met well, and he is making gains.

[17] The older child (age 10) is struggling with serious mental health and behavioural concerns. He currently presents with behaviours that include self-harm, severe physical aggression and sexualized behaviours and verbalization.

[18] Both children are described as highly reactive to even minor events and their behaviour quickly escalates to being out of control. There are safety concerns with placing the children together. Currently, the youngest child remains with his foster mother and the older child is in a specialized treatment centre; however, the foster mother remains very involved with him.

[19] The respondent mother spoke highly of the foster mother, as did others. That admiration seems well-placed. The record illustrates the foster mother's dedicated care and support of both children. In fact, under cross-examination, the respondent mother said that if the children could not be returned to her care, she would want them to be with the foster mother. It appears that the foster mother and respondent mother have forged a respectful relationship, and the foster mother facilitates the respondent mother's communication and involvement with the children.

[20] The respondent mother currently resides in a one-bedroom apartment, and although she is making efforts to relocate and shore up supports and services for the children and herself, it appears the transition plan is lacking. In giving evidence on the stay motion, I commend the respondent mother's candor in recognizing that although hopeful she can successfully manage a return of the children, she acknowledges that it will be a challenge and she requires a lot of ongoing support.

Issue

[21] The issue before the Court is whether the Minister established the requirements of a stay. I was satisfied all the requirements were met and granted the stay. I turn to explain why.

Analysis

[22] To grant a stay, the Minister must establish that the appeal raises an arguable issue and the presenting circumstances are such that the best interests of the children would be served by a stay. The stay requirements were addressed by my colleague, Justice Farrar, in *K.(M.) v. Nova Scotia (Minister of Community Services)*, 2015 NSCA 69. He wrote:

> [39] A combination of s. 49(3) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 (*CFSA*), s. 41(e) of the *Judicature Act*, R.S.N.S. 1989, c. 240 and Rule 90.41(2) of the *Civil Procedure Rules* permits a single judge of this Court to grant a stay.
>
> [40] In *Fulton Insurance Agency v. Purdy* (1991), 100 N.S.R. (2d) 341 (C.A.), Justice Hallett set out the well-known principles which govern the exercise of discretion in granting a stay. A stay may be granted if the applicant shows (i) an arguable issue for the appeal; (ii) that there would be irreparable harm if the stay were denied and that the balance of convenience favours the applicant; or (iii) there are exceptional circumstances.

> [41] However, in child protection cases, special principles infuse the *Fulton* test, Justice Fichaud in *D.M.F. v. Nova Scotia (Minister of Community Services)*, 2004 NSCA 113 reviewed the authorities and summarized the test as follows:
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> > 13 Although the *Fulton* test provides the format for analysis, under s. 2(2) of the *Act* in a child protection case the overriding factor is always the best interests of the child. This reformulates the "irreparable harm" and "balance of convenience" branches of the *Fulton* test. The standard civil tests of irreparable harm to the applicant and balance of convenience between applicant and respondent are sterile in a child custody case. It is not the irreparable harm to the applicant (whether parent or Agency) or the balance of convenience between the litigants (parent and Agency) which governs. Rather the focus is on the child. It is highly unlikely that harm to the child would be compensable in money. So the "irreparable" concept recedes. [Underlining Justice Farrar's]
>
> [42] Therefore, to grant the motion I must be satisfied the appellant has raised an arguable issue and there are circumstances of a special and persuasive nature that would warrant the granting of the stay. In other words, I would have to be satisfied that the circumstances here are such that the best interests of the children would be served by a stay.

[23] These are the principles I applied.

Arguable issue?

[24] Turning to the first of the Minister's hurdles, being whether the appeal raises an arguable issue.

[25] The Minister raises these grounds in the Notice of Appeal:

> (1) The trial judge erred in law in the use she made of the *United Nations Conventions on the Rights of Persons with Disabilities* and on the *Rights of the Child* including by,
>
> > (i) Failing to identify any ambiguity in the *Children and Family Services Act* permitting judicial consideration of extrinsic aids in her exercise of statutory interpretation;
> >
> > (ii) Applying the above-noted *United Nations Conventions* as if they are a statute that can override the express provisions of the *Children and Family Services Act*, a statute within the exclusive jurisdiction of a province;
> >
> > (iii) Concluding a section of legislation may be "combined" with an article of a *United Nations Convention* to create a substantive right to those services required by a respondent parent in order to parent

her children ("would ensure the service required by V.H. to assist her to raise her children");

(iv) Distinguishing the Decision of this Honourable Court in *Nova Scotia (Minister of Community Services) v. L.L.P.*, 2003 NSCA 1, solely on the basis that Article 23 of the *United Convention on the Rights of the Child* was not argued in *L.L.P.*, *supra*.

(2) The trial judge erred in law in her interpretation and application of Section 13 of the *Children and Family Services Act* including by,

(i) Failing to note, consider or apply the discretion granted to the Minister of Community Services by Section 13(1) of the *Children and Family Services Act* ("Where it appears to the Minister or an agency that services are necessary"), or the "reasonable measures" limitation in that subsection, before dismissing the proceeding on the expectation of such services;

(ii) Failing to consider and apply the legal threshold for and discretion granted to the Minister of Community Services by Section 14 of the *Children and Family Services Act* ("if it appears to the Minister") regarding the provision of "appropriate child care services" to children whom are not a child in care ("shall provide … if it appears to the Minister that (a) there is no parent or guardian willing to assume responsibility for the child");

(3) The trial judge erred in law in her interpretation of Section 41(3) of the *Children and Family Services Act* respecting the Agency Plan for the Child's Care including by,

(i) Treating the Agency Plan for the Child's Care as evidence rather than as a pleading, and ruling upon the Minister's application on the basis of the adequacy of the pleading rather than on the adequacy of the evidence;

(ii) Finding the Agency Plan for the Child's Care wanting in some respects and ordering the return of the children, rather than exercising available options other than an order not in the best interests of the children;

(iii) Failing to apply *Family Court Rule* 24.13(1), which states that the Minister need only file a revised Agency Plan for the Children's Care if the Minister seeks a change in placement, access or services from what was sought in the previous Plan of Care.

(4) Such other grounds as may be identified by the Applicant in an amended Notice of Appeal filed within fifteen (15) days of this Notice under *Civil Procedure Rule* 90.39(1).

[26] In her decision, Judge Melvin made some novel use of the two above-noted United Nations Conventions which she coupled with provisions of the *CFSA* in a manner which lead her to apparently conclude that there was an ongoing obligation on the Minister to fund services post-dismissal of protection proceedings. This reasoning appears to be adopted in order to bridge the gap between the children's ongoing high needs and the parents' ability to meet those needs.

[27] The judge reasoned:

> Combining section 13 of the Children and Family Services Act with Article 23, would ensure the services required by V.H. to assist her to raise her children and would be in the best interests of the children.
>
> […]
>
> … the Respondents have engaged in services, whether through the assistance of Minister or on their own. They have separated and learned through counselling how to communicate. They have found services and resources in the community to assist them in their parenting roles. V.H. has maintained a stable home environment. There is a close bond between the children and particularly V.H.
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> The Court finds, given the changes the Respondents have made, it is in the best interests of the children to have another chance for a loving connection and bond with their mother. The alternative is an uncertain future in Permanent Care, which is not in these children's best interest.
>
> There is no doubt that these children and the parents will require support. Even the foster parents have had support and with that, they were not able to care for E.C. and he was removed from there [*sic*] care and placed in a group home.
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> While there is truth to the maxim: it takes a village to raise a child, it is understood that this will not always be voluntary or from not-for-profit services. Some services will require payment.
>
> Section 13 of the Act combined with Article 23 of the United Nations Convention on the Rights of the Child allows for services to be put in place, pursuant to the above, to ensure the best interests of these children are met.
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> The Court finds that the Minister has not proven on a balance of probabilities that there exists a real chance of danger that is apparent on the evidence. The Court finds that an order for Permanent Care is not in the best interests of these children.

[28] The Minister argues that not only are the issues arguable, but the grounds of appeal are so strong the appeal is likely to be granted. The Minister asserts that the judge's interpretation of certain *CFSA* provisions are wrong in law and contrary to clear and binding jurisprudence, including decisions from this Court. Although the

Minister set out these authorities, there is no need for me to delve into them on this motion.

[29] In their written submissions, the respondent parents say the Minister raised no arguable issue. However, during the hearing of the stay motion, when asked by me, both respondent counsel conceded that the Minister's grounds of appeal respecting the interpretation and application of the United Nations Conventions raises an arguable issue. That was a fair and proper concession.

[30] In my view, the Minister's grounds of appeal meet the arguable issue threshold. I need say nothing further about their strength as that will be for the panel to decide. Having met this threshold, I turn to the determining factor of whether a stay would serve the children's best interests.

Is it in the children's best interests that a stay be granted or denied?

[31] The circumstances of this case present a compelling case for a stay. As indicated, the children have very high needs. They require extensive supports and services to meet their individual and complex mental, physical and emotional needs. These needs appear to be currently met by the Minister and the children are slowly making gains.

[32] I am mindful of the need to be deferential to the judge's findings. However, what appears to be lacking in the judge's decision is any meaningful analysis of what the children's needs were at the time of trial and the parents' current ability to meet those needs (particularly the respondent mother's as she was the proposed sole caregiver) to ensure the protection concerns were alleviated.

[33] Given the presenting circumstances, there are risks associated with disrupting the children's care pending appeal. These risks include their respective limited ability to cope with this change and the questionable ability of the parents to meet their needs, particularly given the weak transition plan and lack of supports in place should they return home. I do not fault the respondents as they seem to be genuinely open to and making efforts to shore up a successful transition of the children, but they themselves face certain challenges and/or barriers which impede their success.

[34] The expert who testified at the stay motion before me opined in her report:

> This letter is intended to update yourself and the Nova Scotia Department of Justice Family Court of the increasing need of support required for the day to day care of I.H. [age 10] since the date of January 23rd, 2019
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> […]
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> Given the behavioural/emotional escalation since the time of the trial, the decision to terminate his care status is highly concerning in respect to his safety and well-being, as well as the safety of others should he exit care without a full-time caregiver who can utilize CPI Nonviolent Crisis Intervention. Safety planning must be part of his exit plan, and if this cannot be completed by the incoming caregivers, it is not advised the transition occur. Transitioning him into a home with other vulnerable persons (including both his brother and his mother) is a dangerous decision for both him and others based on his current level of required support to help him with his maladaptive coping skills. The escalation in behaviours we have witnessed has primarily occurred after the trial date, and therefore the information and details of scope, frequency and intensity of these incidents would not have been included in the final decision.
>
> The physical and emotional labour to support I.H. at this time continues to be greater than the capacity of a single or dual foster placement is able to provide. With time and continued intervention, I.H.'s hypervigilance can reduce, thanks to the understanding of neuroanatomy and neuroplasticly [*sic*]. This does require a therapeutic living environment that can support I.H. for 24 hours, seven days per week, which will immerse I.H. in the tenants of trauma-informed care: safety, connectedness/belonging, and emotional regulation. These are the activities he is currently engaged in with Chisholm and Westmount. The question is whether a single parent or dual parent environment will have the emotional and physical capacity to support I.H as he recovers from his adverse childhood experiences that have led him to where he is today.
>
> Ultimately, the matter comes down to the ability for the adult caregiver to maintain safety of I.H. and his brother. Both children have special needs in diverse presentations. I.H. is a smart, charming and witty young boy who loves superheroes, Pokémon, and is a good friend to the children he currently lives with. He needs help right now finding holistic success, but when he has recovered and uses his adaptive, prosocial coping tools, this child will be a positive force and member of his community. If the above described behaviour trends continue I cannot help but worry for the safety of others in family-based placement.

[35] It is true that this report was not before the judge; however, the record otherwise contains material evidence respecting the capabilities of the parents and the needs of the children, and, as the Minister points out, there appears to be a significant gap. Although respondent counsel urged I give the expert's report less weight, her opinions seem quite consistent with the overall tenor of other material evidence in the record.

[36] The above factors in ¶31-35 favour a stay.

[37] I note that both the judge and the respondent parents were critical of aspects of the Minister's involvement during the lengthy protection proceedings. However, on this motion, the primary consideration is what is in the children's best interests pending the appeal. Should the appeal be allowed, the children would remain in the Minister's care, and as explained, moving them has immediate risks. In my view, the children are less likely to suffer harm if they remain in the Minister's care pending the outcome of this appeal.

[38] The respondent parents also requested that any stay order include specific directions on parental access and services. I declined to do so, leaving these matters to the discretion of the Minister. That said, I urged counsel for the Minister to ensure the parents' requests were addressed in a timely manner and guided by the best interests of the children.

Conclusion

[39] Motion for stay granted. No costs are ordered.

Van den Eynden, J.A.