NOVA SCOTIA COURT OF APPEAL

Citation: *L.A.G. v. Nova Scotia (Minister of Community Services)*, 2024 NSCA 71

Date: 20240717
Docket: CA 533719
Registry: Halifax

Between:

L.A.G.

Applicant

v.

Minister of Community Services

Respondent

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

Judge:	Justice Anne S. Derrick
Motion Heard:	July 11, 2024, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Alison Kouzovnikov, for the applicant Amanda Dillman, 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.

Decision:

Introduction

[1] LAG is the mother of five year old LMA. LMA has been in the permanent care and custody of the Minister of Community Services since June 2023. In May 2024, Justice Terrance Sheppard of the Nova Scotia Supreme Court, Family Division, ("application judge") heard LAG's application for leave to apply for termination of the permanent care and custody order. He denied leave (*L.A.G. v. Nova Scotia (Minister of Community Services*, 2024 NSSC 157). The application judge addressed two other issues which are not relevant to the stay motion. LAG filed an appeal from Justice Sheppard's Order of June 5, 2024, which is scheduled to be heard on September 10, 2024.

[2] On July 4, 2024, LAG filed a motion for a stay of the Order. She also sought an order permitting her to file an amended Notice of Appeal. These motions were heard by me on July 11, 2024.

[3] The respondent took no position on LAG's application to file an amended Notice of Appeal. That application is granted.

[4] The respondent opposed the motion for a stay. The Minister has indicated that in the absence of a stay of the application judge's June 5, 2024 Order, a Notice of Proposed Adoption will be given and LMA will be placed with her prospective adoptive family. Were a stay to be ordered, LMA would remain in the permanent care of the Minister and her long-term permanency planning would remain on hold while LAG pursued her appeal. The respondent says stalling LMA's adoption planning does not serve her best interests.

[5] LAG says any further delay in settling LMA's future will not be significant. She states her belief that she is now in a position to parent LMA. She says it is in LMA's best interests to be raised by her.

[6] The fundamental issue to be addressed is whether a stay will serve LMA's best interests. As the following reasons explain, I find it will not. The motion for a stay is dismissed.

The Position of the Parties

[7] The respondent asserts a stay would have to be granted to put the brakes on LMA's adoption. LAG does not agree. She says, in the circumstances of this case, the *Children and Family Services Act*, S.N.S. 1990, c. 5 ("*Act*") prohibits an adoption from proceeding. She relies on s. 76(3) of the *Act* which she says establishes that "while an application to terminate is before the courts, no adoption can proceed" (LAG's July 4, 2024 written submissions). She says until her appeal against the dismissal of her leave application has been heard the respondent cannot move ahead with the adoption process.

[8] The respondent says s. 76(3) does not bear the interpretation advanced by LAG. It is the respondent's submission s. 76(3) operates to prohibit a notice of proposed adoption where there is an outstanding application to terminate a permanent care and custody order. The respondent notes there is no application to terminate in the court below: LAG's application for leave to bring an application to terminate was dismissed.

[9] Otherwise, the parties disagree on whether a stay would be in LMA's best interests. LAG says there are a number of reasons why it is in LMA's best interests for a stay to be entered. The respondent's overarching position is that LAG has failed to satisfy the requirements for a stay, which I set out below. The respondent says a stay will be actively harmful to LMA.

Section 76(3) of the *Children and Family Services Act*

[10] Before I provide my analysis on the issue of a stay, I will first address LAG's submission that s. 76(3) of the *Children and Family Services Act* effectively stays the adoption process.

[11] Section 76(3) of the *Act* says the following:

> In the case of a child who is a child in permanent care and custody, the notice of proposed adoption shall not be given until any appeal from an order for permanent care and custody of the child or from a decision granting or refusing an application to terminate an order for permanent care and custody is heard and finally determined or until the time for taking an appeal has expired.

[12] There is no dispute that an application to terminate a permanent care and custody order cannot proceed without leave of the court. LAG was unsuccessful in obtaining leave. Consequently, there is no termination application in process.

[13] The case of *E.S. v. Children's Aid Society of Cape Breton-Victoria*, 2005 NSSC 172 cited by LAG does not assist her argument. The case addresses the situation of a "live" application for leave to apply for termination of a permanent care and custody order. The judge in *E.S.* held:

> [66] …once the application for leave is sought, I am satisfied there is a corresponding duty on the part of the Agency to suspend the filing of the notice of proposed adoption and the adoption process...

[14] The judge found the leave application "cannot be arrested simply because in the meantime the Agency has taken steps to have the children adopted" (para. 66).

[15] *E.S.* goes on to cite Professor Rollie Thompson from his *Annotated Children and Family Services Act* (1991) where he stated:

> **…once leave has been denied, it is up to the applicant party to seek a stay pursuant to s. 49(2) or (3) pending any appeal of the denial, in order to forestall any continuation of the adoption process**. By this means, it should be possible for the courts to address the merits and demands of individual cases, with the onus squarely placed upon the appropriate party in such situations.
>
> [emphasis added]

[16] Accordingly, it is a stay motion to which LAG must resort, not s. 76(3).

[17] This Court's decision in *Children's Aid Society of Cape Breton v. L.M.*, 1999 NSCA 101 underscores the significance of there being no application for leave to terminate a permanent care and custody order. The appellants in *L.M.* had unsuccessfully appealed the permanent care and custody order in relation to their four-year old child, E.H. They then filed an application to terminate the permanent care order. They did not apply for leave to terminate, a requirement under the *Act*. By the time their application came before the Family Court, a notice of proposed adoption had been given. The Family Court judge concluded he did not have jurisdiction to hear the application to terminate. The appellants' appeal of that decision was dismissed.

[18] In *L.M.*, there was no application for leave to terminate the permanent care and custody order. In its analysis of s. 76(3), this Court held:

> [55] … there was an argument before the trial judge that no notice of proposed adoption could be given where a termination application is "before the courts". Since the appellants had filed an application to terminate the permanent care order, it was submitted that the notice of proposed adoption did not comply with

> s. 76(3) of the Act, and, and therefore, should not have been given. The trial judge rejected that argument, and in my opinion was correct in doing so.

[19] This Court concluded in *L.M.* at paragraphs 58 and 59 that as there was:

> …no order granting or refusing an application to terminate the permanent care order…[and] not even any request for leave to make that application, which is required here…by virtue of s. 76 of the *Act*, the notice of proposed adoption which was given in this case complied with all the prerequisites of the *Act* for giving of such notice, and the adoption application should, on that basis, be permitted to proceed.

[20] In LAG's case, there is no termination application "before the courts". Leave to apply to terminate the permanent care and custody order was sought and dismissed. The options for LAG are the ones she is exercising—an appeal of the dismissal of her leave application and a motion for a stay of the application judge's order. Section 76(3) offers her no relief.

[21] Section 76(3) would apply if LAG's appeal was from a dismissal of an application to terminate the permanent care and custody order. But it is not: there has been no application to terminate either granted or dismissed. Section 76(3) does not apply in LAG's situation. Her only option for arresting the Minister's adoption process is a motion for a stay of the application judge's decision to deny her leave.

[22] It is the principles governing the stay motion to which I now turn.

Test on a Stay Application involving Children

[23] A stay of a judgment under appeal can be granted pursuant to *Civil Procedure Rule* 90.41(2). The traditional test applied by the Court on a stay application is the "*Fulton*" test (*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23). Under the "*Fulton*" test, the party seeking the stay must show: (1) an arguable issue for appeal; (2) they would experience irreparable harm if the stay were to be denied; (3) the balance of convenience favours a stay; or (4) there are exceptional circumstances.

[24] However, the "*Fulton*" criteria are not the focus in a case involving children. The focus there is on a child's best interests. The fundamental question to be answered is whether the applicant has demonstrated circumstances of a special and

persuasive nature that a stay would better serve, or cause less harm to, the child (*Young v. Stephens*, 2015 NSCA 86 at para. 7, per Bourgeois, J.A.).

[25] In *Young v. Stephens*, Justice Bourgeois explained the origins of the onus borne by an applicant for a stay in cases involving children, citing Farrar, J.A. in *Chiasson v. Sautiere*, 2012 NSCA 91:

> [15] In *Reeves v. Reeves*, 2010 NSCA 6, Fichaud, J.A. succinctly summarized the principles from the authorities as follows:
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> > [21] I summarize the following principles from these authorities. The stay applicant must have an arguable issue for her appeal. **But, when a child's custody, access or welfare is at issue, the consideration of irreparable harm and balance of convenience distils into an analysis of whether the stay's issuance or denial would better serve, or cause less harm to, the child's interest.** The determination of the child's interests is a delicate fact driven balance at the core of the rationale for appellate deference. So the judge on a stay application shows considerable deference to the findings of the trial judge. Of course, evidence of relevant events after the trial was not before the trial judge, and may affect the analysis. The child's need for stability generally means that there should be special and persuasive circumstances to justify a stay that would alter the status quo.
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> [16] Saunders, J.A. more recently rearticulated the test in *Slawter v. Bellefontaine*, 2011 NSCA 90:
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> > [21] ... In cases involving the welfare of a child where issues of custody or access arise, the test this Court applies when deciding whether to grant a stay pending appeal is whether there are "circumstances of a special and persuasive nature" justifying the stay. This test originated in *Routledge v. Routledge* (1986), 74 N.S.R. (2d) 290 (NSCA) and the principle has been consistently applied ever since. ...
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> [Emphasis added]

[26] In determining this stay motion, I must assess whether LMA will be better served by a stay being granted. That assessment is fact-driven and requires me to show considerable deference to the findings made by the application judge.

Findings of Fact by the Trial Judge

[27] The application judge noted that to obtain leave to apply for a termination of the permanent care and custody order, LAG had to show she had “a realistic expectation of success at trial” (para. 1).

[28] The application judge correctly identified the burden borne by LAG in an application to terminate a permanent care and custody order. This Court in *L.M.* endorsed the requirement for "ostensibly credible and weighty evidence" that the applicant's parenting or circumstantial "deficiencies" that led to the permanent care and custody order "have improved, or are being convincingly and meaningfully addressed with a realistic expectation of success in the reasonably foreseeable future" (para. 71, citing Judge Levy of the Family Court of Nova Scotia in *D.L.G. v. Family & Children Services of Kings County* (1994), 136 N.S.R. (2d) 131).

[29] In his assessment of LAG's leave application, the application judge reviewed the status of the five outstanding protection concerns that resulted in the permanent care and custody order. They were: the condition of LAG's home; her lack of support in the form of family and friends; her truthfulness; her parenting deficits; and her mental health.

[30] Taking account of the evidence before him, the application judge found LAG had made progress since the permanent care and custody order:

> [40] I find that the mother showed that she could lead evidence, which if accepted by the trial judge, would have a realistic expectation of success in convincing the Court that the Mother had addressed the protection concern of an unfit home.
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> …
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> [42] The Mother's current position is in sharp contrast to the situation she was in during the summer of 2023. While she had engaged with North Grove at that time, she had no other family or friends to support her.
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> [43] In the prior proceeding, the Mother was not forthcoming with the Agency on a number of issues such as her relationship with SRA, the child's father. However, in this matter, the Mother provided her information in a straightforward, credible manner. There were no internal or external inconsistencies in what she told the Court. Further, she made admissions against her interests - for example, her shortfalls in the prior proceedings. The Mother's insight has improved considerably since the Order issued.

[31] However, the application judge was not persuaded LAG had convincingly and meaningfully addressed the issues of her parenting deficits and her mental health. He considered each issue in turn:

> *The Mother's Parenting Deficits*

> [44] The Mother did not provide sufficient evidence on this point. Although the Mother said that she located several parenting groups, she has not actually participated in any of the groups and cannot do so because she does not have a child in her care. The unfortunate catch-22 situation does not, however, produce a realistic chance of success that the mother's parenting deficits have been sufficiently addressed.
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> *The Mother's Mental Health*
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> [45] When the Order issued, one of the most pressing child protection concerns related to the Mother's mental health, and specifically her ability to maintain her mental health long term. Indeed, I consider this to be the overarching concern in that if the Mother's mental health were being properly addressed, all other protection concerns would likely resolve.
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> [46] The Mother states that she has been improving her mental health "through proper diet, exercise, yoga and meditation." AB-A would state that the difference in the Mother's mental health is incredible. During the hearing, the Mother advised the Court that, since the Order, she lost 35 pounds.
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> [47] The Mother also advised that she is not currently taking any medication, does not have a family doctor, therapist, psychologist, or psychiatrist. Further, she does not believe that a walk-in clinic would assist her.
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> [48] The Mother presented her case in a clear, cogent, and well thought out manner. It was obviously emotional for her, but she kept calm throughout. Clearly the proper diet, exercise, yoga, meditation, and weight loss have improved her mental health.
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> [49] I accept that the Mother's mental health has improved since August 2, 2023, and she should be commended for her efforts. However, while I accept that her mental health has improved, the Mother's mental health concerns cannot be alleviated solely through proper diet, exercise, yoga, and meditation given that various professional have indicated the need for long-term treatment:

[32] The applications judge reviewed LAG's history of mental health, and psychiatric, parental capacity, and psychological assessments conducted in 2016, 2017, 2020 and 2022. Various diagnoses were set out in the assessments—Avoidant Personality Disorder (2016), Major Depressive Disorder and Panic Disorder (2017), Adjustment Disorder with Anxiety (2020), and Borderline Personality Disorder (2017 and 2022). (By 2020, LAG no longer met the criteria for Major Depressive Disorder). Recommended therapies included: medications, cognitive behaviour therapy, and Dialectical Behaviour Therapy. In 2020, LAG was going to counselling. In 2022 the Psychological Assessment recommended a referral to a psychiatrist "for medical treatment of ADHD, emotional regulation and to improve mood, energy, and motivation" (para. 49).

[33] By the time of LAG's leave application was heard on May 8, 2024, LAG was not receiving any therapies for her mental health. The application judge found:

> [50] Unfortunately, the Mother is not currently undergoing any therapy or professional treatment. She does not take any medication. She is not monitored by a doctor, psychologist, psychiatrist, or mental health professional. Accepting her evidence at its best, the most the Mother is able to show is that she is exercising, maintaining a proper diet, meditating, and doing yoga. That is simply not sufficient in the circumstances of this case. The Mother has not shown that she has a realistic expectation of success in relation to this overarching concern.

[34] The application judge's finding there was no realistic expectation LAG would successfully manage the mental health issues that had led to the permanent care and custody order was fatal to her leave application. He concluded she had not shown "significant improvement in the overarching issue surrounding her mental health" (para. 51). Despite finding that LAG had been able to demonstrate "considerable improvement in several areas", the application judge concluded LAG had produced no evidence "that her mental health issues had significantly improved or would stabilize in the future" (para. 53).

[35] As I said earlier, in my assessment of LMA's best interests, I must accord significant deference to the application judge's findings.

The Best Interests of LMA

[36] In her written submissions, LAG enumerated the reasons a stay is in LMA's best interests:

- The very high stakes of the adoption as it will sever LMA's relationship with her mother.

- The short delay of only two months until LAG's appeal is heard in September. (I note this does not take into account the decision on the appeal being reserved). LAG says if her appeal is successful she can "quickly have her application to terminate heard. The prospect for this mom and daughter reunifying is realistic".

- The last access visit in November 2023 went well. LMA knows and loves her mother.

- LAG has made substantial progress since the permanent care order in June 2023 and is now in a position to parent LMA.

- LMA's status quo with her foster parents will be undisturbed if a stay is granted. She will continue to be cared for in her foster home while LAG's appeal process proceeds.

- The respondent bears responsibility for delays in the advancement of LAG's application for leave.

[37] The respondent counters LAG's "best interests" arguments. In response, the respondent says: (1) LAG has a steep hill to climb in relation to her appeal, given the application judge's error-free reasoning; and (2) the evidence on the stay motion indicates a risk of harm, and actual harm to LMA if there is further delay in the adoption process.

[38] The respondent filed evidence on the stay motion in the form of the affidavit of Julie Daley, the Child in Care Social Worker for LMA since December 2, 2021. She describes her role as "monitoring [LMA]'s placement, ensuring that her needs are met, and meeting with her and her foster parents regularly". Ms. Daley indicates the following in her affidavit of June 19, 2024:

- The assessment of LMA's proposed adoptive home is completed.

- LMA's half-brother has been adopted by her proposed adoptive parents.

- The ongoing legal proceedings have paused the implementation of LMA's transition into the care of her proposed adoptive parents. The transition is anticipated to be less than two weeks "because [LMA] is so ready for her permanent home".

- LMA's foster parents have noticed a regression in LMA's behaviour, in the form of acting out and demanding more attention, during the past five months while the legal proceedings have been underway.

- LMA has been expressing feelings of being alone. Discussions about her adoption plan have been suspended.

- Continued regression in LMA's behaviour would mean more work for her in counselling and may create hardship for her in the transition to her adoptive home.

[39] The respondent says the following on the issue of further delay:

- A stay would place LMA's transition to her prospective adoptive home on hold.

- LMA has not been in LAG's care since November 2021 when she was two and a half years old. There has been no access since November 2023.

- The pausing of LMA's adoption plan will defer the stability and security associated with the permanency planning that has been underway.

Analysis

[40] LAG is to be commended for the progress, recognized by the application judge, that she made since the permanent care order. There is no question about her love for her daughter and the profound heartache she must be feeling at the prospect of her being adopted. However, the determination of this stay motion has to remain grounded in the law and the facts of LAG's case. And the facts, as found by the application judge, do not support LAG's hopeful claim, mentioned earlier in these reasons, that, "The prospect for this mom and daughter reunifying is realistic". LAG views herself as now in a position to parent LMA. The very recent conclusion of the application judge was that she is not.

[41] The application judge's findings do not support a realistic prospect of reunification. The judge found that LAG's efforts, through exercise, diet, meditation, and yoga, to improve the overarching protection concern of her mental health, were "not sufficient in the circumstances of this case" (para. 50). His findings do not support LAG's submission that a stay and the further pause in LMA's permanency planning it will cause is not adverse to LMA's best interests.

[42] As I noted in paragraph 25 of these reasons, citing Justice Fichaud in *Reeves v. Reeves*: "The child's need for stability generally means that there should be special and persuasive circumstances to justify a stay that would alter the status quo". The status quo in this case is not, as LAG suggests, merely LMA's

placement in her foster home. The status quo here—permanent care and custody with the Minister—includes the adoption process that, as described in Julie Daley's affidavit, has been underway and is close to being concluded. As Ms. Daley says: "[LMA] is very aware that we have stopped talking to her about her adoption plan". In an earlier affidavit from Ms. Daley, dated May 2, 2024, she noted that LMA had been expressing excitement about joining her future family.

[43] In paragraph 24 of these reasons I indicated the test LAG had to satisfy for a stay: she must demonstrate circumstances of a special and persuasive nature that a stay would better serve, or cause less harm to, LMA. This is the "best interests" requirement that has to be met. LAG's love for her daughter and the progress she has made in relation to a number of issues falls short of what is required to obtain a stay in the circumstances of this case. LAG has not shown a stay is in LMA's best interests. Indeed, I find a stay would be contrary to LMA's sense of stability and security and her need for permanency.

Conclusion

[44] The motion for a stay is dismissed without costs.

Derrick, J.A.