NOVA SCOTIA COURT OF APPEAL

Citation: *J.F. v. Children's Aid Society of Cape Breton (Victoria)*, 2005 NSCA 101

Date: 20050629
Docket: CA 341201
Registry: Halifax

Between:

J.F.

Appellant

v.

Children's Aid Society of Cape Breton (Victoria)

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

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

Judge(s): Bateman, Cromwell & Hamilton, JJ.A.

Appeal Heard: June 15, 2005, in Halifax, Nova Scotia

Held: Appeal dismissed as per reasons for judgment of Bateman, J.A.; Cromwell & Hamilton, J.A. concurring

Counsel: Alan Stanwick, for the Appellant
Robert Crosby, Q.C., 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] On January 6, 2005 Justice M. Clare MacLellan directed that S.N. (born April *, 1998), B.N. (born June *, 2000) and D.N. (born June *, 2001) be in the permanent care of the respondent Society. They are the children of the appellant, J.F.. The children's father is P.N. He is not participating in this appeal. This is an appeal from that order made under the **Children and Family Services Act**, S.N.S. 1990, c. 5, as amended. The only issue on appeal is whether the judge erred in declining to order post-permanent care access by the children's mother.
(* *Editor's note- dates removed to protect identity*)

BACKGROUND

[2] The respondent Society became involved with the family in December, 2002, when the children were then four, two and one years old. The Society had become aware that the children's father was being released from the Westmorland Institution having served custodial sentences for the sexual touching of two young girls. The Society sought an order for supervision of the children, who would remain in J.F.'s care with limited access by P.N.

[3] On March 6, 2003, after a contested protection hearing, the judge concluded that neither parent exhibited insight into the risk to their own children and other children who might be in their home posed by the father's history of sexual offences. The judge was not prepared to permit the father to return to live with J.F. and the children, nor to have unsupervised access. The children were found to be in need of protection and an interim supervision order issued which limited P.N.'s access with the children. Services were ordered including a parental capacity assessment.

[4] The disposition hearing was adjourned several times, on each occasion, the parties agreeing it was in the best interests of the children that the statutory time limits be exceeded. At the hearing in June 2003, Ms. Valorie Rule, the clinical psychologist who had completed the parental capacity assessment, testified that, if the family was to re-unify, a principal concern was J.F.'s inability to appropriately monitor P.N.'s interaction with children. J.F. did not accept there was a continuing risk that P.N. might commit another sexual assault. Ms. Rule was also concerned about J.F.'s dependency on P.N. This created a power imbalance in the

relationship and could affect J.F.'s ability to monitor P.N., even should she be willing to do so.

[5] Ms. Rule recommended that J.F. be provided with specialized education about sexual offences including how to monitor risk. She recommended that P.N. not be permitted to return to the home at that time. The Society sought a continuing supervision order with the children to remain in J.F.'s care but without P.N. in the home. Services were to be provided in hopes of equipping J.F. with the understanding and resolve necessary to supervise P.N.. At that point, the Society would conclude its involvement with the family. The disposition hearing was adjourned to accommodate the attendance of additional witnesses. An interim order issued continuing supervision and limiting P.N.'s contact with the children.

[6] Shortly after the adjournment J.F. advised the Society she was unable to meet the children's needs and asked that they be placed in temporary care. A consent order to that effect followed. In August 2003, the parties again appeared before the Court with the Society amending its plan to seek additional mental health services for J.F. and setting out a proposal for the return of the children to J.F.'s care, one at a time. The reunification of the children with J.F. was unsuccessful, breaking down before the third child, B.A.N., was returned.

[7] Consistent with J.F.'s wishes, S.N. and D.N. were temporarily placed with the maternal grandparents. B.N. remained in the Society's care. By the end of September 2003 S.N. and D.N. were returned to foster care when J.F.'s parents were unable to continue to care for them.

[8] With the resumption of the disposition hearing in October 2003, the Society's concerns had expanded to include, not only the danger to the children posed by P.N., but also J.F.'s inability to care for the children. J.F.'s ongoing mental health issues seriously compromised her parenting, which had resulted in the children's exposure to dangerous physical and emotional situations during the brief time the two were returned to her.

[9] At the October hearing J.F. sought return of the three children. It was her proposal that P.N. be permitted to rejoin the family. In the alternative, the parents asked that the children to be returned to J.F., with unsupervised access by P.N.

[10] The children remained in the Society's temporary care with unsupervised access by J.F. and supervised access by P.N. This arrangement continued while the parties received services and J.F. pursued treatment for her ongoing mental health issues. The parties' participation in services was inconsistent. J.F. failed to follow through with counselling and the recommendations of her treating physicians. The children's behaviour, which had improved while in care, deteriorated during access visits.

[11] At the final disposition hearing, which commenced in November of 2004, the Society sought permanent care of the children. J.F. acknowledged she had not been compliant with treatment plans and the recommended counselling in the past. In her submission she was now on the road to recovery having finally been properly diagnosed and treated for bipolar disorder. Her treating physician was more guarded in his prognosis, testifying that it was too soon to tell whether she had stabilized. He expressed concern about the apparent dominant role P.N. played during J.F.'s appointments with him. It continued to be J.F.'s plan for the family to reunite and include P.N.

[12] The judge was not satisfied that J.F.'s mental health had stabilized nor that she was willing or able to supervise P.N.'s interaction with the children. While acknowledging that both parents clearly loved their children, she was not persuaded that the ongoing parenting deficits, mental health issues or risks presented by P.N. had been addressed.

[13] The Society's plan for the children was adoption. The judge was persuaded that this was in their best interests. She ordered permanent care with the gradual termination of access.

ISSUE

[14] The single issue on appeal is whether the judge, upon ordering that the three children be placed in the permanent care of the Society, erred in refusing to order continued access with the mother.

STANDARD OF REVIEW

[15] The standard of review was summarized by this court in **Children's Aid Society of Cape Breton-Victoria v. A.M.**, [2005] N.S.J. No. 132 (Q.L.). Cromwell J.A., writing for the court, said:

> ¶ 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.

ANALYSIS

[16] In **A.M.**, supra, as here, at issue was the judge's order for permanent care without access. Cromwell J.A. wrote:

> ¶ 2 Before turning to the history of the proceedings, it will be helpful to remember two features of the Act which are at the heart of the appeal.
>
> ¶ 3 The first is that the Act contains statutory time limits for the duration of disposition orders. It is common ground that the time limit set out in s. 45(1)(a) of the Act applies here. It provides that where the court makes a temporary care order, "... the total period of duration of all disposition orders ... shall not exceed .... twelve months."
>
> ¶ 4 The second feature of the Act concerns orders for access by a parent after a permanent care order has been made. When a permanent care order is made, the Society becomes "... the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody": s. 47(1). The court may make an order for access by a parent in relation to a child in the permanent care of a Society. However, the court is directed by the statute not to make an order for access unless (and I will consider only the

> provisions relevant to this case): (1) it is satisfied that a permanent placement in a family setting has not been planned or is not possible and access will not impair the child's future opportunities for placement; (2) the child has been placed or will be placed with a person who does not wish to adopt the child; or (3) some other special circumstance justifies making an order for access: s. 47(2). In addition, the Act provides that no child in permanent care and custody with a provision for access may be placed for adoption unless the order for access is terminated: s. 70(3).

[17] The maximum time limits for a child welfare proceeding are set out in s. 45 of the **Act**: twelve months for children under six years of age and eighteen months for those between six and twelve years. At the end of the statutory period a court must either dismiss the proceeding or order permanent care and custody. The time frames within which the proceeding must be resolved are necessarily short in deference to the "child's sense of time," as is recognized in the recitals to the **Act**:

> AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;

[18] Orders for permanent care are not limited to situations where there is no hope of parental improvement. The question is whether adequate parenting can be achieved within a reasonable time frame. That period is presumed to be the statutory time limit (**Nova Scotia (Minister of Community Services) v. L.L.P.**, [2003] N.S.J. No. 1 (C.A.) (Q.L.)).

[19] It is in a child’s interests that the uncertainty that accompanies a child welfare proceeding be prolonged no longer than necessary. The statutory time frames provide the outside limits. Indeed, the **Act** contemplates that an order for permanent care may be necessary even before the maximum times have expired (see, for example s.46(6)). Here, the Society had been involved for twice the length of time permitted by statute. While this was with the consent of the parties and with the goal of enabling the family to reunite, by the time of the final hearing the children had been in temporary care for over eighteen months. Considering the Society’s intervention had commenced when they were four, two and one year(s) old, this was an inordinately long time in the lives of these children. Two of the children had experienced multiple changes of caretaker during that period.

[20] The judge recognized that such impermanence can significantly impair a child's ability to bond with his caretaker. It was critical that these children be settled while they could still form lasting attachments. Although J.F. loved the children and they her, the judge was not persuaded continuing access was in their best interests. J.F.'s mental health issues were longstanding; she had been inconsistent in pursuing treatment, although professing recent progress; she continued to plan a relationship with P.N. and, notwithstanding the counselling, failed to appreciate the risk he posed to children; her dependance on P.N. and his dominance of her remained a concern.

[21] Referring again to Cromwell J.A. in **A.M.**, supra:

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

[22] J.F. says access should have been ordered so as to keep the relationship between the mother and the children intact, in hopes she could eventually regain custody. An order for access prevents adoption placement.

[23] At the end of the statutory time periods, the only options open to the court are to dismiss the proceeding or order permanent care. Section 47(2) of the **Act**, permits a court to order post-permanent care access in limited circumstances:

> 47(2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that

> (a) permanent placement in a family setting has not been planned or is not possible and the persons access will not impair the childs future opportunities for such placement;
>
> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.

[24] J.F. says her improving mental health was a "special circumstance" justifying an access order. An access order here would amount to an indefinite extension of the statutory time periods, double the maximum time having already elapsed. This would run counter to the clear intent of the statute that such proceedings respect the child's sense of time. Whatever the meaning of "special circumstance" in s. 47(2)(d), it cannot be interpreted so as to circumvent the clear maximum times mandated by the **Act** unless the best interests of the child so requires.

[25] The judge was satisfied the children required security and stability with their best hope of achieving this being adoption. In short, their best interests were served by permanent placement for adoption. This conclusion, which is not reflective of error and is not directly challenged on appeal, is inconsistent with the granting of access.

[26] I would dismiss the appeal, without costs.

Bateman, J.A.

Concurred in:

Cromwell, J.A.

Hamilton, J.A.