

NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Community Services) v. N.N.M.*,
2008 NSCA 69

Date: 20080730

Docket: CA 294258

Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

N. N. M. and R. D. M.

Respondents

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

Judge: The Honourable Justice M. Jill Hamilton

Appeal Heard: June 13, 2008

Subject: Child protection. Foster parents. *Parens patriae* jurisdiction for judicial review of MCS decision.

Summary: The foster parents of two young children who eventually wanted to adopt the children, challenged the MCS's decision to place the children for adoption with others and her review of that decision. The judge found she had jurisdiction under the doctrine of *parens patriae* to review the MCS's decision. The judge concluded that the MCS breached the duty of fairness she owed to the foster parents in the selection of an adoptive home for the children and in her review of that decision. The MCS appealed.

Issues: 1. Did the judge err in finding she had *parens patriae* jurisdiction to judicially review the process followed by the MCS in reaching her decision to see if it was procedurally fair?

2. Was the judge correct in finding the MCS did not meet the duty of procedural fairness she owed to the foster parents when selecting the best adoptive home for the children?

Result:

Appeal allowed. The judge did not err in finding she had *parens patriae* jurisdiction to judicially review the process followed by the MCS in reaching her decision to see if it was procedurally fair. The judge was not correct in finding the MCS did not meet the duty of fairness she owed the foster parents. The MCS agreed there was a duty of fairness owed to the foster parents. Determining the scope of the duty of procedural fairness is a question of law for which this court's appellate standard of review is correctness.

The best interests of the children is the paramount consideration for the MCS in determining the process to be followed in selecting an adoptive home, in making the selection and in reviewing her decision if necessary. The interests of others, such as the foster parents, are by definition secondary. The factors set out in **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817 for determining whether the duty of fairness has been met with respect to an administrative decision, must be considered in light of this.

The selection of the best adoptive parents for the children is a personal and sensitive decision of importance to many people. The scheme of the **Children and Family Services Act**, R.S.N.S. 1990, c. 5 gives broad discretion to the MCS, that of a parent, few rights to foster parents and focusses on the importance of time in removing children from harm's way and placing them in a permanent stable adoptive home if their biological parents are found to be unable to continue to care for them. No bad faith was suggested and there was no indication that the MCS did not select the adoptive parents taking into account the best interests of the children at all stages.

The MCS started planning for the adoption of the children when she decided to apply for permanent care. This early preparation is to be commended given the emphasis in the **CFSA** on avoiding delay throughout child protection matters. Taking into account the effect on the children of being separated from the foster parents, she asked the foster parents if they were interested in adopting the

children at a time when they could have taken the necessary steps to become an approved adoptive home. She considered what criteria relating to adoptive parents would best suit the physical, mental and emotional needs of the children. An adoptive home was chosen and the prospective adoptive parents were informed so that the transition could be made quickly if a permanent care order was issued. Once the foster parents indicated they were interested in adopting, with the attachment issue in mind along with the criteria identified for the best adoptive parents, the MCS reconsidered her selection. When the foster parents indicated their disagreement with her selection and their lack of participation in it, she for the most part followed her usual procedure for reviewing such decisions. As part of this review the foster parents had two meetings with the social worker and had the opportunity to put their position before the MCS in writing. Given the best interests of the children to be placed for adoption quickly with adoptive parents best meeting their specific needs, the MCS did not breach the duty of fairness she owed to the foster parents in proceeding as she did.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 29 pages.