NOVA SCOTIA COURT OF APPEAL

Cite as: T.A.G. v. T.G., 2003 NSCA 2

Date: 20030107
Docket: CA 191621
Registry: Halifax

Between:

T.A.G.

Applicant/Appellant

v.

T. G. and Mi'kmaw Family and Children's Services of Nova Scotia

Respondents

Editorial Notice

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

Restriction on publication: 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

Judge(s): The Honourable Justice Linda Lee Oland, In Chambers

Appeal Heard: January 2, 2003, in Halifax, Nova Scotia

Held: Application dismissed

Counsel: Lee Anne MacLeod-Archer, for the applicant/appellant
David Raniseth, for the respondent T. G.
Robert Crosby, Q.C., for the respondent Mi'kmaw Family and Children's Services of Nova Scotia

Oland, J.A.:

[1] The applicant, T.A.G., and the respondent, T. G., are the parents of three children who were taken into protective custody pursuant to s. 22(2)(b) of the *Children and Family Services Act* (the *Act*). By a decision dated December 5, 2002, the Honourable Justice J. Vernon MacDonald of the Supreme Court of Nova Scotia (Family Division) ordered that the children be placed in the temporary care and custody of Mi'kmaw Family and Children Services of Nova Scotia (the Agency) until certain terms and conditions were accomplished, and thereafter, that they be placed in the supervised care of their mother, again subject to certain terms and conditions.

[2] The Disposition Order reflecting the judge's decision issued on December 30, 2002. The father has appealed the decision and order, and now applies for a stay of the order pursuant to s. 49(3) of the *Act* which reads:

> **49 (3)** Where a notice of appeal is filed pursuant to this Section, a party may apply to the Appeal Division of the Supreme Court for an order staying the execution of the order, or any part of the order, appealed.

[3] The parents were married in 1995, separated in 1997, and divorced in October 1999. The three children are twin girls now nine years old, and a boy now five years old. The corollary relief judgment granted the father custody of these children with access to the mother. It also provided that should the father not be in a position to care for the children, day-to-day care shall be with the mother.

[4] Following their parents' separation, all three children were in the care of the mother. In February 1998 the girls went to live with their father and, in January 1999, the boy joined them. All three then lived with their father until June of 2002. In November 2001 the mother moved back to Cape Breton and lived with the children until late January 2002.

[5] The children were taken into protective custody in early June 2002. The boy was immediately placed with his paternal aunt, M. G. F.. In August 2002 both girls were placed with her as well, having been with their grandfather, C. E. G., for the two intervening months. On September 5,

2002 the children were found in need of protective services, which finding was made with respect to the father only.

[6] On this application, I had before me affidavits sworn by the father; his father, C. E. G.; his sister, M. G. F.; and his sister's husband, M. F.. I also had an affidavit sworn by the mother, which contradicted some statements in the affidavits filed in support of the application. None of the deponents were cross-examined in chambers.

[7] These affidavits in support of the stay emphasized how the children were doing in the temporary care of their aunt and the lack of contact with the mother. According to C. G., the mother has not seen the children since January 2002, and according to M. F., the mother has never called asking about the children. However, according to the mother, she was having regular visits with the children until January 2002 and that thereafter, the father refused to allow her access and she was unable to contact them by telephone.

[8] At the disposition hearing on December 5, 2002, the main issue was where the children should be placed pending the continuation of the proceeding. The Agency filed a plan of care seeking to have the children remain in temporary care with their aunt. The father offered no plan for the children and the Agency proposed that he be allowed supervised contact. The mother sought to have the children returned to her under the terms of a supervision order.

[9] The judge had received a needs assessment dated August 30, 2002 for the boy which had been prepared by Dr. David Hawkins-Clarke, a clinical and forensic child counselor. It identified significant psychological problems, and recommended a treatment program and individual counseling. The judge also had reports dated September 3, 2002 regarding each of the girls which had been prepared by Colleen MacPherson, a social worker. Both reports set out behavioural and academic problems and, among other things, recommended continued counseling.

[10] At the half-day hearing, the judge heard the father, the mother, a representative of the Agency, Dr. Hawkins-Clarke, and Ms. MacPherson testify. He also had affidavit evidence from the Agency representative.

[11] The judge found the Agency's plan of care deficient in that it did "not fully access the mother or her availability to parent the children." His decision read in part:

> . . . I find the agency plan does not fully address the mother's position and it does not exclude her from parenting. The mother has come to court here today and explained her position. She has not been discredited. In the past she brought home concerns to the agency. They were not fully addressed. The agency ultimately took the children into care I find consistent with the concerns brought forward by the mother. The agency was slow to involve her in the issue of parenting these children since their apprehension. She may have made it more difficult than otherwise would be the case but she was available. The evidence does not establish any risk presenting her parenting of the children, at least on the evidence I heard.
>
> The children's needs as have been described by Doctor Clarke and Ms. MacPherson are great. They have been, I find, met while they have been in care but there is no reason to believe that the mother could not with assistance, carry on and meet those needs in Pictou. This would be I find consistent with their best interest overall considering their background and the mother[']s availability and would reflect in my judgment the principles set out in **Section 3(2)** of the **Act** dealing with the children's best interest. (Emphasis added)

[12] The judge found that the children needed a stabilized environment which, in his view, should in the first instance be with their mother and it was best that she be placed in charge of them "as soon as practicable."

[13] His Disposition Order requires certain condition to be met, after which the children were to be placed in the supervised care of the mother, subject to additional conditions. It reads in part:

> 1. The children
>
> | Name of child | Date of Birth | Sex |
> |---|---|---|
> | **K. G.** | **May ..., 1993** | **F** |
> | **J. G.** | **May ..., 1993** | **F** |
> | **T. G.** | **October ..., 1996** | **M** |
>
> (*Editorial note- dates removed to protect identity*)
>
> shall be placed in the temporary care and custody of the Applicant until the following terms and conditions are accomplished:
>
> (a) the Respondent, T. G. receive counselling as referred to in the Report of Dr. David Hawkins-Clarke regarding meeting

the child, T.'s needs and continued follow up be arranged for Ms. G. and the child, T. with Dr. Hawkins-Clarke;

(b) the Respondent, T. G. meet with Ms. Colleen MacPherson and receive instructions in meeting the needs of the children, J. and K. both prior to and after the children being reunited with Ms. G.;

(c) arrangements are completed to have the children enrolled in school after Christmas in Pictou, and

(d) arrangements are put in place for the children to continue with counselling of the same kind they have had with Colleen MacPherson;

2. When the above noted terms and conditions of the order have been complied with, the said children are to be placed in the supervised care of the Respondent, T. G. subject to the following terms and conditions:

(a) the Respondent, T. G. shall cooperate with the completion of a parenting capacity assessment as may be directed by the Applicant in terms of assessing what other services can be made available to Ms. G. to meet the children's needs and to meet her own needs while parenting the children;

(b) arrangements are made to provide a teacher's aid for the child, T. at school;

(c) the children, J. and K. be made available by the Respondent, T. G. for counselling and follow-up as directed by the Applicant;

(d) access for the Respondent, T.A. G. be supervised and arranged by the Applicant on notice to the Respondent, T. G.;

(e) the Applicant may pay the reasonable costs to assist the Respondents to access remedial services. (Emphasis added)

[14] On December 12, 2002 the mother met separately with Ms. MacPherson and Dr. Hawkins-Clarke. These meetings were held before the draft of the judge's order was available. Upon being advised that they had been held, the Agency decided to place the children with their mother on December 28, 2002.

[15] After receiving a draft of the judge's order, each of Ms. MacPherson and Dr. Hawkins-Clarke wrote counsel for the Agency separately raising concerns that her or his meeting with the mother had not satisfied the requirements in the order and indicating that additional time was required. The parties sought the judge's clarification of paragraphs 1(a) and (b) of his order. The judge advised that whether the information provided the mother in those meetings was satisfactory would be in the judgment of counsel for the mother.

[16] The father's application to the judge for a stay not exceeding ten days pursuant to s. 49(2) of the *Act* was denied.

[17] Although arrangements had been made, the children were not placed with the mother on December 28, 2002. The hearing of the appeal is scheduled for April 17, 2003.

[18] The test for a stay was set out by Justice Flinn in *Children's Aid Society of Halifax v. B.M.J.*, [2000] N.S.J. No. 405 (N.S.C.A.):

> Justice Hallett, whose decision in **Fulton Insurance Agencies Ltd. v. Purdy** (1991), 100 N.S.R. (2d) 341 sets out the standard by which an application for a stay of execution of a judgment in a civil case is measured, recognized that a different standard is used in cases involving custody of children. He said at p. 344:
>
> > That is not the only test: this Court has considered stays of custody Orders on the ground that if special circumstances exist that could be harmful to a child if the Order were acted upon before the appeal was heard, a stay would be granted (**Millett v. Millett** (1974), 9 N.S.R. (2d) 26 (C.A.); **Routledge v. Routledge** (1986), 74 N.S.R. (2d) 290; 180 A.P.R. 290 (C.A.)). These cases involved children's welfare, not monetary judgments. In **Millett** the stay was granted; in **Routledge** refused. In the latter case, Clarke C.J.N.S., stated:

> "In my opinion, there need to be circumstances of a special and persuasive nature to grant a stay."

Justice Bateman made reference to this test in the recent decision of **Ryan v. Ryan** (1999), 175 N.S.R. (2d) 370, as did I in the case of **Ellis v. Ellis** (1998), 163 N.S.R. (2d) 397.

[19] In seeking a stay pending the disposition of his appeal, the father points to the disruption to the children, including the possibility of their removal from the mother's care following her parental capacity assessment. He also claims that they are at risk of harm and urges that the status quo be maintained.

[20] The father submits that the children will experience serious disruption if moved from their placement with their aunt in a native community to their mother in Pictou, and must change schools mid-year. I am not persuaded that the disruption to these children is such as to warrant a stay. As Flinn, J.A. stated in *B.M.J.*, supra at ¶ 42, disruption is present in every case involving the transfer of care of young children. The father is a native, the mother a non-native, and it appears that the children have been exposed to both communities. While the children would have to change schools in the middle of the school year, in my view it is generally better to start a new school term in a new school rather than moving in mid-term which may involve changes to the curriculum.

[21] Neither am I persuaded that the requirement in the judge's order that the mother undergo a parental capacity assessment constitutes a special circumstance warranting a stay. The judge described the children as having "special needs" and recognized the significant problems each was already experiencing in her or his young life. His order directed that temporary care remain with the Agency until the mother received counseling and instruction with regard to their needs.

[22] The judge then ordered that after the children were placed in the mother's supervised care, that the mother complete a parental capacity assessment. Since he had stated that the evidence did not establish any risk were she to care for the children, this condition seems rather perplexing. The judge gave no reasons for its inclusion and counsel for the parties were unable to shed any real light on this requirement.

[23] Why the judge ordered an assessment of the mother that is to be undertaken only after the children were moved to her care also seems somewhat

perplexing. Ordinarily, such assessments are ordered to be completed prior to placement, so that any difficulties can be identified and a contemplated placement not proceed or helpful services be identified and made available.

[24] The father submits that where, as here, a parental capacity assessment is to be undertaken after placement, there is a risk that the results will be unfavourable. If so, the children may have to be removed from the care of that parent. He argues that the possibility that the children will be transferred to the mother and then moved back again supports a stay. In the circumstances of this case, I do not agree.

[25] While the judge did direct that the mother complete a parenting capacity assessment, nowhere in his decision does he indicate any specific concerns about her parenting ability. He had heard the evidence of the counsellors as to the needs of these children and that of the Agency representative and the parents. His requiring such an assessment, but only after the children's placement with her, does not clearly contradict his statement that no risk to the children by her parenting was established. Had he concerns of any consequence, he could have ordered the assessment before the transfer of the children.

[26] While there may be a risk that the assessment will be unsatisfactory and that either services will be identified as necessary or removal of the children will ensue, there was no clear evidence before me as to the extent of that risk. Having in mind all these circumstances, I am unable to agree that the judge's requirement that the mother undergo a parental capacity assessment after the placement of the children constitutes a risk of harm sufficient to merit a stay.

[27] The father in arguing likelihood of harm to the children also relies on the letters each of Ms. MacPherson and Dr. Hawkins-Clarke wrote after receiving the draft order. Those professionals were concerned that they had not complied with the order and suggested how that might be accomplished. For example, Ms. MacPherson indicated that she had provided information rather than instructions and consequently more sessions with the mother were needed. Dr. Hawkins-Clarke advised that he was unable to continue counseling if the boy moved to Pictou, emphasized the need for continued counseling, and recommended additional meetings with the mother.

[28] The letters dealt with whether the pre-conditions to placement had been met. While it may be regrettable that the letters themselves were not before the judge when he met with counsel for clarification purposes, the judge did

determine how the parties could know that his requirements had been satisfied. Moreover, the letters do not specify any likely harm to the children that might result if the recommendations were not followed although they impress the need for counseling to continue without interruption. In her affidavit, the mother deposed that she has made arrangement for the three children to continue the counseling and/or therapy they had been receiving with Mr. MacPherson and Dr. Hawkins-Clarke. Accordingly, I am not persuaded that these letters provide a basis for the granting of a stay.

[29] The final argument raised by the father was that the status quo should be maintained pending the disposition of the appeal. In this regard, he relied upon *J.E.A. v. C.L.M.,* [2002] N.S.J. No 314, wherein Flinn, J.A. noted that the balance of convenience favoured maintaining the status quo and granted the stay application. However, that decision pertained to an application pursuant to the provisions of the *Hague Convention* and the chambers judge found that the test for a stay in cases involving custody of children did not apply in the application before him, that the test was that in *Fulton Insurance Agencies Ltd. v. Purdy* (1991), 100 N.S.R. (2d) 341, and that the balance of convenience component of that test favoured the status quo in those particular circumstances.

[30] At ¶ 51 of *B.M.J.*, supra, Flinn, J.A. gave some examples of circumstances which might warrant a stay:

> There is no evidence before me of any material change in circumstances since the trial, no evidence that any of the conditions which the trial judge imposed as part of her order have not, or will not, be met, and no evidence from which I could conclude that harm is likely to come to the children if they are turned over to their mother in accordance with the terms of the trial judge's order. Evidence on any one of these matters might very well amount to circumstances of a special and persuasive nature warranting a stay; however, there is none before me.

In my view, none of these matters was made out in this application and I am unable to find any other circumstances of the nature that would warrant a stay.

[31] I would dismiss the application for a stay. Costs will be in the cause.

Oland, J.A.