**NOVA SCOTIA COURT OF APPEAL**

**Citation:** W. R. v. Nova Scotia (Community Services), 2005 NSCA 120

**Date:** 20050930
**Docket:** CA 245843
**Registry:** Halifax

**Between:**

W.R. and R.H.

Appellants

v.

Minister of Community Services

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):** MacDonald, C.J.N.S., Oland and Fichaud, JJ.A.

**Appeal Heard:** September 13, 2005, in Halifax, Nova Scotia

**Held:** Appeal dismissed without costs as per reasons for judgment of Fichaud, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring.

**Counsel:** David A. Grant, for the appellants
John S. Underhill, 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] Justice Williams of the Supreme Court (Family Division), after a trial, ordered that three children needed protection under the *Children and Family Services Act*. The parents appeal. They say that Justice Williams relied on outdated evidence, ignored the parents' recent efforts to improve family conditions, and that the children did not need protection at the date of the hearing.

## ***Background***

[2] The appellant R.H. is the mother of C.M., born February [...], 1997, and J.M., born June [...], 2001. The appellant W.R. is the father of S.R., born June [...], 1997. R.H. and W.R. and the three children lived together in W.R.'s home in [...] from November 2004 to February 7, 2005.

[3] On February 7, 2005, the Department of Community Services ("Agency") took the three children into care. The Agency acted under s. 33 of the *Children and Family Services Act* S.N.S. 1990, c. 5 ("*Act*"). Section 33 permits the Agency to take a child into care where the Agency has reasonable and probable grounds to believe that the child "is in need of protective services and the child's health or safety cannot be protected adequately otherwise than by taking the child into care". The Agency's concerns related to W.R.'s drinking and abusive behaviour and consequent emotional harm to the children.

[4] The Agency filed a protection application and notice of hearing on February 9, 2005.

[5] Following an interim hearing under s. 39 of the *Act*, Justice Williams granted orders issued March 11, 2005 stating that the three children were in need of protective services. These interim orders returned the three children to the care of R.H. subject to the Agency's supervision upon conditions. The conditions included that W.R. not reside with or contact the three children. The orders provided that the parents and children undergo assessment and counselling and that W.R. attend counselling and treatment for substance abuse.

[6] Section 40(1) of the *Act* states that within 90 days of the Agency's application, the court shall hold a protection hearing to determine whether the

child is in need of protective services. Justice Williams conducted the protection hearing on April 1, 2005. The witnesses included R.H. and W.R., a social worker with the Department of Community Services and a registered marriage and family therapist. The parties by consent adduced statements given by the children.

[7] R.H. and W.R. submitted to the trial judge that the children were not in need of protection, and that the protection proceeding should terminate.

[8] The Agency said that the children needed protective services under paragraphs 22(2) (f) and (g)of the *Act*:

> 22 (2) A child is in need of protective services where
>
> . . .
>
> (f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the childs parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.

[9] The trial judge concluded that the three children were in need of protection:

> (7) I am satisfied with respect to S.R. and C.M. that they are in need of protective services both pursuant to section 22, subsections (f) and (g) and that J.M. is in need of protective services pursuant to subsection (g). S.R. and C.M. have exhibited significant concern and anxiety concerning some of the events that have occurred in the home. There is a substantial risk that all will suffer emotional harm.

I have initialized the names in quotations from the trial decision.

[10] The trial judge described an incident at the parties' home on January 19, 2005.

> (9) . . . I am satisfied that there was a serious dispute between them. I am satisfied that there was drinking on at least the part of W.R. I am satisfied that the children were in fear. I am satisfied that there was swearing and yelling.

[11] The trial judge heard evidence from W.R.'s former spouse R.M., (before W.R. began his relationship with R.H.), that W.R. had threatened and committed acts of violence when W.R. used alcohol. R.M. and W.R. were married in 1999, and she moved out at the beginning of 2004.

[12] The trial judge concluded that W.R.'s conduct on January 19th was not an isolated incident but part of the pattern:

> (10) . . . There is a pattern here and that is that conflict and arguments between W.R. and his partner(s) (now R.H.) escalate when he uses alcohol. I conclude that this is harmful to the children. . . .
>
> (12) . . . It is clear that there was a serious and significant problem in the home of R.H. and W.R. on January 19, 2005 and that it was one involving alcohol and domestic violence. . . .

[13] The trial judge issued protection orders that the three children remain in the custody of R.H., with supervision by the Agency, subject to conditions. These included the condition that W.R. not reside with or contact the children, that W.R. undertake substance abuse treatment and that W.R. refrain from using alcohol and non-medically prescribed drugs.

[14] The trial judge noted R.H.'s testimony that W.R. would have a few drinks, but not drink to excess, which R.H. considered to be acceptable. Given W.R.'s acknowledged alcoholism, the trial judge found both W.R.'s practice and R.H.'s compliance to be intolerable:

> (27) . . . What can you do to satisfy me that you accept that alcohol is an issue in your lives and want to do something about it? R.H., that does not mean saying "a drink or two is okay". That means saying "no, a drink or two is not okay". You have heard W.R. say that part of what he did not like about the relationship with Ms. M. is that if she took a drink it was hard for him. Well, we should not need him to tell us or you that again. It is obvious it would be hard for someone in that situation. So there should really never be any alcohol in your home.

[15] W.R. and R.H. have appealed the protection orders to this court under s. 49 of the *Act*.

## *Issues*

[16] The appellants say that the trial judge failed to make a determination "as of the date of the protection hearing", as required by s. 40(4). They submit that the trial judge improperly relied on evidence of events in January, ten weeks before the protection hearing, and ignored evidence that the appellants had dealt with those concerns by the date of the hearing. The appellants say there was "no evidence" to support the protection order as of the date of the hearing. I will consider these arguments together.

[17] The appellants also submit that the trial judge improperly relied on statements given by the children.

## *Standard of Review*

[18] In *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 Bastarache, J. for the Court at ¶ 11 quoted from the reasons of L'Heureux-Dube, J. in *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at ¶ 12:

> . . . Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

Justice Bastarache then stated:

> 12 *Hickey* involved the appellate review of support orders, but the principles related to appellate review discussed therein are equally applicable to orders concerning child custody.
>
> . . .
>
> 15 As indicated in both *Gordon* and *Hickey*, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may

> review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

To the same effect: *Nova Scotia (Minister of Community Services) v. B.F.*, 2003 NSCA 119 at ¶ 45; *Children's Aid of Halifax v. C.V.,* 2005 NSCA 87, [2005] N.S.J. 217 at ¶ 5.

[19] I will apply that standard of review.

***First Issue -***
***Evidence at the date of the protection hearing***

[20] Section 40(4) states that, in a protection hearing, the court "shall determine whether the child is in need of protective services as of the date of the protection hearing". The trial judge concluded that the children were in need of protective services under ¶ (f) or (g) of s. 22(2), and based his finding on W.R.'s pattern of abusive behaviour while under the influence of alcohol.

[21] W.R. testified that, after the January 2005 incident, he stopped drinking alcohol and in March 2005 he began attending the CORE Program at the Commission on Drug Dependancy. The appellants say that, as of the date of the hearing on April 1, 2005, "there was no evidence to support the finding that the children were in need of protective services."

[22] With respect, I disagree.

[23] The trial judge did not base his conclusion on an isolated incident from January 19, 2005. He determined that the January incident was an example of W.R.'s "pattern" of abuse while under the influence of alcohol. The pattern was manifested by W.R.'s behaviour with his earlier partner, before he became involved with R.H. It occurred again in the January incident with R.H. It resulted because W.R., admittedly, was an alcoholic. As W.R. testified:

> You know, it's - alcohol is a sickness. It's a disease, I guess. That's what I believe. And like I say, once an alcoholic, always an alcoholic. You know? An alcoholic is never fully recovered until the day they die. That's what I believe.

[24] The trial judge concluded that W.R. had not extinguished the risk from his patterned behaviour merely by abstaining from alcohol for ten weeks and attending CORE meetings in March. The risk extended to the date of the hearing.

[25] The trial judge noted a second continuing concern. R.H.'s testimony at the hearing suggested that it was acceptable for W.R. to take a few drinks of alcohol, provided he did not become intoxicated. The trial judge said that, for an alcoholic, a single drink is one too many. One drink may trigger the patterned behaviour. R.H.'s attitude of acceptance contributed to the need for protection.

[26] The appellants assume that the trial judge's conclusion stemmed from an incident on January 19, 2005 which became irrelevant when W.R. stopped drinking and attended CORE meetings in March. This misunderstands the trial decision. The trial judge's concern was the risk from W.R.'s penchant for abusive behaviour, sourced in W.R.'s continuing alcoholism and triggered by a few drinks, coupled with R.H.'s acceptance of alcohol in the home because "a drink or two is OK" even for an alcoholic. That risk was not date specific to January 19. It existed at the date of hearing based on evidence at the hearing. It is that risk which the appellants must address to terminate the protection order.

[27] The trial judge's reasoned findings were based on evidence. There was no misapprehension of evidence or material error within the standard of review.

### *Second Issue - Evidence of the children*

[28] Counsel for the appellant submitted that the trial judge wrongly relied on statements given by the children about events in the household, particularly related to the incident of January 19, 2005.

[29] The statements of the children were admitted into evidence with the consent of the appellants stated on the record. Counsel for the appellants reserved the right to challenge the weight of the statements.

[30] Under the standard of review it is not for the appeal court simply to re-weigh the evidence. Although corroboration is not legally required for a child's testimony, in this case there was corroboration. W.R. testified that he was an alcoholic and that he would always be an alcoholic. He testified that he had taken alcohol on the day of the January altercation and on various occasions in the previous several months. He admitted that, when he drank, he "was powerless over alcohol and my life was unmanageable".

[31] The trial judge committed no appealable error in his analysis of the evidence.

## ***Conclusion***

[32] I would dismiss the appeal.

[33] The Agency requests costs. In my view, this is not one of the exceptional cases where costs should be awarded against parents who have appealed unsuccessfully from a protection order governing their children. The parties should bear their own costs.

Fichaud, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.