NOVA SCOTIA COURT OF APPEAL

Citation: *L.G. v. Children's Aid Society of Halifax*, 2005 NSCA 163

Date: 20051220
Docket: CA 252622
Registry: Halifax

Between:

L.G.

Appellant

v.

Children's Aid Society of Halifax

Respondent

Restriction on publication: Section 94(1) *Children and Family Services Act.*

Judges:	Cromwell, Saunders and Oland, JJ.A.
Appeal Heard:	December l, 2005, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs per reasons for judgment of Oland, J.A.; Cromwell and Saunders, JJ.A. concurring.
Counsel:	Perry F. Borden, for the appellant Elizabeth A. Whelton, for the respondent

Reasons for judgment:

Introduction

[1] On July 13, 2005, Justice R. James Williams of the Supreme Court of Nova Scotia (Family Division) issued his decision which placed B.G., the daughter of the appellant, L.G. (Ms. G.) in the permanent care and custody of the respondent Agency. His decision is unreported (neutral citation 2005 NSSC 197). Ms. G. appeals his order which issued the day following his decision.

[2] For the reasons which follow, I would dismiss the appeal.

Background

[3] B.G., who was born March (* *Editor's note- date removed to protect identity*), 2001, is the fifth of Ms. G.'s children. The first four were all placed for adoption by child welfare agencies in Ontario.

[4] Before B.G. was four years old, the Agency had twice taken her into its care and custody. The principal reason for the first apprehension in October 2002 was the condition of Ms. G.'s home. B.G. was then 19 months old. The social worker's affidavit described what she found when Ms. G. finally let her in:

> . . . Immediately upon entering the apartment the foul odour of feces and urine in the apartment was overbearing. The bedroom of the Respondent, L.G. was in total disarray. . . . The bathroom was filthy. There were feces in the toilet which appeared to make the toilet unflushable and there was both mold and insects on the rotting feces. The sink was dirty, covered with hair and the tub was dirty and showed no signs of any recent shower. . . . The hallway to the kitchen was dirty and cluttered with more clothing. There were bugs and flies throughout. . . .In the kitchen there were more and different odours and an overall stench. . . . L.G. indicated that she had appropriate food for the child, B.G, however I noted molding, rotting, sour and fly infested food. There was food rotting in the fridge and in cupboards. The counters were covered with a black substance. There were dirty dishes, and items that were to the point of molding and rotting that they could not be identified. In the room which contained a crib the floor was covered with clothing and the floor had dried dead flies on it. . . .The living room

> contained a chesterfield and a TV. The floor was covered with clothing, plastic food containers, a fork, an open tube of toothpaste, chips, crackers, urine and food particles. Also on the floor was feces, some still in "form" and some smaller pieces of feces. There did not appear to be room on the floor for a toddler to make her way through the room without tripping over something, onto something or without stepping into something.

Ms. G. did not dispute this description of her residence.

[5] B.G. was found to be in need of protective services pursuant to s. 22(2)(k) of the *Children and Family Services Act*, S.N.S. 1990, c. 5, as amended (the *Act*) (parent unable to resume the care and custody of a child in the care of the Agency). Ms. G. accessed community-based services and the Agency provided other services, such as individual counselling and a parenting course. She also received counselling for a gambling addiction she reported.

[6] An assessment report dated January 3l, 2003 by assessment clinicians at the IWK Health Centre recommended that B.G. be placed in the permanent care of the Agency. However, by early that spring the Agency supported B.G.'s return to Ms. G.'s care. This took place in early March 2004 when B.G. was almost three years old.

[7] Since the statutory time limits set out in the *Act* were expiring but further intervention was considered necessary, the first proceeding was terminated and a second commenced. The protection/disposition order in the second proceeding issued in late March 2004. That September, the proceeding ended upon Ms. G. signing an agreement which contained seven conditions, such as B.G. remaining in daycare on a full-time basis and Ms. G. continuing her addiction counselling and with speech and hearing therapy for B.G. Two of those seven conditions stipulated that Ms. G. maintain a stable living accommodation and that all her bills for necessities are paid.

[8] However, within three months of this agreement, Ms. G.'s living conditions had again deteriorated to the point that she herself described them as "deplorable." She had not paid the power bill for two of her apartments in 2004, had used a false name to obtain electricity for one place, and owed over $1400 in arrears to the power company. Earlier she had told the Agency worker who visited that a fuse had blown when in reality her electricity had been cut off for three to four weeks

in May and June of 2004, while B.G. was in her care. She was being evicted for non-payment of rent and left that apartment on December 2, 2004. She owed landlords arrears of $1500. She could not get power hooked up for a new place and so stayed with a friend.

[9] On December 10, 2004 the Agency took B.G. into care for the second time and initiated a third proceeding under the *Act*. When the interim hearing was held on December 21, 2004, Ms. G. had no apartment or any independent living arrangement.

[10] On February 4, 2005 B.G. was again found in need of protective services pursuant to s. 22(2)(k) of the *Act.* A second assessment report, this one dated April 4, 2005, recommended that the child be placed in the permanent care and custody of the Agency. The Agency's plan which sought a permanent care order was opposed by Ms. G. who sought the return of her daughter to her care.

[11] The trial was held over five days. The trial judge described Ms. G.'s evidence as the most important evidence in the proceeding. His decision reads in part:

> ¶ 41 Ms. G. has had some 15 moves since B. was born on March (*Editor's note- date removed to protect identity*), 2001 - four years and three months ago.
>
> . . .
>
> ¶ 44 She is largely unconcerned, even flippant, about her inability to maintain basics - housing, power, et cetera. For example, when asked whether her lack of power in June 2004 was a "big problem" she answered "Was she returned to care?" and "explained" that it wasn't a big problem since the Children's Aid Society had not taken B. back into care.
>
> ¶ 45 In her affidavit of June 15, 2005 Ms. G. indicates "I have fully cooperated with the Applicant (Agency) and would continue to cooperate with them."
>
> ¶ 46 This would not be my conclusion from the evidence.
>
> ¶ 47 Ms. G. has repeatedly lied to the Agency and others. She explains she does so to avoid giving the Agency "stuff against her". Her lies, and lack of forthrightness go beyond this, however, and have impacted on her relationship

> with the Agency, Ms. Stephen, landlords, the Power Corporation, and most importantly B.

[12] While he found that there is an attachment between mother and daughter, the trial judge concluded that Ms. G. has been unable to provide B.G. with a secure place, continuity or some stability in her environment. He determined that there had been serious neglect. His conclusion was that her return to the care of Ms. G. would inevitably result in B.G.'s neglect.

[13] In his view, B.G. remained in need of protective services pursuant to s. 22(2)(k) of the *Act*. The trial judge also concluded that she was in such need pursuant to s. 22(2)(ja) (substantial risk of physical harm) and s. 22(2)(j) (child has suffered physical harm caused by chronic and serious neglect and the parent does not provide or refuses services or treatment to remedy or alleviate the harm).

Issues

[14] The grounds contained in the notice of appeal allege that the trial judge erred in fact and law by misrepresenting the services contemplated by the *Act*; and that he erred in fact in ruling that the appellant did not identify services, which could have been offered to her by the Agency. I will first consider the standard of review and then address these issues.

Standard of Review

[15] In *Children's Aid Society of Cape Breton - Victoria v. A.M.*, [2005] NSCA 58, Cromwell, J.A. stated:

> [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 principal 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] NSJ 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. (Emphasis added)

See also *Nova Scotia (Minister of Community Services) v. B.F. and B.W.*, (2003), 219 N.S.R. (2d) 41 (C.A.) at ¶ 44.

Analysis

[16] Both grounds of appeal concern services provided, or not provided, to Ms. G. and the judge's findings based on the evidence in that regard. In order to understand the errors he is alleged to have made and the appellant's arguments, it is necessary to briefly recount what was provided to or accessed by Ms. G. Following is a chronological summary:

October 2002	B.G. taken into care for first time.
January 2003	Assessment report completed.
April 2003	Agency refers Ms. G. to Mary Haycock and places her on wait list for Agency parenting course. Until November 2003 Ms. Haycock counsels Ms. G. on an individual basis every week and then, until March 2004, every two weeks.
May 2003	B.G. starts speech therapy.
July 2003	Ms. G. takes parenting courses ("Without Spanking or Spoiling" and "Nobody's Perfect") from the North End Parent Resource Centre.
November 2003	Through that Centre, Ms. G. enlists a trustee for her rent until January 2005 and again in April 2005. The trustee also attended to her power payments in June 2005. Elizabeth Stephen becomes Ms. G.'s counsellor for her gambling addiction and subsequently continues as her personal counsellor.

	Agency provides Ms. G. with a family skills worker. She takes the Agency's sixteen week course, which includes eight weeks of in-home observation and intervention.
February 2004	Ms. G. completes the Agency's parenting course and her individual therapy with Ms. Haycock.
March 2004	B.G. is returned to Ms. G.'s care.
	Ms. G. completes a parenting course at Veith House.
September 2004	Agency ceases its involvement with Ms. G., who continues to work with Elizabeth Stephen, and to be in contact with and to receive support from the Single Parent Resource Centre and from Adsum House where she has stayed for various periods.
December 2004	B.G. taken into care for second time.
April 2005	Second assessment report completed.

[17] In his decision, the trial judge considered a number of the *Act's* provisions that were relevant to the proceeding before him, including ss. 9 and 13 which read in part as follows:

> 9 The functions of an agency are to
>
> (a) protect children from harm;
>
> (b) work with other community and social services to prevent, alleviate and remedy the personal, social and economic conditions that might place children and families at risk;
>
> (c) provide guidance, counselling and other services to families for the prevention of circumstances that might require intervention by an agency;
>
> (d) investigate allegations or evidence that children may be in need of protective services;

> (e) develop and provide services to families to promote the integrity of families, before and after intervention pursuant to this Act;
>
> . . .
>
> 13 (1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the childs parent or guardian or be returned to the care of the childs parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.
>
> (2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:
>
> (a) improving the familys financial situation;
>
> (b) improving the familys housing situation;
>
> (c) improving parenting skills;
>
> (d) improving child-care and child-rearing capabilities;
>
> (e) improving homemaking skills;
>
> (f) counselling and assessment;
>
> . . .

[18] The trial judge was satisfied that the Agency had both provided and helped Ms. G. to identify services and stated that many had been used before and after the Agency's initial involvement in October, 2002. In setting out each subsection of s. 42 of the *Act* and his conclusion thereafter, he stated:

> Section 42(2) provides:

> 42(2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> I so conclude. Less intrusive alternatives have been tried. They failed.
>
> (b) have been refused by the parent or guardian; or
>
> Ms. [G.] has repeatedly not paid rent or power. She has effectively refused the most basic of services.
>
> (c) would be inadequate to protect the child.
>
> I so conclude. [B.] is four years old. She is completely dependent of those parenting her for her physical and emotional well being. Ms. [G.] has not been able to provide sustained care to [B.] (Emphasis added)

[19] The appellant's first two grounds of appeal focus on the trial judge's statements following s. 42(2)(b). She submits that he incorrectly identified rent and power as services which are or were offered by the Agency when, since she was a recipient of social assistance, the *Social Assistance Act*, R.S., c. 432, s. 1 is the governing legislative authority which provided assistance in that regard. She also submits that the evidence does not support a finding that she refused rent or power but argues that it was her impecunious state which contributed to her inability to service her rent and utilities.

[20] Both these arguments fail in face of the wording of s. 42(2). That wording is disjunctive, not cumulative; that is, the trial judge needed to be satisfied as to any of ss. 42(2)(a), 42(2)(b) or 42(2)(c). Ms. G. has not contested his findings in regard to the other paragraphs of s. 42(2). I cannot discern any error in legal principle or any overriding and palpable error in any finding of fact that would justify this court's interference.

[21] The appellant's third ground of appeal is that she did not refuse any services offered by the Agency because she was not offered any. She points out that Anne Simmons, the Agency's caseworker, stated that access and an updated assessment

were the only services the Agency put in place after B.G. was taken into care again in December 2004.

[22] In dealing with the issue of services, the trial judge referred to this court's decision in *Nova Scotia (Minister of Community Services) v. L.L.P* (2003), NSCA 1 at ¶ 25, 37 and 38. His analysis continued:

> The "problems" that have led [B.] into care are persistent - Ms. [G.'s] failure, even refusal, to pay rent or power; Ms. [G.'s] inability to maintain a household at a level remotely acceptable for a child of [B.'s] age, or any age; Ms. [G.'s] repeated lies and mis-truths about her financial circumstances; Ms. [G.'s] apparent lack of understanding of the impact and potential impact this recurring pattern of behaviour has upon [B.] Ms.[G.'s] consistent inability to be forthright about, or to follow through with issues as simple as paying rent and power makes it difficult to conclude that services are capable of being "accepted and acted upon".
>
> Ms. [G.] has had personal counselling for two years. She knows that Social Assistance can trustee rent monies and lost an apartment even when this was done. She has had parenting classes and courses. She is connected to and uses community resources such as Adsum House, the Single Parent Resource Centre, and Addiction Services. She has had private counselling. None of these services has impacted upon Ms. [G.] so as to enable her to create sustained change. The Agency states it can identify no services that will address these issues effectively. Two assessments, two years apart, come to the same conclusion. Ms. [G.] suggests there be a case conference (a meeting of service providers) and that [B.] have counselling - neither is a service that can or will address the problems that have led to [B.'s] coming into care. (Emphasis added)

He observed that the conditions in which B.G. lived when taken into care in October 2002 and then in December 2004 were not in dispute.

[23] Further in his decision, in considering ss. 42(4) and 45(1)(a) of the *Act*, the trial judge noted that the issues which led to B.G. being found in need of protective services had continued since her first apprehension, except for three months in the fall of 2004. He continued:

> . . . This is the third proceeding under the *Children and Family Services Act* dealing with the same issues. While Ms. [G.] loves [B.], she is unable to find the personal discipline to pay rent, power or maintain a household. She has had the monies to do so and has offered no explanation for her failures - save saying that, for some of it, it was lost or stolen. She says she has not gambled since

> November, 2003. She has had all the services anyone can identify. [B.'s] life has been disrupted by these failings. The neglect of physical premises endangered [B.] at least twice and I conclude would in the future. Ms. [G.] does not appear to connect any of this to [B.] in a way that might motivate change. She is now in much the same place as 2002 - seriously behind on rent, in danger of eviction. I can contemplate no services or circumstances that would allow [B.] to return to Ms. [G.'s] care within the next eight to ten months. Ms. [G.], in reality, has significant difficulty in providing for herself. Ms. [G.] cares deeply for [B.] but cannot provide or sustain an appropriate physical environment for herself, or [B.]

[24] The trial judge considered the provisions of the *Act* which deal with the Agency's duty to provide services and the legal principles set out in *L.L.P.*, supra. He made no error in legal principle. His factual findings are founded on the evidence that was before him. He made no palpable and overriding error in his finding of the facts. I can see no clear and material error which would call for appellate interference.

Disposition

[25] I would dismiss the appeal without costs.

Oland, J.A.

Concurred in:

Cromwell, J.A.

Saunders, J.A.