NOVA SCOTIA COURT OF APPEAL

Citation: *A.M. v. Nova Scotia (Community Services)*, 2014 NSCA 97

Date: 20141024
Docket: CA 430111
Registry: Halifax

Between:

A.M. and J.W.

Appellant

v.

Minister of Community Services

Respondent

Restriction on Publication: 94(1) Children and Family Services Act

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judges:	Beveridge, Farrar and Bryson, JJ.A.
Appeal Heard:	October 8, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Beveridge and Bryson, JJ.A. concurring.
Counsel:	Appellants in person Adam B. Neal, for the respondent

Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act,* S.N.S. 1990, c. 5.

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.

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:

Background and Proceedings

[1] To avoid any confusion arising from the various proceedings involving these parties, I would emphasize that these reasons dispose of an appeal from the granting of a summary judgment motion referenced in ¶16 *infra*.

[2] The appellants are the parents of twin girls (J.D. and J.A.) born September […], 2006.

[3] The appellants' history with the Minister of Community Services dates back to December, 2004. The Minister's involvement with the twin girls began in November, 2007, culminating in the children being placed in the permanent care and custody of the Minister on October 10, 2012. The history of the appellants' involvement with the Minister and the reasons for the permanent care order are set out in detail in the decision of Justice Darryl W. Wilson reported as 2012 NSSC 343.

[4] The appellants appealed Wilson, J.'s decision to this Court. By decision dated March 1, 2013 (2013 NSCA 29) the appeal was dismissed.

[5] On December 16, 2013, the appellants filed an application to the Supreme Court pursuant to s. 48(3) of the **Children and Family Services Act**, S.N.S. 1990, c. 5 asking that the order for permanent care and custody be terminated.

[6] In support of the application the appellants filed an affidavit sworn by them jointly. The affidavit, for the most part, is a rehashing of the arguments which were made by the appellants before Wilson, J. at the original permanent care trial. One fact that the appellants considered to be of particular significance on the application to terminate is that the charges of sexual assault against J.W. involving a third party's child, which were pending at the time Wilson, J. heard the permanent care trial, had since been withdrawn.

[7] Rule 60A.25(6) provides the following:

> An application for one of the following kinds of orders must be heard no more than the following number of days after the day the notice of application is filed:
>
> (a) to terminate an order for permanent care and custody, ninety days ...

[8] Applying the mandatory rule in these circumstances should have resulted in the application to terminate permanent care taking place before March 20, 2014.

[9] On February 10, 2014, the parties appeared before Wilson, J. in Chambers. At that time, the solicitor for the Minister advised the Court that the Minister would be making a motion for summary judgment to dismiss the application. Justice Wilson adjourned the matter to March 13, 2014, to allow the Minister to file the summary judgment motion. The adjourned date was within the 90 day timeframe.

[10] On February 20, 2014, the Minister filed a Motion for Summary Judgment with supporting affidavit and brief, returnable on March 13, 2014.

[11] On March 13, 2004, the parties were back before Justice Wilson. At that time A.M. indicated to the court that they had been granted a Legal Aid certificate but had been unable to find a lawyer. However, she also said:

> ... at this point I don't want a lawyer.

She did not request an adjournment to obtain counsel. Nor did the Minister's counsel request an adjournment. To the contrary, the Minister's counsel reminded the court that the matter had to be heard within 90 days and objected to the adjournment.

[12] On the judge's own motion the matter was adjourned pending the decision of this Court in another case involving the appellants. In that case, the appellants' daughter was taken into care the day of her birth and was subsequently placed in the permanent care of the Minister. The appellants appealed that decision which was dismissed by this Court by decision dated June 3, 2014 (2014 NSCA 55).

[13] I will comment further on the process and the adjournment later in these reasons.

[14] The matter was rescheduled to June 26, 2014 to hear the summary judgment motion. At that time, A.M. made a motion that the presiding judge, Justice Lee Anne MacLeod-Archer recuse herself. The stated reason was that MacLeod-Archer, J. was involved in another case involving A.M. and her parents. In that case she presided over a pretrial conference.

[15] MacLeod-Archer, J. refused the motion for recusal and the parties made submissions on the summary judgment motion.

[16] In a decision released July 4, 2014, (2014 NSSC 251), the motions judge allowed the summary judgment motion and dismissed the appellants' application to terminate the permanent care order.

[17] The appellants appeal, arguing the motions judge made numerous factual errors as well as prejudging the issues in this proceeding as a result of her involvement in another case involving A.M.

Issues

[18] I would summarize and restate the issues raised by the appellants to two issues as follows:

1. Did the motions judge err in dismissing the application to terminate the permanent care and custody order dated October 10, 2012?
2. Was there a reasonable apprehension of bias that required the motions judge to recuse herself?

Standard of Review

[19] It is sometimes difficult for self-represented individuals to understand the role of an appellate court. Our role is not to embark upon a fresh assessment of the evidence or to substitute our exercise of discretion for that of a trial judge or a motions judge. We may only intervene if the judge erred in legal principle or is shown to have made a clear error with respect to a factual finding that materially affected the result (**Aspden v. Leclerc**, 2014 NSCA 86, ¶14).

[20] The findings of fact and the judge's decision to recuse herself will be reviewed on a deferential standard.

Analysis

Issue #1 Did the motions judge err in dismissing the application to terminate the permanent care and custody order dated October 10, 2012?

[21] Section 48 of the **Children and Family Services Act** provides, in part,

> (3) A party to a proceeding may apply to terminate an order for permanent care and custody or to vary access under such an order, in accordance with this Section, including the child where the child is sixteen years of age or more at the time of application for termination or variation of access. ...

> (8) On the hearing of an application to terminate an order for permanent care and custody, the court may
>
> (a) dismiss the application;
>
> ...
>
> (e) terminate the order for permanent care and custody and order the return of the child to the care and custody of a parent
>
> (10) Before making an order pursuant to subsection (8), the court shall consider
>
> (a) whether the circumstances have changed since the making of the order for permanent care and custody; and
>
> (b) the child's best interests.
>
> ...

[22] The appellants rely on these provisions in arguing that there has been a change in circumstances such that it is in the best interests of the children to terminate the permanent care order and return them to their custody.

[23] The appellants, in their Notice of Appeal, submissions and oral argument before us simply re-argue points which were before the motions judge and for which she had made clear findings.

[24] I will illustrate by way of example – the appellants vehemently argue that the withdrawal of the criminal charges against J.W., involving a third party's child, shows that the initial determination by Wilson, J. that the children were in need of protection was ill-founded. Although not expressing it in these words, they argue that the withdrawal of the criminal charges amounts to a change in circumstances which justifies terminating the original permanent care order.

[25] What the appellants fail to appreciate is the determination that the children were in need of protection did not rest on J.W. having been charged with sexual assault against a third party's child.

[26] The motions judge considered a multitude of factors, one of which was the allegation of sexual impropriety by J.W. against his own daughters. By way of background, in the summer of 2012 the twins told a third party that their father had subjected them to sexually inappropriate behaviours. Although Wilson J. refers to the criminal charges pending involving the third party's child, it was J.W.'s actions with his own daughters that caused the trial judge concern. He accepted that the

incidents which led to the children reporting sexually inappropriate behaviour had occurred. He further found that the mother knew of these concerns and did not take them seriously. It was these incidents with J.W.'s own children, not the charges relating to the third party's child, that formed the basis of the trial judge's decision.

[27] The fact that those charges were subsequently withdrawn is of no particular significance to his ultimate conclusion that the children had been exposed to sexually inappropriate behaviour.

[28] While I appreciate that the appellants allege that the person who reported the incidents of sexual misconduct is lying, the fact is Wilson, J. accepted her evidence (2012 NSSC 343, ¶65). However, it was not the only evidence he relied on in finding that the behaviour occurred.

[29] He also made reference to the grandmother's observation of sexually inappropriate behaviour by one of the twins, the spontaneity of the statements by the children and the immediate reporting of those statements to the mother as support for determining the statements were true and the acts occurred.

[30] The charges being withdrawn does not change Wilson, J.'s factual findings. Justice MacLeod-Archer considered the same argument the appellants' made before this Court and found that the withdrawal of the charges did not amount to a change in circumstances which would justify setting aside the permanent care order. In so finding she did not commit any error.

[31] MacLeod-Archer, J. was also aware of all the arguments being made by the appellants. In her decision she summarizes the arguments:

> [22] In the Joint Affidavit filed by A.M. and J.W., they point to a number of reasons why the permanent care and custody Order should be terminated. They state that:
>
> - charges against J.W. have been dismissed;
> - there are no new charges;
> - they have new resources available;
> - they have accessed counselling on their own initiative;

- a pivotal witness lied in the original hearing;
- they have been denied access with the twins; and
- the twins have been unable to have a relationship with J.W.'s family.

[32] The motions judge then goes on to address each of the arguments raised by the appellants and concludes that the information provided was not sufficient to show a change in circumstances which would justify terminating the permanent care and custody order.

[33] I have carefully reviewed the complete record. I can identify no error by the motions judge in her thorough consideration of the evidence and arguments made by the appellants in seeking to have the order for permanent care set aside. Her determination that there had not been a change in circumstances justifying setting aside the permanent care order is sound and supported by the record.

Issue #2 Was there a reasonable apprehension of bias that required the motions judge to recuse herself?

[34] The burden lies on a party seeking recusal to show bias on the part of the judge which would require disqualification. Justice Linda Oland summarized the principles governing judicial impartiality in **C.B. v. T.M.**, 2013 NSCA 53:

> [31] If a reasonable apprehension of bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at ¶ 99. In *C.H.D.* at ¶ 25, Hamilton J.A., for this court set out the test for reasonable apprehension of bias:
>
> > 25 The test for a reasonable apprehension of bias is set out in *R. v. R.D.S.*, [1997] 3 S.C.R. 484:
> >
> > > [31] The test for reasonable apprehension of bias is that set out by de Grandpré J. in Committee for Justice and *Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added]

[32] In *S. (R.D.)* at ¶ 35, the Supreme Court of Canada observed that according to its Commentaries on Judicial Conduct (1991), the Canadian Judicial Council stated at p. 12:

> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

[33] According to *S. (R.D.)*, to successfully assert that a judge might be partial, one must demonstrate that the beliefs, opinions, or biases held by the judge prevent him or her from setting aside any preconceptions and reaching a decision based only on the evidence:

> 113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark, supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly. [Emphasis added]

[35] Justice MacLeod-Archer, at the time of hearing this motion, had presided over a pretrial conference involving A.M. in another matter. She heard no evidence in that matter. In my view, the fact that she presided over a pretrial falls far short of a reasonable apprehension of bias. An informed person, viewing this matter realistically, and practically would not conclude that the motions judge could not decide this matter fairly. The motions judge correctly set out the test and found that it was not necessary to recuse herself.

[36] The appellants' argument on this ground of appeal is without merit.

Summary Judgment versus Application to Terminate the Permanent Care Order

[37] Although it was not raised by the appellants on the appeal, I have some concern about the manner in which this application proceeded. It is not necessary to decide it in this instance, however, it seems troublesome that the best interests of children can be determined on a summary judgment motion. My concern relates to the different procedural and evidential features that attach to summary judgment motions.

[38] In this particular case, whether this proceeded by way of summary judgment motion or by way of an application to terminate makes little difference in the end analysis. After a review of the record and the motions judge's decision, in my view, the result would have been the same. Let me explain.

[39] Although couched in the words of a summary judgment application, what the motions judge actually did was determine the issues as if it were an application to terminate. She set out the proper test for setting aside a permanent care order and reviewed the evidence submitted by the appellants in detail, in determining the circumstances were not such that would justify terminating the order.

[40] The appellants were given ample opportunity to adduce evidence and to make submissions. There is no suggestion before us or below that they had additional evidence to offer which the motions judge ought to have taken into consideration in reaching her conclusion. To the contrary, the appellants make the same arguments before us that they made before the motions judge and before Wilson, J. Therefore, they were in no way prejudiced by the manner in which the proceeding unfolded.

[41] However, I would caution that in future if the Minister is going to proceed by way of summary judgment in cases such as this, the legal authority for the ability to do so must be presented. As well, motion judges should always be cognizant of the timelines in the **Act**. I am left to wonder why the court below did not simply proceed with the application to terminate permanent care.

[42] The timelines in the **Act** and in Rule 60A.25 must be adhered to. With respect, the reason for extending the timeline in this case – to await a decision of this Court on another matter involving the parties – was highly unusual and, on the record, appears to be unjustified. The decision to adjourn did not consider the best

interests of the children nor the mandatory timelines. The judge simply ignored the timelines despite the Minister's objection to the adjournment.

[43] It has often been said that because of the uncertainty that accompanies a child welfare proceeding, it is in the children's best interests that it be prolonged no longer than necessary (**T.H. v. Minister of Community Services and R.W.**, 2013 NSCA 83, ¶87). An application which commenced in December 2013 is now into its eleventh month. That delay is simply too long. If judges are going to deviate from the mandated timelines, cogent reasons must be given for doing so and it must always be with the children's best interests as the paramount consideration. Having said this, it is difficult to envision a circumstance where it would be in the best interests of the child to prolong a proceeding such as this beyond the mandated timeframe.

Conclusion

[44] The appellant has not satisfied me that the motions judge committed any error. Her conclusions are amply supported by the evidence and are not tainted by any error of law or principle. I would dismiss the appeal.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.