IN THE FAMILY COURT OF NOVA SCOTIA

Cite as: Family and Children's Services of Kings County v. T.B., 2000 NSFC 12

BETWEEN:

FAMILY AND CHILDREN'S SERVICES OF KINGS COUNTY
-APPLICANT

AND

T. B. & P. M.
-RESPONDENTS

DECISION

BEFORE THE HONOURABLE JUDGE BOB LEVY

Editorial Notice

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

COUNSEL:

DONALD MACMILLAN FOR THE APPLICANT

ROBERT STEWART, Q. C. FOR THE RESPONDENT P.M.

THE RESPONDENT T. B. NOT APPEARING

HEARING DATE:

NOVEMBER 7, 2000

DATE OF WRITTEN DECISION:

NOVEMBER 20, 2000

ISSUE: **CHILDREN AND FAMILY SERVICES ACT- POST PERMANENT CARE AND CUSTODY ORDER ACCESS BY A GRANDPARENT WHERE ADOPTION IS PLANNED**

Levy, J.F.C.

I have already given an oral decision from the bench granting the agency's request for a permanent care and custody order with no access by either respondent. I indicated however that I wished to file a supplementary written decision. This is that decision.

BACKGROUND

On July *, 1999, C.M. was killed in an automobile accident. She left two children, K., born April *, 1995, and D., born September *, 1997, who are the subjects of this proceeding. On their mother's death the children were placed in the care of T. B., their father, with whom C. M. had had a highly conflictual relationship. However, on information being received that placement with their father put the children at some considerable risk, Family and Children's Services of Kings, (the agency), removed the children from his care and commenced a protection application under the Children and Family Services Act, (the Act).

As there appeared at first to be no relative able and willing to take care of the children the boys were first placed in a foster home. Subsequently however they were placed with relatives in Cape Breton. These relatives had the boys for only a short while when they determined that they were unable to continue caring for them. The boys were returned to foster care, to the same foster home where they had been placed originally, where they remained until this hearing.

Throughout the whole time the agency concentrated on offering various services to Mr. B. with a view to rectifying the many and serious problems that he had which were impediments to him being able to care for the children. His response was wholly inadequate either as to accepting these

services or in exercising access to the children. In fact he even failed to appear for this disposition hearing, (which says a lot), whereupon his counsel sought and obtained permission to withdraw.

The maternal grandfather, P. M., lives in P. C. and is recently re-married. I understand that it was his information, as much as anything, that alerted the agency that the children would be at serious risk in the care of their father. Right from the start the he applied for and was granted standing as a party in this proceeding. The agency has hoped that he would offer a permanent home to these boys and there was some evidence that at one point he may have mused aloud about seeking the care of the older boy, but that never materialized as a concrete plan. Rather, he sought and seeks only to exercise access to the boys.

The agency's revised Plan of Care, dated August 2000, is for the children to be placed in the permanent care and custody of the agency and then adopted. It was as of August, it appears, that the agency had given up on the father and had stopped hoping that the grandfather would come forward with a plan of his own for the care and custody of the boys. At the scheduled hearing not only did the father not appear, but, surprisingly, neither did the grandfather. However he sent his counsel with instructions to consent to the order for permanent care, but to oppose the agency's position that there be no access ordered.

Given the non-appearance of the father and the consent of the grandfather, and as the evidence satisfied me that there is no reasonable alternative within the foreseeable future, and being further satisfied that permanent care and custody is the best *available* plan for the children, that order was granted.

That left as the only issue the matter of whether the court should preserve, by order, a right of access by the grandfather to his grandsons.

THE LAW

Section 70 (3) of the Act reads:

"*Child in permanent care and custody with access order*
(3) No child in permanent care and custody and in respect of whom there is an order for access pursuant to subsection (2) of Section 47 may be placed for adoption unless and until the order for access is terminated pursuant to Section 48."

Section 47 (2) of the Act reads:

"Order for access
(2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
(a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
(b) the child is at least twelve years of age and wishes to maintain contact with that person;
(c) the child has been or will be placed with a person who does not wish to adopt the child; or
(d) some other special circumstance justifies making an order for access."

Speaking of section 47 (2) Mr. Justice Chipman wrote, in *Minister of Community Services v. S.M.S.* (1992), N.S.R. (2nd) 258, (C.A.), at page 268:

"Under this section, the burden is on the parent or guardian to show that access is in the interests of the child."

Also, the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services v. L. (M.)* [1998] 2 S.C.R. 534, pages 557-8, the Court, per Gonthier, J. said:

"In Ontario and Nova Scotia, the legislation creates a presumption that any right of access is revoked, and sets out the exceptional circumstances in which an order of access may be made."

No doubt, when reference is made in the *S.M.S.* case to the burden being on the parent or

guardian, this would of course equally apply for a grandfather or “other person”.

DISCUSSION

The stark choice for the court under our legislation is between the children having the right of access to their grandfather at the price of being raised in long term foster care, or having the chance to be adopted into a family of their own at the price of losing all contact with their family of origin. There is no middle ground open to this court. And this is so even if, as here, I would be prepared to hold that in all likelihood the best interests of the children would be served by allowing for *both* an adoption *and* continuing access by the grandfather, or, at the very least, that it is premature to exclude that option.

In a situation such as this the agency and the grandparent were obliged to fight it out in court. It is a fight that the grandparent cannot very often win. It would likely be only in a rare situation that a court would decide to deny children of this age a chance to have a stable and secure family of their own.

There was indeed a contest between the agency and the grandfather on this point. This is the man whom the agency until recently had continued to hope would come forward with a plan to take the children. Suddenly, because he determined that he wasn’t able or willing to take on the care of the children but wanted to remain a presence in their lives, he became over night, in *Kafka-esque* fashion, a person with a litany of shortcomings to which the court was invited to attend. This, I should say, is not the fault of the agency, merely the result of the “all or nothing” fight thrust upon both sides.

In the end I did hear of this or that time when he may have done better or more. But the complaints, really, made for pretty thin gruel. Ultimately the biggest complaint was simply that he was not able to make or sustain a sufficient commitment to the children. This of course was exactly the grandfather's point. I do accept however that he visited the children with declining frequency, such that there may have been no more than four visits thus far in the year 2000. Why so few I don't know. Perhaps he did not feel welcome, (I found the foster father to be disconcertingly partisan, certainly in his demeanour, against the grandfather). Perhaps he found the boys too much of a handful, (there is, unhappily, evidence that both these boys have some serious emotional problems). I note too that he has tended to favour the older child; but that seems to have to do with the younger still, (at age 3), not being toilet trained. That isn't much of a reason, but maybe some allowance has to be made for the way he himself was brought up.

I am not overlooking the glaring fact that the grandfather did not even show up for the hearing. This left the court unable to make a direct assessment of him. Whether or not the burden of proof was with him his absence was conspicuous; he had to know that he was not improving his chances by not being present. One can speculate as to the reasons for his absence; a sense of futility perhaps, (and he just sent his lawyer so that he can always say that he did fight), but it is also open to the court to conclude that his commitment to his grandchildren is suspect.

On the evidence I find that the grandfather and the grandchildren do have a relationship, and that on balance to date it has been a salutary one for the children, (the moreso because of the sudden loss of their mother and the indifference of their father). I further find, based on his track record, that there is no reason to believe the children would be at any kind of risk were there to be access between them and their grandfather. Neither is there any reason to believe that his contribution to

his grandchildren would be any more or less beneficial than that of most grandparents, that is to say that it would be a positive in the children's lives. At the same time he can be no more than a grandparent, and a grandparent who lives some distance away.

The agency filed an affidavit by Elaine Sabine Baird, the agency's casework supervisor for adoption, citing generically the benefits of adoption and it's superiority, in terms of a "sense of belonging" and in terms of stability, to foster care. That affidavit and those opinions were not challenged by counsel for the grandfather. This was the burden as well of the responses of the psychologist Elaine Boyd to questions by counsel for the grandfather. This squares with one's own intuitive sense that the best thing one can do for children the ages of these boys is to get them a family of their own, and the sooner the better, as opposed to life in long term foster care with occasional visits with their grandfather.

These children's loss of their grandfather is the all but inescapable result of the operating principle of the Nova Scotia legislation as it affects children in the permanent care and custody of the agency. The only type of adoption permitted by our legislation for children in care is the so-called "closed" adoption, as opposed to an "open" adoption which sanctions some access or contact by members of the family of origin. Section 70 (3) makes this perfectly clear. The added consequence of section 47 (2) is that it effectively prevents the parent, grandparent or whomever from ever receiving notice of proposed adoption so as to be present and make representations on the matter of access surviving an adoption.

One can of course without difficulty enumerate any number of reasons why, as a general rule, you would have to cut off access by a child's natural family so as to maximize the chances of

obtaining and nurturing a successful adoption. However there is nothing inherent in access by an interested grandparent that is necessarily inimical to a successful adoption. It is entirely foreseeable that a grandparent, including this grandparent, can play an important subordinate role, not threatening to the integrity of the new family, providing crucial continuity for the children and an important "bridging" role in the children's new lives. There is certainly no evidence before me that court-ordered access by this grandfather would scare off a potential family, or in any way compromise the adoption process. Neither is there any evidence that the grandfather would be likely to act in a manner inconsistent with the integrity of the new adoptive family.

Legislation that excludes even a consideration of this option, no matter what, is likely doing a disservice to children such as these whose list of losses in their young lives is already staggering. In short, these children must suffer the further loss of their grandfather as a matter of law, not because there is any particular reason to believe that their best interests would be adversely affected.

It is of interest that the legislation of the province of New Brunswick does not exclude the possibility of there being *both* an adoption, (and a placement for adoption), for children in permanent care, *and* a preserved right of access, (see *New Brunswick (Minister of Health and Community Services*) *v. L. (M.) (supra.)*. In that province it is left to the judge hearing the case to decide, on the facts, whether or not to preserve a right of access, even in the case of an adoption.

There is no provision in the adoption provisions in the Act for post-adoption access by a natural parent or "other person", even for adoptions of children other than those in the care and custody of an agency. Interestingly however, Associate Chief Justice MacDonald of the Nova Scotia Supreme Court in *Butler v. Brace et al*, [1999] N.S.R. (2d) Uned. 41, held that the Supreme Court had "equitable" jurisdiction to allow post-adoption access by the child's natural parent. His

Lordship, on the facts before him, declined to make such an order, but the decision, holding that this option was open to the court, is unambiguous. The difference between that type of case and this however is that in that case the natural father was in receipt of notice, a possibility effectively ruled out by section 47 (2) of the Act. This begs the question: if access is potentially available post-adoption in non-agency cases, why must it be impossible for children in care, even for a grandparent who has done nothing wrong and whose access in all likelihood would prove to be in the children's best interests?

DECISION

The children will be placed in the permanent care and custody of the applicant agency and there shall be no order for access by either respondent.

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Bob Levy, J.F.C.