SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: Nova Scotia (Community Services) v. AM, 2015 NSSC 50

Date: 2015-02-17
Docket: Sydney No. 74698
Registry: Sydney

Between:

The Minister of Community Services

Applicant

v.

AM and JW

Respondents

and

Date: 2015-02-17
Docket: Sydney No. 84382
Registry: Sydney

The Minister of Community Service

Applicant

v.

AM and JW

Respondents

Judge:	The Honourable Justice Theresa Forgeron
Heard:	February 10, 2015, in Sydney, Nova Scotia
Written Release:	February 17, 2015
Counsel:	Adam Neal, Counsel for the Minister of Community Services AM, on her own behalf JW, on his own behalf

By the Court:

[1] **Introduction**

[2] Je, Jo and Em are the children of AM and JW. The three children were placed in the permanent care and custody of the Minister of Community Services, with no provision for access. The adoption process has been initiated for each of the children. The mother and the father recently filed applications to terminate the permanent care orders. The Minister objects on jurisdictional grounds.

[3] **Issues**

[4] Does the court have jurisdiction to entertain the applications to terminate given the adoption proceedings?

[5] **Background Information**

[6] ***Je and Jo***

[7] Eight year old twins, Je and Jo, were placed in permanent care, with no provision for access, by a decision reported at 2012 NSSC 343. The parents' appeal was dismissed at 2013 NSCA 29.

[8] On December 16, 2013, the parents filed an application to terminate the permanent care orders. In response, the Minister sought summary judgment. On July 4, 2014, summary judgment was granted by a decision reported at 2014 NSSC 251. The parents' appeal was dismissed on October 24, 2014, as reported at 2014 NSCA 97.

[9] On October 28, 2014, a Notice of Proposed Adoption for each of the twins was filed, and an Acknowledgement of each notice is dated November 7, 2014.

[10] On December 15, 2014, the parents filed another application to terminate the permanent care and custody orders.

[11] On January 9, 2015, the Minister filed a motion for an order confirming a lack of jurisdiction and a dismissal of the application to terminate based on Rule 5.14 and s. 48(4) of the *Children and Family Services Act*.

[12] ***Em***

[13] Two year old Em was placed in permanent care, with no provision for access by a decision reported at 2013 NSSC 414. The parents' appeal was dismissed on June 3, 2014, as reported at 2014 NSCA 55.

[14] On June 25, 2014, a Notice of Proposed Adoption of Em was filed. The Acknowledgement of the Notice is dated July 3, 2014.

[15] On January 7, 2015, the parents filed an application to terminate the permanent care and custody order.

[16] On January 9, 2015, the Minister filed a motion seeking a dismissal of the application to terminate because of a lack of jurisdiction based on Rule 5.14 and s.48 (4) of the *Act*.

[17] ***Motion and Hearing***

[18] The jurisdiction motion was scheduled to be heard on January 26, 2015. The parents requested an adjournment; they wanted to secure a lawyer. After balancing the various prejudices in the context of the children's best interests, the adjournment was granted. The motion was rescheduled.

[19] The motion was heard on February 10, 2015. The parents were not able to retain a lawyer, and were thus self-represented.

[20] The parties agreed that the court should hear the jurisdiction motions together, such that the three affidavits filed by the parents would be considered for the purposes of both motions, as would the Minister's two affidavits.

[21] Ms. Marr, a protection worker, employed by the Department, was cross-examined by the mother and the father. The Minister did not cross-examine the parents.

[22] The court adjourned to render a written decision. In so doing, I have thoroughly considered the evidence and the submissions of all parties. The burden is on the Minister.

[23] **Analysis**

[24] **Does the court have jurisdiction to entertain the applications to terminate given the adoption proceedings?**

[25] ***Position of the Parties***

[26] The Minister states that the court is precluded from hearing the applications to terminate because the adoption process has begun for all three children.

[27] The parents vigorously dispute the Minister's position. They believe that the maternal grandparents are attempting to adopt the twins, while Em has been placed with unrelated third parties. They state that adoption is contrary to the children's best interests. In this context, the Respondents voiced many concerns, including the following:

- The Minister failed to provide them with services;
- The Respondents should raise their own children because they are loving parents;
- Siblings should not be separated;
- Em could be exposed to abuse by being placed with strangers;
- The maternal grandparents are too old to adopt the twins;
- The Minister failed to properly assess the protection concerns that were raised by the Respondents in respect of the maternal grandparents;
- The proposed adoptive parents are not suitable;
- The twins want to live with the Respondents. The children's wishes should be respected.

[28] The Respondents state that the court must hear their applications to terminate in the best interests of the children. The Respondents were highly critical of the process, agency workers, legal counsel, and the court.

[29] ***Rules, Legislation, and Case Law***

[30] The Minister relies upon Rule 5.14 and s. 48(4) of the *Act*. Rule 5.14 reviews the process to be applied when jurisdictional motions arise. Rule 5.14 states as follows:

> - Lack of jurisdiction
>
> (1) A respondent who maintains that the court does not have jurisdiction over the subject of an application, or over the respondent, may make a motion to dismiss the application for want of jurisdiction.
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> (2) A respondent does not submit to the jurisdiction of the court only by moving to dismiss the application for want of jurisdiction.
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> (3) A judge who dismisses a motion for an order dismissing an application for want of jurisdiction must set a deadline by which the respondent may file a notice of contest.

[31] Section 48(4) of the *Act* discusses applications to terminate in the context of adoption proceedings. This section states as follows:

> Where the child has been placed and is residing in the home of a person who has given notice of proposed adoption by filing the notice with the Minister, no application to terminate an order for permanent care and custody or to vary or terminate access under such an order may be made during the continuance of the adoption placement until
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> (a) the application for adoption is made and the application is dismissed, discontinued or unduly delayed; or
>
> (b) there is an undue delay in the making of an application for adoption.

[32] The question of whether s. 48(4) of the *Act* deprives the court of jurisdiction has not been considered in detail, nor resolved as noted by Flinn, J.A. in **L.M. and B.M. v. Children's Aid Society of Cape Breton,** 1999 NSCA 101, at para. 65. In one sense, the point is academic; the effect of s.48 (4) appears to be clear, whether or not it is strictly characterized as a jurisdiction depriving provision.

[33] In **R.K. v. H.S.P., L.A.C. and the Minister of Community Services and Family and Children's Services of Cumberland County**, 2009 NSCA 2, the Nova Scotia Court of Appeal commented on the scope of s. 48(4) in the course of holding that a father could not use an appeal of an adoption order as a means to challenge a permanent care order. Bateman, J.A. states at paras. 29, 30, and 32, as follows:

> 29 As noted above, a party to a child protection proceeding may apply to terminate an order for permanent care (s. 48(3)), subject to certain

> limitations (s. 48(4) and (6)). Section 36(1) includes the child's parent among those who may be a party to a protection proceeding.
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> 30 Once permanent care has been ordered, the CFSA prioritizes the adoption (permanent placement) of a child over continuing contact with the parent through access (s. 47(2)(a) and (3A)). A parent may not apply to terminate a permanent care order if the child has been placed for adoption and a notice of proposed adoption given (s. 48(4)). This too is consistent with the goal of stabilizing and finalizing the child's circumstances without delay.
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> . . .
>
> 32 Where a child is in permanent care the only consent to adoption required is that of the Minister or the agency (s.74(8)). This is consistent with s. 47 which provides that the parent's legal status vis-a-vis the child ended with the permanent care order. A parent may not apply to terminate the permanent care order if a child has been placed for adoption (s. 48(4)), nor is s/he entitled to notice of the proposed adoption.

[34] Further, the Nova Scotia Court of Appeal adopted the Minister's summary of the effect of s. 48(4) in **H.(B). v. Nova Scotia (Minister of Community Services)**, 2009 NSCA 67, by confirming that "[n]o application to terminate a permanent care and custody order may be made following the commencement of an adoption application, unless that adoption application has been dismissed, discontinued or unduly delayed…": paras. 15 and 16 per Hamilton, J.A.

[35] The language of s. 48(4) has roots in predecessor legislation and case law. For example, in **M.T. and E.T. v. Family and Children's Services of Lunenburg County et al** (1975), 11 N.S.R. (2d) 348 (C.A.), the Court of Appeal considered the issue of whether a biological parent could challenge an adoption of a crown ward. Subsection 33(5) of the *Child Welfare Act*, RSNS 1967, c. 31, provided as follows:

> Where a child has been committed as a ward of a Children's Aid Society or of the Director, wardship shall not be terminated where the child has been placed and is residing in the home of a person who has given notice of the proposed adoption of the child under the *Adoption Act* until an adoption order is made under that Act or until the application is dismissed, discontinued or unduly delayed.

[36] The court noted that this section had been enacted in response to the decision of the Supreme Court of Canada in **Mugford v. Children's Aid Society of**

Ottawa, [1969] S.C.R. 641, in which it was held that a biological parent's right to seek termination of a wardship of a child placed for adoption should not be lost as a result of implied language in the statute. Accordingly, "… s. 33(5) was added to the *Nova Scotia Act* with the obvious intention of trying to block a natural parent's efforts to recover a child which has been placed for adoption.": at para.11. Similar reasoning is also found in **T v. Family and Children's Services of Annapolis County** (1982), 50 N.S.R. (2d) 136 (S.C.A.D.).

[37] ***Decision***

[38] There is no doubt that s. 48(4) of the *Act* applies to the factual circumstances which are before this court. In each instance, the Notice of Proposed Adoption was filed in advance of the application to terminate the permanent care and custody order. The court is precluded from hearing the applications because the adoption process has begun. The legislature has assigned priority to permanency planning: **The Minister of Community Services v. T.H. and D.B.**, 2010 NSCA 63, per Fichaud J.A. at para. 46.

[39] As a result of this ruling, the factual allegations raised by the parents need not be considered on their merits; they are not relevant to the disposition.

[40] **Conclusion**

[41] The Minister's motions are granted. This court is legislatively barred from hearing an application to terminate a permanent care order once the adoption process is engaged.

[42] On a final note, the court must favorably comment on Mr. Neal's professionalism in the presentation of this emotionally charged case.

[43] Mr. Neal is to prepare the orders and forward to the court for issuance.

Forgeron, J.