IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: A.Z.A. v. Nova Scotia (Community Services), 2008 NSSC 181

Date: 20080611
Docket: SFHCFSA-13526
Registry: Halifax

Between: A.Z.A.

Applicant

v.

Minister of Community Services
F. Y. A.
A. Y. A.

Respondents

Restriction on publication:

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:
> "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 relative of the child."

Editorial Notice

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

Judge: The Honourable Justice Mona M. Lynch

Heard: June 3 & 4, 2008, in Halifax, Nova Scotia

Written Decision: June 4, 2008

Counsel: Tilly Pillay - for the Minister of Community Services
Linda Tippett-Leary - counsel for F.Y. A.
Peter Katsihtis - counsel for A.Y.A.

By the Court (orally):

[1] This was an application dated August 17, 2007 and filed with the court on August 22, 2007. I'm going to indicate what my decision is now in relation to Ms. A.'s application. I heard all of the evidence from Ms. A. and I've heard her submissions this morning as well as submission by all counsel for the Respondents requesting a motion for non-suit.

[2] The application was from A. A. to vary the terms of the permanent care and custody order which was granted on May 23, 2003, to allow for access pursuant to 48(3) of the *Children & Family Services Act*; an application as well pursuant to 48(6)(d) for leave to apply to terminate the order for permanent care and custody dated May 23, 2003; and an application to terminate permanent care and custody and return the children to her care pursuant to 48(8)(e) of the *Children & Family Services Act*. Leave was granted to Ms. A. to make the applications on June 3, 2008 with the consent of the Respondents.

[3] Ms. A. was represented by counsel when the application was made, however, her counsel requested and was granted permission to withdraw as counsel

in November of 2007. Counsel was appointed for the two children and the children's evidence came in the form of Will Say Statements.

[4] There were many procedural matters that had to be taken care of between August and the date of the hearing which was June 3rd. There was service on Ms. A.'s sister who had been a Respondent in the original proceeding, Ms. H. A., and there was an order for substituted service. I'm satisfied that she was aware of the proceeding. There was, as well, an application by the Minister to adjourn the matter and it was adjourned to June 3 & 4.

[5] On June 3rd I heard evidence from Ms. A. as well as evidence from Mr. Chambers which continued on today's date. Ms. A. testified, Mr. Chambers testified and Mr. Chambers is a social worker for the Minister of Community Services. He was the casework supervisor for the children from September 2003 until a few weeks ago. Counsel for both children confirmed the position that the children in their instructions had not changed since the filing of the children's Will Say Statements which set out their position. The Minister of Community Services, when called upon to give evidence, made a motion for non-suit as well as indicated

earlier that they likely would be not calling any evidence and the lawyers for the children offered no further evidence other than the Will Say Statements.

[6] It's an application by Ms. A. and the burden is on her to establish under 48(10) of the *Children & Family Services Act* that the circumstances have changed since the making of the order for permanent care and custody and also it is up to her to establish the children's best interests. At the close of Ms. A.'s case the Minister applied for a non-suit, saying that Ms. A. had not proven her case and counsel for the children agreed. The question in a motion for non-suit pursuant to Rule 30.08 of the Civil Procedure Rules is whether the Applicant has established a *prima facie* case. I must determine whether any facts have been established by Ms. A. from which a reasonable jury could find in her favour. I must decide this based not on what I believe but whether there is any evidence that would allow Ms. A.'s claim to be successful.

[7] Ms. A. alleges the children are in a very bad situation and that this is the fault of the Minister of Community Services. Her daughter is pregnant for the second time in the last year and she is 15 or 16 years old. Her son has been in W. and various group homes and placements in the Province of Nova Scotia. He's

been suspended from school and is involved in the criminal justice system. He has suffered injuries while in the care of the Minister. Neither child, Ms. A. alleges, has kept up with their culture or their religion and Ms. A. alleges this is the fault of the Minister of Community Services. Neither child has done well in the education system and they are not currently enrolled in school, again Ms. A. alleges this is the fault of the Minister of Community Services. The children's ages and names are not correct in the documents before the court and this has caused problems for the children. They cannot obtain social insurance numbers and the daughter cannot obtain the child tax benefit.

[8] Ms. A. does not understand why the children were taken from her in the first place but her main assertion is that the children are not doing well and it is not in the children's best interest to remain in the care of the Minister of Community Services. Ms. A. is alleging the change is how poorly the children are doing in the care of the Minister. She says that the children would be better off with her, presumably because she is their family and she will provide for their safety and reconnect them with their culture.

[9] The primary consideration in any termination proceeding is the best interests of the children. In *G.S. v. Children's Aid Society of Cape Breton*, pararagraph 13, the Court of Appeal quotes from the case of *Family & Children's Services of Annapolis v. T.* and says that the test is a judge must be satisfied the parent's circumstances have changed so there is no longer any need for protection and that the parent is the proper person to care for the child and that it is in the best interests of the children to terminate the order. The best interests include all of the considerations in section 2 of the *Children & Family Services Act.*

[10] In *D.(M) v. Children's Aid Society of Halifax* there was an appeal from a decision finding there had been no change in circumstances which were significant, relevant and a positive benefit for the welfare of the child and change that will have a positive benefit on the children.

[11] Ms. A.'s position appears to be that in returning the children to her would have a positive effect on them as they are doing poorly and that is a change, and that it is in their best interests for the children to return to her care and to their culture. She says separation from her is harmful to the children and not in their

best interests. She alleged that in her affidavit. She indicates that she's been in the same apartment for over a year.

[12] If those assertions were accepted, that the separation from her caused the problems and the problems would be gone if the children were returned to her then her application could succeed. I'm going to then dismiss the motion for the non-suit.

[13] However, without hearing from the Respondents I am not satisfied that the separation has caused the problems and would alleviate the problems with the children. The children have not done well in the care of the Minister of Community Services. Ms. A. blames the Minister for the problems. I do not know the root of the children's problems. Perhaps they were planted before 2003. Perhaps they've occurred since the children were taken into care. One thing is certain and that's that they have not done well.

[14] The problems Ms. A. is concerned about are real. I am not sure what other provinces do, but in Nova Scotia we do not have a good system to deal with older children of any culture that do not remain in foster homes. There are a few foster

homes willing to accept older children with special needs. The problem is worse when the children are from a different culture and there is a small community in Nova Scotia for these children. Young people in group homes do not get the nurturing they need and placing children with problems in group home living with a whole lot of other children with problems as bad or worse than theirs is not a good idea but there is little choice. There is no other option available. The staff in group homes do the best they can in the circumstances but it is not the same as children living in a stable and secure home.

[15] The Minister of Community Services in this case have done the best they can. They have not ignored the children's culture and they have tried to ensure the children kept up with their cultural heritage and their religion, but if there are no foster homes which will foster the culture then it is a tough situation. I accept that the Minister of Community Services found that the * school (**editorial note-removed to protect identity*) was no longer a good place for A.. I find that F. rebelled somewhat against what she saw were restrictions placed on her, both in the foster home and by her religion. These restrictions were likely different from the other children that she knew and she indicated she didn't want them.

[16] I accept that the Minister of Community Services tried their best to continue the children's education. The children had obstacles to their education to start with and they have never overcome those obstacles, I would say despite the best efforts of the Minister of Community Services.

[17] I accept that the Minister of Community Services is working on getting the proper documentation to straighten out the children's names and birthdates.

[18] I accept that the Minister of Community Services has provided placements for the children, and while I accept A. was injured while in the care of the Minister of Community Services there are lots of children that are injured in the care of caring and loving stable homes. It is not the fault of the Minister of Community Services that A. was injured.

[19] The Minister has not ignored any of the complaints that Ms. A. has about culture, values, religion, education, birthdates and names. Some of the concerns that Justice Gass noticed when the children were placed in permanent care are still present. The allegations at that time were that the children were drugged and raped

and assaulted in at least three schools, one in S. and two in H. Justice Gass spoke of the bizarre, disruptive and irrational behaviour of Ms. A. and her sister.

[20] Ms. A.'s behaviour before the court on this application has continued to be disruptive. In her appearances leading up to the trial, Ms. A. has alleged that her son was raped at gun point. In his Will Say Statement A. has denied that. This is concerning to me because it continues the pattern of allegations that Ms. A. was making and were noted by Justice Gass at the time permanent care was ordered.

[21] I have considered the children's physical, mental and emotional needs and the ability to meet those needs. I do not have any evidence to satisfy me that those would be met in Ms. A.'s care. The children's cultural, racial and linguistic, heritage and culture - the Minister is doing what it can and I am satisfied in many instances that they cannot do much with these if the children do not want them. I have considered the children's views but of course they are not determinative of the issue.

[22] Ms. A. has alleged that it is not in the children's best interests to be placed where they are. And it is true that they are not doing well. But the burden is not

on her to show that they are not doing well where they are but that it is in their best interests to require me to terminate the order and return them to her. I am not satisfied that the circumstances have changed with the children or with Ms. A. which would make it in their best interests to be returned to her.

[23] Based on the children's Will Say Statements there has been concerns about access since access has occurred with Ms. A.. Particularly the Will Say Statement of A. who wanted access and had a negative experience when he was exercising access with Ms. A.. I'm, therefore, not satisfied, as well, that it is in the children's best interests to have an order which requires access. Ms. A. did not really address that but she certainly did not establish that it was in the best interests of the children for access. So I am dismissing Ms. A.'s applications for the termination and for access.

J.