IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

CITATION: Children's Aid Society of Cape Breton-Victoria v. M.H., 2008 NSSC 242

Date: 2008-09-09
Docket: 50883
Registry: Sydney

Between:

The Children's Aid Society of Cape Breton-Victoria

Applicant

v.

M. H., C. B., J. B. and S. B.

Respondent

DECISION

Justice:	The Honourable Justice Theresa M. Forgeron
Heard:	June 9, 2008
Oral Decision:	July 16, 2008
Written Decision:	September 9, 2008
Counsel:	Mr. Robert Crosby QC, counsel for the Agency Mr. Alan Stanwick, counsel for C. B. Mr. David Raniseth, counsel for M. H.

Restriction on Publication:

S. 94 (1) of the Children and Family Services Act applies and this judgement or its heading may require editing 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 a relative of the child,* 1990 c. 5.

I Introduction

By the Court:

[1] B. J. B. is one years old. He is the son of M. H. and C. B.. The Agency became involved in B.'s life because the Agency was concerned that B.'s parents were abusing substances and lacked appropriate parenting skills. B. is currently in the temporary care of the Agency; he resides with his paternal grandparents, S. B. and J. B..

[2] The Agency seeks an order of permanent care and custody, with no provision for access. The Agency supports the plan of the paternal grandparents to adopt B.. M. H. and C. B. contest the application for permanent care. In the alternative, they seek access.

[3] The trial was held on June 9, 2008 and the following people testified: N. H., J. B., S. B., A. K., M. H., and J. B.. Written submissions were received on June 23rd.

An oral decision was rendered on July 16, 2008.

II. Issues

[4] The court must determine the following issues:

a) Should B. be placed in the permanent care and custody of the Agency?

b) If so, should access be granted to M. H. and C. B.?

III. Analysis

[5] Should B. be placed in the permanent care and custody of the Agency?

a) Position of the Agency

[6] The Agency seeks to have B. placed in its permanent care and custody. The Agency states that despite their extensive and long term efforts, B. remains a child in need of protective services. The Agency states that C. B. continues to abuse substances and Ms. H. is either unwilling or unable to provide a plan of safety for B.. The Agency notes that Ms. H. does not even acknowledge that Mr. B. is abusing drugs; nor does she have an

understanding that the current home environment poses significant safety risks for B..

b) Position of the Respondents, J. and S. B.

[7] J. and S. B. agree with the position of the Agency. They state that C. has a history of drug addiction and that they have done all within their power to have C. successfully deal with this disease. All of their efforts have failed. They state that it is not safe for B. to be in the care of C. and M.. They wish to adopt B..

c) Position of the Respondents, M. H. and C. B.

[8] Ms. H. and C. B. state that they can provide a safe and nurturing environment for B.. They deny that C. is currently abusing drugs. They deny that there were drugs in the home. They state that they have bonded well to B. and that they have done nothing which would merit having B. permanently removed from their lives.

[9] They ask the court to consider the consistent positive comments about their relationship with B.. They were noted to be affectionate and appropriate to B.'s needs. They love B. dearly. They have never physically harmed B.. There is no domestic violence. Their home is clean and tidy.

d) Decision

[10] I have reviewed the evidence, together with the plans and the submissions of the parties. I have applied the burden of proof to the Agency and given the Agency's application to permanently remove B. from the care of his parents, it is a heavy burden indeed.

[11] I have considered the legislative provisions of the *Family and Children's Services Act*. I have considered the legislative objectives stated in s.2 (1) of the *Act* which are threefold: a) to protect the child from harm; b) to promote the integrity of the family, and c) to assure the best interests of the child.

[12] I have applied the best interests of the child test as the paramount consideration in this decision as directed in s. 2(2) of the *Act* and pursuant to the relevant factors stated in s. 3(2). I have placed special emphasis on s. 3(2) a, b, c, d, e, f, i, k, l, and m of the legislation.

[13] I find that the order requested by the Agency is the appropriate one. B. continues to be a child in need of protective services. It is in the best interests of B. that he be placed in the permanent care and custody of the Agency pursuant to *s.* 42 (1)(f) and s. *47* of the *Act*.

[14] This was a difficult decision to reach as I recognize the love which Ms. H. and Mr. B. have for B.. I also recognize that their home is clean and safe. There has been no violence. Most importantly, I recognize the bond which exists between B. and his parents. I recognize that Ms. H. and Mr. B. were cooperative and participated with the family support worker and that they attended Family Place Resource Center on four occasions. I recognize that the Agency found B. to be a happy child in his parents' care. Despite these positives, I must nonetheless grant the application for permanent care and custody.

[15] According to the legislation which I must follow, the court has only two options available at this time. I can dismiss this proceeding and thus have B. returned to his parent's care. Or, I can place B. in the permanent care and custody of the Agency. There is no middle ground.

[16] I cannot return B. to Ms. H. and Mr. B. because B. remains a child in need of protective services. A permanent care order thus must issue.

[17] I find that the factors outlined in s. 42(2) of the *Act* have been proven by the Agency. Section 42 (2) states as follows:

> 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;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.

[18] I find that less intrusive alternatives, including services to promote the integrity of the family have in some respects been attempted and failed and in

other respects would be inadequate to protect B.. I draw this conclusion based upon the following findings which I make:

a) Mr. B. continues to abuse drugs. I reject the evidence of C. B. and M. H. that there is no drug abuse. I accept the evidence of J. B. that he found a bottle of pills on the floor of the residence of C. B. and M. H.. I accept the evidence of S. B. that she found an empty pill capsule in the bathroom of M. H. and C. B.. I accept the evidence of J. B. that C. was slurring his speech on occasion and was difficult to reason with, and that such are signs that C. B. was abusing substances.

b) I find that the failure of C. B. to consistently be available for drug testing as arranged by the Agency was due to the fact that C. B. knew the tests would return positive for drugs or alcohol. I do not accept the excuses offered by C. B. for his failure to take the tests. I find that C. B. and M. H. intentionally failed to answer their door on many occasions so that C. B. could avoid taking the court ordered tests.

c) C. B. and M. H. do not understand the significant risks associated with substance abuse and parenting. They do not appreciate the serous harm that will flow to B. if he is placed in an environment where drugs and alcohol are abused. Because of this lack of understanding, both continue to place B. at risk. Ms. H. has been unable or unwilling to develop a safety plan. Neither party recognizes that C. B.'s substance abuse places B. at a significant risk of harm.

d) C. B. has not successfully completed the services needed to conquer his long standing addiction. Although C. B. did initially work with Blair Kasouf at Addiction Services, he did not arrange for another counselor upon Mr. Kasouf's retirement. Further, Mr. B.'s many, past attendances at various Detox programs did not result in positive, lasting changes.

e) The unresolved addiction and the lack of a safety plan will continue to lead to poor, parental decision-making in the future. Until these issues

> are successfully resolved, B. will remain at risk for physical harm, and by this I mean a significant risk that is apparent on the evidence.

[19] Although Ms. H. and Mr. B. have made some inroads, and have exhibited some positive changes, the permanent care order must nonetheless issue. It is not safe to return B. to Ms. H. and Mr. B. at this time. Further, I find that the circumstances justifying the order are unlikely to change within a reasonable, foreseeable time. The permanent care and custody order is therefore granted.

[20] Should access be granted to M. H. and C. B.?

a) The Position of the Agency

[21] The Agency states that the court has no jurisdiction to grant access to M. H. and C. B. because the Agency intends to have B. adopted by his paternal grandparents. The Agency states that case law supports their position. The Agency believes that a long term placement with his paternal grandparents would be in B.'s best interests as such provides stability and

emotional security. B. has a positive attachment with his paternal grandparents and has resided with them for long periods of time.

b) The Position of the respondents, J. and S. B.

[22] J. B. states that he seeks custody of B. and wishes to adopt him. J. B. noted that he intended to raise B. as his grandchild. J. B. further stated that he would permit access between B. and M. H. and C. B.. He stated that if C. B. made lasting and positive changes in his life, he would agree that B. be returned to C. B. and M. H.. He said that C. B. and M. H. could "adopt" B. back.

[23] S. B. disagreed with the position of her husband. She clarified that they wanted to adopt B.. She stated that C. B. and M. H. had been given many chances and were not able to effect the necessary life style changes. She wants to raise B. and does not intend to have B. returned to C. B. and M. H. at any time in the future.

c) Position of the respondents, M. H. and C. B.

[24] M. H. and C. B. are seeking access to B. in the event a permanent care order is granted. They rely upon the best interests of B. and note the positive bond which presently exists between B. and them. They say a lack of access would result in harm to B..

d) Decision of the Court

[25] If access is sought once an order for permanent care is made, the burden of proof shifts to the respondents as noted in s. 47(2) of the *Children and Family Services Act* and as reviewed by Cromwell J. in **Children's Aid Society of Cape Breton-Victoria v. A.M.** (2005), 232 NSR (2d) 121 (CA). The *Act* contains a presumption against access once a permanent care order has issued.

[26] *Section 47(2)* of the *Act* has been a source of heated debate as thoughtfully reviewed by Levy J. in **Family and Children's Services of Kings County v. M.J.B. and K.B.** 2008 NSFC 12 (Fam.Ct).

[27] Section 47(2) of the *Act* reads as follows:

> 47(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
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> (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;
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> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
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> (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.

[28] In **Children's Aid Society of Cape Breton-Victoria v. A.M., supra,** Cromwell J. noted that the access decision contemplated in s. *47(2)* of the *Act* was a "delicate exercise that requires the judge to weigh the various components of the best interests of the child." Cromwell J. further directed that in performing this "delicate balance," the court was required to consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access.

[29] In two other appeal cases, **Children's Aid Society and Family Services of Colchester County v. E.Z. and J.M.** [2007] NSCA 99 and **A.J.G. v. The Children's Aid Society of Pictou County and J.G.** [2007] NSCA 78, Bateman J.A. makes comments relevant to the interpretation of s.47(2). In **E.Z. and J.M., supra,** Bateman JA notes that s. *47(2)* of the *Act* cries out for legislative clarification. She further states that permanent placement of a child takes precedence over access, and that access must not be made where it will impair a child's opportunity for permanent placement at para 56:

> 56 As others have commented, the wording of s. 47(2) cries out for legislative clarification. It suffices to say here that, at a minimum, this is statutory recognition that permanent placement of the child (which is usually, but not always, accomplished through adoption) takes precedence over access and that an access order must not be made where it will impair a child's opportunity for permanent placement.

[30] **In A.J.G., supra,** Bateman JA confirms that the amendments to s. 78 of the *Children and Family Services Act* did not alter the prerequisites for the granting of access once a permanent care order has issued at para. 31:

> 31 As stated above, the amendments are reflected in s. s.78(5) and (6). It is key here that s. 47(2) remained unchanged. The amendments to the CFSA permitting the continuation of a pre-existing access order

> on adoption did not alter the prerequisites for the granting of access on permanent care.

[31] Further, Bateman JA confirmed the parameters to the meaning of "special circumstances" in **A.J.G.,** supra at para 33:

> 33 **A.G.** urges this Court to provide guidance as to what would constitute "special circumstances". The potential fact situations are so varied that it is impossible to provide any specificity. It must be highlighted, however, that "special circumstances" are only available as a basis for access where "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" (s. 47(2)(a)).

[32] In **Family and Children's Services of Kings County v. M.J.B. and K.B.,** supra, Levy J. extensively reviewed the competing factors involved with the statutory interpretation of s. 47(2).

[33] This has been a difficult decision. I thank counsel for their excellent and helpful briefs. In reaching my decision, I have reviewed the legislation, the case authorities, the evidence and the burden of proof. I have reviewed the principles at play and I have placed the best interests of B. as the paramount consideration in the decision which I have made.

[34] The obligation to act in B.'s best interests is one which I take seriously. I will do all within my power to ensure that his best interests are met. The interests of the Agency, M. H., C. H., J. H., and S. H. are secondary to the best interests of B..

[35] I find that it is in B.'s best interests to have access with his parents, M. H. and C. B. notwithstanding the ongoing protection concerns which exist and the permanency planning which has been made. I make this finding for the following reasons:

a) B. has a positive, healthy attachment to his parents, and in particular to C. B.. I accept that B. knows that C. B. and M. H. are his parents. I accept that the access visits are positive and nurturing. I find that future access visits will continue to be positive and nurturing. I find that B. will continue to benefit from access visits with his parents, and in particular with his father. I find that C. B. received excellent example from his own parents as a child and as a result is able to provide positive parenting during supervised access visits to his son.

b) I find that J. and S. B., with the consent of the Agency, wish to have B. in their permanent care. Although they want to adopt B., they will nonetheless raise him as "grandparents" and not as "parents." B. will know that his parents are C. B. and M. H..

c) I find that permanency planning for B. with J. and S. B. will not be impaired by an order for access. There is absolutely no evidence to suggest that J. and S. B. will refuse to provide a permanent placement for B. if access was awarded. To the contrary, J. B. stated that he will

allow access visits and even opined that should C. prove he has successfully dealt with his addictions for an extended period of time, he would allow C. B. to "adopt" B. back. I recognize that S. B. did not agree with her husband on this point. I find that an access order will not impair B.'s opportunity for permanent placement.

d) I find that informal, discretionary visits as arranged by S. and J. B. will be insufficient to meet the best interests of B.. Such visits would be without legal enforcement. Court ordered access, on the other hand, is the right of the child. I find that B. requires regular visits with his parents if he is to develop into an emotionally stable young man. The bond and positive attachment already exists between father and son, and between mother and son and must be permitted to grow. I am concerned that S. B. would attempt to restrict informal visits between B. and his parents.

e) I find that informal visits will likely be a source of significant friction between J. and S. B.. I find that S. B. will likely attempt to restrict visits, while J. B. will be more open. Friction in the household where B. resides is not in his best interests. Court ordered access will remove the source of the friction.

f) J. and S. B. provide exemplary care to B.. I find that they will meet B.'s basic needs in the future. B. will have the vast majority of his needs met by J. and S. B.. I find, however, that unless there is access, B. will in all probability experience an emotional void which will become more intense as B. ages.

g) I was favourably impressed by both grandparents, and in particular with J. B.. J. B. continued to reach out to his son C. up until the time of trial. He continued to encourage C. to seek professional assistance. J. B. is an excellent example of the unconditional love that one hopes to see in a parent.

[36] The provision for access in the face of permanency planning is an exceptional remedy. I accept that it should be rarely ordered. However, s.

47(2)(d) of the *Act* must have some function and some role, or it would not have been written, albeit in a vague and uncertain manner. This is one of the rare cases where I find that the provisions of s.47(2) have been met. Because of the unique circumstances of this case, and because of the unique needs of this child, I find that special circumstances do exist which justify the making of the order for access.

[37] The delicate balance overwhelmingly favours access and the respondents, M. H. and C. B. have met the heavy burden which was upon them.

V. Conclusion

[38] The order for permanent care and custody is hereby granted, subject to the right of access. Supervised access will continue at rate of at least three hours per week and on the condition that neither party is under the influence of alcohol or nonprescription medication at the time of the visits.

[39] Mr. Crosby is to draft the order. Thank you.

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Justice Theresa M. Forgeron