

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Children's Aid Society of Cape Breton-Victoria v. A.L., 2010
NSSC 33

Date: 20100126

Docket: 60627; 56925

Registry: Sydney, Nova Scotia

Between:

Children's Aid Society of Cape Breton-Victoria

Applicant

v.

A.L. & J.W.M.

Respondent

Editorial Notice

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

Judge: The Honourable Justice Darryl W. Wilson

Heard: November 20, 2009

Counsel: David Raniseth - Counsel for the Applicant
Luke Wintermans - Counsel for the Respondent, A.L.
Alfred Dinaut - Counsel for the Respondent, J.W.M.

The Court:

[1] A Disposition Review Hearing was heard on September 13th and 14th, 2009 to determine whether the children, H., age 4 and N., age 1, should be placed in the permanent care and custody of the Children's Aid Society of Cape Breton-Victoria, the Agency. A.L. is the mother of the children. J.M. is the father of H. but does not believe he is the father of N. A.L. asserts that he is the father of N.

[2] The Court adjourned its' decision to September 23, 2009 and at that time rendered an oral decision with written reasons to follow ordering that the proceeding with respect to H. be dismissed and the child, N., be returned to the Respondent mother subject to the supervision of the Agency. Written reasons were provided on November 5, 2009.

[3] On October 2, 2009, the Court received an application by the Agency seeking an Order to stay the execution of the Order for Dismissal with

respect to H. and the execution of the Supervision Order with respect to N. The application was premature as neither the written reasons or Order had been issued.

[4] The Agency applied for an Order pursuant to *Civil Procedure Rule 15.08(a)*, to allow the Agency to introduce new evidence in the proceeding. The Agency also applied for an Order of Production of documents submitted by A.L. to the Residential Tenancies Board on September 16, 2009. A.L. agreed to the request for an Order of Production. A hearing was held on November 20, 2009 to consider the admission of the new evidence. Witnesses testified on behalf of the Agency and A.L., including A.L.

[5] The Court reserved decision. The Court is required to: (1) consider whether the new evidence should be allowed; and, (2) if allowed, decide what Disposition Order is in the children's best interests taking into account

the new evidence along with the evidence present at the Disposition Hearing in September.

APPLICATION TO RE-OPEN THE HEARING

[6] The criteria set out in **R. v. Palmer, [1980] 1 S.C.R. 759** apply where counsel seek the re-opening of a hearing or trial. MacIntyre J. summarized the criteria at paragraph 775:

[1] The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: See *McMartin v. The Queen*, [1964] S.C.R. [484];

[2] The evidence must be relevance in the sense that it bears upon a decisive or potentially decisive issue in the trial;

[3] The evidence must be credible in a sense that it is reasonably capable of belief; and

[4] It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

THE PROPOSED NEW EVIDENCE

[7] The Agency seeks to adduce fresh evidence to show that the Respondent, A.L., did not have access to living accommodations in *

at the time of the hearing and was having contact with P.M. who was waiting trial on a charge of assaulting her. A presenting protection risk when the children were taken into care was A.L.'s relationship with partners who were violent towards her. The Agency's position at the Disposition Review Hearing was that A.L., despite access to services about the risk to children of exposure to domestic violence, continued to have contact with a person who was violent towards her.

[8] The proposed new evidence includes:

(a) Testimony from Cst. Russell Chiasson of the Cape Breton Regional Police who investigated a landlord/tenant dispute at the residence of A.L. in * on September 11, 2009. Cst. Chiasson's testimony was that A.L. told him the landlord would not let her into her apartment because the rent was not paid on time. She could not access her belongings. The landlord arrived at the apartment soon after Cst. Chiasson. Eventually,

it was agreed that A.L. could remove her possessions from the apartment the next day, September 12, 2009. A.L. indicated she would take the dispute to the Residential Tenancies Board;

(b) Copies of documents filed by A.L. as exhibits in a Residential Tenancies Board hearing on September 16, 2009. The documents filed included invoices for moving and storage expenses incurred as a result of having to vacate her apartment on September 12, 2009. Other expenses claimed were for gas receipts and a ferry receipt for two trips to * I on September 11th and September 13th. According to the Agency, this evidence is relevant because P.M. was residing in * at the time, pursuant to a condition of his release.

(c) Testimony from Protection Worker, Monique Gibson, on:
(1) the conversation she had with A.L. after the Court's decision on September 23, 2009, in which A.L. confirmed she was not

residing in * at the time of the hearing; and, (2) referral information received by the Agency from Victims' Services, after the court hearing, that A.L. consented to a variation of a no-contact provision in P.M.'s Undertaking, to permit contact between them with her written consent;

(d) A certified copy of the Amended Recognizance of P.M. dated October 19, 2009 indicating that P.M. may have contact with A.L. with her written consent.

[9] A.L.'s testimony concerning her employment and living accommodations at the Disposition Hearing on September 13th and 14th, included the following:

A.L., Duly called, sworn, testified as follows:

DIRECT EXAMINATION

MR. WINTERMANS: Can you state your full name and address please?

MS. L: [removed to protect identity]

Q. And how long have you been at that address?

A. Just recently moved.

Q. I see. And before that, where were you living?

A. [removed to protect identity]

Q. And that's where?

A. [removed to protect identity]

...

[FURTHER ON IN THE TRANSCRIPT]

MR. WINTERMANS: So you, you're working now?

MS. L.: Yes.

Q. Where are you working?

A. I am working at *.

Q. What's that?

A. It's a, ah, call centre...it's like, ah, in catalogue sales.

Q. And that's in *?

A: That is correct.

Q: And, ah, are you on full-time there?

A: Ah, yes, I am.

Q. How long have you been working there.

A. Since July 13th...June 13th.

Q. June 13th of 2009?

A. Yes.

Q. So about three months?

A. Yes.

Q. And, um, what kind of hours do you have?

A. Ah, well...

Q. Is it...do you switch?

A. ...they do switch.

Q. Yeah.

A. They do switch, however, they have been doing the best they can to, um, to ensure that I still make my visits because the, the shifts are, they, like I said, they do rotate shifts.

Q. Yes.

A. And they have been accommodating.

Q. Okay. So they would accommodate your child care?

A. That's correct.

Q. Alright. Now what do you want, ah, as a result of this hearing today?

A. I would like to have my boys.

Q. Returned to you?

A. That's correct.

Q. Right. And if you did, they would be living with you at your address in *?

A. That is correct.

Q. Um, can you describe the apartment that you have there?

A. Yes. It's a, um, ah, very large 2-bedroom.

Q. Uh hum.

A. Ah, um, of course, it's got the living room, kitchen, um...

Q. Uh huh.

A. ...everything is completely child-proofed - all the little plugs in the socket, the...

Q. Yes.

A. ...they have things on the door knobs, and...

Q. Uh huh.

A. ...a very clean place. It's only four years old.

Q. Uh huh.

A. Um, it's got central air going through it, and...

Q. Huh hmm.

A. ...everything is included.

Q. What do you mean by everything?

A. Heat and lights. I...

Q. I see, okay.

A. ...yes.

Q. And, um, how much is the rent?

A. \$720.00.

Q. Okay, and what's your monthly income at the present time, approximately?

A. Ah, wow, ah, I guess, maybe \$1,300.00.

Q. I see.

[10] Counsel for the Agency did not cross-examine A.L. on her testimony about her living accommodations at the Disposition Hearing.

[11] At the Disposition Review Hearing, the Agency was alleging that A.L. continued to have contact with P.M. despite protection concerns of domestic violence and services being implemented to address this risk factor. P.M. is awaiting trial on charges of assaulting A.L. and P.M. was not to have contact with A.L. pursuant to a Recognizance issued in criminal

proceedings. A.L. was not to have contact with P.M. pursuant to a condition in a prior Disposition Order in this proceeding.

[12] There was a conflict in the testimony of witnesses at the Disposition Review Hearing in September on whether A.L. was travelling in a motor vehicle with P.M. on August 1, 2009. A Cape Breton Regional Police officer testified that he observed the two of them in a motor vehicle, that he was aware that P.M. was on an Undertaking not to have contact with A.L. and he was concerned about A.L.'s safety. He followed the motor vehicle and when the vehicle stopped at a service station, P.M. exited the vehicle and ran off. The police officer identified P.M. as the person who fled the scene. A.L. denied having contact with P.M. She and P.M.'s son testified it was P.M.'s son who fled the motor vehicle when the police approached them. The Court was left to resolve this contradiction in the testimony. An assessment of A.L.'s credibility was a relevant factor to be considered in resolving this conflict.

[13] The proposed new evidence conflicts with A.L.'s testimony on her employment and living circumstances at the time of the Disposition Hearing.

[14] Counsel for A.L. submits that the proposed new evidence about A.L.'s living accommodations at the time of hearing is not relevant, since she had made alternate living arrangements for the children in * as of September 16, 2009. Counsel for A.L. further submits that the evidence regarding A.L.'s consent to a change in P.M.'s Undertaking occurred after the hearing and, therefore, is not new evidence.

[15] I will deal with the issue of the relevance of the proposed evidence later in this decision. I am satisfied that the evidence relating to A.L.'s consent to a change in P.M.'s Undertaking can be considered new evidence, even though it occurred after the hearing date. In my opinion, once a decision is made to re-open a hearing, then subsequent evidence, which is relevant to the question the court has to decide is fresh evidence,

even if it occurred after the last hearing date. In this case, the evidence relating to A.M.'s consent to a change in P.M.'s Undertaking would not be available for any future review of a Disposition Order respecting the child, H., since the time for further Disposition Orders had expired with respect to that child. Therefore, if this evidence meets the test for admission, pursuant to the criteria set out in **R. v. Palmer**, *infra*, it qualifies as new evidence.

[16] The general principle that evidence should not generally be admitted, if by due diligence it could have been adduced at trial is subject to a provision that it not be applied as strictly in criminal proceedings. In my opinion, the general principle should not be applied as strictly in child protection proceedings as well because the court must make a determination in the best interest of the child and, therefore, should have available for consideration all relevant evidence. In this instance, A.L. changed her residence from the Northside area of Cape Breton to the * area of Cape Breton in early September, 2009. The Agency did not check

the suitability of the accommodations since it was looking for an Order of Permanent Care and Custody. The mother was aware, at the time of the hearing, that she did not have access to her apartment in * and she was making arrangements for new accommodations in *. She did not inform the Agency or the Court of these facts.

[17] The proposed new evidence is relevant because it relates to circumstances the Court is required to consider in determining what Order is in a child's best interest, including the following factors set out at Section 3(2) of the **Children and Family Services Act**:

3(2)(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;

...

(l) the merits of a plan for the child's care proposed by an Agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;

...

(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services.

[18] The proposed evidence, including testimony from Cst. Chiasson, exhibits filed by A.L. at the Residential Tenancies Board Hearing, the Agency's conversation with A.L. about her living accommodations after the Court's decision in September and the certified copy of the Recognizance issued in the criminal proceeding is credible evidence. A.L. does not dispute the facts as alleged but takes issue with conclusions that should be drawn from the facts.

[19] The court relied upon the evidence of A.L. in reaching its' assessment of the relevant factors of Section 3(2) of the **Children and Family Services Act**, which requires the Court to make an Order in a child's best interest. The proposed evidence, if believed, when taken with the other evidence adduced at trial, could reasonably be expected to have

affected the results. The evidence relates to the credibility of A.L.'s testimony in general and, in particular, her ability to provide a stable and secure home environment for the children and her ability to protect the children from the risk of physical harm occasioned by or caused by domestic violence.

[20] The application to introduce new evidence is granted.

[21] While counsel made submissions at the conclusion of the hearing in November, it was not clear to the Court whether counsel's submissions were intended to be only in relation to the admission of new evidence. Before the Court issues its' final decision on what Disposition Order is in the best interests of the children, counsel are invited to make a further submission on this issue based on the evidence presented at the hearing in September, as well as the new evidence admitted by the Court at the hearing in November.

[22] I would ask counsel to advise the Court if they are content with their prior submissions, or if they wish make a further submission which I request be filed by February 5, 2010.

J.