SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Community Services) v. S.S., 2012 NSSC 293

Date: 20120803
Docket: SFH CFSA 079394
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

S.S.

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	June 8, 2012
Written Decision:	August 3, 2012
Counsel:	Jean V. Webb for the Minister of Community Services R. Michael MacKenzie for Mr. S G. Douglas Sealy, Q.C. for Mr. and Mrs. D

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."

By the Court:

Introduction

[1] This is an application by maternal grandparents to be added as a party to a child protection proceeding under the *Children and Family Services Act*, S.N.S. 1990, c. 1. The application is pursuant to clause 36(1)(f) of the *Act* and Family Court Rule 5.09. The Minister consents to the relief sought by the applicants. The children's father, Mr. S, opposes the application.

[2] The Ds are the maternal grandparents of T and S. T is seven years old and S is five. The children's mother died in January 2012. The children's father, Mr. S, has been criminally charged in their mother's death. Following their mother's death, the Minister of Community Services began a child protection application relating to T, S and their older half-sibling. The application relating to their half-sibling has been terminated as a result of that child's placement with her mother.

[3] The Ds have filed an application under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. To pursue that application, they will need leave. They have not yet sought leave in that matter.

[4] In support of their application, the Ds filed an affidavit. Mr. S has not offered any evidence. Cross-examination of the Ds was waived. I heard submissions from counsel for the Ds and Mr. S on June 8, 2012. The Minister made no submissions.

[5] In the matter before me, the protection hearing was completed on May 8, 2012 when a supervision order was granted, with Mr. S's consent, placing the children in the care and custody of their maternal aunt, subject to the Minister's supervision. The pre-trial prior to the disposition hearing was held on June 8 when I heard the Ds' application to be added as a party to this application. The Minister has given notice that it seeks a disposition order which continues the children's placement with their maternal aunt. The children have been in this placement since the interim (five day) order was granted on February 17, 2012.

Context for the application

[6] Clause 36(1)(f) of the *Children and Family Services Act* provides that the parties to a proceeding pursuant to sections 32 to 49 of the *Act* include "any other person added as a party at any stage in the proceeding pursuant to the Family Court Rules".

[7] All manner of proceedings are described in sections 32 to 49 of the *Children and Family Services Act*: interim hearings; protection hearings; disposition hearings; reviews; termination applications and appeals. As noted, the protection hearing in this matter has been completed. A placement hearing is scheduled for August 14 and 15, 2012.

[8] The Family Court Rules, N.S. Reg. 20/93 address adding parties in Rule 5.09 which states that any person may, with my leave and subject to enactments respecting confidentiality, intervene in a proceeding and become a party to it, where the person claims and to my satisfaction "by the filing an affidavit containing the grounds for the intervention, can show a direct interest" in the proceeding's subject matter, concerning the enforcement of the judgment therein; or has a right to intervene under an enactment or Rule.

[9] Section 11 of the 1997 *Act to Amend the Judicature Act*, S.N.S. 1997, c. 5 provides that

> Rules made by the Family Court Rules Committee pursuant to s. 11(2) of the *Family Court Act* concerning the practice and procedure in the Family Court continue and apply to the practice and procedure of the Family Division of the Supreme Court until amended, varied, cancelled, suspended or repealed pursuant to the *Judicature Act*.

None of these events has happened, so Family Court Rule 5.09 continues to apply in the Family Division.

[10] The Ds do not assert a right to intervene under an enactment or Rule. As a result, to be added as a party, they must show a direct interest in the proceeding's subject matter or concerning the enforcement of a judgment in this proceeding.

[11] Family Court Rule 5.09 governs those who seeks to become a party in proceedings pursuant to the *Maintenance and Custody Act* and pursuant to the *Children and Family Services Act*.

The test to grant standing

[12] Briefs were filed on behalf of the Ds and Mr. S. I was referred to decisions from all levels of Nova Scotia's Courts. The Ds referred me to *C.G. v. M.G.*, 1995 CanLII 4158 (NS SC) (affirming (1995) 137 N.S.R. (2d) 161 (FC)); *MacLeod v. Theriault*, 2008 NSCA 16; and *Brooks v. Joudrey*, 2011 NSFC 5. In addition to these decisions, Mr. S referred me to *M.D.S. v. S.A.M.*, 1999 CanLII 19099, a decision of the Family Court (incorrectly referred to as a decision of the Supreme Court in its current citation).

[13] These four cases all deal with applications for leave to have standing to bring a custody or access application under subsection 18(2) of the *Maintenance and Custody Act.* In each, someone who was not a parent within the meaning given that word in the *Maintenance and Custody Act*, wanted leave to bring a parenting application against someone who was a parent: each case was a private custody or access dispute. (In *C.G. v. M.G.*, 1995 CanLII 4158 (NS SC), the "non-parent" was the child's biological mother and the "parents" were the child's maternal grandparents who had adopted the child.)

[14] The *Maintenance and Custody Act* and the *Children and Family Services Act* are very different pieces of legislation: the former governs private disputes while the latter regulates the state's intervention into families' private lives. In various decisions (*Gray*, (1995) 137 N.S.R.

(2d) 161 (FC) at paragraph 191 and *B.(R.) v. Children's Aid Society of Halifax*, 2003 NSCA 49 at paragraphs 30 and 44) the existence of different tests for standing has been identified. In *B.(R.) v. Children's Aid Society of Halifax*, 2003 NSCA 49 at paragraph 44, Justice Chipman said that the test of compelling circumstances (which applies when an application is made by a non-party with no prior involvement in the child protection proceeding, after a permanent care order has been made) "is to be distinguished from that appropriate for granting standing in custody proceedings or child welfare proceedings prior to a final disposition order being made."

[15] At the same time, there are some commonalities to be found in the standing test. The factors identified at paragraph 189 by then-Judge Legere in *Gray*, (1995) 137 N.S.R. (2d) 161 (FC) were drawn upon by Justice Bateman at paragraph 51 and 52 of her reasons in *C.(I.) and C.(H.R.) v. Children's Aid Society of Shelburne County*, 2001 NSCA 108 in identifying areas which supported the application by foster parents to be joined as parties. It's worth noting that in applications such as that in *B.(R.) v. Children's Aid Society of Halifax*, 2003 NSCA 49, it's recognized that an application for party status can't be considered independent from the application for leave to terminate the permanent care order. Here, of course, there is no permanent care order.

[16] In *Children's Aid Society of Halifax v. C.(T.)* (1996), 152 N.S.R. (2d) 277 (FC) Judge Daley added the mother's half-sister and her husband (the Ms) as parties at the disposition stage of a child protection application. His Honour said, at paragraph 7, that the *Children and Family Services Act* intends and requires that all reasonable alternatives for a child's care be exhausted before a child is permanently removed from its parents. This is accomplished by the Minister searching out those who might provide a placement (relatives, neighbours or community members) or by an individual or individuals coming forward. His Honour continued:

> There needs to be more than just familial connection. There must be sufficient evidence that the person who is seeking leave, has a reasonable alternative to the permanent removal of the child from his family. In deciding if there is a reasonable alternative, is the question of the welfare of the child: is there a reasonable possibility, when compared to the other alternatives, that the welfare of the child may be enhanced by granting leave and hearing the evidence of the third party?

[17] Like *C.(I.) and C.(H.R.) v. Children's Aid Society of Shelburne County*, 2001 NSCA 108 and *Family and Children's Services of King's County v. K.D.*, 2006 NSFC 8, Judge Daley acknowledged, again at paragraph 7, the assistance of then-Judge Legere's decision in *Gray*, (1995) 137 N.S.R. (2d) 161 (FC) at paragraphs 189-190 in identifying "some of the questions to be explored."

[18] In *B.(R.) v. Children's Aid Society of Halifax*, 2003 NSCA 49 at paragraph 39, Justice Chipman said that "Having regard to the Statute and the case law, particularly *C.(I.)*, I am satisfied that the test for permitting standing and leave to one who is not a party and without prior involvement in the proceedings is more stringent than that applied by Dellapinna, J., ie. the "reasonable alternative" test." His Lordship was clearer at paragraph 44, the compelling

circumstances test "is to be distinguished from that appropriate for granting standing in custody proceedings or child welfare proceedings *prior* to a final disposition order being made."

Analysis

[19] In determining whether the Ds should be added as a party, I am to consider whether they have a direct interest in the proceeding's subject matter, whether there is a familial (or some other) relationship and whether there's a reasonable possibility, when compared with other alternatives that the children's welfare may be enhanced by adding the Ds' as parties and hearing their evidence.

[20] Here, there is a direct interest in the proceeding's subject matter and a clear family relationship: the Ds are the maternal grandparents of T and S. It's their uncontradicted evidence that they attended "medial" [sic – medical] appointments with their daughter while she was pregnant with T. The Ds were present at T's birth in 2005, they cleaned the home before T came home from the hospital and, when their daughter said she was leaving Mr. S shortly after T's birth, they provided a home for her and T. T and her mother moved to western Canada with Mr. S in the fall of 2005. During this time, the Ds provided financial support to the family. Mrs. D visited her daughter and T in western Canada in March 2006 and T and her mother stayed with the Ds during the summer and fall of that year. While pregnant with S, there was another separation when the Ds' daughter and T again stayed with the Ds. From 2007 to 2010, there were regular visits between the Ds, their daughter and the grandchildren, T and S. The Ds also provided financial support. T spent six weeks with the Ds during the summer of 2010 and again during the summer of 2011. Regular visits continued. There is a family relationship between the Ds, T and S that is more than their blood relationship. There has been regular in person contact and the Ds describe an emotional relationship with the children.

[21] The statutory basis for the Minister's application is found in clauses 22(2)(b) and (g) of the *Children and Family Services Act*, which clauses relate to the substantial risk that the children will suffer physical harm caused by a parent's failure to supervise and protect them adequately and the substantial risk that the children will suffer emotional harm and the parent doesn't provide or refuses or is unavailable or unable to consent to services or treatment to remedy or alleviate the harm. Specifically, the Minister has identified concerns about Mr. S's alcohol and marijuana use and his poor decision-making.

[22] The Ds' involvement with T and S is, for the children, life-long. The Ds have observed aspects of the children's lives during visits to the children's homes.

[23] In terms of "other alternatives", a placement hearing is scheduled for later this month. I understand that Mr. S will be advocating for placement of the children with members of his family. Other alternatives include, obviously, Mr. S himself and the maternal aunt with whom the children are currently placed. Events may transpire that lead the Minister to seek permanent care that does not involve placement with any family member.

[24] At this point, the Ds offer a reasonable alternative to a permanent care and custody order.

[25] I turn now to the issues raised by then-Judge Legere in *Gray*, (1995) 137 N.S.R. (2d) 161 (FC) at paragraph 189-190. She asked:

> Is the application frivolous or vexatious?
>
> Is there sufficient interest and/or connection and should the custodial parents be called upon to respond to the application?
>
> Are there other more appropriate means of resolving this problem or having the court hear the issue?
>
> Is there a justiciable issue?
>
> Are there risk factors associated with this case that call for court intervention?
>
> Will the leave application, if granted, place the child in more risk of litigation and uncertainty?
>
> Are there extenuating circumstances, such as a change in the natural order of access or a denial of access?
>
> Does the death of one of the custodial parents constitute extenuating circumstances?
>
> Is the involvement of the third party destructive or divisive in nature?

[26] Mr. S argues that application is frivolous or vexatious, saying the Ds

> . . . have made it abundantly clear that they oppose the very obligation which the [*Children and Family Services*] *Act* and the law imposes upon the Minister, namely to provide all services reasonably necessary to promote the reunification and integrity of the family unit and to return the children to the care of the parent from whom they were taken.

In the absence of any evidence from Mr. S, I don't know how the Ds "have made it abundantly clear" that they oppose the Minister's legal and statutory obligation. The evidence from the Ds is that they understand that attempts to turn the children against their father or to speak negatively about him in the children's presence would negatively impact the children. Accordingly, they don't undermine Mr. S. The Ds have reassured the children that their father is "okay", they have explained his failure to attend access visits in a non-blaming way and Mrs. D has assisted in delivering Mr. S's Easter gift of bicycles to the children. In their support of the children, the Ds' conduct has been supportive of Mr. S. I do not accept that the Ds' application is frivolous or vexatious.

[27] Mr. S admits that the Ds have sufficient interest or connection with the children. I agree, both prior to and since their daughter's death, the Ds have been engaged in the lives of T and S.

[28] In terms of other appropriate means to resolve this problem or having the court hear this issue, Mr. S says there is no present issue of access and no obligation that the Minister can't discharge without adding the Ds as parties. This argument isn't responsive to the point raised by then-Judge Legere. The Ds are not seeking access to T and S and applications pursuant to the *Children and Family Services Act* don't deal with access disputes between private litigants. The *Children and Family Services Act* regulates the state's intervention in families' private lives. Where the state intervenes, it's because the family's circumstances transcend those which we permit a family to resolve on its own.

[29] There are means, other than adjudication, to resolve child protection applications. Mediation is available pursuant to section 21 of the *Children and Family Services Act* and judicial settlement conferences are available pursuant to Civil Procedure Rule 60A.35. However, the Ds have no entitlement to participate in these processes unless they are parties.

[30] As a child protection application, this is unlike a private parenting dispute where a non-parent wants standing to apply for custody or access. At the five day, interim and protection stages of this proceeding, the Minister's intervention has been warranted. There is a justiciable issue with regard to the children's need for protective services. Reasonable and probable grounds were found to exist that the children were in need of protective services at the interim stage and a protection finding was made on May 8, 2012.

[31] Regardless of whether the Ds become parties, there will be litigation and uncertainty for T and S. The Ds are not the instigators of this proceeding. The Ds' course of action in seeking to involve themselves in this proceeding (and holding their application pursuant to the *Maintenance and Custody Act* in abeyance), attempts to minimize litigation.

[32] In private custody cases, a parent's death might create an extenuating circumstance by leaving members of extended family without a conduit for a relationship with children. In a child protection proceeding, parents may jointly present a single plan in response to the Minister or they may respond separately and individually. The death of the children's mother is an extenuating circumstance. In her absence, there is only one parent to respond to the Minister's application. Adding the Ds as a party expands the options available to meet the children's best interests under the *Act* if reunification is not possible.

[33] Mr. S argues that the Ds' involvement "demonstrates" that their involvement would be destructive or divisive and that they take the position that Mr. S "should not be reunited with the care and custody of his children". The Ds have, in supporting their grandchildren, supported the legislative aim of reuniting T and S with their father. Even if I accepted Mr. S's argument (which is unsupported by any evidence), both the Minister, in its actions, and I, in my decision-making, are guided by the preamble to the *Children and Family Services Act* and its requirement, among others, that children should only be removed from the supervision of their parents if less intrusive measures have been attempted and failed, have been refused or would be inadequate to protect T and S.

[34] As a result of this analysis, I conclude that the Ds have a direct interest in the proceeding's subject matter and a familial relationship with the children. There is a reasonable possibility, when compared with other alternatives, that the children's welfare may be enhanced by adding the Ds' as parties and hearing their evidence. I've considered the issues raised by then-Judge Legere in *Gray*, (1995) 137 N.S.R. (2d) 161 (FC) at paragraph 189-190 and, in all regards, they support adding the Ds as a party to this application.

Conclusion

[35] The Ds shall be added as a party to this application pursuant to clause 36(1)(f) of the Children and Family Services Act and Family Court Rule 5.09.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia