SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Nova Scotia (Community Services) v. K.H.,* 2021 NSSC 188

Date: 2021-06-02
Docket: SFHCFSA-114956
SFHCFSA-118046
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

K.H. and K.K.

Respondents

Judge:	The Honourable Justice R. Lester Jesudason
Heard:	May 31, 2021
Oral Ruling:	May 31, 2021
Written Release:	June 2, 2021
Counsel:	Peter McVey, Q.C., for the Minister of Community Services Lola Gilmer, for K.H. Raymond Kuszelewski, for K.K. Louis A. d'Entremont, for P.G. Neil D. Robertson, for T.H.

RESTRICTION ON PUBLICATION:

Pursuant to subsection 94(1) of the *Children and Family Services Act*, there is a ban on disclosing 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. This decision complies with this restriction so that it can be published.

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:

1.0 Overview

[1] This decision concerns a verbal stay motion which I permitted the Minister of Community Services to make following an oral decision I gave on the afternoon of May 31, 2021. In that decision, I dismissed the Minister's application for permanent care and custody of three young children under the *Children and Family Services Act* and granting an order placing those children with their maternal aunt, T.H., under the *Parenting and Support Act.*

[2] The May 31st date for my oral decision was scheduled weeks ago around the availability of counsel on the understanding that all parties and their counsel would be present in Nova Scotia to receive same.

[3] Ms. Whelton, Q.C., has been the Minister's counsel of record throughout this proceeding. However, on May 31, 2021, Mr. McVey, Q.C., appeared on her behalf: I was advised that Ms. Whelton had a personal commitment and that, at her request, he agreed to appear for the purpose of receiving my oral decision. I thanked Mr. McVey for appearing so that the matter could proceed in Ms. Whelton's absence.

[4] After I rendered my decision, Mr. McVey asked to be heard on a verbal stay motion on behalf of the Minister and sought permission to make the motion without prior notice to the other parties and waiving the normal filing requirements under the *Civil Procedure Rules.*

[5] After giving all parties the opportunity to discuss the request with their respective clients, it was agreed that I would deal with the Minister's verbal motion that day so that matters would not be further delayed.

[6] After hearing from all parties, I decided to stay my orders until the end of this week to give the Minister time to file a formal stay motion before the Court of Appeal and to file a Notice of Appeal. Mr. McVey referred to himself as the Minister's appellate counsel and advised that this would give him time to move quickly to file the necessary documents with the Court of Appeal.

[7] Given the time-sensitivity to file the necessary documents with the Court of Appeal, Mr. McVey advised that having a written decision from me would be very helpful to the Minister. He would otherwise have to rely on court staff to send him a CD of my oral decision which presumably would have to be transcribed. Thus, I agreed to prepare and release a written version of my oral decision. I did so yesterday: *Nova Scotia (Community Services) v. K.H.*, 2021 NSSC 140.

2.0 The Law

[8] To grant a stay, the Minister must establish that the appeal raises an arguable issue and the present circumstances are such that the best interests of the children would be served by a stay: *Nova Scotia (Community Services) v. V.A.H.,* 2019 NSCA 26 at para. 22.

3.0 Positions of the Parties

[9] Mr. McVey asserted that my decision raised arguable issues on appeal and that it would be detrimental to the children's best interests to displace them from their foster placements and allow them to go back now with T.H. to British Columbia. He stated that the Minister wants to be able to assert the Minister's rights to bring the matter before another judge and that by exercising my discretion to grant a short stay (10 days or such lesser time as I believed was appropriate), this would essentially maintain a short temporary holding pattern which would avoid any disruption to the children.

[10] All other parties strongly opposed a stay.

[11] T.H. already has legal care and custody of the children's older half-brother in British Columbia. Furthermore, the two older children in these proceedings have previously lived with her family.

[12] Her counsel, Mr. Robertson, expressed strong displeasure over the fact that no notice was given by the Minister of a potential stay and that at least one of the arguable issues raised by the Minister arose from an oral ruling[1] I made

[1] I ruled that I could consider T.H.'s application under the *Parenting and Support Act* seeking to have the children placed with her when considering the Minister's plan for permanent care and custody under the *Children and Family Services Act*. I then reserved my decision on final placement of the children.

back on January 25, 2021, which was never appealed. He advised that, as agreed, T.H. had travelled to Nova Scotia at her own expense to be present to receive my decision on May 31st. Without providing details, he advised that granting a stay now would be very problematic for T.H's plans. He said T.H. wanted to have the matter concluded now.

[13] All other parties agreed that the children's futures should not delayed any further and that they should be placed immediately with T.H.

[14] In response to the concerns expressed by T.H., Mr. McVey stated:

- While it was true that one of the arguable issues related to my ruling made on January 25, 2021, the Minister would not have chosen to seek any interlocutory appeal of that ruling as it would have resulted in delay for the children.

- I should not be concerned about any prejudice to any of the parties caused by the granting of the stay. The focus must be the children's best interests.

4.0 Conclusion

[15] The date for my oral decision was scheduled weeks ago. All parties were advised that they should be present to receive it. I appreciate T.H.'s counsel's concerns that it would have been known to the Minister that his client was travelling from British Columbia and that no prior notice was given to him that the Minister could be seeking a stay on any grounds, particularly a ground arising from my January 25, 2021, ruling. If the Minister had appealed that ruling, and is correct that I can't consider T.H.'s proposed placement for the older two children, then the children's fates may have been determined well before now as it would appear that the only viable option available to me would be to place them in the Minister's permanent care and custody. There would have been no need for anything further from the parties or any decision on what long-term placement was in the children's best interests given that T.H. was seeking that all three children be placed with her. On the other hand, my decision and reasons for dismissing the Minister's application for permanent care and custody and ordering the children be placed with T.H. under the *Parenting and Support Act* were unknown to the parties until I gave my oral

decision on May 31st. Mr. McVey acted promptly to bring the verbal stay motion.

[16] I realize that this latest development must be very upsetting to T.H. and the children's other family members who are parties to these proceedings. T.H. is clearly anxious to be reunited with the two older children and have them once again live with her family along with I.K. and their older brother who is already is in T.H.'s legal care. My decision would result in the children being permanently placed with biological family which, in all the circumstances, I found to be in their best interests.

[17] However, my focus on the stay request must be on the children's best interests as opposed to any sympathies I may feel for any of the parties. Thus, when I consider the children's best interests on the Minister's stay application, I agree with the Minister that the children's best interests favoured a short stay so that the Minister can bring this matter before the Court of Appeal. As I stated to the parties on May 31st, if I made errors of law, then the Court of Appeal has a role to intervene as it deems appropriate in these circumstances in the children's best interests.

[18] Notwithstanding my ruling, as I emphasized again on May 31st, I am very concerned about the delay in determining these children's fates. It has already been too long. Mr. McVey is experienced appellate counsel and indicated he would move swiftly to file the necessary paperwork with the Court of Appeal. I have released a written decision quickly in follow up to my oral decision in the hope that it may assist in any appeal being filed by the Minister on an expeditious basis.

[18] Finally, given that I appreciate that the stay application was brought without any prior notice and may have resulted in some additional costs for any of the parties, counsel agreed that I could reserve my ability to hear any submissions on costs on the stay motion should a request be made.

[19] In closing, I thank all counsel for their patience and cooperation on May 31st. I appreciated their efforts.

Jesudason, J.