

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Children's Aid Society of Halifax v. R.J., 2005 NSSC 217

Date: 20050822

Docket: SFHCFSA-24189

Registry: Halifax

Between:

CHILDREN'S AID SOCIETY OF HALIFAX

Applicant

- and -

R. J. and J. J.

Respondent

- and -

V. M. and G. M.

Third Parties

Editorial Notice

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

Restriction on publication: **There is a restriction on publication pursuant to s. 94(1) of the *Children and Family Services Act***

Judge: The Honourable Justice Leslie Dellapinna

Heard: September 20, 2004, January 25, 26, 2005, February 22, 23, 24, 2005 and March 8, 9 and 10, 2005, in Halifax, Nova Scotia

Last Written Submission on the Issue of Costs: June 27, 2005

Counsel: Pam MacKeigan, for the Children's Aid Society
Elizabeth Cusack, for V. & G. M.

Restriction on publication: Pursuant to s. 94(1) of the *Children and Family Services Act*.

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:

[1] Over nine days between September 20, 2004 and March 10, 2005 I heard an application by the Children's Aid Society of Halifax for an order for permanent care and custody of the Third Parties' grandson and as well as an application by the Third Parties pursuant to the *Maintenance and Custody Act* for an order for custody. By way of a written decision dated March 31, 2005 I dismissed the Agency's application and granted custody of the child to the Third Parties.

[2] The Third Parties are seeking costs.

[3] Counsel for the Third Parties has submitted affidavits detailing various disbursements incurred by her and by the Third Parties in relation to these proceedings. She has also outlined the number of hours that she and her articulated clerk worked in relation to the applications.

[4] Counsel for the Third Parties was involved in this case prior to the trial itself, taking part in a telephone conference prior to the commencement of the trial as well as two telephone conferences in October 2004 and January 2005 prior to the recommencement of the trial on January 25. She did not represent the Third Parties on the first day of trial but did provide them with assistance in their preparation. She also represented the Third Parties during the final eight days of the trial. The Third Parties' legal fees and disbursements, even if discounted, are likely to be substantial.

[5] The Third Parties do not take issue with the Agency's decision to apprehend the child and place him in temporary care. However, they believe that the trial was necessary because the Agency acted improperly by opposing their application for custody.

[6] The Agency's protection application was filed with the Court in April 2003. The interim application was commenced on April 28 and completed on May 23, 2003. At that time it was ordered that the child remain in the custody of his mother subject to the Agency's supervision.

[7] On July 3, 2003 the child was found to be in need of protective services.

[8] The first disposition order was issued on September 30, 2003. The child remained in his mother's care subject to the Agency's supervision.

[9] On December 2, 2003 the child was taken into Agency care after it was determined that his mother could no longer manage him. The original disposition order was reviewed and varied on December 8. The child was placed in foster care. Shortly thereafter the Third Parties were approved as a restricted foster placement and the child was placed with them as of December 20, 2003.

[10] Further reviews took place on January 27, 2004 and May 27, 2004. During the May 27 review hearing trial dates were scheduled with the trial set to commence on September 20. At that hearing both respondents (the child's parents) indicated opposition to the child remaining in the care of the Third Parties (the maternal grand-parents). They were instructed to file their proposed plans of care. In the father's plan of care filed in July 2004 he proposed placement with his sister, H. M.. In the mother's plan, also filed in July 2004, she proposed placement with a long-time friend.

[11] In an affidavit sworn by the mother on July 5, 2004 she stated, among other things:

3. At this point, the Agency have made Application for Permanent Care of D., believing that I am unable to care for him. I freely acknowledge that I cannot care for D. on my own. The physical limitations that I have suffered, as a result of my accident, would make that impossible.

4. At present, my son is in the care of my mother, V.. At first, I was in support of this because I believed that my mother and I could put our differences aside and be able to pull together for the sake of D.. I believed that I would be welcome to live at home with D. and have an active part in his day to day care with the assistance of my mother.

5. Sadly, that has not happened. I continue to have a very strained relationship with my mother and I have most of my life. My mother and father split up when I was very young, which resulted in a heated custody battle for me. In the end, I was sent to live with my father at the age of two.

...

7. In February 1995 or 1996, my two oldest children were placed in the joint custody of my mother and myself, with primary care given to my mother and liberal access to myself, to be arranged between the two of us.

...

9. Exercising access to my girls has also been difficult due to some of my mother's actions....

10. I am worried that the problems I have with access with my girls will occur if I were to allow D. to be adopted by my mother.

11. In the past few months, contact between my children and myself has significantly diminished. I am concerned that my mother, V., is not encouraging or taking steps to maintain my contact with my children.

12. When he was in foster care, his foster mother let D. call me on Sundays. D. would spend time telling me he missed me, and asking when he would see me again. Now when I speak with D. on the phone, he curtly states "I don't want to talk to you". This concerns me as it has only been about six months that D. has been living with my mother.

13. My girls, over the last two months, will not talk to me on the telephone. This occurred after I returned from an extended trip in Cape Breton during March. I feel that this may be a result of me not signing an Adoption Agreement in regards to D.. I think that by not signing the Agreement, it has made my mother very angry and that the children have picked up on the hostility that she has towards me.

...

15. I do not feel that it would be in the best interests of D. to remain in my mother's care. In the past I have found my mother to be a very controlling individual and I worry about D. sometimes. To me, it felt as though my mother never played a maternal role in my life and I worry if the same thing is happening with my children.

...

17. I am absolutely terrified that should my mother adopt D., it will end any relationship that I have with him and any contact. I do not think this is in D.'s best interests. Just because his mother has physical limitations and cannot care for

him on her own does not mean she does not love him. It is not fair to cut him out of his parents' lives, which is what is going to happen.

...

[12] In the father's affidavit sworn July 13, 2004 he stated:

...

12. Currently D. is residing with his maternal grandmother and two sisters. I am concerned that should D. be placed permanently with his maternal grandmother, that she will frustrate access between myself and my son.

...

[13] In my decision of March 31, 2005 I stated the following:

[28] With limited time available before the final disposition date Wanda Smith, the caseworker for the parties, conducted her own assessment of the plans put forward by Mr. and Ms. J. and in the process interviewed the M.s. After she met with H. M. and her husband and V. and G. M. Sr. as well as others, the Agency decided to move D. to the home of H. M. out of concern for D.'s emotional well being and because of what Ms. Smith considered to be a threat by G. M. Jr. to abscond with D. if he thought the Agency planned to remove him from his parents' care.

[29] After D. was taken from their home Mr. and Ms. M. applied for custody pursuant to the Maintenance and Custody Act. Their application for leave, as required by section 18(2) was not contested.

[14] The assessment to which I referred was conducted in the latter part of July, 2004. It resulted in the child being removed from the Third Parties and placed with his paternal aunt on August 13, 2004.

[15] At the conclusion of the trial I found that it was in the child's best interest to be placed in the care of the Third Parties and custody was granted to them.

[16] On behalf of the Third Parties it is argued that the child was removed from their care and their application for custody unreasonably opposed because the Agency “carried out an incomplete home-study and relied on incomplete information”. Further, it is argued the Agency’s investigation of the facts in the Third Parties’ household as well as in the maternal aunt’s household was not thorough or objectively managed and that in turn led the Agency to adopt a rigid and unreasonable position.

[17] On behalf of the Agency it is submitted that the decision to place the child with his paternal aunt was reasonable under the circumstances that were known at that time given the information that was then available to the Agency and the positions put forward by the child’s parents.

[18] When the trial commenced on September 20, 2004 the positions of both parents were consistent with their affidavits. After one day of evidence the trial was adjourned due to ill health and a death in the family of the Third Parties.

[19] When the trial resumed in January 2005 the child’s mother had dismissed her counsel, was then living with the Third Parties and changed her position dramatically such that she fully supported her parents’ application. The position of the child’s father remained the same throughout.

[20] At the conclusion of the trial I decided that it was in the best interest of the child to be placed with the Third Parties for a number of reasons. With respect to access by the Respondents I concluded that the Third Parties then appreciated why it was important for the child’s sake that he maintain contact with his parents. I was also satisfied that they would follow the Court’s direction regarding access.

[21] With respect to the perceived threat by G. Jr. to abscond with the child, I concluded in my decision as follows:

“I do not believe that G. Jr. threatened to take D. away. I do however find that whatever he said led Ms. Smith to believe that such a threat was conveyed.”

[22] Both parties agree that the authority for costs in the context of child welfare proceedings is as was stated by Chipman, J.A. in *D.C. and L.L.A. v. Children’s*

Aid Society of Cape Breton-Victoria, 2004 NSCA 146. The Court of Appeal acknowledged that a decision to award costs is discretionary but unlike most other cases where the successful litigant can generally expect an award of costs, costs are infrequently ordered against a child welfare agency. As Justice Chipman stated at paragraph 6:

[6] In particular, in the context of child welfare proceedings, costs are not generally awarded against an agency which takes proceedings that are not successful. In M. Orkin, *The Law of Costs*, 2nd ed. (looseleaf) (Aurora, Ontario; Canada Law Ltd., 2003) the author discusses costs in child welfare proceedings at p. 2-91:

“In wardship proceedings involving a Children’s Aid Society costs have been awarded against the agency when it acted improperly, or unfairly and indefensibly, or while not grossly negligent, performed below a reasonable level and prolonged the litigation; or adopted an untenable position, but not where the agency brought the proceedings in good faith and committed no error; or, where although the agency made severe and grave allegations against the respondent which it subsequently withdrew, the ordinary person would not see such actions as unfair or unreasonable.

Costs should only be ordered against an agency in exceptional circumstances of improper or overbearing action.”

[23] I do not believe that the circumstances of this case are such that an award of costs against the Agency is appropriate.

[24] Section 9 of the *Children and Family Services Act* sets out the functions of an Agency appointed under the *Act* and includes protecting children from harm. Section 2(2) provides that in all proceedings and matters pursuant to the *Act*, the paramount consideration is the best interests of the child. When the child was placed with the Third Parties he was in the temporary care and custody of the Agency. The Third Parties were approved as restricted foster parents. He was placed with them by the Agency because at the time the Agency felt such a placement was in his best interest and it was less intrusive than leaving him in the care of strangers.

[25] When he was removed from their care he was placed with another family member. Again the Agency honestly believed that placement with the maternal aunt was in the child's best interest and also believed it to be a less intrusive arrangement than if the child remained with the Third Parties. That is because the Agency had an honest belief, based in large part on the statements of the Respondents but also comments made by the Third Parties and their son to Ms. Smith in July, 2004, that access between the child and his parents would be problematic if he remained in the Third Parties' care. They also had a genuine belief that there was a risk that the Third Parties' son may abscond with the child.

[26] The Agency acted out of concern for the child's welfare and the Agency at all times acted in good faith.

[27] The Agency also made reasonable efforts to resolve this matter without the necessity of a trial. The Agency expressed a willingness to take part in the mediation process, a proposal which the Third Parties did not accept. The Agency was also willing to take part in a Settlement Conference and was prepared to make its counsel and worker available at all times proposed by the Court. Although the Third Parties were also prepared to take part in the Settlement Conference, they did not do so because their lawyer was not able to attend on the dates made available by the Court.

[28] I am also satisfied that the Agency did all that it could to minimize the Third Parties' legal costs by cooperating with the Third Parties' requests for adjournments and by agreeing to their witnesses being called out of order in order to accommodate the witnesses' schedules and travel arrangements.

[29] In conclusion, the Third Parties' request for costs is denied.

Dellapinna, J.