NOVA SCOTIA COURT OF APPEAL
Citation: ***A.J.G. v. Children's Aid Society of Pictou County***,
2007 NSCA 78

Date: 20070628
Docket: CA 277523
Registry: Halifax

Between:

A.J.G.

Appellant

v.

The Children's Aid Society of Pictou County

Respondent

- and -

J.G.

Respondent

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

Judges: Bateman, Oland and Fichaud, JJ.A.

Appeal Heard: June 13, 2007, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Oland and Fichaud, JJ.A. concurring.

Counsel: Rosanne M. Skoke, for the appellant
Elizabeth Van Den Eynden, for the respondent, The Children's Aid Society of Pictou County
respondent J.G.not appearing
Thilairani Pillay for Minister of Community Services not appearing

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:

> **94(1) 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.**

Reasons for judgment:

[1] A.G. is the 20 year old mother of B.E., born December (*editorial note- date removed to protect identity*) 2002 and K.G., born June (*editorial note- date removed to protect identity*), 2005. She appeals from the orders of Wilson, J.F.C., directing that the children be placed in the permanent care of the respondent agency. J.G., father of K.G., although a party at trial, is not participating in this appeal nor is the father of B.E.

BACKGROUND

[2] A.G. came into the agency's permanent care when she was 12 years old. Thereafter she lived in a series of foster and group homes. When she became pregnant at age 16 her permanent care order was terminated at her request so that she could return to her parents' home to raise her child.

[3] Apparently A.G.'s reconciliation with her family did not go well. Her parents maintain that they were B.E.'s primary care givers during the first 10 months of her life. At that point A.G. moved into an apartment with B.E. She lost the apartment after three months and B.E. returned to live with her maternal grandparents. A.G. visited when she could, moving back into her parents' home for about three months when B.E. was 14 months old. She again moved out due to her troubled relationship with her mother. With A.G.'s agreement, B.E. stayed with her grandparents. Her visitation with B.E., by her own account, was intermittent. She sometimes lived with a long time friend/boyfriend, J.G. By February of 2005, when the maternal grandparents were no longer able to take care of B.E., A.G. sought the agency's assistance. A.G. was then pregnant with J.G.'s child and unable to provide for B.E. She was placed in the agency's voluntary care and in foster home placement with the maternal great-aunt, with access to A.G.

[4] By April, 2005 B.E.'s foster home placement was no longer viable; A.G. and J.G. were without a residence; A.G. was experiencing complications with the pregnancy, had missed scheduled access visits, and had been asked to leave an employability program due to missed time. The agency terminated the voluntary care arrangement and apprehended B.E.

[5] The agency commissioned a parental capacity assessment as well as an attachment assessment between mother and child and requested that A.G. and J.G. attend anger management counselling and parenting courses. K.G., born in June, 2005, was apprehended prior to his discharge from hospital.

[6] The agency recommended that J.G. attend supportive counselling through Tearmann Outreach, arranged individual psychological counselling for A.G. and continued to recommend anger management intervention for J.G.

[7] A.G.'s relationship with J.G. was tumultuous with several separations over the course of these proceedings resulting in various changes in A.G.'s housing arrangements and plans for the children's care. During one period of separation A.G. acknowledged that J.G. physically and emotionally abused her, yet she reconciled with him.

[8] Throughout the majority of the proceedings the agency supported a plan that would see the children in A.G.'s care. Ultimately, however, the agency sought permanent care.

ISSUES

[9] The issues engaged by A.G.'s many grounds of appeal can be summarized as follows:

- the judge erred in ordering the children into the agency's permanent care;
- the judge erred in failing to extend the time lines.
- the judge erred in refusing to grant access to A.G.;
- the judge erred in concluding that the agency had provided sufficient services within s. 13 of the **Children and Family Services Act**, S.N.S. 1990, c. 5 (the "**Act**");

STANDARD OF REVIEW

[10] An appeal is not a retrial where the appellate court can substitute its own exercise of discretion for that of the trial judge (**Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58, 232 N.S.R. (2d) 121 (C.A.) at para. 26). A trial judge's decision on a child protection matter may be set aside on appeal only if the trial judge erred in legal principle or has made a palpable and overriding error in his/her appreciation of the evidence (**Family and Children's Services of Kings County v. B.D.**, (1999), 177 N.S.R. (2d) 16; [1999] N.S.J. No. 220 (Q.L.) (C.A.) at 175; **Nova Scotia (Minister of Community Services) v. C.(B.) T. and F.Y.** , 2002 NSCA 101, 207 N.S.R. (2d) 109 (C.A.), at p. 111, **Nova Scotia (Minister of Community Services) v. B.F.**, 2003 NSCA 119, 219 N.S.R. (2d) 41 (C.A.) at para. 44).

ANALYSIS

(i) Permanent Care/Extending the Time Lines

[11] As with so many child welfare proceedings, the events giving rise to the apprehension are heartbreaking. As stated above, A.G. was in the care of the agency when she first became pregnant, having been taken into care when she was 12 years old. Prior to that time she had been subjected to severe emotional abuse by her mother and stepfather. She alleges that her stepfather sexually abused her as well. A series of foster and group home placements proved to be unworkable for A.G. Her decision to return to her family of origin while pregnant was ill advised and doomed to fail, as it did.

[12] Psychological and parenting assessments of A.G., undertaken for this proceeding, revealed that she is probably suffering from post-traumatic stress disorder resulting from the situation leading up to her own apprehension. While an adolescent in the care of the agency she was unwilling or unable to engage in or benefit from the many therapeutic services arranged by the agency. Upon coming out of agency care and after giving birth to B.E. she entered into a relationship with J.G., father of K.G., during which she suffered further abuse, both emotional and physical.

[13] A.G. is bright with good academic ability and has made admirable gains in acquiring education and becoming self-supporting. Sadly, those advances do not translate to her parenting ability. It is not disputed that A.G. loves the children and wants to provide for them.

[14] In his reasons for judgment, Wilson, J.F.C., analyzed the psychological and parenting capacity assessments in detail. He summarized A.G.'s present psychological situation as follows:

> [45] . . . While bright enough to be successful, she is, as a result of her life experiences, compromised in her psychological functioning. She is diagnosed with post traumatic stress disorder as a result of the abuse she has endured. She is only now starting to gain insight into "what's wrong" and perhaps willing, for the first time, to open up in therapy to deal with these issues. Given the maladaptive personality traits she has developed in dealing with her abuse, prognosis for positive change is guarded. I understand a guarded prognosis to mean success is possible, but is likely to be a struggle.

[15] This conclusion is amply supported by the evidence. Indeed, the judge states the prospects for positive change somewhat more optimistically than the evidence may warrant. The judge discussed the many ways in which A.G. is emotionally compromised. All of his findings in that regard are supported by the evidence. He considered the children's circumstances and the fact that B.E. has not been in A.G.'s care for any meaningful period and K.G. not at all. It is expected that B.E. will be particularly demanding of her care giver if moved from her current foster situation - the most stable placement she has known. He noted the evidence that K.G. will also have adjustment challenges. A.G. has little community support. While she continues to turn to her family of origin for assistance, they are unhelpful and emotionally abuse her. Thus, should the children be placed with A.G., she would be attending to their high needs, virtually on her own.

[16] The judge accurately stated the difficult situation presented:

> [54] The circumstances of A.G. can evoke great sympathy from the court. Had she benefited from better parenting, she may not be where she is today. Whether A.G. has continued to struggle because of the lack of effective services while she was in care or because of her own personality structure, she is today a single parent with very limited parenting experience and identified emotional

> challenges. The issue is not whether A.G. may someday overcome her challenges, but whether she is today able to provide the stability and support her two children require.
>
> [55] The *Children and Family Services Act* recognizes a child needs to be in a stable placement within a defined time. It is not an option of the court to extend time limits simply to allow a parent further opportunity to prove herself. What is a fair opportunity for the parent is defined by the time limits in the statute. As noted by Monin, J.A. in *C.A.S. (Children's Aid Society of Winnipeg) v. C.A.R.* (1980) 19 R.F.L. 92d) 232 at par. 6:
>
> > "To give this mother another chance is to give these children one less chance in life."
>
> [56] To place these children with A.G. would be to ignore the very real risks that continue to be present. It might work out but the prognisis for success is guarded. The task of parenting children who are expected to have high needs as they move from their foster placement would place demands on any parent. Those demands would increase many fold for an inexperienced single parent who has not yet had the opportunity to deal with her own issues. The children's best interest require a stable family placement.
> (Emphasis added)

[17] After noting that there were no possible extended family placement options for the court to consider, the judge said:

> [58] The alternative is permanent care and adoption. The prospects of an early adoption placement are very good for both children. The court must recognize again the importance of placing children in circumstances where they can have a secure place as the member of a family, where they are not likely to experience further disruption and it need be done without further delay. The court therefore concludes that it is in the best interests of B.E. and K.G. that they be placed in the permanent care of the applicant Agency.

[18] I am not persuaded the judge erred in concluding that permanent care was the only viable option consistent with the children's best interests. It was the consensus of the experts who testified that A.G. could not adequately parent unless she was able to successfully address some significant emotional issues. Service providers had been unable to make measurable gains in that area despite years of therapy. None were confident that A.G.'s emotional issues could be remediated

sufficiently to equip her to parent these children. All agreed that progress would occur only over a considerable time frame, if at all.

[19] The appellant submits that the judge should have extended the statutory time limits to allow A.G. further time for therapy. In effect, she says the judge has an unfettered discretion to extend the time limits.

[20] As this Court has said, repeatedly, once the statutory time lines have expired the Court's only options are to dismiss the protection proceeding or to order permanent care (see, for example, **G.S. v. Nova Scotia (Minister of Community Services)** 2006 NSCA 20; 241 N.S.R. 92d) 149 (C.A.); **Nova Scotia (Minister of Community Services) v. B.F.** , **supra**). The issue of exceeding the time lines was addressed by Cromwell J.A. for the Court in **Children's Aid Society of Cape Breton (Victoria) v. J.F.**, 2005 NSCA 101; 235 N.S.R. (2d) 117:

> **[17]** The maximum time limits for a child welfare proceeding are set out in s. 45 of the **Act**: twelve months for children under six years of age and eighteen months for those between six and twelve years. At the end of the statutory period a court must either dismiss the proceeding or order permanent care and custody. The time frames within which the proceeding must be resolved are necessarily short in deference to the "child's sense of time," as is recognized in the recitals to the **Act**:
>
> > AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;
>
> **[18]** Orders for permanent care are not limited to situations where there is no hope of parental improvement. The question is whether adequate parenting can be achieved within a reasonable time frame. That period is presumed to be the statutory time limit (**Nova Scotia (Minister of Community Services) v. L.L.P.**, [2003] N.S.J. No. 1 (C.A.) (Q.L.)).
>
> **[19]** It is in a child's interests that the uncertainty that accompanies a child welfare proceeding be prolonged no longer than necessary. The statutory time frames provide the outside limits. ...

[21] B.E. was four years old at the time of Wilson, J.F.C.'s decision. She had experienced a series of care givers over her short life. K.G., at 18 months, had

never been in her mother's care. A.G. acknowledged on appeal that dismissal of the proceeding was not an option. Thus, the only available option was a permanent care order. In addition to being the only option, it was clearly consistent with the children's best interests.

(ii) Services

[22] In addition to alleging that the agency failed to provide appropriate and timely services to A.G. during this proceeding, she asserts that the judge further erred by failing to find the agency owed her a "greater duty" because she was in agency care while a minor.

[23] The judge thoroughly reviewed the law on the provision of services, citing this Court's decision in **Nova Scotia (Minister of Community Services) v. L.L.P.** , 2003 NSCA 1; 211 N.S.R. 92d) 47 at paras. 25 and 38. He found that the agency had "consistently" offered services to A.G. while she was in care and when her own children came into care. This factual finding is supported by the record. Sadly, A.G. was unwilling or unable to benefit from the variety of services offered over the years.

[24] A.G., in claiming that the Agency failed to provide her personally with adequate services, does not recognize that the primary focus of these proceedings must be the welfare of the children. A.G.'s inability to develop adequate parenting skills is very sad. However, to suggest that the children should be placed in her care or kept on hold for a further indefinite period completely ignores the children's needs. The evidence is clear. B.E. and K.G. urgently required a final, stable placement and continuity of care. As the trial judge rightly recognized, the issue was not whether A.G. is to blame for the children's circumstances, but, with the situation as it is, what was in their best interests? (at para. [16], above, quoting from the trial judgment at para. 54)

[25] The judge did not err in concluding that continuous and varied services had been available to A.G. during her own time in agency care and throughout these proceedings.

(iii) Access

[26] A.G. says, notwithstanding the permanent care order, the judge should have ordered that she continue to have access with the children. In declining to order access the judge said:

> [59] Pursuant to the provisions of Section 47(2) an access order will not be granted *unless* a permanent placement in a family is not planned or the child is over the age of 12 and wishes to maintain contact or placement is planned with a person who does not wish to adopt the child or other special circumstances justify access. While there have been recent amendments to the *Children and Family Services Act* which permit under Section 78(6) adoptions with access to occur where it is in the best interests of a child to continue a previous access order, there has been no amendment to Section 47(2). The intent of Section 47(2) is very clear. (See *The Children's Aid Society of Pictou County v. S.B. and J.C.* 2006 NSFC. 41) Given the plan of the Agency and the age of the children, access should only be granted if there are special circumstances that justify the making of an order for access.
>
> [60] There is before the court evidence from the adoption placement worker, that an access order in this case would limit the available placements for both children. The opinion of the adoption worker is access orders reduce the pool of parents willing to adopt. Access orders not only reduce the pool of potential parents but restrict placements geographically as on going contact must be arranged. It is not speculation on the part of the court, but the evidence of an experienced adoption worker that access restricts a child's options for a stable placement.
>
> [61] The parent's wish to maintain contact cannot alone justify access. If that were the case, access would be granted in virtually every contested permanent care application. To grant access that limits the family placement for adoption would flout the intention of the Act to settle children in a timely manner. There is no evidence of special circumstance in this case.
>
> [62] Adoptions under section 78 can occur in a number of different circumstances including when an adoption placement becomes an option subsequent to permanent care. Indeed the very wording of section 78(6) anticipates circumstances quite different that access in the context of section 47(2), a permanent care order with an adoption plan. The removal of section 70(3) (no adoption with access), and the inclusion of the new section 78(6) simply opens up adoption placements that are consistent with established access. In contrast,

> section 47(2) gives priority to a family placement over access when a child is brought into permanent care. While section 78(6) creates new options for adoption, it should not be [interpreted] as changing the plain meaning of section 47(2). Had the legislation intended to give priority to parental access over adoption placement, amendment to section 47(2) is required.
>
> [63] In this case there are no special circumstances and priority must be given to a placement for adoption. In these circumstances the children will be placed in permanent care without access.
> (Emphasis added)

[27] A.G. says the judge erred at law in concluding that there were no special circumstances here. Elaborating, she says that certain 2005 amendments to the **CSFA** have altered the law on access where permanent care is ordered. Prior to the amendments, adoption and access orders could not co-exist. This resulted from s. 70(3) of the **CSFA**, which then provided:

> 70(3) No child in permanent care and custody and in respect of whom there is an order for access pursuant to subs. (2) of s. 47 may be placed for adoption unless and until the order for access is terminated pursuant to s. 48.

[28] With the 2005 amendments s. 70(3) was repealed and, as is relevant to access, the following provisions were added:

> 47(8) At least thirty days prior to consenting to an order for adoption, the Minister shall inform any person who has been granted an order for access under subsection (2) of the Minister's intention to consent to the adoption.
>
> . . .
>
> 78(5) Subject to subsection (6), where an order for adoption is made in respect of a child, any order for access to the child ceases to exist.
>
> (6) Where an order for adoption is made in respect of a child, the court may, where it is in the best interests of the child, continue or vary an order for access or an access provision of an agreement that is registered as an order under the Maintenance and Custody Act in respect of that child.

[29] In support of her submission that access on permanent care has been substantially altered with the above amendments, A.G. cites **Family and**

Children's Services of Annapolis County v. A.R.-R. 2006 NSFC 28; [2006] N.S.J. No. 311 (Q.L.)(Fam. Ct.). There Levy, J.F.C mused about the effect of the 2005 amendments on post-permanent care access. His reasons, read in full, confirm the *status quo* in relation to access orders on permanent care:

- the burden remains upon the parent seeking continued access to establish that the criteria of s. 47(2) are met;

- access is the exception not the rule (citing Gonthier J., writing for the Court in **New Brunswick (Minister of Health and Community Services) v. L.M.**, [1998] 2 S.C.R. 534 at para. 39).

[30] The current provisions of the **Act** in issue are:

> 47 (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.
>
> (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
>
> (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;
>
> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> (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.
>
> (3) Any access ordered pursuant to subsection (2) may be varied or terminated in accordance with Section 48.

(3A) Where the child has been placed and is residing in the home of a person who has given notice of proposed adoption by filing the notice with the Minister, no application for an order granting access may be made during the continuance of the adoption placement until

(a) an application for adoption is made and the application is dismissed, discontinued or unduly delayed; or

(b) there is an undue delay in the making of an application for adoption.

. . .

78 (1) Where the court is satisfied

(a) as to the ages and identities of the parties;

(b) that every person whose consent is necessary and has not been dispensed with has given consent freely, understanding its nature and effect and, in the case of a parent, understanding that its effect is to deprive the parent permanently of all parental rights; and

(c) that the adoption is proper and in the best interests of the person to be adopted,

the court shall make an order granting the application to adopt.

. . .

(5) Subject to subsection (6), where an order for adoption is made in respect of a child, any order for access to the child ceases to exist.

(6) Where an order for adoption is made in respect of a child, the court may, where it is in the best interests of the child, continue or vary an order for access or an access provision of an agreement that is registered as an order under the Maintenance and Custody Act in respect of that child. 1990, c. 5, s. 78; 2005, c. 15, s. 6.
(Emphasis added)

[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.

[32] The burden is on the parent seeking access to establish that such would be in the child's best interests. In **Children's Aid Society of Cape Breton (Victoria**) **v. A.M.**, **supra**, Cromwell, J.A. wrote for this Court:

> [36] These submissions must be considered in light of three important legal principles. First, I would note that once permanent care was ordered, the burden was on the appellant to show that an order for access should be made: s. 47(2): **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, [1998] 2 S.C.R. 534 at para. 44 and authorities cited therein. Second, I would observe that, as Gonthier, J. said in **L.M.** at para. 50, the decision as to whether or not to grant access is a "... delicate exercise which requires that the judge weigh the various components of the best interests of the child." It is, therefore, a matter on which considerable deference is owed to the judge of first instance for the reasons I have set out earlier. I would note finally that, in considering whether the appellant had discharged her onus to establish that access ought to be ordered, the judge should consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access.

[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)).

[34] The evidence before the judge was that the agency plan for these young children was adoption and that an access order would reduce the pool of prospective adoptive families. However, even had access been an option, it was clear, as found by the trial judge, that such was not in the children's best interests. Dr. Susan Hastey who testified at the trial and conducted a detailed parenting assessment was unable to determine the extent of any attachment B.E. may have developed to A.G. through access. As B.E. had not been in her mother's care for any significant period of time, Dr. Hastey opined that B.E.'s primary familial attachment, if any, would be to her maternal grandparents. She was of the view

that B.E. may consider A.G. as more of a sibling than a parent. She noted that at the end of access visits B.E. was exhibiting significant stress and asking to see her foster mother. Further, it was her opinion that access would be a barrier to a ready adoption placement and that these children needed settlement as soon as possible.

[35] In an assessment report prepared by Dr. Carolyn Humphries, an expert on child and family psychology, in August 2005, the doctor noted that there was some primary attachment between B.E. and her mother but it has been compromised by her mother's unavailability. B.E. has experienced significant disruption in her attachment relationships with primary care givers which, coupled with her mother's unavailability, has impacted her sense of security.

[36] In assessing whether continued access is in the child's best interests, evidence of how access has been exercised by the parents is highly relevant. As Gonthier, J. wrote in **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, **supra**:

> 52 The evidence as to how access has been exercised is particularly relevant, since it relates both to the attitude of the parent and to the effects of the visits on the child. Every parent must place his or her child's interests ahead of the parent's own. The parent's inability to do so, and the harm suffered by the child, are factors that may result in access being prohibited. This will be the case, for example, where the parent is violent, manipulative, unstable or unable to control his or her emotions. With regard to the effects of the visits on the child, signs such as sadness, anxiety, regression, the reappearance or exacerbation of behavioural problems, mood and nightmares may evidence harm. . . .

[37] From the evidence of the three access facilitators who had supervised A.G.'s visits with the children it is fair to conclude that the access was of questionable benefit to the children. During the period that A.G. was living with J.G. and the two were exercising access together, they were sometimes late or unprepared for visits and, not infrequently, too tired to focus on their time with the children. Their relationship difficulties interfered, as well. When A.G. separated from J.G. she continued to have problems expressing affection with the children during the visits and in focussing on them to an appropriate extent. B.E. was ambivalent about the visits.

[38] In summary, B.E. was frustrated and confused by the visits; A.G. had difficulty sustaining her interest in the children during her time with them; the

nature and extent of B.E.'s attachment to A.G. was questionable. It was in the face of this evidence that the judge concluded that there were no special circumstances establishing that access would be in the best interests of the children. His finding in this regard is entitled to considerable deference. As recognized in **New Brunswick (Minister of Health and Community Services) v. L.M.**, **supra**, *per* Gonthier, J.:

> 34 The appellant contends that the Court of Appeal should not have substituted its discretion for that of the trial judge. This Court has stated on a number of occasions that the trial judge is in the best position to decide the best interests of the child. In *Adams v. McLeod*, [1978] 2 S.C.R. 621, Spence J. wrote (at pp. 625-26):
>
> > Again our courts have been unanimous that the most authoritative pronouncement thereon is by the trial court judge who hears the evidence and assesses it. . . .However, as to custody issues, that caution must, in my view, become very strong indeed. Those issues are so intensely personal that the trial court judge is able to do, and does, far more than merely assigning credibility.
>
> (Emphasis in original)

[39] I am not persuaded the judge erred in declining to make an access order.

DISPOSITION

[40] I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.