NOVA SCOTIA COURT OF APPEAL

Citation: *Family and Children's Services of Yarmouth County v. E.A.*, 2004 NSCA 96

Date: 20040805
Docket: CA 218121
Registry: Halifax

Between:

Family & Children's Services of Yarmouth County

Appellant

v.

E.A. and S.D.

Respondents

Restriction on publication: Section 94(1) of the *Children and Family Services Act*

Judge(s): Saunders, Oland and Fichaud, JJ.A.

Appeal Heard: June 18, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed without costs as per reasons for judgment of Oland, J.A.; Saunders and Fichaud, JJ. A. concurring.

Counsel: Gregory Barro, for the appellant
Marci Melvin, for the respondent A.
Hugh Robichaud, for the respondent D.

Reasons for judgment:

Introduction

[1] In December 2002 Family & Children's Services of Yarmouth County (the agency) took J.A., the son of the respondents E.A. and S.D, into care. J.A. was subsequently determined to be in need of protective services under s. 22(2)(b) and 22(2)(ja) of the *Children and Family Services Act* (the *Act*). He was ordered to remain in the care and custody of the agency with supervised access to the parents.

[2] The disposition hearing was held in February 2004. On March 5, 2004 Chief Judge John A. Comeau of the Family Court of Nova Scotia released his decision which ordered, *inter alia*, that J.A. be placed in the temporary care of the agency and that S.D. continue to have access in accordance with agency guidelines. His decision is reported as *Family and Children's Services of Yarmouth County v. E.A., G.L., B.M., S.D.*, 2004 NSFC 4.

[3] The agency appeals that decision and his order dated April 2, 2004. It argues that the trial judge erred in law and made palpable and overriding errors in his appreciation of the evidence. It asks that J.A. be placed in its permanent care and custody.

[4] For reasons which I will develop, I would dismiss the appeal.

Background

[5] When the respondents E.A. and S.D. commenced their relationship in August 1995, E.A. already had four children. S.D. is the father of J.A., E.A.'s fifth child, who is now six years old. S.D. is married but there are no children of that marriage. J.A. is S.D.'s only child.

[6] All five of E.A.'s children were taken into care in December 2002. The circumstances which led to the agency taking the children are set out in the December 19, 2002 affidavit of Laurie d'Entremont, a protection worker/intake worker and agent for the agency. The eldest of E.A.'s children claimed that S.D. had yelled at him, hit him, struck him with a boot, had him locked in his room every day after school, locked him outside the house for two hours one rainy winter night, fed him little, and treated him very badly. Ms. d'Entremont's

inspection of his room and interviews of his siblings corroborated many of his allegations. On May 14, 2003, with the consent of the respondents, the four oldest of E.A.'s children were placed in the permanent care and custody of the agency.

[7] E.A. and S.D. were charged under the *Criminal Code*. E.A. has been convicted of unlawful confinement. The trial of S.D. for unlawful confinement, assault, sexual assault and sexual exploitation has not yet been held.

[8] The evidence before the trial judge, at the disposition hearing, included the affidavit of Ms. d'Entremont, the agency plan dated May 7, 2003, and an Assessment Report dated April 30, 2003 (the IWK report) prepared by Linda MacEachern, a social worker, and Debbie Emberly, a psychologist (candidate register) with assessment services of the I.W.K. Health Centre. These documents were entered into evidence by agreement. The judge also had S.D.'s plan for J.A., a parenting capacity assessment dated December 12, 2004 (the Donaldson report) prepared by Michael S. Donaldson, a family therapist and parental assessor, and several letters regarding S.D. from the community. Mr. Donaldson, S.D., and some of the letter writers testified and were cross-examined.

[9] The IWK report had been prepared in respect to all five children. The portion pertaining to J.A. reads in part:

> J. is a child who has attention and love lavished upon him. However, it does not appear that he received adequate stimulation and encouragement of his development in many regards. He exhibits symptoms of developmental delays in the areas of language, social, and cognitive development. J.'s weight is a serious health concern, given his young age. Parents have grossly neglected this child's nutritional needs, and have indulged him in high-fat foods. J. requires an environment in which he will be assisted with losing weight through appropriate nutrition and exercise. He needs to be stimulated and encouraged to do physical activity.
>
> J. has had few if any limits imposed on him, and has been the favoured child in the family since his birth. He has not been told "no" for many of the requests he had, and there is a high likelihood that this child will begin to exhibit some challenging behaviour for parents in time.

[10] The assessment of S.D. in the IWK report includes the following:

> ***1V. Formulation:*** *Given the long standing personal issues facing Mr. D., his limited cognitive ability, and lack of personal insight with regard to his functioning and behaviour, the prognosis for personal change is highly guarded. Mr. D.'s upbringing and socialization has led him to hold beliefs regarding the punishment and discipline of children which are ingrained in his personality make up and as such are highly resistant to change. Mr. D. has behaved in an abusive manner towards Ms. A.'s children, readily admitting preferential treatment of his own biological child. However, the belief structure employed by Mr. D., which advocates the use of physical discipline and emotional deprivation coupled with his limited cognitive abilities suggests that the prognosis for change is poor. The risk to the children for physical, sexual, and emotional abuse remains too high to permit Mr. D. to remain in a parenting role or to have contact with any of the children who are the subject and focus of this assessment report.*

Among other things the IWK report recommended that J.A. be taken into permanent care and custody of the Minister of Community Services with a view to adoption and that access by his parents be gradually terminated.

[11] The agency plan which had also been prepared in respect to all five children sought their placement in its permanent care and custody. It read in part:

> **2. Description of services to be provided to remedy the condition or situation on the basis of which the child was found in need of protective services**
>
> (a) Agency Services: Not applicable
>
> (b) Other Community Resources: Not applicable

The agency plan proposed J.A.'s placement in a foster home with a view to adoption.

[12] S.D.'s plan proposed that he have the care and custody of his son. S.D., who is 52 years old, only attended school to grade two and is unable to read or write to any degree. After working for T.C. for 20 years he now works on the wharf, is seasonally employed in the local fisheries, and receives EI. He owns his own home where he lives with his wife. For some time he has left his house each morning for E.A.'s place and returned home in early evening. S.D. testified that if J.A. should be returned to him, he would leave his wife. He stated that he would

also leave E.A. and would not see her nor, unless and until the court so orders, would he allow her to see J.A..

[13] The agency did not offer S.D. any counselling or other services while J.A. was in the temporary care of the agency. S.D. testified that he was interested in assistance or guidance to help him understand and improve his parenting skills, but none was forthcoming from the agency. On his own, he sought out services and approached the Yarmouth Hospital seeking counselling and the Parents Place towards obtaining parental support. He also commenced nutritional counselling with a dietician and arranged for an apartment for he and his son. S.D.'s plan read in part:

> **2. Description of services to be provided to remedy the condition or situation on the basis of which the child was found in need of protective services.**
>
> (a) Agency Services: Whatever the Court determines reasonable to assist the Respondent, S.D., with his care of the child J.
>
> (b) Other Community Resources: Whatever the Court determines reasonable to assist the Respondent, S.D., with his care of the child J.

[14] According to the Donaldson report, a parent/child bond exists between S.D. and J.A. and the father has an observable affection for his son that predated his apprehension. Despite S.D.'s best intentions with J.A., which are described as benevolent, he had been inappropriate in his parental role with J.A., primarily in exposing the child to activities and events and comments that he should not have been exposed to. The Donaldson report read in part:

> **Guideline 4: Observations of Current Parenting Ability**
>
> g) **Strengths to Build Upon**, There are several. S.'s natural affection for J. S.'s ability to provide for J.'s material needs. S.'s stated willingness to participate in whatever program was deemed necessary for him to take to facilitate J.'s return. S. related that although he had been tempted to drink alcohol since J.'s apprehension, he rationalized that it would do more harm than good. The IWK report noted that "It does appear that Mr. D. now recognizes that he may have done wrong". These all point to the possibility that S. is not incorrigible.

[15] Mr. Donaldson stated that whether S.D.'s overall lack of parenting skills and abilities can be compensated by either education or time was questionable. If the bond between father and son were severed, in his opinion there would be negative consequences for the boy. His view was that while S.D. was not at the time of the report capable of appropriately parenting J.A. by himself, this would not prevent the exploration and/or implementation of a type of parenting arrangement that included S.D. in some type of parenting capacity.

[16] The trial judge described the issue before him as whether it would be in the best interests of the child to consider a plan that would involve parenting by his father, S.D. The evidence pointed to the love between father and son. He observed that the preamble of the *Act* contemplates that agencies will assist parents and that s. 42(2) contemplates that services must be at least offered:

> **Restriction on removal of child**
>
> (2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> ©) would be inadequate to protect the child.

[17] The trial judge stated that no explanation had been given as to why services had not been offered even when S.D. had requested them. While S.D. faces some criminal charges, none involve J.A. and the agency had offered and promoted access. He observed that S.D. is willing to participate in any program that would assist with his parenting J.A. At para. 51 the trial judge concluded that:

> It would be in the child's best interest, if possible, to continue a relationship with his father. The type and extent of that relationship has yet to be determined. One factor in particular would be any conviction on the criminal charges against the Respondent, S.D. These charges consist of offences with respect to a child. A conviction would result in his name being placed on the Child Abuse Register and the consequences are self-evident.

[18] The trial judge ordered that J.A. be placed in the temporary care of the agency for a period of six months in compliance with s. 45(2)(b) of the *Act*. His order of April 2, 2004 continued:

> A. The Respondent father, S.D., shall continue to have access in accordance with the Agency's guidelines;
>
> B. Family and Children Services of Yarmouth County shall assist and arrange for the Respondent father, S.D., to take parenting courses with particular emphasis on discipline;
>
> C. That Family and Children Services of Yarmouth County investigate and provide such other services outlined in Section 13 of **The Act** as would assist the Respondent father, S.D., in parenting J. so as to adequately protect him;
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> D. That the Respondent father, S.D., will with the cooperation of the Agency continue with nutritional counselling for J. which he had already started at Southwest Health;
>
> E. That if the Respondent father, S.D., is convicted of any of the child related criminal charges against him, this Court shall immediately be notified by any or all of the parties. Consequently, the Respondent S.D. will be entered on the Child Abuse Register and upon review an Order will issue for the Court granting permanent care and custody of J. to the Agency.
>
> F. That the Respondent, E.A., is not to have any contact with the child unless she participates and completes counselling and/or parenting courses satisfactory to the Agency.

Issues

[19] The grounds of appeal, slightly restated for convenience, are that:

1. The trial judge erred in law, in the circumstances of this case, by ordering the agency to fund and provide services to S.D.

2. He made a palpable and overriding error in his appreciation of the evidence when he determined that S.D. should have access to J.A., who is presently in foster care, despite the evidence of abuse accepted by the trial judge.

Analysis

[20] Unless the judge has acted upon a wrong principle of law or committed an obvious and critical error in appreciating or applying the evidence, this court will not interfere: *T.B. v. CAS* (2001), 194 N.S.R. (2d) 149 (C.A.) at para. 15. In my view, the trial judge neither acted upon a wrong principle of law nor made such an error in his appreciation or application of the evidence. I would dismiss the appeal.

[21] Since the agency did not raise any issue concerning the authority of a trial judge to order the provision of services, this decision does not deal with that question but assumes, without deciding, that such an order is within his or her jurisdiction. The agency puts its case on the more limited basis that the trial judge erred in law by ordering it to provide services when the IWK report did not suggest that any services would be beneficial. Moreover it says that since S.D. did not specify what meritorious services he proposes, he failed to meet the "burden of persuasion" upon him.

[22] I disagree. The trial judge was clearly concerned by the agency's failure to provide any services to S.D. He had before him the agency plan that in view of the circumstances described in the d'Entremont affidavit and the recommendations and concerns in the IWK report, E.A.'s five children could not be adequately protected while in the care of E.A. and S.D. As set out in para. 10 of this decision, the IWK report described the prognosis for personal change by S.D. as highly guarded. However, that report also noted that he had behaved in an abusive manner towards E.A.'s children, and had given his own biological child, J.A., preferential treatment. The trial judge heard testimony that S.D. had made considerable efforts to obtain services to improve his parenting skills and had taken nutritional counselling. The agency did not argue before him that s. 42(2)(c) of the *Act* which provides that the court shall not make an order removing a child from the care of a parent unless it is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to s. 13, would be inadequate to protect the child, was applicable here. Assuming, without deciding, that a trial

judge has the authority to order services, I see no error so critical that I would interfere with the decision of the trial judge.

[23] The agency's argument as to the "burden of persuasion" relies upon para. 51 of *T.B.*, supra. That paragraph reads:

> The agency has a statutory duty to take reasonable measures to provide services to families and children that promote the integrity of the family (s. 13 CFSA). The court has its own responsibility to take into account such measures and alternatives as are applicable in the circumstances of the case, before removing the child from the care of a parent or guardian (s. 42(2) CFSA). Thus the court and the agency share a responsibility to see that *reasonable* family or community options are considered. **But the burden of establishing the merits of the alternative proposed are squarely upon the proponent. It is the proponent who must satisfy what I would term a burden of persuasion. Only when specific arrangements have been conceived and put in place by the proponent can the viability of that proposal be assessed.** (Emphasis added)

In my view, the agency has misconstrued this passage. A reading of the entire case would indicate that it does not relate specifically to s. 13 services but rather to a proposed plan in its entirety.

[24] Nor am I persuaded that the trial judge erred in his appreciation of the evidence in determining that S.D. could continue to have access to J.A. The d'Entremont affidavit does contain serious allegations of abuse by S.D. of the other four children of E.A. It was entered into evidence without challenge. The agency submits that S.D.'s behaviour with those children was such that denial of access to his own son is justified. It also argues that by failing to make a determination that S.D. had abused them, the trial judge had abdicated his responsibility to the criminal courts and made a palpable and overriding error in his appreciation of the evidence.

[25] However there was, as the agency acknowledges, no evidence that S.D. physically harmed his own son, J.A. The trial judge heard evidence that S.D.'s relationship with J.A. was significantly different than that with E.A.'s other four children. In addition to the d'Entremont affidavit and the IWK report, he had the Donaldson report which deals only with S.D. and J.A. and he heard the testimony of Dr. Donaldson, S.D.'s employer, one of S.D.'s siblings and S.D. himself as to the love between S.D. and J.A. He also had letters from individuals attesting to the

affection shown by each to the other. Without diminishing the seriousness of the alleged actions recounted in the d'Entremont affidavit and having in mind the advantages a trial judge has over an appellate court in assessing evidence, credibility, and the weight to be given to evidence, I would not interfere on this basis with his finding that it would be in the best interests of J.A. were access by his father, S.D. to continue.

[26] In his decision the trial judge referred to the criminal charges faced by S.D, noting that none involved J.A. He stated that any conviction on the criminal charges would be a factor in the determination of the type and extent of the relationship between father and son. In his order, placing J.A. in the temporary care of the agency for six months, he was careful to include a condition requiring that the court be immediately notified by any or all of the parties should S.D. be convicted of any of the child related criminal charges against him, and to provide for a review by the court. His order also emphasized that it could be reviewed prior to its expiration. The incorporation of such terms and conditions in his order is within the jurisdiction of the trial judge, according to s. 43(1) of the *Act* which provides that the court may impose reasonable terms and conditions in relation to the child's care and supervision including any which it considers necessary.

[27] In the circumstances of this case, the conditions contained in the order are appropriate safeguards. We would rely on the trial judge to closely review his order whenever and however it returns for review.

Disposition

[28] I would dismiss the appeal. There will be no award of costs.

Oland, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.