C.A. No. 02910

NOVA SCOTIA COURT OF APPEAL

**Hallett, Roscoe and Pugsley, JJ.A.**

**Cite as: M.A.D. v. Children's Aid Society of Halifax, 1993 NSCA 206**

**BETWEEN:**

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|---|---|---|
| M. A. D.<br><br>Appellant<br><br>- and -<br><br>CHILDREN'S AID SOCIETY OF HALIFAX<br><br>Respondent | ) | Appellant appearing in person<br><br>Pamela J. MacKeigan for the Respondent<br><br>Application Heard: December 9, 1993<br><br>Ruling Delivered: December 9, 1993 |

**Editorial Notice:** Identifying information has been removed from this electronic version of the judgment.

**THE COURT:** Application to adduce fresh evidence on hearing of appeal dismissed per reasons for ruling of Hallett, J.A.; Roscoe and Pugsley, JJ.A. concurring.

HALLETT, J.A.

This application to adduce evidence on appeal arises on an appeal from an order of the Family Court dismissing the appellant's application to terminate a permanent custody order respecting her son who had been taken into care by the Children's Aid Society shortly after his birth.

The request that this court receive evidence on the appeal is made pursuant to **s. 49(5)** of the **Children and Family Services Act**, R.S.N.S. 1990, Chapter 5 and **Civil Procedure Rule 62.22** which is the general rule governing the reception of evidence on the hearing of an appeal.

**Section 49(5)** of the **Act** provides:

> " 49(5) On an appeal pursuant to this Section, the Appeal Division of the Supreme Court may in its discretion receive further evidence relating to events after the appealed order."

**Civil Procedure Rule 62.22** provides:

> " 62.22(1) The Court on application of a party may on special grounds authorize evidence to to be given to the Court on the hearing of an appeal on any question of fact as it directs.
>
> (2) The evidence shall be taken by oral examination before the Court or by affidavit or deposition, as the Court directs.
>
> (3) The Court on an appeal may on special grounds inspect or view any place, property or thing."

In **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 112 N.S.R. (2d) 258 at paragraphs 27-30 this court decided that the principles enunciated in **R. v. Palmer**, [1980] 1 S.C.R. 759 should be applied in considering whether or not to receive evidence on an appeal of an order for permanent custody made pursuant to the **Children and Family Service Act**. The same rule should apply with respect to an appeal

from an order refusing to terminate an order for permanent care and custody.

The principles for the reception of fresh evidence were stated by McIntyre J. in **R. v. Palmer** at p. 775:

> " (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see: *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of believe, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

In the **S.M.S.** case (para. 27) this court also decided that the procedure to be followed in dealing with an application to adduce fresh evidence should be as established in **R. v. Nielsen and Stolar**, [1988] 1 S.C.R. 480:

> " The fresh evidence rule has been stated many times and is summed up in **R. v. Palmer**, [1980] 1 S.C.R. 759; 30 N.R. 181; 50 C.C.C. (2d) 193. The principles therein set out are equally applicable in a civil case; **Munro - Glasgow v. Glasgow** (1983), 59 N.S.R. (2d) 442; 125 A.P.R. 442 (C.A.), at p. 444, per Macdonald J.A.. The procedure that should be followed by an appeal court in receiving fresh evidence was outlined by McIntyre, J., in **R. v. Neilsen and Stolar**, [1988] 1 S.C.R. 480, 82 N.R. 280; 52 Man. R. (2d) 46; 40 C.C.C. (3d) 1, at p. 10 (C.C.C.)."

We have heard the representations of the appellant and counsel for the respondent; we have reviewed all eight affidavits and nine letters submitted by the appellant in support of the application. Considering the principles set forth in the **S.M.S.** case and, in particular, the criteria for the admission of evidence on appeal as enumerated in the **Palmer**

decision we are of the opinion that the evidence should not be received. The various pieces of evidence sought to be admitted fit into one or more of three categories: (i) the evidence was either available at the trial and was not adduced; or (ii) is evidence that is repetitious of evidence given at the trial and is not new; or (iii) is evidence that, taken with the evidence adduced before Judge Daley, could not be expected to have affected the decision not to terminate the order for permanent care and custody of the appellant's son M.. We are of the unanimous opinion the application should be dismissed.

Doane Hallett

Concurred in:

Roscoe, J.A.

Pugsley, J.A.