Date: 19991210
Docket: CA 158347

NOVA SCOTIA COURT OF APPEAL

[Cite as: Nova Scotia (Community Services) v. S.Z.., 1999 NSCA 155]

Chipman, Hallett and Pugsley, JJ.A.

BETWEEN:	)	
	)	
S. Z.	)	Peter D. Crowther
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
MINISTER OF COMMUNITY	)	Peter C. McVey
SERVICES and G. Z.	)	for the Respondent,
	)	Minister
Respondents	)	and
	)	G. Z. in person
	)	
	)	
	)	
	)	Appeal Heard:
	)	November 29, 1999
	)	
	)	
	)	Judgment Delivered:
	)	December 10, 1999

THE COURT: The appeal is dismissed as per reasons for judgment of Chipman, J.A.; Hallett and Pugsley, JJ.A., concurring.

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.

CHIPMAN, J.A.:

[1] The appellant is the mother of a male child B.Z. born on January *, 1999 (*editorial note- removed to protect identity*) and taken into the care of the respondent Minister of Community Services the following day pursuant to a Notice of Taking into Care under the provisions of the **Children and Family Services Act**, N.S. 1990, c. 5.

[2] On January 27, 1999, the interim hearing required by s. 39(1) of the **Act** was commenced by Judge Dyer of the Family Court. He found that there were reasonable grounds to believe that B.Z. was in need of protective services and granted an interim order that the child remain in the care of the respondent.

[3] On March 5, 1999, the interim hearing was completed. Judge Dyer ordered that B.Z. remain in the temporary care of the respondent.

[4] On April 9, 1999, a pre-trial conference was held by Gass, J. of the Supreme Court (Family Division). The appellant, through her counsel, consented to an order pursuant to s. 96 of the **Act** whereby evidence from a previous proceeding concerning two other children of the appellant was admitted into evidence in the current proceedings.

[5] On April 21, 1999, a protection hearing was held before Williams, J. of the Supreme Court (Family Division). After evidence from the previous proceedings was presented, the appellant consented to a finding that her child B.Z. was in need of protective services pursuant to the **Act.** Williams, J. granted a protection order continuing the terms of the interim order of March 5, 1999.

[6] On June 1, the respondent filed an application for disposition and notice of hearing seeking an order for permanent care and custody relating to the child pursuant to s. 42(1)(f) of the **Act**. This was served on the respondent G. Z. and on the appellant.

[7] On June 29, 1999, the appellant appeared with new counsel before Williams, J. at a pre-trial conference. The hearing of the respondent's application for permanent care was set down for July 14, 15 and 16.

[8] On July 14, 15 and 16, Williams, J. held the disposition hearing. The appellant was represented at the hearing by counsel. The respondent G. Z., although duly notified of the proceedings, did not attend. Six witnesses were called on behalf of the respondent and two witnesses on behalf of the appellant. The evidence from the previous proceedings relating to the two other children of the appellant was also before the court.

[9] On July 30, 1999, Williams, J. delivered an oral decision placing B.Z. in the permanent care of the Minister pursuant to s. 42(1)(f) of the **Act**. His written decision was released on September 8, 1999.

[10] The appellant appeals from the decision of Williams, J. contending that he erred:

(1) in placing undue emphasis on the appellant's past parenting and, in particular, that he made improper use of the evidence adduced pursuant to s. 96 of the **Act**;

(2) in placing the child in the permanent care of the respondent when

less intrusive alternatives were readily available.

FIRST ISSUE:

[11] The material relied on by Williams, J. consisted of the evidence from the proceeding relating to the other two children of the appellant and **viva voce** evidence relating to the appellant's conduct during her pregnancy with the child B.Z., as well as her conduct thereafter. I have considered the evidence. It paints a picture of a dysfunctional young woman seriously addicted to alcohol and drugs. She was the subject of constant abuse from the father of B.Z. from which she was not prepared to withdraw. The effect of this on the child was best summed up by Williams, J. when he said at p. 28 of his decision:

> Her pre-natal care was, in a word, dangerous to him.

[12] Williams, J. was the trial judge at the earlier hearings concerning the appellant's other two children, the evidence at which was with the appellant's consent before him. Appellant's counsel advised the Court that his client did not have any problem with Williams, J. sitting on this case.

[13] I am unable to conclude that the trial judge placed undue emphasis on the appellant's past parenting. It was, of course, the primary evidence on which he would be entitled to rely in judging the appellant's ability to parent B.Z. In **Children's Aid Society of Winnipeg v. Forth et al.** (1978), 1 R.F.L. (2d) 46 at p. 51, Carr, Prov. J., (as he then was), said at p. 51:

> . . . In deciding whether a child's environment is injurious to himself, whether the parents

> are competent, whether a child's physical or mental health is endangered, surely evidence of past experience is invaluable to the court in assessing the present situation. But for the admissibility of this type of evidence children still in the custody of chronic child abusers may be beyond the protection of the court . .

[14] The appellant does not seriously contend that the evidence respecting her past parenting is of any help to her case.

[15] The evidence apart from that relating to past parenting also fails to support the appellant's offer of an alternative to a permanent care order.

[16] There was evidence of recent discontinuance of cocaine use. Williams, J. noted, however, that notwithstanding that the appellant had undertaken at her protection hearing to enter an in-patient detox program, it was not done. She missed and delayed appointments for addiction assessment. To her credit, he noted that she had two urinalysis tests that were clean and she did go to Yarmouth for a five day program at the end of May, 1999. Even in this program, however, she missed some of its content as a result of illness. She undertook to follow five recommendations made as part of the program. None were followed. The appellant failed to attend other referrals and programs and, in particular, an in-patient detox on May 12, 1999. She failed to follow through with day detox and was discharged from that program on May 21, 1999. She failed to show up for an assessment on May 26, 1999. In early July she was asked to plan a recovery program. She did not do so.

[17] Williams, J. referred to the evidence relating to the appellant's use of alcohol and other drugs in 1999. The appellant stated that she had not followed through with programs because she did not like in-patient detox and did not agree

with it.

[18] Apart from a request for more time, the appellant offered no plan for the care of the child.

[19] The only evidence available to Williams, J. other than with respect to past parenting related to the appellant's actions after the birth of the child. There was nothing here that could provide Williams, J. with any comfort respecting the appellant's ability to parent B.Z. In his decision he said:

> With respect to s. 42(2), I am satisfied that numerous services have been repeatedly tried over the last number of months, and even years, and have failed. I am satisfied that a number of these services have either been expressly or constructively refused by Ms. [Z.]. The repeated recommendation for a significant in-patient detox program and her repeated refusal or failure to commit to that type of program is but one example. I am further satisfied that any arrangements other than keeping [B.Z.] in the care of the Department would be inadequate to protect [B.Z.] at this time. The plain fact is Ms. [Z.] acknowledges this. She seeks not a return of [B.Z.] at this time but a continuation of the temporary care and custody order.
>
> [S. Z.] is a captive. She is twisting in her addictions and dependencies. She has had opportunities for years now to address her addictions, her abusive relationship with [G. Z.], her need for psychiatric and other counselling. She is not on cocaine now and she is to be commended for that. She went to Yarmouth for a five day program. Even though she could not attend all of it, she should be commended for that. She continues, however, to lie, to minimize the blame and to insist on solving problems on her own, problems that are far bigger than her and problems that have been demonstrated as being bigger than her for an extensive time. She makes promises when Court creates acute pressure and then abandons them. She is disabled by migraines. She has made so many promises and statements that she cannot keep them straight. She has virtually no credibility as a witness in the court room.

[20] Williams, J. reviewed the relevant provisions of the **Act** in detail in his decision. He made particular reference to those sections which required him to consider the interests of the child's parents and family as they related to the child's best interests. In carrying out the exercise, Williams, J. correctly applied the

relevant principles and his decision was amply supported by and justified by the evidence before him.

SECOND ISSUE:

[21] As to less intrusive alternatives, these were carefully considered by Williams, J. but rejected in the face of the overwhelming evidence of the appellant's lack of ability to parent
B.Z. With respect to alternatives suggested by the appellant's counsel, Williams J. said:

> Ms. [Z.'s] counsel suggests an early permanent care order may not be fair to Ms. [Z.]. She has had more than a fair chance with [B.Z.]. She failed him and herself pre-natally. She continued that through a series of hearings and promises since January. She has tried. She wants the Court to tell her what to do. This Court, child welfare workers, therapists, drug dependency workers and undoubtedly lawyers have told her what to do for a long time now. She has said repeatedly, at times under oath, at times in affidavits, at times through counsel, that she will do things. The what to do - whether it be going to the in-patient detox, entering and attending specific programs, seeing a psychiatrist, ending the dependency on drugs and alcohol, stop seeing [G. Z.] - has been enunciated, recommended, and repeated. There is no mystery to it. Promises have been made repeatedly and broken. Like the little boy who cried wolf, Ms. [Z.] cannot be relied on. There is, in my view, no prospect in that changing in the foreseeable future.
>
> I conclude that it is in the best interests of [B.Z.] to be placed in the permanent care and custody of the Agency. There is no plan available from [G.Z.]. He is part of the problem. He is a significant part of the problem. The agency seeks an order providing that Ms. [Z.] and [G. Z.] have no access to [B.Z.]. In the circumstances, it is in [B.'s] interests, considering his age, that he be placed for adoption at the earliest day possible.

[22] The appellant clearly posed a danger to B.Z. Not only has the appellant shown no error in principle on the part of the trial judge in his decision, the evidence before him makes clear that he had no alternative to making the disposition that he made.

[23] In **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 112 N.S.R. (2d) 258 at p. 268 the Court said:

> Overall, it is important to remember that the function of this Court in dealing with appeals of this nature is a limited one. In **Children's Aid's Society of Colchester County v. Macguire and Boutlier** (1979), 32 N.S.R. (2d) 1; 54 A.P.R. 1, Mr. Justice Cooper said at pp. 7-8:
>
> > It is no doubt true that an appeal court should not interfere with findings of fact made by a trial tribunal unless they are clearly wrong. The trial judge must have made a "manifest error" or some "palpable and overriding error" - see **Talsky v. Talsky**, 7 N.R. 246; [1976] 2 S.C.R. 292, at p. 294, and **Stein et al. v. The Ship "Kathy K" et al.**, 6 N.R. 359; [1976] 2 S.C.R. 802, at p. 808. It has, however, been said on many occasions that an appeal court is free to draw its own inferences from proven facts . . .
> >
> > A trial judge in dealing with the custody of an infant is called upon to exercise a discretion which it is recognized will only be interfered with if he has gone wrong in principle or overlooked material evidence. It was put thus by Viscount Simonds in the following passages in **McKee v. McKee**, [1951] A.C. 352, Privy Council, at p. 360:
> >
> > > Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.
>
> These observations are particularly appropriate here where the trial judge has seen and heard a large number of witnesses . . . has considered the evidence, made a number of findings of credibility and in particular, has made an assessment of the appellant's parenting skills and the effect that continued exposure of her to her children would have on them. We simply do not have the many advantages he had. We are not, in these circumstances, in a position to substitute our judgment for his.

[24] These principles are applicable here. I would dismiss the appeal.

Chipman, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.