NOVA SCOTIA COURT OF APPEAL

Citation: *A.L.F. v. Children's Aid Society of Cape Breton-Victoria*, 2004 NSCA 2

Date: 20040107
Docket: CA 204747
Registry: Halifax

Between:

A. L. F.

Appellant

v.

Children's Aid Society of Cape Breton-Victoria

Respondent

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

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

Appeal Heard: December 12, 2003, in Halifax, Nova Scotia

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

Counsel: Alan Stanwick, for the appellant
Robert M. Crosby, Q.C., for the respondent

Reasons for judgment:

[1] At the hearing of the appeal we allowed the appellant's application for admission of fresh evidence and dismissed her appeal, with reasons to follow. These are those reasons.

[2] K.F. was born on January (*editorial note- date removed to protect identity*), 2001. In June 2002 the respondent, the Children's Aid Society of Cape Breton-Victoria (CAS), took the child into temporary care for the second time. It put forward a plan of care which sought permanent care without access to her natural

parents and K.F.'s eventual placement for adoption. Neither of her parents offered a plan for the child's return to his or her care. The appellant, a niece of K.F.'s father, asked that the child be permanently placed in her care with a view to her future adoption by the appellant. Her application was supported by K.F.'s mother.

[3] At the disposition hearing held on June 25, 2003 Justice Vernon J. MacDonald of the Nova Scotia Supreme Court (Family Division) heard testimony given by protection worker with the CAS; the mother of K.F.; the mother of the appellant; and the appellant. He granted an order pursuant to s. 42(1)(f) of the *Children and Family Services Act*, N.S. 1990, c. 5 as amended (*CFSA*) that K.F. be placed in the permanent care and custody of the CAS without access by her parents. The appellant appeals his decision, asking for custody under the *Maintenance and Custody Act*, S.N.S. 1989, c. 160 and to be allowed to move K.F. to Ontario.

[4] We will deal first with the appellant's application to have her affidavit dated September 19, 2003 admitted as fresh or further evidence pursuant to s. 49(5) of the *CFSA*. Some three weeks after the disposition hearing the appellant moved, with the man she subsequently married and her two children, to Ontario. At that hearing she had not testified as to any serious relationship or as to any plan to marry or to relocate from this province. The affidavit she proposed to introduce contains material pertaining to her marriage and move, her husband's employment, their home, and intended arrangements for K.F.

[5] Section 49(5) of the *CFSA* permits this court in its discretion to receive further evidence relating to events after the order under appeal. In *Catholic Children's Aid Society of Metropolitan Toronto v. C.M.*, [1994] 2 S.C.R. 165 L'Heureux-Dube, J. approved the approach taken in *Re Genereaux and Catholic Children's Aid Society of Metropolitan Toronto* (1985), 53 O.R. (2d) 163 (C.A.) on an application to admit fresh evidence in an appeal from a child welfare matter. In that decision, Cory, J.A. (as he then was) in reviewing the Ontario legislation regarding further evidence stated at p. 164-165

> This is remedial legislation dealing with the welfare of children. It should be broadly interpreted. Undue restrictions should not be placed upon it. Specifically, narrow restrictions should not be read into the section when they do not appear in the legislation.

> The judge on appeal, bearing in mind that he is dealing with the welfare of children, may determine that he will exercise his discretion and will hear further evidence so long as it is relevant to a consideration of the best interests of the child. . . .

[6] In *Children's Aid Society of Cape Breton v. S.G.* (1995), 142 N.S.R. (2d) 57 (C.A.) at p. 63, Freeman, J.A. summarized the criteria to be considered on an application to admit fresh evidence according to the Supreme Court of Canada:

> ¶ 29 For this evidence to be admissible it must meet the criteria determined by L'Heureux-Dubé, J. in **M.C.** That is, it must be evidence that:
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> (1) could not have been adduced before;
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> (2) is highly relevant in that it enables the Court to make determinations on an accurate picture of the situation at hand;
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> (3) is potentially decisive as to the child's best interests;
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> (4) is credible;
>
> (5) is uncontroverted;
>
> (6) bridges the gap between the previous hearing and the appeal.
>
> ¶ 30 While all these factors were present in **M.C.**, L'Heureux-Dubé, J. did not suggest they all must be present before fresh evidence can be admitted in child welfare appeals. Nevertheless, each of the criteria is highly relevant.

[7] The evidence contained in the affidavit proposed by the appellant could not have been adduced before the disposition hearing. Relating as it does to events which happened afterwards, that evidence bridges the time between that hearing and the hearing of the appeal. It provides details as to the current situation which are critical in an assessment of the child's best interests. Finally, the affidavit evidence is credible and uncontroverted in that, for example, there is nothing to suggest that the appellant has not married and moved.

[8] The respondent does not contest the admission of the affidavit evidence proposed by the appellant, although it urges caution as to its application as the evidence could not be tested under cross-examination and lacks detail in various

aspects. We are satisfied that it meets the test in *C.M.*, supra and would allow the application for admission of fresh evidence.

[9] In an appeal such as this, this court will not intervene unless the judge has acted upon a wrong principle of law or committed an obvious and critical error in appreciating or applying the evidence: *T.B. v. Children's Aid Society of Halifax et al.* (2001), 194 N.S.R. (2d) 149 at p. 152. We must always be conscious that as the trial judge has the advantage, denied to an appellate court, of seeing the parties and investigating the circumstances of the child, his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence. See *McKee v. McKee*, [1951] A.C. 352 (P.C.) at p. 360, cited with approval in *Nova Scotia (Minister of Community Services) v. S.M.S. et al.* (1992), 112 N.S.R. (2d) 258 at p. 268-269.

[10] In her notice of appeal the appellant enumerates 15 grounds of appeal. In essence, she alleges that the trial judge erred in failing to conclude that a family placement with her was to be preferred over the CAS plan for K.F. In particular, she argues that he failed to adequately address the "best interests" criteria enumerated in s. 3(2) of the *CFSA*; wrongly concluded from the evidence that her plan was not well thought-out; and further, wrongly concluded that a placement with her was too risky in light of the high potential for conflict with and interference from the natural parents of K.F.

[11] We are not persuaded that the trial judge erred in principle or made any palpable or overriding error. In his decision he stated his consideration of all of the evidence and submissions and identified subsections (a) to (f), (i), (k), (l) and (n) of s. 3(2) of the *CFSA* as relevant in this case. He summarized the evidence about K.F.'s earlier apprehension and her situation since being taken into care, her contact with family members (including the appellant), and her need for a stable home environment. He recounted how the appellant came forward as a potential family placement in January 2003 when K.F.'s father asked her to do so after the disposition hearing scheduled for that month had been adjourned. He reviewed various aspects of the appellant's plan, noting her age, her employment and financial circumstances, and her two children.

[12] The trial judge also considered the evidence of the lengthy involvement that the CAS has had with K.F.'s family. The other two children of her natural parents and another child of K.F.'s mother had come into the care of the CAS. Difficulties had been encountered with family placements secured for those children. The trial

judge observed that the appellant believed that she could stand up to her uncle, K.F.'s father, and to other family intrusiveness which had been detrimental to those other placements.

[13] We see no error in the trial judge's statements as to the applicable law nor are we persuaded that in reaching the decision he did, he acted on some wrong principle. Moreover, from our examination of the record we are unable to agree that he erred in either appreciating or applying the evidence before him. Our assessment that the trial judge did not err in determining that a placement with the appellant was not in the best interests of the child includes a consideration of the fresh evidence contained in the appellant's affidavit.

[14] We would observe that the remedy the appellant sought on her appeal of the trial judge's decision rendered pursuant to s. 42(1)(f) of the *CFSA* was custody of K.F. pursuant to the *Maintenance and Custody Act* (*MCA*). She could not direct us to any case law where such a remedy had been ordered under that legislation on an appeal of a *CFSA* decision at the disposition hearing stage. We are not persuaded on the arguments made before us that custody under the *MCA* is available on such an appeal.

[15] We would dismiss the appeal.

Oland, J.A.

Concurred in:

Chipman, J.A.

Fichaud, J.A.