SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *A.E. v. Nova Scotia (Minister of Community Services)*, 2024 NSSC 192

Date: 20240625
Docket No. SFYCFSA-133898
Registry: Yarmouth

Between:

A.E.

Applicant

v.

Nova Scotia (Minister of Community Services)

Respondent

Restriction on Publication: s. 94(1) *Children and Family Services Act*

Judge:	The Honourable Justice Michelle K. Christenson
Heard:	June 20, 2024 in Yarmouth, Nova Scotia
Witten Release:	June 25, 2024
Counsel:	Seamus Murphy for the Applicant Katie Stephenson for the Respondent

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act, S.N.S. 1990, c. 5. **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:

Prohibition on publication

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.

By the Court:

[1] A.E. applied on to terminate a permanent care order of her child M., born May 29, 2020.

[2] A.E. says that because of the date that order was made, she can apply as a right to terminate that order.

[3] The Minister disagrees. The Minister says because of the date the order was made; she must first apply for leave.

[4] A.E. filed a motion under *Civil Procedure Rule* 12 asking for a determination of a question of law, namely, "Is A.E. required to obtain leave to apply to terminate the order for permanent care?"

[5] The Minister agreed clarity on this issue was required.

[6] The parties agree:

1. If the order for permanent care was made on May 9, 2023, A.E. can apply as a right.
2. If the order for permanent care was made on July 13, 2023, A.E. requires leave.

3. The parties agree her application to terminate the permanent care order was filed on May 27, 2024.

ISSUE:

[7] To determine if leave is required, I need to decide the following issue: "What is the date of "the making of the order" in paragraph 48(6)(a) of the *Children and Family Services Act?"*

FACTS:

[8] The evidence relevant to the motion is not in dispute. A.E. filed an affidavit in support of her motion. In my view, these are the relevant facts:

1. On May 9, 2023, I rendered a decision granting the Minister a permanent care order for the child M.
2. On May 19, 2023, the Minister forwarded an order reflective of the courts decision to A.E.'s counsel and the parties agreed on the form of the order.
3. The birth certificate was not available and there was a delay caused in the issuance of the order.

4. The order was issued on July 13, 2023, by a Deputy Prothonotary.

5. A.E.'s application to terminate the permanent care order was filed on May 27, 2024.

LEGAL FRAMEWORK:

[9] Section 48 of the *Children and Family Services Act*, set out the provisions related to termination of permanent care and custody orders.

[10] The timelines for making an application to terminate permanent care are set out in section 48(6) and 48(6A). User friendly provisions, they are not.

[11] Counsel agrees on what provisions apply. What they disagree on is the date of "the making of the order."

[12] The relevant sections for our purpose are 48(6)(a), 48(6)(c)(i), and 48(6A)(a), which say the following:

> ***Children and Family Services Act,* SNS 1990, c 5, s 48(6-6A)**
>
> 48 […] (6) Notwithstanding subsection (3), a party, other than the agency, may not apply to terminate an order for permanent care and custody
>
> (a) within forty-five days after of "the making of the order" for permanent care and custody;
>
> […]
>
> (c) except with leave of the court, after

> (i) five months from the expiry of the time referred to in clause (a),
>
> […]
>
> (6A) A party may apply to terminate an order for permanent care and custody after eleven months but before two years from
>
> (a) the expiry of the time referred to in clause (a) of subsection (6) of Section 48;

[13] Broadly speaking, these provisions provide for a six-and-a-half-month bar on any applications to terminate permanent care by a party other than the Minister from the date of the making of the permanent care order or the disposition of any appeal. There is then a 6-month window within which a party can apply if they get leave, followed by a one year and one month period within which a party can apply as of right. After that, leave is again required.

[14] The Minister argues July 13, 2023, is the day the order was made, and by virtue of these provisions A.E. must appeal for leave.

[15] A.E. argues May 9, 2023, is the day the order was made, and by virtue of these provisions she may apply as a right.

[16] After a consideration of the evidence, the legislations, caselaw, and arguments advanced I have decided the order for permanent care was made on May 9, 2023: the day I rendered the decision. Given the applicable sections notes above, A.E. is not required to apply for leave, her application to terminate the permanent care order is properly before the court.

[17] I have made this decision because I agree with all the submissions made by A.E., as noted in paragraphs 15 through to 37 of her brief. I adopt those paragraphs as the reason to explain the decision I have come to.

> [15] Whether leave is required in this case ultimately depends on the date of "the making of the order" as set out in paragraph 48(6)(a). This is a question of statutory interpretation. The Supreme Court of Canada has on many occasions reiterated the approach to statutory interpretation endorsed in *Re Rizzo & Rizzo Shoes Ltd*: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament."
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> **…*Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21, citing Elmer A. Driedger, Construction of Statutes, 2nd ed (Toronto: Butterworths, 1983).**
>
> [16] A.E. says the order was "made" on the date the judge actually placed M. in permanent care on May 9, 2023, so A.E. is within the 48(6A)(a) window and does not require leave.
>
> [17] If the order was only "made" after it was signed by the court officer on July 13, 2023, however, then she would require leave. The latter interpretation, favoured by the Minister, is convenient for the Minister's lawyers. It would allow time to be calculated from the same date as the second deadline for an appeal. In *MacDonald v. MacDonald*, our Court of Appeal interpreted a similar ambiguity in subsection 21(3) of the Divorce Act which said that no appeal could be made more than "thirty days after the day on which the order was made." In that case though, subsection 21(6) of that Act allowed the Court of Appeal to align the time limits for appeal to their own rule 90.13(2), leading too the conclusion that orders are "made" under the *Divorce Act* when the order is signed, not when the decision is rendered.
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> **…*MacDonald v. MacDonald*, 2010 NSCA 34 at paras 9-27.**
>
> [18] The *Children and Family Services Act* is a different statute, however, and this case is not about the timeline for an appeal. Rule 90 consequently has no bearing on the interpretation of subsection 48(6)(a). In fact, it's worth noting that subsection 49(1) uses different wording, allowing an appeal "within twenty-five days of the order," not the making of the order.
>
> **…*Children and Family Services Act*, SNS 1990, c 5, ss 48(6)(a), 49(1).**

[19] This matters. In *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 81

[20] There's consequently good reason to expect that paragraph 48(6)(a) is not intended to track the time limit for an appeal, particularly as the 45 days set out in paragraph 48(6)(a) has no correlation to the 25 days for an appeal. Indeed, when the drafters intended to create a bar until an appeal period has expired, they simply say so explicitly in subsection 76(3).

…*Children and Family Services Act*, SNS 1990, c 5, ss 48(6)(a), 76(3)

[21] The flip side of the presumption of consistent expression is that "[g]iving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."

…*R v Zeolkowski*, [1989] 1 SCR 1378 at para 19.

[22] So where else do we see this phrase: "the making of the order"? The most germane to this analysis is subsection 48(10)(a), which sets out the first criterion for terminating an order for permanent care:

> 48 […] (10) Before making an order pursuant to subsection (8), the court shall consider
> (a) whether the circumstances have changed since the making of the order for permanent care and custody; and

…*Children and Family Services Act*, SNS 1990, c 5, s 48(10)(a).

[23] Here, the "making of the order" must refer to the date of the decision, not the date of the formal order. The court based its decision on the evidence it had at the time, and could not possibly consider circumstances that transpired after the decision was made but before the order was issued.

[24] If the reason for an order for permanent care is that the only parent of a child was in a coma on May 9, 2023, and she recovered from her coma on July 10, 2023, would her recovery be precluded from consideration in an application to terminate permanent care solely because the court officer signed the order on July 13, 2023? The legislature could not have intended that, and so this phrase in paragraph 48(10)(a) must be referring to the date of the decision.

[25] By the presumption of consistent expression, the date of the "making of the order" must be the same in paragraph 48(6)(a) as it is in paragraph 48(10)(a).

[26] Further textual analysis leads to the same conclusion that an order is made when the decision rendered.

[27] Subsection 42(1) is important. It provides that "At the conclusion of the disposition hearing, the court shall make one of the following order, in the child's best interests" and then lists the various possible orders, including permanent care and custody. A disposition hearing concludes with the court's decision and it is at that time the court must make the order, not later.

…*Children and Family Services Act*, SNS 1990, c 5, s 42(1).

[28] Any other interpretation would cause havoc with the timelines. Subsection 45(1), for example, states that "The duration of a disposition order made pursuant to section 42 must not exceed three months." If an order is only "made" when the form of the order is settled and that happens two months after the court's decision, would that extend the timeframe for the next review to a total of five months? Would the maximum timeline increase by two months if this was the first disposition hearing?

…*Children and Family Services Act*, SNS 1990, c 5, s 45(1).

[29] Moreover, like subsection 48(10)(a), subsection 46(4)(a) requires a court to consider on review "whether the circumstances have changed since the previous disposition order was made." If an order doesn't take effect or is not considered "made" until a formal order is drafted and signed, then the court cannot consider changes that occur between the date a review concludes with a decision and the date the order gets settled. In Nova Scotia (Community Services) vs JP, the Court of Appeal emphasized that "[o]rders should be issued promptly." At issue in that case was a decision wherein the judge had lamented that "the Minister's orders are often filed late; in some cases the order isn't filed until immediately prior to the next docket date (up to 3 months later)." In those cases, because of procedural delay caused by a lawyer representing the opposing side, is it never possible for a parent to prove a change in circumstances since the previous review order was only "made" the day before?

…*Children and Family Services Act*, SNS 1990, c 5, s 46(4);… *Nova Scotia (Community Services) vs JP*, 2021 NSCA 45 at para 70.

[30] All these provisions are only coherent and workable if orders are "made" on disposition and review hearings the day they are granted by the judge, which is when they take effect and become enforceable, not the arbitrary day they are signed by the court officer.

[31] That interpretation is bolstered by rules 78.03(1) and 78.07:
78.03 […] (1) An order must be in writing, except directions and a ruling may be given orally and other kinds of orders may be given orally if the order is to be enforced before a written order can be made.

78.07 […] (1) A written order is in effect when it is issued and an order made orally is in effect from the time it is spoken, unless the order provides otherwise.

…*Civil Procedure Rules*, rule 78.03(1), 78.07(1).

[32] Child protection requires speed. The issuance of an order can be delayed by all kinds of random, arbitrary factors from lawyer oversight to a judge's vacation or illness. Children can't be left in danger if the Court so finds nor overheld by the government if the Court orders a return solely because an order hasn't yet been signed. Orders must be enforceable from the date they are spoken to, and an order is "made" when it takes effect.

[33] Returning to the timeline at issue here in subsection 468(6A)(a), the following preamble should be recalled: "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."

…*Children and Family Services Act*, SNS 1990, c 5, preamble

[34] M. has been in the permanent care and custody of the Minister since May 9, 2023, not just since July 13, 2023. It is as much M.'s right to have his best interests determined by this court in an application to terminate as it is A.E.'s right to apply. He shouldn't have a different timeline than every other child in permanent care just because the issuance of his order was arbitrarily held up by circumstances that had nothing to do with him or his mother. That would suspend his substantive rights for nothing except the convenience of counsel.

[35] The timelines for termination applications are already narrow enough after the amendments that came into force in 2017. They can't be a moving target where there is a different window for every single permanent care and custody order depending on the arbitrary gap between granting and issuing.

[36] Moreover, it is the Minister who almost always is in control of how quickly the order gets issue. This responsibility should not create an unfettered power to manipulate the time period when a parent can seek to terminate without needing leave, based on how much "extra" time gets added on after the judge makes a decision. In this case, the delay was caused because the Minister didn't have a copy of the birth certificate despite being required under rule 60A.03(4) to have obtained and filed that birth certificate "immediately after starting an application." The rights of A.E. to make this application and of M. to have his best interests determined by this court should not be delayed so arbitrarily and randomly.

[18] The Minister agreed the practice of the court, in setting timelines for hearing, related to further reviews, and the ultimate timeline in the matter flowed from the date the Judge made the order in court, not the day the order was issued.

[19] The Minister argued the issue before the court was not one of interpretation, but more an administrative issue related to the counting of time. I disagree. That is not in keeping with our practice as it relates to child protection, and how we determine the next steps in the proceeding. When we count dates for protection, disposition, next review, or the ultimate timeline, we do so in accordance with the day the order was made in court, not on the day the order was issued. Why would we adopt a difference practice related to the practice of when an application to terminate an order can be made. It is important to be consistent in our approach.

[20] Section 48 of the *Act* sets out timeframes in which parties may, or may not take action with, or without leave. It is necessary to interpret the statute to correctly apply those timeframes.

[21] It is noteworthy that the legislator in drafting section 48 choose to use the language of "the making of an order," instead of the language "after the order is issued." Words do matter.

[22] The Minister rightly noted that in the following two cases, *L.A.G. v. The Minister of Community Services*, 2024 NSSC 157 and *K.F. v. Minister of Community Services and C.N.*, 2023 NSSC 52, other judges of this court have operated on the basis that the timeline related to applications to terminate permanent care flowed from the date the order was issued.

[23] But I am not bound by those decisions. Nor was the central issue in those cases, a determination of the issue of what constitutes "the making of an order."

[24] The Minister cited commentary from *The Annotated Children and Family Services Act, (3rd edition),* page 312 arguing the purpose of paragraph 48(6)(a) and 48(6)(c)(i) is to create an absolute bar to applications during appeal.

[25] The Minister wrote:

> In The Annotated Children and Family Services Act, Third Edition, Peter C. McVey, K. C., and M. Ann Levangie reviewed the reasoning as to why both the filing windows for an application for appeal and the application under section 48 are determined to be from the date of issuance.
>
> > There is an absolute bar to applications during an appeal (which typically lasts about six months from the date of issuance of the order under appeal) Previously, a party could file an appeal within 30 days, or an application to terminate with leave on the 31st day. One could also apply to terminate with leave the day after an appeal was dismissed, as was done by the unsuccessful applicant in *B.(K.) v. Nova Scotia (Community Services)*, [2013] N.S.J. No 131 2013 NSCA 32 (N.S.C.A.) The elimination as a whole of access on permanent care removed the other problem of having no leave requirement for such applications, allowing parents to abuse the court's process by repeatedly seeking access, thereby preventing the child from being adopted. The absolute bar window of about six and a half months will

> allow for timely adoption, unless the child's needs, characteristics or the size of the sibling group present objective challenges. (page 312)
>
> The date from which the period for appeal is counted is from the date the Order for Permanent Care and Custody is issued. If the purpose is to allow for the window of time for an appeal to go through it's process, it would not make sense for the legislation to count the window for a section 48 application from a different date, since they could have the effect of interfering with each other.

[26] I agree with counsel for A.E., that this interpretation is a misread of the secondary source.

[27] I endorse and adopt paragraphs 5 through to 8, in A.E.'s reply brief as the basis of my rationale:

> **Respondent's Pre-Conference Summary (June 11, 2024) at 3.**
>
> [5] The problem is that paragraphs 48(6)(a) and 48(6)(c)(i) are not what creates the bar being discussed in *The Annotated Children and Family Services Act*. Rather, it is subsection 48(6)(b) that says that non-agency parties may not apply to terminate an order for permanent care and custody "while the order for permanent care and custody is being appealed pursuant to Section 49." It was this bar to which the passage cited from the textbook was referring.
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> **…*Children and Family Services Act*, SNS 1990, c 5, s 48(6)(b).**
>
> [6] It is then subparagraph 48(6)(c)(iii) that creates a 6-month bar from the date an appeal is dismissed before you can apply for leave to terminate permanent care, and paragraph 48(6A)(a) which starts the clock for an application without leave from 11 months after the date the appeal is dismissed..
>
> **…*Children and Family Services Act*, SNS 1990, c 5, s 48(6)(c)(iii), 48(A)(b).**
>
> [7] If an appeal is taken, therefore, paragraphs 48(6)(a), 48(6)(c)(i), and 48(6A)(a) don't apply anymore. Their purpose when they do apply is not to replicate paragraph 48(6)(b), nor is it to create a randomly variable window that mirrors the timeline for an imaginary appeal. Rather, their purpose is to give a 6 ½ month window after a child is placed in permanent care within which the Minister can work on a child's adoption without any possibility of termination, followed by a six-month period within which such applications require leave.
>
> [8] In this case, the Minister got their 12 /2 months. They don't get 15. A.E. properly applied as of right on May 27, 2024.

CONCLUSION:

[28] On the motion, it is my decision that A.E. does not require leave to apply to terminate. Her application is properly before the court, and she is in the window to be able to apply as a right.

[29] The order for permanent care was made on May 9, 2024.

M. K. Christenson, J.