2009 CarswellAlta 12, 2009 ABCA 10, [2009] A.W.L.D. 768, [2009] A.W.L.D. 710, [2009] W.D.F.L. 831, 446 A.R. 135, 442 W.A.C. 135

Alberta (Director, Child, Youth & Family Enhancement Act) v. S. (L.)

L.S. (Appellant) and Alberta (Director of Child, Youth and Family Enhancement) (Respondent)

Alberta Court of Appeal

B. Mahoney J. (ad hoc), K. Ritter J.A., and P. Martin J.A.

Heard: December 3, 2008
Judgment: January 9, 2009
Docket: Calgary Appeal 0801-0014-AC

Counsel: C. **Easton** for Appellant

T. Larochelle for Respondent, Alberta (Director of Child, Youth and Family Enhancement)

J. Hart for Children

Subject: Family; Public; Evidence

Family law --- Children in need of protection — Practice and procedure in custody hearings — Evidence at hearing — Documentary evidence

Secret video tape showed mother engaging in internet sex in presence of children — Trial judge concluded that based on evidence, permanent guardianship orders were warranted — Appeal judge granted mother's fresh evidence application and proceeded to hear 16 days of new evidence — Appeal judge concluded that trial judge had not erred and dismissed appeal — Mother appealed decision to dismiss appeal from order granting Director of Child and Family Services permanent guardianship orders in respect of three children, based in part on admissibility of evidence — Appeal dismissed — Decision to admit master tape did not disclose any reviewable error — By end of appeal, master tape had been properly admitted into evidence — Appeal judge was well aware that master tape was edited version of original tapes — Nothing prevented mother from entering all other tapes if she wished to.

Administrative law --- Requirements of natural justice — Bias — Personal bias — Apprehended

Secret video tape showed mother engaging in internet sex in presence of children — Trial judge concluded that based on evidence, permanent guardianship orders were warranted — Appeal judge granted mother's fresh evidence application and proceeded to hear 16 days of new evidence — Appeal judge concluded that trial judge had

not erred and dismissed appeal — Appeal judge commented that although sexual activity between consenting adults done in private was not relevant to apprehension proceedings, same activity done in presence of children was relevant to proceedings — Appeal judge also remarked that he did not enjoyed watching video tape — Mother appealed decision to dismiss appeal from order granting Director of Child and Family Services permanent guardianship orders in respect of three children, based in part on reasonable apprehension of bias — Appeal dismissed — Mother was unable to demonstrate reasonable apprehension of bias — Comments were no more than statement of obvious — Moreover, judge suggesting that something was relevant did not mean that judge had decided that it was relevant or that judge had weighed supposedly relevant evidence.

Cases considered:

Alberta (Director of Child & Family Services) v. S. (L.) (2006), (sub nom. *S. (L.) v. Alberta (Director of Child & Family Services))* 384 W.A.C. 270, (sub nom. *S. (L.) v. Alberta (Director of Child & Family Services))* 397 A.R. 270, 2006 ABCA 319, 2006 CarswellAlta 1423, 68 Alta. L.R. (4th) 110, 33 R.F.L. (6th) 1 (Alta. C.A.) — referred to

S. (T.), Re (2005), 393 A.R. 197, 2006 ABPC 10, 2005 CarswellAlta 2051 (Alta. Prov. Ct.) — referred to

T. (M.) v. Alberta (Director of Child Welfare) (2005), 42 Alta. L.R. (4th) 99, 2005 CarswellAlta 362, 2005 ABCA 125, 363 A.R. 306, 343 W.A.C. 306 (Alta. C.A.) — referred to

Statutes considered:

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12

s. 117 — referred to

APPEAL by mother from decision to dismiss appeal from order granting Director of Child and Family Services permanent guardianship orders in respect of three children.

Per Curiam:

1 The appellant, L.S., appeals the Court of Queen's Bench judge's decision to dismiss her appeal from the Provincial Court trial judge's order granting the Director of Child and Family Services (the "Director") permanent guardianship orders ("PGO") in respect of each of the appellant's three children.

2 The two issues before the trial judge were: 1) whether secret video footage of the appellant's home was admissible; and 2) whether it was in the children's best interests to grant PGOs to the Director: *S. (T.), Re* (2005), 2006 ABPC 10, 393 A.R. 197 (Alta. Prov. Ct.).

3 The admissibility issue related to what was described as the "master tape". The father of one of the children had recorded 160 hours of video footage, on 22 tapes, using a "nanny cam" he had secretly installed in the appellant's house. The master tape was compiled from this material, and was one hour and 17 minutes in duration. It showed the appellant engaging in internet sex in the presence of the children, and other acts of neglect involving the children. The trial judge determined that the *Wigmore* criteria respecting privilege were not applicable in child protection proceedings, and relied instead on the principle that "absent solicitor and client privilege, all relevant material should be placed before the Court such that the best interests of children may be determined": at para. 16. He concluded that the video footage was admissible as evidence: at para. 21.

4 Based on all the evidence before him, the trial judge concluded that PGOs were warranted in the circumstances, and granted them in respect of all three children.

5 The appellant's original appeal to the Court of Queen's Bench was struck on technical grounds, but this Court ordered that the appeal be heard on the merits: *Alberta (Director of Child & Family Services) v. S. (L.)*, 2006 ABCA 319, 397 A.R. 270 (Alta. C.A.).

6 The appeal judge granted the appellant's fresh evidence application, pursuant to s. 117 of the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, and proceeded to hear 16 days of new evidence. Of the trial judge's findings, the appeal judge relied on the deferential standard of review set out in *T. (M.) v. Alberta (Director of Child Welfare)*, 2005 ABCA 125, 363 A.R. 306 (Alta. C.A.) at para. 24. We note, however, that given the new evidence heard on appeal, it essentially amounted to a trial *de novo*.

7 Following the fresh evidence, the appeal judge made adverse findings about the appellant's credibility:

> Her testimony was not believable. She was not responsive to some questions, over-responsive to others, cagy in answering other questions, evasive at other times, and lying on many occasions. I do not believe her. [Appeal Book Digest, p. F33, ll. 1-5]

8 The appeal judge concluded that the appellant had engaged in sexual activity, using a web camera, in front of the children. He also found that there had been sexual contact between the appellant and her six-year-old son. He went on to find that the children had properly been apprehended:

> In my view, the Appellant is not fit to look after these children and it is not in their best interests that she do so. In my view, it would be contrary to the safety of the children to reunite her with them. Their psychological, spiritual and emotional welfare was not met, and cannot be met, by her. [A.B.D., p. F34, ll. 8-14]

He determined the trial judge had not erred and dismissed the appeal.

9 The appellant now raises several discrete issues on appeal. Some of these discrete issues are set out in the appellant's factum, but were not precisely argued at the appeal hearing. Other issues that were argued during the hearing were not set out with any precision in the appellant's factum. In oral argument, the appellant's counsel referred to the page limit for facta in this type of appeal and suggested that it was impossible to deal with each item and still meet the limit given the complex nature of the appeal. We will consider each argument advanced by the appellant, regardless of how it was made.

Admission of Evidence

10 The first issue relates to the master tape, which was marked for identification at the Provincial Court trial, but was never entered as a full exhibit. During the appeal hearing, the appellant was cross-examined about the master tape during her testimony, and the appeal judge disclosed that he had started to view the tape over one of the lunch breaks. The appellant argues that it was an error for the appeal judge to view the master tape before it was formally entered into evidence, and before it was identified by the person who made the original tapes, and who edited the master tape. She contends that when the appeal judge viewed and relied on the master tape, it had not been established that it was neither changed nor altered, and as a compilation, it clearly has been altered. The appellant also alleges that the edited master tape presents a false picture of what actually occurred,

not because it was somehow doctored, but because some of the events are out of sequence and because video footage of her doing things a good parent does were omitted.

11 The decision to admit the master tape does not disclose any reviewable error. By the end of the appeal, the master tape had been properly admitted into evidence. Since the appellant testified first, it was necessary for the tape to be used for cross examination prior to it being formally entered into evidence and identified. The appellant's counsel did not object when the appeal judge disclosed he had watched the tape.

12 With respect to the sequence issue, this is not a case about the order of events. It is about whether certain conduct occurred and no more. The appellant never testified that the master tape was inaccurate or doctored, and it was made clear that it was merely a compilation of many other tapes. The appeal judge was well aware that the master tape was an edited version of the original tapes. Moreover, there was nothing to prevent the appellant from entering all the other tapes if she wished to.

13 Another important piece of evidence was a DVD of an interview conducted by Detective Allen of the oldest child, which became the subject of a *voir dire*. The appeal judge described it as "one of the best interviews I have ever seen of a child". The interview contained evidence of sexual contact between the appellant and her son. The appeal judge found it admissible and was persuaded, on a balance of probabilities, that "that there was sexual contact between the appellant and [the oldest child], and as I say, that he believes so." The appellant argues that the appeal judge relied on the DVD, even though it was not entered into evidence. The appeal judge clearly ruled that the DVD was admissible, and he watched it. The apparent oversight in not marking it as an exhibit is inconsequential.

14 The appeal judge also made an adverse inference in respect of the DVD, as the appellant did not testify on the *voir dire*. He also alluded to the fact that criminal charges had been laid against the appellant. The appellant argues that the criminal charges have since been stayed by the Crown, undermining the reasoning of the appeal judge. In determining the best interests of the children, the appeal judge was entitled to draw his own conclusions from the DVD, regardless of what the Crown decided to do about the charges. There is no indication on the record that the appeal judge made inappropriate use of the outstanding criminal charge.

Procedural Fairness

15 The appellant alleges three instances during her appeal that resulted in a reasonable apprehension of bias and therefore procedural unfairness. First, she argues that the appeal judge's decision to view the master tape prior to hearing from expert witnesses resulted in a reasonable apprehension of bias. However, in any proceeding, some evidence must come first, and since the appellant testified first, it was inevitable that the master tape would become an issue early on. Just because a trial judge might develop views about the evidence as it is entered does not amount to bias.

16 The appellant also alleges bias based on two comments made by the appeal judge. First, the appeal judge commented that although sexual activity between consenting adults done in private is not relevant to child apprehension proceedings, the same or similar activity done in the presence of children is relevant to their apprehension. We disagree that his comments suggest a reasonable apprehension of bias, as they constitute no more than a statement of the obvious. Moreover, a judge suggesting that something is relevant does not mean that the judge has decided that it is relevant or that the judge has weighed the supposedly relevant evidence. In addition, the appeal judge was right in this case. The evidence of sexual activity was very relevant. Indeed, the appellant does not argue that it was irrelevant, but that far too much weight was given to it since an expert opined that the

sexual activity would not have affected the children.

17 The second comment alleged to raise a reasonable apprehension of bias is with respect to the appeal judge remarking that he had not enjoyed watching the tape. Again this was very much a statement of the obvious. The videotape raised a serious issue in the context of child welfare apprehension proceedings. This was not a question of prurient observation, but a step towards careful assessment of relevant evidence.

18 We conclude that the appellant is unable to demonstrate a reasonable apprehension of bias.

19 The appellant also argues that the appeal judge's failure to terminate the appeal when she was arrested for allegedly committing a sexual assault on one of her children was highly prejudicial to her and resulted in the appeal being unfair overall. The decision to terminate a proceeding or not, based on something that occurs over the course of the proceeding, is a discretionary one, not lightly interfered with on appeal.

20 In this case, the proceeding was an appeal, some of which was based on an existing record, and some of which was based on admission of fresh evidence. Most importantly, this appeal was before a judge alone. Judges often hear or observe things over the course of a proceeding that are highly prejudicial to parties and yet set aside the prejudicial material in their ultimate analysis. For example, in criminal proceedings, judges frequently rule very damaging statements made by persons charged with offences to be inadmissible because of the manner in which the statement was obtained. Often the trial judge dismisses the charges because the only real evidence against the accused person is the inadmissible confession. The point is that judge's frequently become aware of prejudicial material or actions which are inadmissible or irrelevant and set that material or admission aside in coming to a decision.

21 Nothing in the record suggests that the appeal judge considered the arrest as a factor in making his decision. He certainly considered the underlying reason for the arrest, but did so on the evidence before him, as he was entitled to do.

Misapprehension of Evidence

22 Finally, the appellant argues that the appeal judge significantly misapprehended the evidence, disregarded significant evidence, and declined to accept the expert evidence presented by the appellant. The appeal judge's decision to prefer certain evidence will not be interfered with unless it discloses palpable and overriding error. The record here does not disclose any such error.

23 The appeal is dismissed.

Appeal dismissed.

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