In the Court of Appeal of Alberta

Citation: E.G. v Alberta (Child, Youth and Family Enhancement Act, Director), 2014 ABCA 237

Date: 20140722
Docket: 1401-0151-AC
Registry: Calgary

Between:

E.G. and A.G.

Respondents
(Appellants)
(Respondents)

- and –

The Director of Child and Family Services

Applicant
(Respondent)
(Applicant)

Restriction on Publication

Identification Ban – See the *Child, Youth and Family Enhancement Act*, section 126.2.

No one may publish the name or photograph of a child, or of the child's parent or guardian, in a manner that reveals that the child is receiving, or has received, intervention services.

NOTE: This judgment is intended to comply with the restriction so that it may be published.

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application for a Stay of the Judgment by
The Honourable Mr. Justice G.C. Hawco
Dated the 3rd day of July, 2014
(2014 ABQB 406, Docket: FL01-17502)

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

I Introduction

[1] The Director applies for an abridgment of time to seek a stay and for a stay of a decision of the Court of Queen's Bench at 2014 ABQB 406 which ordered twin boys, age 7, under somewhat controlled circumstances, to be returned to their parents. In so doing, the Queen's Bench justice reversed an earlier decision of the Provincial Court at 2013 ABPC 311 which gave a Permanent Guardianship Order to the Director regarding the boys. The boys had been, since their age 4, in foster care. Counsel advised that the appeal will likely be heard in September, 2014. In light of the ability of counsel to put together materials for this motion, and their familiarity with the file, I have no reason to question that scheduling prospect.

[2] After the oral hearing, I granted an interim stay of the decision of the Queen's Bench judge pending my issuance of written reasons either confirming the stay pending appeal or refusing it. After reflecting on the matter, I rule as follows. The Director is given the abridgment of time sought. The stay pending appeal, which was declined by the Queen's Bench judge under Rule 508 of the *Rules of Court*, AR 390/1968, is granted. After consideration of the submissions of counsel, notably those of counsel for the children, I decline to make an order for access by the parents pending the appeal. My reasons for decision follow.

II Procedural Context

[3] The appellate jurisdiction of the Queen's Bench judge resided under s 117 of the *Child Youth and Family Enhancement Act*, RSA 2000, c. C-12. Before me, counsel for the respondent parents took the position that such an appeal is effectively *de novo*, in the sense that the Queen's Bench judge can substitute a different conclusion for that of the Provincial Court judge on a different appreciation of the evidence.

[4] On reading his reasons, it is apparent that the Queen's Bench judge substantially re-weighed key evidence. The evidence was taken in a hearing said to have run 16 days including 13 days of evidence and approximately 1800 pages of transcript in the Provincial Court. There was much exhibited material, such as written reports. His re-assessment of the case included consideration of written reports which the Director impugns as improperly considered on appeal. Although he acknowledged the fact that the reports were not pressed by the parents on appeal – their authors were not subject to cross-examination at trial either – he inferred that the evidence was also read by the Provincial Court judge because she had made notes on the exhibits. He found those reports had also been considered by witnesses for the Director but did not find any of them had been adopted by Director witnesses but rather were rejected in material respects. He made no disguise of re-weighing that evidence because he criticized the Provincial Court judge's conclusion for her lack of detailed assessment of its effect in her reason: see para. 10 of his reasons.

[5] The Queen's Bench judge also took a different view from that of the Provincial Court judge as to other evidence, and as to the type of physical interaction with children that would constitute abuse: see paras. 7 to 15 of his reasons. For example, he re-considered the influence of "people who supervised the access visitation" and set aside the Provincial Court judge's reason for not giving that evidence weight. He also opined that the Provincial Court judge failed to have regard to s 36(1)(c) of the Act. He did mention that a judge in his role was given deference, but plainly he found the reasons of the Provincial Court judge to be seriously wanting and deserving of little or no deference. Counsel for the parents supports this analysis.

[6] Whether or not the Queen's Bench judge was in error to do so is one of the issues that is raised by the Director on appeal to this Court: see *e.g.* ***T(M) v Director of Child Welfare***, 2005 ABCA 125 at para. 34, 363 AR 306, ***F(T) v Alberta (Director of Child & Family Services)***, 2009 ABCA 290 at paras. 21 to 22, 70 RFL 6th 278; ***C(M) v Director (Child Youth and Family Enhancement Act)***, 2012 ABCA 359 at paras. 10 to 13, 539 A.R. 202. See also, where 'new evidence' is admitted on such an appeal, cases such as ***Alberta (Director, Child, Youth & Family Enhancement Act) v. S (L)***, 2009 ABCA 10 at para. 6, 446 AR 135. There are other decisions on this question that may also be considered by the panel in the fall.

[7] During the hearing all counsel referred to circumstances outside the record for different purposes. After I asked if anyone planned a new evidence motion, it appeared that no counsel had made a decision on that question as yet. Under those circumstances, matters outside this record, such as whether the Director might or might not arrange a "kinship" placement, or what the attitude of the foster parents might be going forward, or whether the foster parents and the Director are doing enough to further the engagement of the children with their cultural heritage, all seem to be a matter of conjecture. That being so it cannot have much effect on the outcome of this specific motion.. That said, I pause to mention, that under s 35.1 of the Act, if the children are not adopted, guardians prior to the Permanent Guardianship order are not without remedy. At such a motion such alleged facts as discussed outside this record would presumably be turned into evidence in some manner.

[8] Further, I do not consider it appropriate to give weight to the fact that there was no application by the parents in the Court of Queen's Bench pursuant to s 116 of the Act for a stay of the Provincial Court judge's decision pending the appeal to that court. The effect of that has been that the parents have not seen the children since December 19, 2013. Noting that there was a change of counsel for the parents, that the Act involves some complexity of deadlines, and that there appears to have been a potential of misunderstanding between counsel on the question of arranging a stay motion, it seems to me to be just not to chalk that up as some sort of concession or waiver by the parents. Nor is the *status quo* necessarily an argument for its own legitimacy.

[9] The grounds of the Director's appeal are discussed below.

III Reasons of the Two Courts

[10] By her decision dated November 22, 2013, the Provincial Court judge made a Permanent Guardianship Order in favour of the Director of Child and Family Services respecting twin boys, born May 15, 2007. According to the record as I have it, these two children had been subject to Supervision Orders since February, 2011, and to Initial Custody Orders since August, 2012, after apprehension by the Director in July, 2011. There were three other older adopted children involved who were placed under a Permanent Guardianship Order on March 8, 2012, but their legal situation is not directly raised before me.

[11] Counsel for the parents, and the Queen's Bench judge's reasons, do not identify a clear basis to question as palpable and overriding error the findings of the Provincial Court judge that the parents had lost custody of those adopted children due to gross abuse. The Provincial Court judge's description of the evidence related to the multiple incidents and pattern of abuse towards those older children need not be repeated here. Those facts raise concerns about attitude, awareness, empathy, self-management and impulse control. In my respectful view, taking her summary of that evidence as free from any palpable and overriding error, her characterization of the conduct cannot be considered over-statement. She related that maltreatment of those adopted children to the two boys here in this way:

> 182 This is not a situation where the focus should be on whether the parents are capable of "good enough" parenting. It is a case about the actual physical and emotional harm done by these parents to their three other children, E., K. and D., and the substantial risk they would do it again to C.G. and G.G.

[12] In her analysis on this line, she specifically discounted the impact of supervised visits with the children as being an answer to the opinions of Dr. Mendelson, Ms. Nagy and Ms. Araya which said, in her view, that there was a substantial risk to the children. As to the sort of *nexus* reasoning that approach involved, she was satisfied that theirs was "the only reliable testimony" on the potential graduation of the twins to the status of similar victims: see para. 193 of her reasons.

[13] Three aspects of the evidence supporting the serious risk of such transference of violence were emphasized by the Provincial Court judge. First, she reached conclusions about the parents' conduct towards those children being "repetitious, calculated and hidden from view by a pattern of lies" and their denial and minimization of the matter when it came to light. Second, she referred to their lack of empathy "towards any one of these children" and their detachment from the "enormity" of what they did. Third, she remarked about their continued view that their conduct to the other children was merely discipline gone wrong, at its worst.

[14] Counsel for the parents before me contended that the Queen's Bench judge was entitled to implicitly substitute his own view for the significance of the father hitting the twin boys with a belt: see his reasons at para. 14. Because the twins did not reveal "trauma symptoms", he was "not satisfied that the evidence with respect to 'abuse' of the twins would in fact amount to abuse

without something more." The evidence upon which the Queen's Bench judge placed reliance inferred the ability and intention of the parents to manage themselves in future in a manner consistent with proper child raising – as compared with the different standards they seemingly applied before. That was not an inference the Provincial Court judge was prepared to make. How those witnesses perceived the parents actions in the past would have been a matter for cross-examination.

[15] By his decision dated July 3, 2014, the Queen's Bench judge substantively reversed the decision of the Provincial Court judge. He ordered that the Director "return the two children to their parents, on certain conditions". He reasoned that the Provincial Court judge had "acted on a wrong principle and disregarded material evidence". For her part, the Provincial Court judge had included, at para. 218 of her extensive reasons following a lengthy hearing, the following observation, that:

> "..... neither parent has ever been honest about the abuse each perpetrated. From the time the abuse came to light they have consistently blamed the children for the need to resort to such inexplicably brutal treatment. They have remained focussed on the effect of the abuse on themselves without any true appreciation of the effects on their children."

[16] The Queen's Bench judge evidently found error in this view principally on the basis that the Provincial Court judge had fixed on their conduct with the older adopted children too much and that she approached the crucial point of the best interests of the twins in a skewed manner. She was, in his view, "unduly influenced by the abuse of the parents to their three adopted children". He also opined that she erred in failing to appreciate the potential distinction in treatment by the parents of the children as between the adopted children and their natural children. He does not refer to any expert or other evidence to make that difference between adopted or personal children meaningful nor clarify why deliberate differentiation, if any, would be helpful to their case: see para. 12 of his reasons. Counsel for the parents asserted before me that there was evidence that the parents would apply the "time out" method of discipline with their own children and also would have them out of the room when dealing with the adopted children. If that is so, and if there was parental intent or plan in this differentiation conduct, it is hard to see that evidence as indicative of error in the Provincial Court judge's view about the attitude of the parents.

[17] The Provincial Court judge had gone on to conclude in para. 219 of her reasons that "the survival, security and development of these two children cannot be adequately ensured if they are returned to their parents" using language in s 1(2), s 2(e)(ii) and s 34(1)(b) of the *Child Youth and Family Enhancement Act*, RSA 2000, c. C-12. She provided for a period of farewell contact within 30 days to permit a parting between the parents and the children. But she determined, in effect, that it was necessary to close that chapter in the lives of the children in order to create the opportunity to integrate the twins into a new, stable and more secure life. She did provide for the possibility of initially supervised contact amongst the siblings.

[18] The Queen's Bench judge relied on the opinions of Debra Harland, a social worker, and Dr. Sonya Vellet, a psychologist, particularly the latter. Ms. Harland was a listed witness for the parents and her report was filed at the outset on that basis. According to the submissions of the Director, the parents expressly chose not to call her as witness after having put some of her information to Dr. Mendelson in cross. The Queen's Bench judge wrote that Dr. Mendelson "disagreed with many of Ms. Harland's conclusions.": see his reasons at para. 8. He, however, found Harland's written opinion compelling that the "risk of maltreatment is very low based upon the evidence that this couple has already demonstrated in their learning and capacity to change". As he went on to say, Dr. Mendelson rejected this opinion of Ms. Harland. The Director assails the approach taken by the Queen's Bench judge in this respect as procedurally improper. Errors of evidence law are said to arise from this.

[19] As to Dr. Vellet, she, like Ms. Harland, proposed ongoing "intervention" and suggested the parents had "emergent skills". As noted, the Provincial Court judge was having none of the contention that the parents were reliable, a key foundation of both the opinions of Dr. Vellet and Ms. Harland. The Queen's Bench judge felt the opinion of Dr. Vellet, who was also not called by the parents and thus not subjected to cross-examination, and despite the position of the parents "that they did not seek to rely on either of these reports", was a basis to conclude that the Director had failed to make the case for the Permanent Guardianship Order. He found the admissibility of Dr. Vellet's opinion could be grounded on the fact her report was "referred to" by Dr. Mendelson. Ultimately, the Queen's Bench judge adopted recommendations of Dr. Vellet as to the disposition of the matter going forward: see his reasons at para. 18. The Director also attacks this approach to Dr. Vellet's report as being procedurally improper. Errors of evidence law are said to arise from this.

IV Discussion

[20] The parties did not dispute the essential characteristics of the three part test applied for stays pending appeal. Counsel for the children takes the position that there was a pattern of successful visitations, and that whatever the disposition is, there should be access restored. Counsel for the children expresses concern about whether the current fostering arrangement was compliant with s 2(n) of the Act which contains hortatory language respecting making the "child aware of the child's familial, cultural, social and religious heritage". At the same time, counsel for the children and the parents both submit that the children have reached an age allowing for a measure of understanding their situations. This provision of the Act cannot weigh heavily in the present motion because its application is at least partly speculative.

[21] Counsel for the Director urges the stay on the basis of what the Director says are substantial grounds for intervention by this Court arising from adjudicative substitution, and a range of errors of law. The Director adds to the evidential and procedural points mentioned above an intention to argue further error in the treatment of the evidence of a Dr. Estay by the Queen's Bench judge. The

Director urges that the substantial best interests of the children should operate to prevent the events ordered by the Queen's Bench judge from happening before the appeal.

[22] Counsel for the parents resists the stay and argues vigorously for the positions and conclusions reached by the Queen's Bench judge. In her view, there was now a substantial record to support the position offered by Ms. Harland and Dr. Vellet that the children could be re-integrated with the parents, albeit in a staged manner with appropriate intervention. Counsel says, in essence, that the eagle eyes of the Director would spot any departure from proper parenting to the degree justifying re-intervention, and the Director could be expected to move with alacrity in such circumstances.

[23] The three part test adopted in Alberta can be summarized as arguableness, irreparable harm and balance of convenience even though modified in cases of the best interests of children: see *e.g.* ***B(C) v C(P)***, 2003 ABCA 321, 346 AR 121; ***B(J) v G(A),*** 2008 ABCA 61, 429 AR 394; ***G(N) v E(R)***, 2010 NLCA 60 at paras. 14 to 33, 100 RFL 6th 101; ***S(CL) v S(BR),*** 2013 ABCA 349, 37 RFL 7th 112.

[24] The standard of arguableness has often been described as "low". That is largely because a chambers judge on a stay motion is usually not in a good position to assess the merits except on a *prima facie* basis. It is not incorrect to proceed on that basis, but the strength of the arguments are not irrelevant. Where arguments are made by opposing parties as to the best interests of children, and each side urges a form of irreparable harm in their opponent's position, the relative strength of the positions of the parties becomes important. The court must always be concerned about the disturbance of a child's formative years by abrupt and significant adjustments in their care arrangements. A change triggered by arguable but unmeritorious arguments has a good chance of being reversed. This type of variation of child circumstances has been colloquially called a "yo-yo" effect, but the metaphor is not intended to suggest such changes are not meaningful.

[25] Here the Director's submission is that the safety and stability of the lives of these children is at risk. The parents did not seem to say that the children would suffer irreparable harm from a temporary lack of contact with them going forward. They did suggest such in the longer range. As for whether the parents themselves might suffer harm it is difficult to see how irreparable that harm would be for them for the time period involved, and in any event it would take second place to the best interests of the children.

[26] In cases involving the best interests of children, the factors of irreparable harm and balance of convenience, with the interests of children at the centre of the discussion, are viewed holistically because there is really no sensible way to treat them as discrete. The "convenience" of the children, usually, will be the only convenience that really counts.

[27] In my view, the arguments for the Director are not merely arguable, but they are relatively strong. Having said so, I will recuse myself from participating in the appeal. By comparison, and while I understand the arguments by the parents' counsel against the decision of the Provincial Court judge, I note that they tend to question either her specific fact findings or the exercise of

discretion that she had under s 36(1) of the Act or the sufficiency of her reasons. Those arguments are not of the same order as the arguments for the Director, in my opinion.

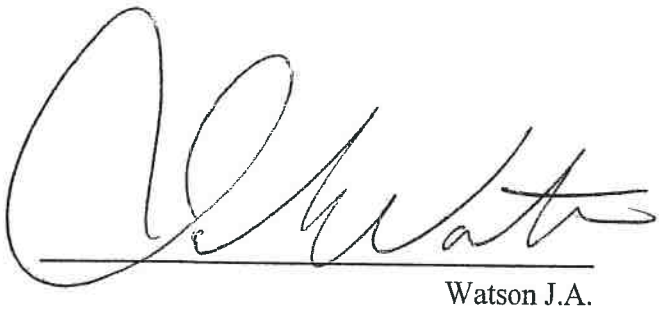
[28] A further practical matter is whether in the few months prior to this appeal, the Provincial Court's judge decision which continued almost three years of reality for these children should be unwound as per the Queen's Bench judge's view of the evidence. To stay the Queen's Bench decision preserves both decisions for a panel of the court. And, more crucially, it places the balance in favour of the physical and psychological stability and security of the children for the time being. I am not in a position to overrule the foundational fact finding achieved after much evidence that these children would be at significant risk in the custody of their parents and that they need a more secure and stable environment going forward than the periodic involvement of their parents will accommodate. This remains the case before me, with all due respect to those of a different opinion, as respectable as those opinions may be. Changing the custody of the children back to the parents was not an experiment the Provincial Court judge was prepared to do. The Queen's Bench judge also took pains to say that future intervention or regulation was in order.

V Conclusion

[29] The stay is granted. Because I am not persuaded that there is a proper evidential basis to interfere with the reasoning of the Provincial Court as to access in the meantime I decline to make such a direction.

Application heard via video-conference
in Edmonton on July 16, 2014

Reasons filed at Calgary, Alberta
this 22nd day of July, 2014



Watson J.A.

Appearances:

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for the Applicant

S. Channan
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