FAMILY AND CHILDREN'S SERVICES OF KINGS COUNTY v. E.D.

[Indexed as: Fam. & Children's Services, Kings County v. D.(E.)]

Nova Scotia Supreme Court [Appeal Division], MacKeigan, Macdonald and Jones JJ.A.

Heard – February 2, 1988.
Judgment – February 5, 1988.

Children – Child protection – Procedure – Child apprehended by warrant from custodial father – No grounds for warrant issuing – Child not brought before court within statutory limitation period – Judge losing all jurisdiction to proceed – Judge having no jurisdiction to make protection order – Order set aside on appeal and child returned to custodial father – Children's Services Act.

Children – Child protection – Procedure – Notice – County Court Judge setting aside Family Court order finding child in need of protection because notice not given to non-custodial parent – County Court Judge erring in setting aside order for improper service – Appeal nevertheless dismissed because of jurisdictional error by Family Court – Children's Services Act.

The custodial father disciplined the child by striking him on the hands with a stick. The society, as a matter of policy, disapproved of any form of corporal punishment. There was no other evidence relating to the father's fitness to have the care of the child. The society, after an ex parte hearing, obtained a search warrant under s. 46(1) of the Children's Services Act and apprehended the child. More than 21 days later the trial judge found the child in need of protection, made a supervision order and ordered a psychological assessment of the child. On appeal, the order was set aside because notice had not been given to the mother and the child was ordered returned to the father. The society appealed.

Held – Appeal dismissed.

No inquiry into the need for protection was begun within 21 days of the apprehension as required by s. 47(3) of the Act and the trial judge thereupon lost jurisdiction to deal with the matter. Further, s. 46(1) of the Children's Services Act authorizes a judge to issue a search warrant when satisfied there are reasonable and probable grounds for suspecting a child is in need of protection and is concealed on the premises. Here, there was insufficient evidence to justify a warrant issuing. The warrant had no foundation and was invalid.

Under s. 44, service need only be made on the parent(s) having care of the child. Although the County Court Judge erred in setting aside the Family Court order for improper service, the Family Court Judge had no jurisdiction to make a protection order and the appeal from the County Court order should be dismissed.

Annotation

This case has become a cause célèbre in Nova Scotia, the focus of more media and public attention than any other child protection case in recent memory. The Appeal Division's decision and the dramatic release of the father from imprisonment for contempt have raised serious questions about Nova Scotia's apprehension and pre-trial procedures under the Children's Services Act, S.N.S. 1976, c. 8. In response to the decision, the Minister of Community Services has promised a review of present procedures.

The Appeal Division decision itself raises more questions than it resolves, in part the result of the speed with which the decision was produced (three days). Unfortunately for those practising in the field, there has been considerable confusion about the proper interpretation of the court's decision, leading to difficulties in cases now coming before the Family Court.

The Appeal Division addresses four issues arising from the complex lower court proceedings in this case: (1) the proper interpretation of the 21-day limit found in s. 47(3) of the Act; (2) the disclosure requirements resting upon the agency after apprehension and prior to the first hearing; (3) the effect of an invalid warrant issued pursuant to s. 46(1) of the Act; and (4) service requirements on a s. 44 "notice to bring" proceeding. In the result, the court's decision is founded upon the first of these issues, although there is considerable comment about the remaining three.

(1) *The 21-day limit*

The Appeal Division concludes that the Family Court Judge lost jurisdiction over the matter by reason of the failure to begin the inquiry within 21 days as required by s. 47(3). In Nova Scotia, as in most Canadian provinces, no form of judicial pre-authorization is required for the summary removal of a child from the family home, since apprehension can take place by an agency worker without warrant (s. 45(1)). Accordingly, the statute provides for a speedy post-removal hearing before the Family Court, at which the parent is entitled to contest the issue of temporary care pending the trial of the matter.

Inevitably, the legal question arises whether the statutory time limits for the post-removal hearing are directory or mandatory. Here, the Appeal Division has come down – correctly I would argue – on the side of the mandatory interpretation. In doing so, the Nova Scotia court reached the same conclusion as did the Saskatchewan Court of Queen's Bench in *Candlish v. Min. of Social Services*, 5 R.F.L. (2d) 166, [1978] 3 W.W.R. 515, 85 D.L.R. (3d) 716. Mr. Justice Hughes stated at p. 168 that sections of this kind deal with "serious business", namely, "a legally-sanctioned interference with a basic civil right from the position of both the parent and the child", where "the legislature intended rigorous observance" of time limits (p. 170). In reaching his decision, Hughes J. rejected the directory interpretation given to a similar 4-day provision in an older Manitoba case: *Re Kowaliuk; C.A.S. v. Brooklands*, 41 Man. R. 463, [1933] 3 W.W.R. 476, 61 C.C.C. 27, [1934] 1 D.L.R. 678 (C.A.).

The Appeal Division's mandatory interpretation of the time limit and the Family Court's consequent loss of jurisdiction over the matter is also consistent with an earlier Family Court decision cited in the respondent's factum. In *C.A.S., Halifax v. Wood* (1982), 59 N.S.R. (2d) 438, 125 A.P.R. 125 (Fam. Ct.), the court failed to make a finding within the required six-month period after apprehension, leading to a dismissal of the matter for want of jurisdiction.

While this much is clear from the reasons of MacKeigan J.A., what is not clear is the nature of the hearing that must take place within the 21-day limit. It has been the practice in the Family Court to hold an initial hearing within that period for the sole purpose of resolving the issues of temporary care and access. In the vast majority of the cases, the parents are not in a position to contest or resume temporary care; the initial hearing is very brief and little or no evidence is taken. Nonetheless, the very structure of s. 49(1) of the Act makes clear that the first issue to be addressed by the Family Court, under para. (*a*), is the matter of temporary care and custody during the period of adjournment pending the trial of the issues of finding and disposition, which are provided for under paras. (*b*) and (*c*). Unfortunately, the Appeal Division has failed to appreciate the structure of the proceedings, as occasional comments by the court seem to suggest that the hearing which must be commenced within 21 days is directed to the need for protection of the child.

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Inevitably, the legal question arises whether the statutory time limits for the post-removal hearing are directory or mandatory. Here, the Appeal Division has come down — correctly I would argue — on the side of the mandatory interpretation. In doing so, the Nova Scotia court reached the same conclusion as did the Saskatchewan Court of Queen's Bench in *Candlish v. Min. of Social Services*, 5 R.F.L. (2d) 166, [1978] 3 W.W.R. 515, 85 D.L.R. (3d) 716. Mr. Justice Hughes stated at p. 168 that sections of this kind deal with "serious business", namely, "a legally-sanctioned interference with a basic civil right from the position of both the parent and the child", where "the legislature intended rigorous observance" of time limits (p. 170). In reaching his decision, Hughes J. rejected the directory interpretation given to a similar 4-day provision in an older Manitoba case: *Re Kowaliuk; C.A.S. v. Brooklands*, 41 Man. R. 463, [1933] 3 W.W.R. 476, 61 C.C.C. 27, [1934] 1 D.L.R. 678 (C.A.).

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It is submitted that such a reading of the decision would be impractical, unfair and contrary to well founded established practice. The current practice of separating the interim hearing on temporary care from trial on the merits of the finding and disposition finds support in the language of s. 49(1), as well as permits a reasonable opportunity for both agency and parents to prepare their respective cases for trial and allows the court to fix a date within the six-month period for a full and complete trial of the merits. At the interim hearing, it is suggested that the court need only inquire into the nature of the allegations made by the agency, whether those allegations disclose reasonable grounds to believe that there is a risk to the child's health or safety pending trial, and whether the child can be adequately protected in the parental home with or without supervisory conditions.

(2) *The requirement of disclosure*

The Appeal Division is quite critical of the agency's failure to disclose particulars of its allegations to the father prior to the initial hearings. As the decision demonstrates, the notice of hearing required by s. 47(1)(c) simply recites the uninformative language of the relevant statutory definitions of s. 2(*m*), which hardly constitutes "fair notice" as MacKeigan J.A. discerns.

Disclosure practices vary considerably across the province, depending upon the agency, agency counsel and the Family Court Judge. To date, apart from voluntary disclosure, the degree of disclosure obtained has depended upon the aggressiveness of parents' counsel and their use of the Family Court Rules (notably RR. 12.05, 12.07 and 1.04 which allows discretionary application of the Civil Procedure Rules) to obtain discovery of the agency case. More recently, some Family Court Judges have required filing of affidavits by the agency in support of the "notice of taking into care" and "notice of hearing" which are filed with the court on the interim hearing, coupled with more effective use of pre-trial conferences to resolve issues of disclosure.

The Appeal Division's clear pronouncement in favour of disclosure in this decision should serve to resolve the issue, as the court has placed an affirmative obligation upon the agency to make the necessary disclosure, an obligation which can and should be rigorously enforced by the Family Court. The spectre of potential loss of jurisdiction (alluded to, but not decided here) should provide sufficient "incentive" to both agency counsel and the court to ensure full and adequate disclosure.

(3) *Invalidity of the search warrant*

While the Appeal Division's comments upon disclosure and potential loss of jurisdiction are salutary, the same cannot be said of the similar allusive comments respecting the invalid search warrant. The initiating document in a protection proceeding in Nova Scotia is the "notice of taking into care" under s. 47(1)(*a*), not the warrant issued under s. 46(1). It is the act of taking the child into care that provides the legal foundation for the agency's temporary care and custody until otherwise ordered under s. 45(3). It is difficult to see how a bad warrant could vitiate the proceedings.

The warrant issued under s. 46(1) is not a prerequisite to the apprehension, which can take place without warrant under the terms of s. 45(1), but merely provides the ancillary authority required to enter and search, with force if necessary, to apprehend the child: see *Re Mairs* (1961), 35 C.R. 265, 35 W.W.R. 469, 130 C.C.C. 361 (D.C.S.C.); see also *Min. of Social Services v. C.* (1982), 26 R.F.L. (2d) 417 (Sask. Q.B.).

(4) *Service of the notice to bring*

Section 44 of the Children's Services Act offers an alternative, non-removal route to get a protection matter before the court, known as a "notice to bring" since

in terms it requires the parent to bring the child before the Family Court. The powers of the court under s. 44(3) are noticeably vague, apart from the specified power to order "referral of the child for psychiatric, medical or other examination", the power employed by the Family Court Judge in this instance. Procedurally, the section has been subjected to judicial criticism: *Fam. & Children's Services, Hants County v. Bell* (1982), 50 N.S.R. (2d) 522, 98 A.P.R. 522 (Fam. Ct.).

The Appeal Division's holding [post, p. 109] that service "need be made in the first instance only on the parent or parents who appear to have care of the child" only further muddies an already muddy section. The reference in s. 44(1) to "the parent or guardian" is identical to the similar notice provision for apprehensions found in s. 47(1) and these terms are clearly defined in s. 2(*w*) and (*x*) of the Act. It is hard to see why a notice to bring need only be served upon, for example, a custodial parent, but not an access parent. Any problems with service upon absent parents can easily be dealt with under Family Court RR. 7.01 and 7.02 respecting service and substituted service.

That said, Hall Co. Ct. J. was clearly wrong in holding that failure to serve the absent mother deprived the Family Court of jurisdiction to make the orders under s. 44(3), since orders for examination and agency visiting can hardly be seen to interfere with the absent mother's rights. Whether more intrusive orders are available under s. 44 is a nice point, but not relevant here.

The dismissal of the proceedings here for lack of jurisdiction had one interesting consequential effect, in light of events subsequent to the impugned orders of the Family Court Judge, adverted to earlier. After the return of the child from a visit with the mother in Montreal over the Christmas period, the father responded to his perception of the child's distress by hiding the child and refusing to divulge his whereabouts to the Family Court. This led to the father being cited for contempt and being imprisoned after a contempt hearing before another Family Court Judge. At the time of the appeal court hearing, the father was still committed and, with the Friday afternoon judgment of the Appeal Division, the father was released from jail and reunited with his son.

The case has caused a reassessment of apprehension procedures by the provincial Department of Community Services. Amazingly enough, the department undertook a 15-month review of family and children's services in the province, culminating in the Report of the Task Force on Family and Children's Services in February 1987, yet the report contained no significant proposals for legislative changes in respect of child protection procedures. If the decision in *Fam. & Children's Services, Kings County v. E.D.* demonstrates anything, it points up the need for a thorough reappraisal of the procedures and due process guarantees of the now 12-year-old Children's Services Act.

D.A. Rollie Thompson
Associate Professor, Dalhousie Law School
Halifax, Nova Scotia

Statutes considered

Children's Services Act, S.N.S. 1976, c. 8
- s. 44(1)
- s. 46(1)
- s. 47(1) [am. 1977, c. 76, s. 1], (3)
- s. 49(1)

Canadian Abridgment (2d) Classification

Infants and Children
- XIII. 1.
- XIII. 4.

APPEAL by society from decision of County Court Judge allowing appeal from Family Court protection order and returning child to custodial parent pursuant to Children's Services Act.

A.S. Butler, for appellant.
Respondent in person.

(No. S.C.A. 01875)

February 5, 1988. The judgment of the court was delivered by

MACKEIGAN J.A.:– This appeal is from two decisions and orders of the Honourable Judge Donald M. Hall whereby he set aside two orders of Her Honour Judge Margaret Stewart of the Family Court. Judge Hall ordered the return to the respondent Mr. D. of his 4-year-old son, M., who had been seized by family services agents of the appellant Family and Children's Services of Kings County (hereafter the "agency") and R.C.M.P. officers under a warrant issued by Judge Stewart on 24th September 1987.

The court action originated with a "notice to bring" issued by two agency workers, Ms. Skerry and Ms. Miller, on 11th September under s. 44(1) of the Children's Services Act, which provides:

> 44(1) An agent may, by notice in writing served upon a parent or guardian, require the parent or guardian to appear or bring a child named in the notice before a judge at a place named in the notice and at a time not earlier than four clear days after the date of the service of the notice.

The notice required M., "age four", to be brought to the Family Court Judge on 16th September "respecting the allegation that the above named children are in the care of persons who are unfit or unable to properly care for them and that the health and emotional welfare of these children may be endangered".

At court appearances on 16th and 17th September evidence was given by Dr. Carrothers that on examination of the child on 1st September he had found no evidence of physical abuse of the child or of emotional distress but that he gathered from the child that his father would on occasion strike his hand with a rod if he was disobedient. Ms. Miller had only hearsay evidence of "beatings". On her visit of 1st September she saw no sign of emotional neglect. Mr. D. testified that he used a slim rod (like a balloon stick) to correct the child on occasion and admitted that "in the last two weeks" he had on "a couple of occasions" given "three to five strikes" on the palm of one hand for disobedience of simple commands, such as to go to dinner or go to bed. He believed strongly that his method of kind but firm punishment was sanctioned by his religion.

Ms. Miller was asked:

> Q. You don't believe that any form of corporal punishment should be used with respect to raising children, is that correct? A. No, I do not and the Department of Social Services is very firm with that standard that corporal punishment is not to be used as a means of discipline here in the Province of Nova Scotia.

She had told Mr. D. of this "standard".

Mr. Greatorex, administrator of Family and Children's Services, on 30th September wrote D.'s counsel:

> The policy which you have outlined in your letter and which was described by the agent for the Family and Children's Services of Kings County at the court hearing on September 17, 1987, is not a policy documented within the Family Children's Services Division of the Department of Social Services, Province of Nova Scotia.
>
> Parental discipline or any other parental conduct directed towards a child must be considered within the context of the definitions of "child in need of protection" set out in the Children's Services Act.

I mention this because existence of this "standard", in my opinion, obviously influenced the views expressed subsequently by the agency's witnesses and gave rise to the resistance of Mr. D.

I am unable to find in the record of the numerous court appearances any other evidence which touches on the fitness of D. to have the care of the child or on his treatment or alleged abuse of M., let alone that M.'s "life, health or emotional welfare was endangered", as alleged in the "notice to bring". Judge Stewart ordered that the child be made available for a complete medical examination and a psychosocial assessment and that personnel of the agency be permitted to visit M. "alone" once a week. D. immediately appealed this order to County Court. Judge Hall on 27th October set aside the order on the ground that notice under s. 44 had been given only to the father of the child and not to the mother, who lived in Montreal.

I respectfully think the learned judge erred in his reasons. In my view, service under s. 44 need be made in the first instance only on the parent or parents who appear to have care of the child. Whether adequate grounds were shown to justify the Family Court order on the evidence is now a moot issue and need not be here addressed.

As already noted, the child was seized under search warrant on 24th September. Judge Stewart, after an ex parte hearing, issued the warrant under s. 46(1):

> 46(1) When a judge is satisfied upon the oath of an agent or a peace

> officer that there are reasonable and probable grounds for suspecting that a child is in need of protection and is concealed in premises, he may issue a warrant authorizing any person named therein to conduct a search of the premises, using force if necessary, and where necessary to take the child into care.

It is apparent from the transcript of the hearing that both the judge and the agency's counsel realized that there was no evidence that the child was "concealed". More importantly, I fail to see that the judge had "reasonable and probable grounds for suspecting that a child is in need of protection" on the bases alleged, viz., fitness of D. and *danger* to the child's life, health or emotional welfare. What could those grounds have been other than the evidence of 17th September referred to above? That evidence shows nothing of D.'s fitness unless his disagreement with department policy on corporal punishment shows unfitness; this is hardly credible. That evidence shows no danger that would conceivably warrant the terrible sanction of finding the child in need of protection and liable to permanent separation from his father.

The warrant had no foundation and was, in my view, completely invalid. Its use was certainly not redeemed by the facts that the child, screaming, was seized by police from D.'s arms in the barn of the community where they all lived, and that the child had not been "concealed".

The agency workers, Skerry and Miller, took the child and on the same day gave D. "notice of taking . . . into care" (s. 47(1)) and gave notice (s. 47(3)) of hearing of an application alleging that M.:

> . . . appears to be in need of protection on the grounds that he is a child in the care and custody of a person who is unfit, unable or unwilling to exercise proper care over the child, and that his life, health or emotional welfare is endangered within the meaning of Section 2(m) of the Children's Services Act . . .

The application was to be made to the Family Court Judge on 29th September at 9:00 a.m.

Section 47(3) states:

> 47(3) For the purpose of this Section the hearing shall be at a time not earlier than four clear days and not later than twenty-one days after the date the child is taken into care.

The child was seized on 24th September. The hearing must therefore have at least begun not later than 21 days after, i.e., not later than 15th October. The judge (s. 49(1)) "shall inquire into the subject matter of the proceedings" at the "time fixed for the hearing or any adjournment thereof". The judge may (s. 49(1)(*a*)) "adjourn

the hearing from time to time for a period up to but not exceeding six months".

On 29th September agency counsel and Mr. D. appeared before Judge Stewart. Mr. D. was accompanied by a fellow member of his religious community, Ms. J.S. He sought to have Ms. S. represent him. He expressed repeatedly his desire to proceed immediately with the inquiry. He had four witnesses whom he wished to call (a Baptist minister, a dentist and two neighbouring farmers) and a brief he wanted to file.

Judge Stewart insisted on adjourning the session until 6th October so D. could get a lawyer, which he did not want. She refused to begin any hearing and refused to listen to his request for at least supervised visits with his son.

Counsel for the agency apparently shared the judge's desire not to begin the hearing. She gave no indication of what witnesses or other evidence she proposed to adduce in support of the basic allegations of unfitness and danger.

No attempt was made, then or later, to give any particulars of those basic allegations. This was a grievous breach of the basic principle that any court or other tribunal determining allegations of misconduct against a person must, before entering on an inquiry, ensure that the person inquired into is given fair notice of those allegations and an opportunity to be heard.

On 6th October agency counsel and Mr. Dellapina for Mr. D. appeared before Judge Stewart. The transcript shows nothing happened except adjourning to 27th October of argument as to whether Ms. S. could act as agent or friend for D. and an attempt by D.'s counsel to get a ruling about access by D. to the child. Access was refused by the judge. Mr. Dellapina protested (p. 47 of transcript):

> Well, my learned friend knew that I was coming today looking to get the child back so, surely, she could have addressed at least with her so-called experts. I mean, I want somebody to start thinking about the child . . . I want a child to meet with his father. He must be scared to death or at least my client deserves the right to see that he's not, if, indeed, he's fine.

The judge then agreed to adjourn the request for access to 15th October.

On 15th October counsel appeared again. Judge Stewart held no access could be given, but gave counsel permission to file further briefs by 29th October. No attempt was made by the agency to give

any particulars of the basic allegations or to produce any evidence of any kind pertinent thereto. The 15th October session was not and, indeed, did not purport to be a hearing on need for protection.

Not shown on the 6th October transcript, and not remembered by Mr. Dellapina, was an order that M. "shall be in the temporary care and custody of the applicant". This matter should have been addressed by the judge immediately after the execution of the seizure of the child, after proper notice to D.

The typed order incorporating this order was dated 6th October, was signed by Judge Stewart and filed in court on 20th October. It was added by Judge Hall to the appeal before him and was quashed by his order of 6th November whereby he returned the child to his father.

In my opinion, no inquiry was begun within 21 days as required by s. 47(3) and Judge Stewart thereupon lost jurisdiction on this whole matter. We need not decide whether she previously had lost jurisdiction in view of the invalid seizure of the child and the failure to ensure D. had proper notice of the basic allegations against him.

The appeal from Judge Hall's order of 6th November, voiding the care and control order and returning the child to his father, should be dismissed. In view, however, of the jurisdictional error of the Family Court, we should set aside the parts of the order directing that the child not leave the province, that he continue to reside at [M.T.] Farm and that he be visited weekly by the agency.

Since the Family Court has, since 15th October, lost jurisdiction to proceed further with the inquiry as to need for protection, we should set aside any other orders of the Family Court made incidental to that inquiry, including any order requiring Mr. D. to give the agency information as to the whereabouts of his son and any order for committal for contempt based thereon.

Judge Hall, in the exercise of his discretion, imposed $700 costs against the agency, apparently to cover the high costs of transcript incurred by Mr. D. We should not disturb this award. We should not, however, award any costs to either party in these appeal proceedings.

Appeal dismissed.

BURTON v. BURTON

Alberta Court of Appeal,
McClung, Belzil and Hetherington JJ.A.

Judgment – December 21, 1987.

Children – Maintenance – Factors governing award – Separation agreement – Husband receiving custody and waiving right to child support pursuant to agreement – Husband claiming and obtaining child support on divorce – Wife appealing – No evidence husband unable to support children from own resources – Appeal allowed – Divorce Act, 1985.

The parties married in 1975 and separated in 1986. The parties entered into minutes of settlement whereby, inter alia, the husband received custody and waived any right to child support. In divorce proceedings, the husband claimed child support. The trial judge awarded child support without giving reasons. The wife appealed.

Held – Appeal allowed.

A court may override a child support agreement where the agreement does not meet the needs of the children. There was no evidence before the trial judge regarding the children's needs and the husband had not proven he was unable to meet the children's needs from his own resources. Accordingly, the trial judge erred in awarding child support and the appeal should be allowed, but reserving to the husband the right to renew his application on proper grounds.

Cases considered

Currie v. Currie, 10 R.F.L. (3d) 207, [1988] 1 W.W.R. 361 (C.A.) – followed.

Jull v. Jull, 42 R.F.L. (2d) 113, [1985] 1 W.W.R. 385, 34 Alta. L.R. (2d) 252, 14 D.L.R. (4th) 309, 56 A.R. 123 (C.A.) – referred to.

MacKenzie v. MacKenzie, 9 R.F.L. (3d) 1, [1987] 5 W.W.R. 481 (Man. C.A.) – considered.

Pelech v. Pelech, [1987] 1 S.C.R. 801, 7 R.F.L. (3d) 225, [1987] 4 W.W.R. 481, 14 B.C.L.R. (2d) 145, 17 C.P.C. (2d) 1, 38 D.L.R. (4th) 641, 76 N.R. 81 – referred to.

Richardson v. Richardson, [1987] 1 S.C.R. 857, 7 R.F.L. (3d) 304, 17 C.P.C. (2d) 104, 38 D.L.R. (4th) 699, 22 O.A.C. 1, 77 N.R. 1 – considered.

Statutes considered

Divorce Act, S.C. 1986, c. 4
s. 15(5)(c), (8)

Canadian Abridgment (2d) Classification

Matrimonial Causes
IX. 8. f.
XXI. 3.
XXI. 6.

APPEAL by wife from order awarding child support pursuant to the Divorce Act, 1985.

R.M. Simpson, for appellant.
M.T. Moreau, for respondent.

(Edmonton No. 8703 0338 A)