Citation: Child and Family Services of Western Manitoba v PH and TB, 2017 MBCA 41
Date: 20170419
Docket: AH16-30-08602

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

B E T W E E N :

	)	***J. D. Cram***
	)	*for the Appellant*
	)	
CHILD AND FAMILY SERVICES OF WESTERN MANITOBA	)	***K. L. Webb***
	)	*for the Respondent P.L.M.H.*
(Petitioner) Appellant	)	
	)	***A. J. Synyshyn***
- and -	)	*for the Respondent T.K.B.*
	)	
P.L.M.H. and T.K.B.	)	*Appeal heard and*
	)	*Decision pronounced:*
(Respondents) Respondents	)	***February 8, 2017***
	)	
	)	*Written Reasons:*
	)	***April 19, 2017***

NOTICE OF RESTRICTION ON PUBLICATION: No one may disclose any information likely to identify any person involved in the proceedings as a party or a witness (see section 75(2) of *The Child and Family Services Act*, CCSM c C80).

MAINELLA JA (for the Court):

[1] The petitioning agency (the agency) appeals a one-year supervision order for three children (aged five to seven) made under section 38(1)(a) of *The Child and Family Services Act*, CCSM c C80 (the *Act*). The agency and respondent mother also moved to adduce fresh evidence on the appeal. At the hearing of the appeal, it was dismissed with reasons to

follow. These are those reasons.

[2] The judge heard significant evidence during the child protection hearing regarding the parents' long history of domestic violence, substance abuse and general inability to provide a stable household for the children, as well as the parents' efforts to address these issues. The judge concluded that the children would be in need of protection if returned to either parent (see section 17(1) of the *Act*). The parties do not challenge that aspect of his decision.

[3] In terms of a remedy, rather than the permanent order of guardianship sought by the agency, the judge concluded that it was in the best interests of the children that they be placed with the mother pursuant to a supervision order with strict conditions, including that the father have no contact with her or the children without the agency's approval. The judge determined that the mother had "made significant progress in dealing with the root causes which led [to] her children being apprehended". In his view, if she separated herself from the father, "she will prove to be a good parent". The agency obtained a stay of the judge's order pending the appeal. As a result, the children are currently in foster care.

[4] The motions for fresh evidence arise from the fact that, unbeknown to everyone, either shortly before or after the hearing, the mother became pregnant. She had her fourth child with the father six months after the judge's decision. The infant was apprehended at birth but remains in the care of the parents, who currently live together. A consent six-month supervision order under the *Act*, with conditions, was recently made in relation to the infant. The fresh evidence on the appeal is directed towards the mother's current ability to parent her children presently in foster care in

addition to the infant.

[5] Admission of fresh evidence on an appeal is a discretionary matter (see section 26(3) of *The Court of Appeal Act*, CCSM c C240). Receipt of such evidence is governed by the criteria set out in *Palmer et al v The Queen*, [1980] 1 SCR 759, but with some flexibility to ensure that important evidence as to what is in the best interests of the child is considered (see *Winnipeg Child and Family Services v F (JM)*, 2000 MBCA 145 at paras 20-25).

[6] The fresh evidence from the mother is that, since the hearing, there have been no incidents of domestic violence, the mother and father have been sober and the father has told the mother that he is making plans to get treatment. The agency and the father consent to admission of this fresh evidence.

[7] The fresh evidence from the agency consists of a report of a psychologist who is familiar with the family and who provided his opinion that the mother would be unable to parent four children by herself, as required by the supervision order under appeal. The mother and father oppose admission of the psychologist's report. They argue that the agency is trying to shore up its case. They say that the psychologist had prepared a report prior to the hearing but the agency did not rely on it. They submit that the principle of finality requires that there be some end to receipt of evidence; otherwise, the child protection process could go on indefinitely.

[8] In our view, it is in the interests of justice to admit the fresh evidence in light of the *Palmer* criteria. A careful review of the psychologist's report confirms that it bears on the present condition and

relationship of the parents (see *F (JM)* at para 25). It is not surprising from the record that the psychologist has doubts as to the mother's ability to parent in light of the reality that parenting four young children by oneself is a challenge for anyone, and is particularly so for someone who has inadequacies in his/her parenting skills. However, the issue here is not the reasonableness of the psychologist's conclusions but the reasonableness of the judge's conclusions. Leaving aside the psychologist's opinion, his post-hearing interviews of the parents are important. His interviews support the judge's findings of fact that the mother continues to mature, show insight into her inadequacies and make positive efforts to better herself. The reasonableness of the judge's conclusion that the mother has the capacity to parent the children, who are now in foster care, is the only issue on this appeal and we see no reason to not admit and consider the report of the psychologist as it materially bears on that issue.

[9] The argument of the agency on the appeal of the supervision order is that the judge's choice of remedy under the *Act* was unreasonable. It submits that the judge misapprehended the evidence in his conclusion that the mother was committed "to separate from [the] father if the children were returned to her". The agency says that all that was before the judge to support his conclusion was the mother's bare promise that, despite her historic desire to co-parent the children with the father, she was prepared to do so alone. The agency argues that the judge should have had more skepticism towards the mother's evidence that she would parent the children without the father. The agency submits that the judge should not have relied on this evidence because, when the parents were previously subject to a no-contact order arising from an allegation of domestic violence, they failed to comply with that condition. The agency says that more weight should have

been given to the parents' historic inability to follow court orders. In summary, the agency argues that the judge's faith in the mother being able to parent the children alone was a palpable and overriding error.

[10] The standard of review on child protection matters is one of correctness for errors of law and palpable and overriding error for questions of fact or mixed fact and law (see *Metis Child, Family and Community Services v AJM et al*, 2008 MBCA 30 at paras 26-27, leave to appeal to SCC refused, 2008 CanLII 39175). The choice of a remedy under the *Act* is an exercise of discretion that will not be lightly interfered with absent a misdirection on the law or the facts, particularly when the judge chooses not to order permanent guardianship, as that remedy is "one of last resort only to be made where the court is satisfied that a complete severance of all parental ties is in the best interests of the child" (*Child and Family Services of Winnipeg East v KAD et al* (1995), 102 ManR (2d) 262 at para 24 (CA)).

[11] This appeal is essentially fact-driven. The trial judge heard the evidence, made findings of fact and assigned weight to those facts. His findings of credibility about the mother's sincerity cannot be disturbed if the record is reasonably capable of supporting them (see *Michif Child and Family Services v VEMB et al*, 2016 MBCA 13 at para 18). In his reasons, he made several key findings about the mother demonstrating progress in her parenting abilities and her insight into the effect of the father's problems with violence and alcohol on both her and the children. These findings support the judge's conclusion about the mother's capacity to parent under the supervision of the agency and attract considerable deference. Appellate courts are not free to interfere with findings or come to different factual conclusions merely because they might disagree with how much weight

should have been assigned to the underlying facts (see *Housen v Nikolaisen*, 2002 SCC 33 at para 23). Additionally, the fresh evidence admitted on the appeal does not cause a concern as to the overall reasonableness of the judge's findings of fact.

[12] One final comment. Undue delays in child protection hearings are "intolerable and unacceptable" *(Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33 at para 87). In this case, three young children spent almost three years in foster care before a court order was made to govern their care. The reasons for that delay are not before us but I would impress the importance to all participants in child protection proceedings that, as was explained in *HH and CG*, there is a need to re-adjust old attitudes and practices to these matters so that other children do not experience the same uncertainty and disruption without any concrete, court-sanctioned blueprint for their future.

[13] In the result, the appeal is dismissed. The supervision order is stayed for three months from the hearing date of the appeal to allow the parties to make the necessary arrangements to implement the order, including the parents obtaining separate residences.

Mainella JA

Beard JA

Cameron JA