Citation: Sagkeeng Child and Family Services v. A.R.W. et al., 2007 MBCA 122

Date: 20071012
Docket: AH07-30-06630
Docket: AI04-30-05754

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice Richard J. Chartier
Mr. Justice Alan D. MacInnes

B E T W E E N:

SAGKEENG CHILD AND FAMILY SERVICES	)	***C. L. Dunn***
	)	*for the Appellant*
(Petitioner) Respondent	)	
	)	***K. M. Saxberg***
	)	*for the Respondent*
- and -	)	
	)	***C. A. Devine***
A. R. W.	)	*for the Attorney General*
(Respondent) Appellant	)	*of Manitoba*
	)	
	)	*Appeal heard and*
- and -	)	*Decision pronounced:*
	)	***September 14, 2007***
V. C. F.	)	
	)	*Written reasons:*
(Respondent)	)	***October 12, 2007***

CHARTIER J.A.

1 This was an appeal from a judgment dismissing the appellant's claim that ss. 41(1) and 45(1) of *The Child and Family Services Act*, C.C.S.M., c. C80 (the *Act*), violated her rights pursuant to ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The appeal with respect to s. 41(1) was abandoned prior to oral argument. We dismissed the appeal, without costs, with reasons to follow. These are the reasons.

Appeal from 2006 MBQB 256, 209 Man.R. (2d) 247

2 The narrow focus of this appeal is whether s. 45(1) of the *Act* is broader than is necessary in providing that an order of permanent guardianship absolutely terminates parental rights pending the placement of the child for adoption.

3 The relevant sections of the *Act* are as follows:

> **Best interests**
> **2(1)** The best interests of the child shall be the paramount consideration of the director, an authority, the children's advocate, an agency and a court in all proceedings under this Act affecting a child, other than proceedings to determine whether a child is in need of protection, and in determining the best interests of the child all relevant matters shall be considered, including
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> (a) the child's opportunity to have a parent-child relationship as a wanted and needed member within a family structure;
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> (b) the mental, emotional, physical and educational needs of the child and the appropriate care or treatment, or both, to meet such needs;
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> (c) the child's mental, emotional and physical stage of development;
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> (d) the child's sense of continuity and need for permanency with the least possible disruption;
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> (e) the merits and the risks of any plan proposed by the agency that would be caring for the child compared with the merits and the risks of the child returning to or remaining within the family;
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> (f) the views and preferences of the child where they can reasonably be ascertained;
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> (g) the effect upon the child of any delay in the final disposition of the proceedings; and
>
> (h) the child's cultural, linguistic, racial and religious heritage.
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> **Effect of order of permanent guardianship**

45(1) An order of permanent guardianship operates as an absolute termination of parental rights and obligations and the agency may, following the expiration of the allowable period of appeal under section 44, place the child for adoption in accordance with *The Adoption Act*.

Termination of permanent guardianship on application

45(2) The agency having permanent guardianship of a child may apply to court for an order that the guardianship be terminated.

Application by parents to terminate permanent guardianship

45(3) The parents of a child with respect to whom an order of permanent guardianship has been made may apply to court for an order that the guardianship be terminated if

(a) the child has not been placed for adoption; and

(b) one year has elapsed since the expiry of the parents' right to appeal from the guardianship order or, if an appeal was taken, since the appeal was finally disposed of.

Order

45(4) A judge hearing the application under subsection (2) or (3) may

(a) terminate the permanent order and return the child to the parents; or

(b) terminate the permanent order and make an order under clause 38(1)(a), (b), (c), (d) or (e); or

(c) dismiss the application.

No application for another year

45(5) Where the judge dismisses the application, the parents may not bring another application under subsection (3) until 1 year has elapsed from the dismissal.

4 The relevant sections of the *Charter* are as follows:

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> **15(1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

5 In this case, to establish a violation of her s. 7 *Charter* rights, the appellant must prove on a balance of probabilities that the permanent guardianship order deprived her of her right to security of the person and that such deprivation was not in accord with the principles of fundamental justice. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, Lamer C.J. stated (at paras. 69-70):

> While relieving a parent of custody of his or her child restricts the parent's right to security of the person, this restriction may nevertheless be in accordance with the principles of fundamental justice. The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. It is a time-honoured principle that the state may relieve a parent of custody when necessary to protect a child's health and safety. Rand J.'s judgment in *Hepton v. Maat*, [[1957] S.C.R. 606], is the classic statement of this principle in Canadian law. At pp. 607-8, he wrote:
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> > It is, I think, of the utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: *prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed. . . .
> >
> > The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.

> This, in substance, is the rule of law established for centuries and in the light of which the common law Courts and the Court of Chancery, following their differing rules, dealt with custody.

More recently, La Forest J., writing for three others in *B. (R.)* held at para. 88 that

> the common law has long recognized the power of the state to intervene to protect children whose lives are in jeopardy and to promote their well-being, basing such intervention on its *parens patriae* jurisdiction; see, for example, *Hepton v. Maat*, [[1957] S.C.R. 606] … *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388. The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure.
>
> Thus, the principles of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination.

6 In this case, the trial judge agreed that the appellant's security of the person's interests had been engaged by the guardianship application. The judge then carefully considered whether termination of parental rights in s. 45(1), which would disallow a parent from subsequently challenging the placement of a child for adoption, is contrary to the principles of fundamental justice. She found that it was not. In her reasons, the trial judge correctly stated that "[t]he state has the authority and responsibility to sever the parental tie when the child is in need of protection and the welfare of the child requires it" (at para. 77). This reasoning is consistent with the authorities mentioned above.

7 The trial judge explained that the termination of parental rights, including the inability to challenge an adoption proceeding was necessary to ensure "finality to the determination of the child's need for protection or best interests" (at para. 79). She made it clear why this is so (at para. 78):

> … A child in care should not be placed for adoption while his or her legal status is uncertain. The child's ability to form the necessary attachment to the adoptive parents and their ability to bond with the child would be undermined by such uncertainty.

8 The appellant did not present any persuasive legal authority to upset fundamental principles of law that operate to further the best interests of children. She did not specify how the impugned legislation or its operation, in a situation where adoption proceedings are commenced, was in violation of the principles of fundamental justice. Further, the appellant did not specify any particular lack of procedural fairness in the legislation, nor did she advance any argument as to any procedural unfairness in the conduct of the respondent Sagkeeng Child and Family Services or in the conduct of the trial.

9 On the appeal with respect to the s. 15(1) *Charter* question, the appellant did not allege that the judge erred in dismissing the s. 15(1) argument that she raised at trial. Rather, she raised for the first time at this appeal a new discrimination argument. She argued that parents whose child had been made a permanent ward of the state were treated differently, depending on whether the child was or was not placed for adoption.

10 The appellant argued that pursuant to s. 45(3) of the *Act*, a parent whose child is not placed for adoption within one year after the expiration of the parents' right to appeal from a guardianship order may apply to court for

an order terminating the guardianship order, whereas a parent whose child is placed for adoption within such one-year period may not. That is, the parental rights of the latter parent are and remain absolutely terminated, whereas the parental rights of the former parent, while absolutely terminated, may be regained.

11 Although this argument was not properly put before this court (not having been raised at the first instance), it can be dealt with summarily. The Supreme Court set out the three stages of analysis under s. 15 in *Law v. Canada* (*Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (at para. 88):

> (3) … .
>
> > (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
> >
> > (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> > (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

12 The distinction raised by the appellant clearly is not based on one or more personal characteristics of the parent. Rather, it is one created by statute without regard to any personal characteristic of the parent. Thus, her argument failed at the first stage of the analysis.

13 The appellant failed to demonstrate to us that the trial judge did not apply the correct legal principles or that she committed any palpable or overriding error with respect to the application of the legal principles to the facts.

_____ J.A.

I agree:

_____ J.A.

I agree:

_____ J.A.