Date: 19961211
Docket: CA022522
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT:

BEFORE THE HONOURABLE December 11, 1996

MR. JUSTICE MACFARLANE

IN CHAMBERS Vancouver, B.C.

BETWEEN:

THE DIRECTOR OF CHILD, FAMILY AND COMMUNITY SERVICE

APPELLANT

AND:

BEVERLY SCHNEIDER

RESPONDENT

F. Potts appearing for the Appellant
B. Long appearing for the Respondent

(applications for leave to appeal and for a stay)

[1] MACFARLANE, J.A.: This is an application for leave to appeal on a question of law pursuant to s.82 of the Child, Family and Community Service Act. There is also an application for a stay of proceedings if leave be granted and in the alternative for an expedited hearing of the appeal if the stay be not granted.

[2] The question of law is whether there is jurisdiction under s.37 of the Child, Family and Community Service Act (the Act), when interim custody has been granted to the Director, to order that the actual hearing of a protection proceeding commence on a fixed date and continue immediately thereafter. The Director submits that such an order is contrary to the practice approved by the Courts under previous legislation. The practice in general terms was to order that the parties appear in Court within 45 days at which time the hearing would commence by the introduction of token evidence and be adjourned to a date satisfactory to the Court and to the parties. Some changes in that practice have occurred since the passage of the new legislation but it is not necessary to detail them.

[3] The practice was and is considered necessary because of limited judicial and I expect Social Service resources. I think Mr. Justice Shaw, from whose judgment the appeal is taken, is correct in his interpretation of s.37 of the Act. The judge presiding at a presentation hearing has jurisdiction to set both the formal commencement date and the date upon which the protection hearing must actually proceed.

[4] I am told that Mr. Justice Shaw's reasons and Judge Martinson's direction are being interpreted as meaning that in every case a protection hearing must not only start within 45 days but must continue without adjournment. I am told that some judges and some parties have taken the position that it is not open to the judge at the protection hearing to adjourn the hearing even though the lack of judicial resources or other matters dictate that such an adjournment should be granted if a fair and proper hearing is to be held and justice achieved.

[5] Counsel for the Director submits that if this Court were to interpret the words "as soon as possible" as found in s.37 of the Act as meaning as soon as possible having regard to the availability of judicial resources the problem would be solved. In my view, it is not necessary for a division of this Court to repeat what Mr. Justice Shaw has said in such detail and to add that observation which appears to me to be clear to anyone carefully reading the statute and considering the matter.

[6] In my view, the interpretation that has been given to the reasons of Mr. Justice Shaw and to Judge Martinson's direction has been incorrect. One only has to look at the reasons of Mr. Justice Shaw to see that, if the circumstances justify, an adjournment may be granted from time to time in order to achieve a fair and proper hearing. He said this:

> I add this. It is open to the trial judge who has already been assigned to the case to organize the trial and grant any adjournments that may be necessary in order to ensure that the hearing is fairly conducted. The words in s. 37(2), "the protection hearing must be concluded as soon as possible", do not suggest that the trial judge's responsibility to ensure that the hearing is fair is abrogated. The parties need not wait until the hearing date to apply to the assigned trial judge for any directions that may be necessary. However, the substantive hearing must commence within the 45 day period from the conclusion of the presentation hearing. The trial judge must require that the hearing get underway in a real rather than simply a pro forma sense. I leave to the trial judge the question of what will suffice.

As I understand that passage Mr. Justice Shaw is saying that applications for adjournment of a protection hearing from time to time may be made. In my view, relevant factors on an adjournment application would be the availability of judicial resources and whether the care is such that the parties properly can be ready to address the issues on the date fixed for the protection hearing.

[7] In this case I understand that no problem has occurred which will make it necessary to adjourn the proceeding. Judicial resources have been made available and the proceeding has been underway for sometime. It will probably be concluded early in the new year.

[8] I should note that in this case the order made by Judge Martinson appears to have been discretionary in nature. She said at p.20 of her reasons:

> The need to have a protection hearing quickly is particularly compelling in this case. [R] has not seen her mother for nearly three months, since July 8th. I have already emphasized the polarization of the medical evidence. If the doctors at Children's Hospital are right, an early decision is in [R]'s best interest. If it is determined that she is not in need of protection, a prolonged separation could do irreparable harm.
>
> I therefore direct that the trial coordinator set the Protection Hearing to commence within 45 days from today, to continue immediately thereafter. The court will make arrangements for this to happen in this unusual case. A case conference is to be set forthwith. However, in the particular circumstances of this case, the need for a case conference can be waived with the written consent of both counsel. It is hoped that plans move forward quickly to have an independent, multidisciplinary assessment conducted.

[9] It is clear that discretion was exercised in favour of an early hearing because it is an "usual case", and one in which the need to have a protection hearing quickly is particularly compelling.

[10] In exercising discretion Judge Martinson did not interfere with the care conference, and did not in any sense say that if

justice demanded that an adjournment of the trial could not be given.

[11] Mr. Justice Shaw has said that he can find no basis for interfering with the discretion exercised by Judge Martinson. I share the same view.

[12] I should mention two other matters in connection with this application for leave to appeal. I think that the granting of leave in this case might unduly interfere with the hearing now underway. If leave were granted it might be taken as an invitation to adjourn the protection hearing and await the decision of this Court. In the circumstances of this case that would not be in the interests of justice.

[13] Another matter has to be taken into account. This is a second appeal. In the initial appeal Mr. Justice Shaw canvassed the facts and the law in considerable detail. In my view a further appeal is not justified.

[14] I would dismiss the application for leave to appeal. I would refuse the application for a stay of proceedings.

"The Honourable Mr. Justice Macfarlane"