British Columbia (Director of Child, Family and Community Service) v. J.C., 1996 CanLII 8460 (BC S.C.)

Date: 1996-08-08
Docket: F960261
URL: http://www.canlii.org/en/bc/bcsc/doc/1996/1996canlii8460/1996canlii8460.html
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Date of Release: August 8, 1996 No.F960261
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE CHILD, FAMILY AND COMMUNITY SERVICE ACT
BILL 46, 1994 AND AMENDMENTS THERETO

BETWEEN:

THE DIRECTOR OF CHILD, FAMILY AND COMMUNITY SERVICE

APPELLANT

AND:

J.C. and C.C.

RESPONDENTS

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE COLLVER

Counsel for the Appellant: Frank G. Potts

Counsel for the Respondents: Steven N. Mansfield

Place and date of Hearing: Vancouver, B.C.
June 11, 1996

1 British Columbia's child protection legislation provides that where a trial judge has ordered that an apprehended child be returned to the parent entitled to custody, that order is suspended upon an appeal being brought. However, the legislation also gives a party to the proceeding the right to apply for an order that the transfer of custody take place pending the appeal. These reasons concern such an application. Two questions arise:

1. Who bears the evidentiary burden?
2. What is the nature of the burden?

2 The respondents are the parents of A.C. ("the child"), who was born on December 2, 1992. Under the authority of the Director of Child, Family and Community Service ("the director"), a social worker apprehended the child (and her older sister, who is nine) on September 15, 1994. The apprehension followed allegations of the father's abuse of the older sister.

3 The trial lasted seven days, ending on April 17, 1996. The learned Provincial Court Judge did not believe the older sister's testimony. However, because the older sister refused to return home, she was found to be in need of protection by reason of her parents' inability to care for her, and she was committed to care for twelve months.

4 The younger child was not found to be in need of protection, and was ordered to be returned to her parents.

5 The director appealed the trial decision, triggering the mentioned statutory suspension of the order returning the younger child to her parents.

6 The appeal will be heard in this court and, pursuant to s.62(2) of the Child, Family and Community Service Act, RSBC 1994, c.27 ("the Act"), the parents now seek an interlocutory order transferring custody of the younger child to them "in accordance with the order under appeal".

7 The Act provides as follows:

> 62.(1) If an order made under this Part or Part 6 has the effect of transferring the custody of a child from a director to another person, the order is suspended
>
> (a) for a period of 10 days, and
>
> (b) if an appeal is brought during the 10 day period, until the appeal is heard.
>
> (2) If an appeal is brought, any party to the proceeding in which the order was made may apply to the court hearing the appeal, and it may order that custody of the child be transferred in accordance with the order under appeal.

8 With respect to the applicable burden, s.40(2) provides that where a court finds that a child is not in need of protection, the court "must order the director to return the child as soon as possible". Accordingly, counsel for the parents submits that when, pursuant to s.62.(2), parents seek relief from the statutory suspension of the ordered return, the director must bear the burden of demonstrating why the order of the trial judge should not be implemented.

9 This is relatively new legislation. Aside from the fact that counsel could not cite a British Columbia precedent, cases decided elsewhere provide little guidance, given the variety of provisions enacted in other provinces, For example, Saskatchewan also has a "stay" provision, but its operation is not automatic. Saskatchewan's statute is also silent with respect to the burden of proof. Moreover, cases decided there reflect application of appellate rules, only.

10 In the present case, although an order to return a child creates a status quo which the applicants are attempting to uphold, the Act actually creates a new status quo by suspending that order. Accordingly, it is this legislative status quo which the parents now seek to vary. That would seem to require them to bear the burden of proof.

11 I accept the submission of counsel for the director that, if we begin by assuming that children in the director's care are safe, requiring the director to prove that the order should not be implemented is the same as requiring the director to establish that the appeal has merit. This would render the statutory suspension provision meaningless. Although the director failed at trial, I must assess the director's grounds of appeal, consider counsel's submissions, then determine whether the parents have established that, pending the appeal, it is in the child's best interests that her custody now be transferred to them.

12 What evidentiary burden must the parents meet?

13 Counsel for the parents submits that, in the absence of a statutory provision that the parents can adduce further evidence (allowed in some other provinces), the reasons of the learned trial judge must be examined to consider whether there is justification for continued suspension of the order for the younger child's return to her parents. He cites the dearth of evidence suggesting that the younger child needs protection.

14 In this province, where there is risk of injury, determining what is in a child's best interests seems to require a standard of proof requiring something less than simply balancing probabilities [Superintendent of Family and Child Service v. M.(B.) and O.(D.), 1982 CanLII 768 (BC S.C.), (1982), 37 B.C.L.R. 32 (S.C.)]. That standard was

approved in Supt. of Fam. & Child Service v. G.(C.) (1989), 22 R.F.L. (3d) 1 (B.C.C.A.), where the Honourable Mr. Justice Locke stated that the safety and wellbeing of the child must be "the starting point" for trial judges.

15 In the present case, the learned trial judge expressed discomfort with what he termed the "unreal" nature of the standard. That aside, it seems to me that, in a case where the parents seek return of custody, I am simply bound to consider what the safety and wellbeing of the child requires.

16 In my view, on an application for transfer of custody pending the hearing of an appeal, parents must simply establish, on a balance of probabilities, that it would be in the child's best interests to be returned, rather than to be left in the director's care.

17 Counsel for the director was critical of the parents' failure to present an alternative to the director's proposal of keeping the girls together, in care. That seems harsh, since the submission of counsel for the parents obviously reflects their instructions to simply seek the younger child's return, in light of the findings of the trial judge that abuse did not occur.

18 The parents' application must, however, be assessed in the context of prevailing circumstances, and I am required to consider the factors which are listed in s.4 of the Act. With emphasis on those which seem to be applicable here, the statutory factors are as follows:

(a) the child's safety;

(b) the child's physical and emotional needs and level of development;

(c) the importance of continuity in the child's care;

(d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;

(e) the child's cultural, racial, linguistic and religious heritage;

(f) the child's views;

(g) the effect on the child if there is a delay in making a decision.

19 Considering those factors in reverse order, I first observe that appeals in child protection matters are heard on a priority basis and, although recognition of child's sense of time dictates the earliest possible determination of custody, hearing delay is not significant, in light of how long the child has already been in care.

20 With respect to her relationship with others, the child has been in care for half of her infancy. She has, of course, always lived with her older sister. Although her parents are not strangers to her (they have exercised access rights), there is, nevertheless, reason for pause before wrenching her from her older sister pending the hearing of the appeal.

21 I acknowledge that the learned trial judge must have considered the consequences of the sisters' separation when he committed the older child to care but ordered the younger child returned to her parents. Separating very young children is, however, only one consideration.

22 If the order of the learned trial judge is now implemented, properly programmed preparation for the child's return to her parents will not be possible. That, I concede, is a problem every time a child is ordered returned to parents pursuant to s.40.(2) of the Act. It is, as well, something which an older child might well overcome or adapt to.

23 I also acknowledge the importance of continuity in an infant's care. Given this child's tender age, her physical and emotional needs, and her level of development, I am not satisfied that, pending the hearing of the appeal, it would be in her best

interests to disturb her present living arrangements.

For the above reasons, the application is denied.

There will be no order for costs.

Vancouver, B.C., August 8, 1996 "Collver, J."