Case Name:

Children's Aid Society of the Districts of Sudbury and Manitoulin v. L.N.

Between
The Children's Aid Society of the Districts of Sudbury and Manitoulin, Appellant, and
L.N., V.M. (Father of K.N. [Hereafter referred to as K.N.(1)]) and D.M. (Father of L.M.), Respondents

[2011] O.J. No. 855

2011 ONSC 1052

Court File No. AP-32-11

Ontario Superior Court of Justice

P.C. Hennessy J.

Heard: January 24, 2011.
Judgment: February 28, 2011.

(32 paras.)

Counsel:

Dawn V. Dubois, for the Appellant.

Lance Carey Talbot, for the Respondent L.N.

Gerald Brouillette, for the Respondent V.M.

George H. Fournier, for the Respondent D.M.

Decision on Appeal

1 P.C. HENNESSY J.:-- The Children's Aid Society of the Districts of Sudbury and Manitoulin ("Society") brings a motion for a stay of execution pursuant to s. 69(4) of the *Child and Family*

Services Act. They seek this order pending the hearing of the appeal of the final Order of Justice M.G. McLeod of the Ontario Court of Justice, made on January 17, 2011.

2 There are two children who are the subject of this proceeding: L.M., born May 29, 2009 ("L.M."); and K.N.(1), born August 17, 2003 ("K.N.(1)"). D.M. is the father of L.M. and V.M. is the father of K.N.(1). L.N. is the mother of both children.

3 On November 30, 2009, the two children were apprehended from the care of L.N. and D.M., after the discovery of serious injuries on L.N.'s body, and placed in the interim care and custody of K.N. [Editor's note: Hereafter referred to as K.N.(2)] and her spouse. K.N.(2) is the sister of the mother. At the same time, K.N.(1) was initially placed in the interim care of his father. On April 27, 2009, K.M.(1) was placed in the care of his paternal grandparents with whom he had been living while in the temporary care of his father. During the time that L.M. was in the care of K.N.(2) and her husband, the mother was able to be with and care for L.M., subject to strict supervision terms. In December 2009, L.M. suffered a significant bruise to his arm and was apprehended from the care of his maternal aunt and placed in foster care. In May 2010, L.M. suffered a broken leg. The mother alleges that this occurred while he was in the care of the Society.

4 The trial of this matter was held on four days in January 2011. The trial judge found the children L.M. and K.M.(1) to be in need of protection and placed them in the care of their mother, L.N., subject to the supervision of the Society for 12 months.

5 The initial apprehension of the children occurred following the discovery of severe injuries to one month old L.M. which included torn frenulum to the tongue and 19 fractures to his limbs and ribs. L.M. had been in the exclusive care of his parents L.N. and D.M. There was no allegation of any injury to the child K.M.(1). Neither parent could provide a satisfactory explanation of the cause of L.M.'s injuries. Neither parent has had any past involvement with the Society, nor has any prior criminal conviction, nor has any known addictions.

The Findings at Trial

6 Justice McLeod made the following findings at trial:

(1) In his first month of life, while in the care of his parents, the child L.M. sustained severe trauma which could only be caused by the application of substantial force.
(2) D.M. caused the injuries detected on June 29, 2009, and refrained from telling L.N. anything about what he had done until June 29, 2009, when it was too late.
(3) The evidence establishes that Ms. L.N.'s opportunity to harm L.M. was not exclusive.
(4) With respect to the injuries detected on June 29, 2009, the evidence failed to establish that L.N. was responsible or that she should have been aware that the infant had been hurt by someone else and failed in her responsibility as a parent.
(5) D.M. clearly and unequivocally admitted responsibility for causing the injuries detected on June 29, 2009. He had the opportunity, ability and fully admitted to doing so. D.M.' assertion that he did not appreciate the significance or consequences of his actions is unreliable. With respect to

the injuries to L.M. which were discovered on June 29, 2009, the case against D.M. is overwhelming.

(6) The expert evidence that the injuries could not have been caused by the actions described by D.M. is not grounds to reject the admissions made by D.M.

(7) With respect to the injury discovered on December 13, 2009, the court declined to make the finding that L.N. was responsible for them.

(8) With respect to the injury detected May 5/6, 2010, the court found that the evidence against either parent was extremely weak.

(9) At the time of the apprehension in June, 2009, both L.M. and K.N.(1) were in need of protection.

(10) The possibility that either L.M. or K.N.(1) would be at risk in the mother's care has been substantially mitigated by the findings made against D.M. and the other findings that there is no other evidence to support a finding that L.N. continues to present a reasonably-based risk of any kind.

(11) The children were in need of protection and a further court order was necessary to protect them from the risk of harm.

(12) The court made an order returning the children to the mother's care subject to a 12 month supervision order.

The Appeal

7 The society appealed the order of the trial judge and brought this motion for a stay of the order pending the appeal.

8 The Society identified 16 issues on appeal. It is not necessary to deal with each one of them. The submissions largely focused on the question of whether the judge had misapprehended the experts' evidence with respect to causation, misapprehended the statements of D.M. regarding his role in the injuries, and therefore did not correctly apply the law in that regard.

9 The appellant Society argues that the judge misapprehended the evidence of D.M. thereby concluding that Mr. D.M. had admitted to causing injuries to the child. In making this finding, the trial judge exonerated the mother, both with respect to causing the injuries and with respect to the allegations that she did not adequately protect the child from injuries.

10 The Society submits that the case of *Children's Aid Society of Toronto v. K.P.* [2006] O.J. No. 5599 stands for the proposition that where there is no evidence of intervention by a third party, the failure to explain the cause of injuries constitutes grounds for a finding that the child is in need of protection.

11 It is the absence of a credible explanation of the real cause of the injuries that seems to be at the crux of this case. Although the experts could not comment on D.M.'s admission, they did give the opinion that his explanations for the injuries were not consistent with the actual injuries sustained. The trial judge found that Mr. D.M.'s explanations were simply intended to buttress his assertion that he did not intend to injure L.M. and did not diminish the effect of his admission.

12 The Society further argues that the trial judge misapprehended the evidence with respect to the allegation that the mother, Ms. L.N., should have noticed the distress that L.M. undoubtedly suffered at the time of or shortly after the severe injuries.

13 The respondent mother argues against a stay. The father of L.M., D.M. takes no position on the motion. The father of K.N.(1), V.M., joins the Society in the appeal and the motion for the stay.

Serious Issue on Appeal

14 On the three prong test for a stay, the first issue is whether there is a serious issue on the appeal. I find that there is a serious issue.

15 The standard of review on appeals where it is alleged that the trial judge made an error of law is correctness. Where the appellant argues that the judge has made an error of fact, the standard of review is "palpable and overriding error."

16 The trial judge did consider the law with respect to unexplained injuries. He was of the view that the cases cited by the Society were easily distinguished from the present case.

17 D.M. offered certain limited explanations for the injuries to L.M. Essentially he stated to the Society and police investigators that he may have handled L.M. roughly while he was changing him, swaddling or holding him and that this handling, as he described it, may have caused the injuries but that he couldn't be sure of the exact cause of the injuries and in any event had no intent to hurt the child. He also described one fall he had when he was carrying the child.

18 In the opinion of the experts, the child sustained more than one severe trauma which could only have been caused by the application of substantial force. They testified that the actions described by D.M., with any amount of force, would not have caused these injuries. In their view, the injuries remained unexplained as neither parent provided a credible explanation for the injuries.

19 The trial judge relied on the statements of D.M. and an assessment of his credibility to find that he caused the injuries and that the mother did not cause the injuries.

20 The Society argues that the judge erred by finding that the 'explanations' provided by D.M. were sufficient to constitute an explanation of the injuries and more importantly, that he erred by finding that the explanation exonerated Ms. L.N. In particular, the appellants point to the evidence that Ms. L.N. seems to have been unaware of any distress undoubtedly suffered by the infant even though she acknowledges that the child was in her continuous care.

21 Although I do not have the benefit of the trial transcript, I have had the opportunity to review the various affidavits with respect to the statements made during the investigation. The experts' opinions that Mr. Mark's admissions do not actually explain the injuries remain at odds with the finding that the admissions are sufficient in themselves to exonerate the mother. Although the finding of the trial judge is well-reasoned, there is a good argument that he misapprehended the law with respect to unexplained causes of injuries in child protection cases.

22 With respect to the implication of the mother, I am of the view that the Society has a strong argument that the trial judge misapprehended the evidence with respect to the apparent distress that the infant would have suffered by concluding that the infant's reactions in December 2009 and May 2010 support the argument that there would have been no observable distress during the first month of life when the infant suffered 19 severe fractures.

23 If the trial judge misapprehended either the mother's evidence with respect to her observations of the infant or the father's statements, this would be a palpable and overriding error.

Irreparable Harm

(a) *L.M.*

24 Given the unexplained injuries and the role of the parents as the caregivers of L.M., there is a serious risk of harm to L.M. if a stay is not granted and it turns out that the mother is not able to properly care for or protect her child. The risk that exists in this case is serious. There were 19 fractures and other injuries in the first month of the child's life. Further injuries could lead to permanent impairment. I find that a return to mother pending appeal is a risk of irreparable harm to the child.

(b) *K.N.(1)*

25 K.M.(1) is seven years old and has been living with his paternal grandparents for the last eighteen months. He sees his parents and other members of the blended families regularly. His father joins the Society in this appeal. He has not suffered any injuries in the care of his mother.

26 Although the risk of harm to K.N.(1) is significantly less to K.N.(1), he is a vulnerable child and a risk exists.

27 I am persuaded on the arguments that K.N.(1) could be at risk of irreparable harm if he is placed in the care of the mother and the stay is not granted.

Balance of Convenience and Harm

28 The mother is working very hard to support herself and see her two children pursuant to a schedule worked out by the Society. The mother-child time and bond is not fully realized in such circumstances. To this extent, having the children in care pending appeal is a negative outcome for the mother. Nor is it ideal to have the children separated from one another. The mother argues that K.N.(1) is exhibiting signs that he is confused over where he belongs. There is a well-developed protocol in place for frequent and regular access between both parents (separately) and L.M. Although this is not ideal from the mother's perspective, it does provide safe supervised visits and care from the mother to her son.

29 On the other hand, the children are protected in this period from the risk posed by a return to her care. Neither father opposes the interim stay pending appeal. The father of K.N.(1) specifically supports the stay.

30 In the event the Society is unsuccessful on the appeal, the mother and the children will have been deprived of important bonding time together. However, the current access protocol goes a fair way to ensure that the mother and the children have frequent and regular time together to ensure that a significant relationship can be sustained.

31 The safety of the children is the primary interest. In balancing the interests, conveniences and risk of harm, I am persuaded on all of the evidence that the stay is the better option for the children.

32 The evidence on the three prong test is in favour of a stay of the Order pending the appeal of this matter. Order to go accordingly.

P.C. HENNESSY J.

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