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Case Name:

I.W. v. Kasohkowew Child Wellness Society

Between
I.W. & B.W., Appellants, (Applicants), and
Kasohkowew Child Wellness Society, Respondent, (Respondent)

[2011] A.J. No. 580

2011 ABCA 160

Dockets: 1003-0280-AC, 1003-0343-AC

Registry: Edmonton

Alberta Court of Appeal
Edmonton, Alberta

J.E.L. Côté and P.T. Costigan JJ.A. and R.A. Graesser J. (ad hoc)

Heard: May 2, 2011.
Judgment: May 26, 2011.

(19 paras.)

Aboriginal law -- Aboriginal status and rights -- As consideration in family law proceedings -- Appeal by former foster parents from dismissal of applications for guardianship and parenting and for access to child allowed in part -- Child, aboriginal with siblings in care, lived in foster home for three years prior to reunion with siblings and placement with relatives on reserve -- Best interests of child served by preventing alienation from family and culture -- No basis to admit fresh evidence about lack of inappropriate physical contact by foster parents as judge already found that none had occurred -- Reasons unclear for dismissing appellants' access application, where two experts testified that access not inappropriate.

Family law -- Custody and access -- Considerations -- Best interests of child -- Child's cultural heritage -- Separation of siblings -- Expert report or assessment -- Access -- Appeal by former foster parents from dismissal of applications for guardianship and parenting and for access to child allowed in part -- Child, aboriginal with siblings in care, lived in foster home for three years prior to reunion with siblings and placement with relatives on reserve -- Best interests of child served by preventing alienation from family and culture -- No basis to admit fresh evidence about lack of inappropriate physical contact by foster parents as judge already found that none had occurred -- Reasons unclear for dismissing appellants' access application, where two experts testified that access not inappropriate -- Family Law Act,

ss. 18, 35.

Family law -- Child protection -- Protective agencies and institutions -- Supervision or guardianship -- Considerations -- Best interests of child -- Care and custody of children -- Placing the child in a place of safety -- Custody to non-parent -- Practice and procedure -- Evidence -- Appeals and judicial review -- Appeal by former foster parents from dismissal of applications for guardianship and parenting and for access to child allowed in part -- Child, aboriginal with siblings in care, lived in foster home for three years prior to reunion with siblings and placement with relatives on reserve -- Best interests of child served by preventing alienation from family and culture -- No basis to admit fresh evidence about lack of inappropriate physical contact by foster parents as judge already found that none had occurred -- Reasons unclear for dismissing appellants' access application, where two experts testified that access not inappropriate -- Family Law Act, ss. 18, 35.

Appeal by IW and BW from the dismissals of their applications for guardianship and parenting of and contact with a six-year-old First Nations child who had been in their foster care for three and one-half years. The child was placed in the appellants' home in March 2005. Her siblings were also subject to guardianship orders. In August 2008, the Society, the child's permanent guardian, advised the appellants that the child would be removed from their care and placed with her siblings with a view to eventually placing the child with relatives on the Samson Cree Reserve. The appellants were unsuccessful in having the placement decision reviewed. They requested the child's removal by the end of June 2009. The child was removed and placed with her siblings. In January 2010, the child and two siblings began the process of relocating to their relatives' home. In August 2010, the children were placed full-time with their relatives. After the child's removal, a psychologist recommended against unsupervised access by the appellants in part because of alleged inappropriate physical contact. The police investigated and no charges were laid. The appellants obtained a pre-trial order requiring the Society to disclose any documents upon which it intended to rely in their applications for guardianship, parenting and contact. In the application, the appellants led expert evidence from a psychologist recommending the placement of the child in their care. The psychologist considered the child's separation from the appellants detrimental. The Society led evidence from its psychologist. She testified that it was better to place the child with relatives and siblings on the reserve to prevent the child from becoming alienated from her culture, community and family. She had no problem with the appellants having unsupervised access. The child's caseworker considered unsupervised access inappropriate. The judge found that the child had bonded with the appellants. She found that no inappropriate physical contact had occurred. Further, she accepted that reintegration of the child into a stable family in her cultural community was a priority, outweighing the child's attachment to the appellants. The judge went on to find that the appellants failed to prove that a contact order was reasonable in all the circumstances. The appellants sought to adduce fresh evidence on appeal in the form of an assessor's letter. The assessor concluded that there was no merit to the allegation of inappropriate physical contact and suggested that it was inappropriate for the Society's expert to have rendered an opinion about custody and access without having completed an assessment.

HELD: Appeal allowed in part. Given the judge's finding that no inappropriate physical contact occurred, the fresh evidence on this point could have had an impact on the outcome of the application. The judge was aware of the extent of the Society's expert's involvement with the children as their therapist. No ethical issues formed the basis of the judge's decision. The appeal relating to the guardianship and parenting application was dismissed. There seemed to be a gap in the judge's reasons for concluding that a contact order was not appropriate, given that both experts testified that contact would not be inappropriate. Factual findings on this issue were necessary, requiring a re-hearing on the merits of the contact issue.

Statutes, Regulations and Rules Cited:

Family Law Act, SA 2003, c. F-4.5, s. 18(2), s. 35(5)

Appeal From:

Appeal from the Order by The Honourable Madam Justice J.E. Topolniski. Dated the 17th day of November, 2010. Filed on the 16th day of December, 2010 (Docket: FL03-23038).

Counsel:

K.S.V. Linton, for the Appellants.

W.B. Hogle, Q.C., for the Respondent.

F.A. Shadlyn, Q.C. (no appearance), for the Interested Party.

Memorandum of Judgment

The following judgment was delivered by

1 THE COURT:-- The appellants appeal the dismissal of their applications for guardianship and parenting of, and contact with, a six year old child who was in their foster care for three and a half years. They argue the trial judge misapprehended the evidence of the attachment between them and the child; erred in requiring proof of harm to the child; erred in interpreting a pre-trial order; erred in accepting the custody recommendation of the respondent's expert; and erred in placing undue weight on the preservation of the child's family unit. The appellants apply to adduce fresh evidence in their appeals. The respondent is the child's permanent guardian.

FACTS

2 The child, a member of the Samson Cree Nation, was placed in the appellants' foster home in March 2005. Her siblings were also the subjects of guardianship orders. In August 2008, the respondent advised the appellants that the child would be removed from their care and placed with her siblings with a view to eventually placing the children with relatives on the reserve. After an unsuccessful attempt to have the placement decision reviewed, the appellants requested the respondent to remove the child by the end of June 2009. The child was removed and placed with her siblings. In January 2010, the child and two of her siblings began the process of relocating to their relatives' home on the reserve. In August 2010, the children were placed full-time with their relatives.

3 After the child's removal from the appellants' home, Ms. Massimo, a psychologist, recommended against unsupervised access by the appellants in part because of alleged inappropriate physical contact. The police investigated that allegation and closed their file without laying charges.

4 The appellants obtained a pre-trial order from Browne J. which required the respondent to disclose certain documents and provided:

> Any documents or disclosure not made known and provided to the solicitors for the Applicants ... shall not be referred to or admitted into evidence at trial nor relied upon by the Respondent or the Respondent's witnesses during the conduct of the trial herein.

THE GUARDIANSHIP AND PARENTING APPLICATION

5 At the trial of their application for guardianship and parenting, the appellants led expert evidence from a psychologist, Ms. Torres, whose qualification as an expert in the preparation of parenting and custody assessments was admitted. The trial judge found Ms. Torres was not qualified as an expert in the area of ethical standards. Ms. Torres recommended that the child should be in the appellants' care. In her opinion, it was clear that separation from the

appellants would be detrimental to the child.

6 The respondent led expert evidence from Ms. Massimo. The appellants consented to Ms. Massimo's qualification as an expert in psychological counselling and therapy with particular expertise in working with aboriginal persons and children. Ms. Massimo testified it would be better for the child to be placed with her relatives and siblings on the reserve than with the appellants. She suggested the child might become confused and disengaged or alienated from her culture, community and family if she was not placed with her relatives and siblings on the reserve. Ms. Massimo testified that she would have no problem with the appellants having ongoing unsupervised access to the child if the child was placed with her relatives. The respondent also led evidence from the child's caseworker, Ms. Twins-Hardy, who was not qualified as an expert. Ms. Twins-Hardy testified that it would not be appropriate for the appellants to have contact with the child.

7 During the trial, counsel for the appellants objected to questions asked of the respondent's witness, Ms. Nepoose, on the basis that the questions were precluded by the order of Browne J. because they went beyond the words in a disclosed document. The trial judge did not sustain the objection.

8 The trial judge found the child had bonded with the appellants and that a discussion about the child's relatives was relevant to the assessment of the child's best interests. She considered the evidence of the expert witnesses and reviewed all the factors in s. 18(2) of the *Family Law Act*, S.A. 2003, c. F-4.5. She found the evidence did not establish that inappropriate physical contact occurred. She accepted Ms. Massimo's evidence that reintegration into a stable family in the child's cultural community was a priority. In the result, she concluded: "while the child's continuing attachment to the [appellants] is of some significant weight, that attachment and consideration of all of the other factors which I have discussed are not capable of sufficiently overriding other considerations": Transcript 402/14-17.

THE CONTACT APPLICATION

9 Following the dismissal of their application for guardianship and parenting, the appellants filed an application for contact with the child. The trial judge dismissed that application. She noted that the appellants relied on the evidence of Ms. Torres, who was of the opinion that there was a strong attachment between the appellants and the child and that separation would be detrimental to the child. The trial judge considered the test in s. 35(5) of the *Family Law Act* - that the court must be satisfied that (a) contact is in the best interests of the child, (b) the child's physical, psychological or emotional health may be jeopardized if contact is denied and (c) the guardian's denial of contact is unreasonable. She concluded the appellants had not discharged their onus of proving a contact order was reasonable in all the circumstances. She said:

> First, I am not satisfied that it is in the child's best interests, that the evidence shows this. There is clearly a bond, nevertheless, that is one feature and one alone. Even if that were the case and the first best interest tests were met I would not find on this evidence that there was any jeopardy to the child's well being by not making the order: A.R.D. F52/20-23.

STANDARD OF REVIEW

10 Considerable deference should be given to a trial judge's findings in a family law case: ***Hickey v. Hickey***, [1999] 2 S.C.R. 518 at para. 10.

ANALYSIS

The Guardianship and Parenting Application

11 The appellants argue the trial judge misapprehended the evidence pertaining to the significance of the emotional attachment between them and the child and placed undue weight on the preservation of the child's family unit. These grounds of appeal cannot succeed. The trial judge specifically found the child had formed a bond with the appellants.

She weighed this finding and others when considering the factors in s. 18(2) of the *Family Law Act*. She found that other considerations, such as the desirability of fostering the child's connections to her siblings, extended family and culture outweighed the child's bond with the appellants. Absent an error in principle, which did not occur here, the weight to be given to evidence is within the purview of the trial judge. We cannot interfere with the trial judge's weighing of the evidence.

12 The appellants say the trial judge failed to give effect to Browne J.'s pre-trial order and, in so doing, allowed the respondent to mount a successful collateral attack on the order. We are not satisfied that the trial judge misinterpreted the pre-trial order. It was directed towards pre-trial documentary disclosure. The paragraph at issue precluded reference to, or entry into evidence of, non-disclosed documents. The questions to which the appellants' counsel objected were intended to elicit *viva voce* evidence from Ms. Nepoose. The pre-trial order had no application to that sort of evidence. In any event, the trial judge's reasons make only a brief reference to Ms. Nepoose's evidence and there is no indication that any reliance was placed on that evidence.

13 The appellants assert that the trial judge erred in accepting the custody recommendation of the respondent's expert because it exceeded the expert's qualifications and retainer and was not permitted by the code of conduct governing psychologists. The appellants' counsel consented to Ms. Massimo's qualifications and no objection was taken at trial to the scope of her expert evidence. The appellants' expert was not qualified to give opinion evidence as to ethical standards and the trial judge found that Ms. Massimo's ethical conduct was not a matter for the court's consideration. On this record, no reviewable error has been established from the trial judge's handling of the expert evidence.

Fresh Evidence

14 The fresh evidence the appellants seek to adduce is in the form of a letter from an assessor who concluded there was no merit to the allegation of inappropriate physical contact and documents that suggest it was inappropriate for Ms. Massimo to provide an opinion about custody and access without having completed an assessment. The trial judge concluded that the evidence did not support the allegation of inappropriate physical contact. Therefore, the fresh evidence on this issue could not affect the result of the guardianship and parenting application The trial judge was aware of the extent of Ms. Massimo's involvement as the child's therapist. The thrust of Ms. Massimo's evidence related to the counselling and treatment of aboriginal children, including the child. The trial judge specifically declined to consider ethical issues. Therefore, this fresh evidence does not bear on a potentially decisive issue at the trial of the guardianship and parenting application.

15 The appeal from the dismissal of the appellants' guardianship and parenting application is dismissed.

The Contact Application

16 The appellants assert that the trial judge erred in requiring proof of harm, rather than a possibility of harm, to the child if no contact order was made. The trial judge correctly stated part of the test as "the child's physical, psychological or emotional health may be jeopardized if contact between the child and the Applicant is denied": A.R.D. F51/14-17. She noted there must be sufficient evidence on which to find jeopardy.

17 However, Ms. Torres clearly voiced the opinion that complete separation from the appellants will be detrimental to the child. Moreover, Ms. Massimo testified that she would have no problem or difficulty with the appellants having ongoing unsupervised access to the child if the child was placed with her relatives. Ms. Torres and Ms. Massimo were the only expert witnesses. Nonetheless, the trial judge concluded that a contact order was not in the child's best interests and she would not find "on this evidence" that there was any jeopardy to the child if a contact order was not made. In reaching these conclusions, the trial judge either misapprehended the evidence of Ms. Torres and Ms. Massimo or failed to articulate a principled basis for rejecting that evidence. Moreover, the trial judge failed to identify any evidence supporting her conclusions. That gap in reasons is operative because this is not a case in which the trial judge's finding is clearly supported by the preponderance of the expert evidence. As a result of these errors, the order dismissing the

contact application must be set aside. Given this result, it is unnecessary for us to consider the fresh evidence in the context of the contact application.

18 On this record, it would not be appropriate for us to make a contact order. Findings of fact must be made. Accordingly, the issues of whether there should be contact and, if so, the extent of that contact are remitted to the Court of Queen's Bench for re-hearing before a different judge. The re-hearing should proceed expeditiously. In the meantime, we remind the respondent that in law no one should take any steps that would defeat the purpose of our order to re-consider the contact matter on the merits.

RESULT

19 The appeal from the dismissal of the guardianship and parenting application is dismissed. The appeal from the dismissal of the contact application is allowed and a new hearing is ordered on that issue before a different judge.

J.E.L. CTÉ J.A.
P.T. COSTIGAN J.A.
R.A. GRAESSER J. (ad hoc)

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