Wpg. Child and Family Services v. M.A. et al., 2002 MBQB 209

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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	)	COUNSEL
	)	
WINNIPEG CHILD AND FAMILY SERVICES,	)	
	)	
Petitioner,	)	Petitioner:
- and -	)	Marlaine Lindsay
	)	
M.A. and G.R.,	)	
	)	
Respondents.	)	Respondents:
	)	Shannon Hanlin for M.A.
	)	No one for G.R.
	)	
	)	Judgment delivered:

) July 19, 2002

BEARD J.

I. THE ISSUE

[1] This is a case about an aboriginal child who is being denied her right to a permanent, secure family because the aboriginal agency and the band's community committee have vetoed any such placement. The reason for the veto arises from a desire to stop the removal of aboriginal children from their cultural heritage. While a laudable goal, its dogmatic application is counterproductive and unfair. The tragedy in this case is that the best plan for the child, which would see her placed with a permanent family, has been rejected for historical and political reasons that have nothing to do with her case. The irony is that, in trying to make up for past wrongs to aboriginal children and past discrimination towards the aboriginal community, more wrongs are being committed and the discrimination against individual aboriginal children goes on in another form, this time perpetuated by the aboriginal agency and the band community committee. While non-aboriginal children are offered a permanent adoptive family, aboriginal children continue to be offered the lesser option of a foster family, which lacks the permanence and security that would come with an adoption.

[2] It is important to point out that this is not a case about the non-aboriginal child welfare system preferring a non-aboriginal family over an aboriginal family, because neither Winnipeg Child and Family Services ("Wpg CFS") nor Dakota Ojibway Child and Family Services ("DOCFS") has an aboriginal family for her. An aboriginal placement is not an option, in any form, so the child is left to be raised by one or more non-aboriginal foster families, which is clearly not the best available option for her. The end result is that the child is being held hostage by a child welfare system that has put its own political interests and expediencies ahead of her best interests. Surely this is unfair to her.

[3] Wpg. CFS has applied for permanent guardianship of A.S.A. ("A.S.A."), born […], 1999. Her mother, M.A. ("Ms M.A."), opposed the application. Her putative father, G.R., has had no involvement with her, has not contacted Wpg. CFS to respond to the application and has not appeared at any of the court proceedings regarding this apprehension.

[4] There are two issues in this case:

(i) was A.S.A. in need of protection when she was apprehended and does she remain in need of protection today; and

(ii) will her best interests be met by the plan of Wpg. CFS or by that of her mother?

II. THE FACTS

[5] Ms M.A.'s birthday is on […], 1984, so she turned 15 nine days after A.S.A. was born. At that time, she was living with her mother and her two sisters, aged approximately 9 years and 11 years. Because of Ms M.A.'s very young age, Wpg. CFS was notified of the birth and immediately became involved with the family to provide support to help Ms M.A. learn how to care for her baby. After a couple of months, it became clear to the worker that Ms M.A.'s mother, F.A. ("the grandmother"), had taken over the care of the baby while Ms M.A. was going out, sometimes for days at a time, drinking and associating with members of a street gang. Often, when the worker went to the house, Ms M.A. was either not there or was sleeping, and both she and her mother were quite candid with the worker as to her activities.

[6] When it became clear that the grandmother had become the primary caregiver, the worker shifted her plan to one of supporting the grandmother in her care of the baby and attempting to stabilize Ms M.A. so she could get alcohol treatment and possibly return to school. The worker continued with this focus until the grandmother's own situation broke down and she began drinking and staying out herself instead of caring for her children and A.S.A.. At that point, in early May 2000, A.S.A., Ms M.A. and her two sisters were apprehended from the grandmother. Ms M.A. turned 18 while in foster care and ceased being a permanent ward, but her two sisters and A.S.A. remain in foster care.

[7] At the time of the trial in April 2002, the grandmother had been accepted into a facility operated by the Native Women's Transition Centre Inc., a long- term treatment centre providing shelter, counseling and life skills training. When we reconvened in July, the grandmother had left the treatment centre before she completed the program and Ms M.A.'s sisters remained in foster care, as did A.S.A.. A.S.A., who is now three years old, has now been in the temporary guardianship of the Wpg. CFS since May 19, 2000, a period of almost 25 months.

[8] Ms M.A. testified and called evidence at the trial. She did not suggest that she was ready to have A.S.A. returned to her care at that time. Instead, her lawyer argued

that I should adjourn the trial until a date into the fall to allow Ms M.A. time to find a suitable programme and begin treatment.

[9] When we reconvened in July 2002, Ms M.A. failed to appear in court. Her lawyer stated that she had recently spoken to her and expected her to be at the hearing. Notwithstanding Ms M.A.'s non-appearance, her lawyer stated that her plan remained to secure a place at the Native Women's Transition Centre Inc. treatment facility. As I understood her submission, however, the earliest that Ms M.A. could be admitted would be in September 2002, and even that date is not assured. According to the evidence at trial, Ms M.A. would be expected to attend the program for several months before having A.S.A. move in with her, resulting in A.S.A. spending many more months as a temporary ward before there was even a possibility of attempting a return to her mother.

[10] The witnesses for Wpg. CFS indicated that the best plan for A.S.A. would be to place her for adoption, but the agency is not pursuing this option for her. A.S.A. has or is entitled to treaty status, so, according to the Child and Family Services manual, she can only be placed for adoption with a non-native family if the placement is approved by the relevant aboriginal agency, in this case, DOCFS. That agency has vetoed any consideration of an adoption plan for A.S.A. involving a non-aboriginal family, so Wpg. CFS is not even looking at that option.

[11] The Wpg. CFS plan is to move A.S.A. to new long-term foster home. The current foster parents have appealed that decision based on their objection to the proposed new family, whom they know personally. Wpg CFS cannot undertake the move until that appeal process is completed, which the worker expects will be sometime in August 2002. As the current family is not appealing to keep A.S.A., she will be moved either to the home that the agency has identified, if the appeal is not successful, or to another home yet to be identified.

[12] In brief, the history of this apprehension is as follows:

[…], 1999	A.S.A.'s birth date
May 3, 2000	first apprehension and application for guardianship – agency looking for temporary guardianship
May 19, 2000	Ms M.A. consents to a temporary order of guardianship to November 19, 2000

November 16, 2000	second apprehension and application for guardianship – agency looking for temporary guardianship
March 23, 2001	Ms M.A. consents to a further temporary order of guardianship to September 23, 2001
September 24, 2001	third apprehension and application for guardianship – agency looking for permanent guardianship
April 8, 2002	trial, agency asking for permanent guardianship
July 12, 2002	continuation of the trial to address certain issues regarding placing A.S.A. for adoption

III. ANALYSIS

(i) need of protection

[13] It was clear from the evidence at trial that A.S.A. was in need of protection at the time of her apprehension and that she remained in need of protection in April 2002. That was not contested by either Ms M.A. or the grandmother.

[14] The evidence at trial was that, in spite of the many services offered to Ms M.A. and the efforts of several workers to personally take Ms M.A. to the various agencies, programmes and facilities to assist her in beginning life skills training to take on her role as a mother, she failed to follow through on anything. After a short while, she abdicated her responsibility to care for A.S.A. in favour of her mother and continued her own life as a single teen, one apparently out of control. She was clearly not prepared to take any steps to care for A.S.A. on a long-term basis. After many months, the grandmother resumed drinking, leaving the children alone and was unable to maintain a home for them, so A.S.A., Ms M.A. and her two sisters were all apprehended. They were all in need of protection at that time.

[15] It appears that nothing changed between the apprehension and the trial. The agency continued to try to work with Ms M.A., but she continued to fail to follow through with any of the support services offered to her. She had no means of support, no home and was living a transient lifestyle. By Ms M.A.'s own evidence, she was

not asking to have A.S.A. returned to her immediately, so A.S.A. remained in need of protection at the date of the trial.

[16] Because I adjourned the trial to obtain further information from the agency, I offered Ms M.A. the opportunity to call further evidence when we resumed to show what further steps she had taken. Not only had she taken no further steps, but she also failed to appear in court when we reconvened. The social worker testified that she still had no income, no permanent home and remained transient. Thus, it is clear that A.S.A. remained in need of protection at the date of the continuation of the hearing.

(ii) the mother's plan

[17] As I indicated earlier, the mother's plan is to adjourn the trial and leave A.S.A. in temporary care while she pursues treatment at some unspecified time in the future. She continues to live with another family on an intermittent basis, to associate with members of a street gang and to have no means of support despite attempts by the social worker to help her obtain welfare.

[18] Her request for an adjournment runs counter to the clear intention of the ***Child and Family Services Act***, S.M. 1985-86, c. 8 – Cap. C80. Section 41(1)(a) clearly states that the period of temporary guardianship shall not exceed 15 months for a child under 5 years old. In this case, A.S.A. has been in care for over two years, and it is time to make some permanent plans for her future.

(ii) the agency's plan

[19] Both A.S.A.'s worker and the representative of Wpg. CFS's permanency planning committee testified that an adoption would be the best arrangement for A.S.A., as it would provide her with the most stable family unit. Further, both indicated that A.S.A. is a very adoptable child and there would be no difficulty in finding an adoptive home for her, but there was no aboriginal adoptive home available. Any consideration of adoption by a non-aboriginal family was vetoed by DOCFS, so, at my direction, the trial was adjourned and the assistant director for DOCFS, Beverley Flett ("Ms Flett"), appeared to explain that agency's position regarding A.S.A.. Ms Flett was an honest and straightforward witness, and I appreciated her frank answers to my questions.

[20] Ms Flett testified that the community committee of the band of which A.S.A. is or is entitled to be a member has refused to permit any adoptions of any aboriginal children by a non-aboriginal family for policy reasons arising out of the historical adoption of aboriginal children away from their communities and the failure of many of those adoptions. Consistent with that philosophy, the community committee

refused to consent to a non-aboriginal adoption for A.S.A., and DOCFS adopted that position.

[21] I have great sympathy for past aboriginal adoptees whose adoptions failed, and for the bands and the parents who experienced the loss of many children over a period of several decades. To the extent that the removal of aboriginal children from their families was unjustified or justified for political purposes such as assimilation into the white society, it was wrong and cannot be condoned. It caused great damage to many aboriginal families and communities, which cannot be undone. It is equally wrong, however, to deprive today's children of any permanent family, where their birth family cannot care for them and an aboriginal family is not available.

[22] Many steps have been taken to avoid the past mistakes and past injustices by involving the aboriginal community in the child welfare process. As the following facts show, A.S.A.'s case cannot be compared to the historical removal of aboriginal children for political purposes without consultation with the aboriginal community:

- notice was given to the DOCFS when A.S.A. was first apprehended;

- DOCFS had the right and the opportunity to be involved in planning for A.S.A.'s care from her first apprehension and to propose a culturally appropriate solution;

- DOCFS was advised of each subsequent apprehension and of the decision by Wpg CFS to apply for a permanent order of guardianship;

- DOCFS was asked to take the order of permanent guardianship in its name and assume responsibility for A.S.A. following the order, but it declined to do so;

- after the trial, a DOCFS supervisor reviewed the Wpg CFS file and agreed with both the apprehension and that a permanent order of guardianship of A.S.A. should be granted to Wpg CFS.

[23] The fact is that the decision to veto an adoption placement for A.S.A. with a non-aboriginal family has nothing whatsoever to do with A.S.A., her particular circumstances, or this case. The community committee's decision, which was adopted by DOCFS and accepted by Wpg CFS, is impossible to support on the facts of this case, which are as follows:

- The community committee and the band have had no involvement with, or knowledge of, Ms M.A. or A.S.A. or of their individual needs. Ms M.A. was born in Winnipeg and has never lived in Swan Lake or anywhere other than Winnipeg and, for a short while, in Vancouver. Likewise, A.S.A. was born in Winnipeg and lived here with her mother and grandmother until she was apprehended. The decision to live away from the band and the reserve was the family's choice. Their only connection with Swan Lake is through their band membership.

- When DOCFS was advised of A.S.A.'s apprehension, the matter was referred to the Swan Lake community committee. By their own choice, neither DOCFS nor the community committee participated in planning for A.S.A.'s care after she was apprehended, and they had no options to offer in terms of ongoing care when Wpg. CFS decided to apply for a permanent order of guardianship, notwithstanding their right to do so.

- Neither DOCFS nor the community committee participated in the trial, or even attended, but in spite of their complete failure to participate at any step of the proceeding, the community committee refused to consent to having A.S.A. placed for adoption in a non-aboriginal home, which refusal was adopted by DOCFS. The worker from the Wpg CFS permanency planning committee testified that the only reason that his agency would not arrange an adoptive placement for A.S.A. was because, in his experience, the Director of Child and Family Services would not approve any adoption without the consent of DOCFS.

[24] The community committee and DOCFS did approve A.S.A.'s placement with a non-aboriginal foster family. According to Ms Flett, that placement was approved, firstly, because A.S.A. had received respite care from the family so she was familiar with them, and secondly, because the family agreed to maintain contact between A.S.A. and her birth family and to support her in learning about the aboriginal culture. Ms Flett stated that the concern associated with adoption is the likelihood that a non-aboriginal adoptive family will not be motivated to maintain contact between the child and her culture or with the birth family after the adoption is finalized.

[25] While understandable, this concern is without any valid basis, given s. 33(1) of the ***Adoption Act***, S.M. 1997, c. 47 – Cap. A2, regarding "openness agreements" to maintain contact between the adopted child and the birth family and/or an Indian band member. That section states as follows:

Openness Agreements

33(1) For the purpose of facilitating communication or maintaining relationships, an openness agreement may be made in writing between an adoptive parent or a prospective adoptive parent and any of the following:

> (a) a birth parent of the child;
>
> (b) if a child and family services agency has permanent guardianship of the child by court order, a member of the extended birth family of the child who is approved by that agency;
>
> (c) any other person who has established a meaningful relationship with the child;
>
> (d) a prospective adoptive parent or an adoptive parent of a minor sibling of the child; and
>
> (e) if the child is, or is entitled to be a member of an Indian band as defined in the *Indian Act* (Canada), a member of that Indian band.

[26] DOCFS could use this section to enable a non-aboriginal adoption to proceed while still ensuring that the family carried through with its commitment to maintain the child's cultural heritage by requiring that the family enter into an openness agreement under s. 33(1) of the ***Adoption Act*** as a condition of consenting to the adoption. Further, as DOCFS has participated in approving the non-aboriginal foster family, I am certain that it could continue to be involved in the selection and/or approval of a suitable adoptive family to ensure that the family would recognize and respect A.S.A.'s aboriginal heritage. This option would give A.S.A. the security of being a permanent member of a family and also ensure that she maintained her contact with her culture and birth family.

[27] An adoption is the option that best fits with the criteria of the ***Child and Family Services Act***. Section 2(1) of that ***Act*** defines the best interests of the child, the relevant portions of which state as follows:

2(1) The best interests of the child shall be the paramount consideration of the director, 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

> (a) the child's opportunity to have a parent-child relationship as a wanted and needed member within a family structure;
>
> . . . . .
>
> (d) the child's sense of continuity and need for permanency with the least possible disruptions;
>
> . . . . .

[28] These statutory obligations are not met as well by a placement with a foster family as with an adoption.

[29] In making these statements in favour of an adoptive family over a foster family, I do not want to be taken as rejecting the specific foster family chosen in this case or as denigrating the very important task undertaken by foster families in general. They assume the heavy responsibility of caring for the children of others with love and caring, and for this they are to be highly commended. My concern is with the systemic insecurities and instabilities inherent in foster placement, including:

> - the fact that, until a child has been placed for adoption, the birth family has the right to apply for custody of the child once every 12 months, whether or not there has been any change in their circumstances or any likelihood of success;
>
> - the fact that DOCFS or Wpg CFS can have the child moved to another home at any time, subject to the right of the foster family to appeal to the director of child and family services; and
>
> - probably the most important is the fact that A.S.A. will know that she is not a permanent part of the foster family in the same way as she would be with an adoptive family, but rather remains a "foster child".

[30] A foster family is not intended to be a permanent family. A child in a foster home is not legally a part of that family and common sense dictates that a foster child

cannot have the same feeling of emotional and psychological security as an adopted child.

[31] I recognize that an adoptive family can break down, but that is also true of birth families, such as A.S.A.'s, and of foster families. There is no absolute guarantee that whatever arrangement is put in place will last, but the parents make a greater commitment to the child where there is an adoption.

[32] I also recognize that s. 2(1)(h) of the ***Child and Family Services Act*** includes the child's cultural, linguistic, racial and religious heritage as a criteria to be considered in determining the best interests of the child and that there are special risks associated with a cross-cultural adoption. Those concerns cannot dictate the decision between adoption and foster placement in this case because the foster placement approved by DOCFS is with a non-aboriginal family, so it will be subject to the same cultural pressures as a non-aboriginal adoptive family. This criterion can be met by an openness agreement under s. 33(1) of the ***Child and Family Services Act***.

[33] I am hopeful that DOCFS, the community committee and Wpg CFS will reconsider the option of placing A.S.A. for adoption and look for an adoptive family for her. Certainly, if I had the jurisdiction to order that A.S.A. be placed for adoption, I would do so. Unfortunately and to my frustration, I do not have that jurisdiction. Having found that A.S.A. was and remains in need of protection, under the legislation I must weigh the merits and the risks of any plan proposed by the agency and those of any plan proposed by the mother to determine which is in the best interests of the child.

[34] The agency's plan of long-term foster placement is not the optimum plan for A.S.A. for the above reasons. There is the added complication that A.S.A. is not presently in the home that the agency feels would be best for her. Notwithstanding those deficiencies in the agency's plan, it is clearly the only realistic plan for A.S.A., given that neither the mother nor the grandmother are in a position to provide even the basic necessities of a home and food for her, let alone care for her psychological and emotional needs. If the anticipated placement does not proceed, then the agency will locate another long-term foster family, but whoever becomes the foster family, they will be able to provide for at least A.S.A.'s basic needs, which is more than Ms M.A. can do.

IV. DECISION

[35] For the above noted reasons, I find as follows:

(i) that A.S.A. was in need of protection when she was apprehended and remained in need of protection at the time of the hearings in both April and July 2002; and

(ii) that the plan which is in A.S.A.'s best interests, and indeed which is statutorily mandated, is that Wpg. CFS be appointed permanent guardian of A.S.A..

[36] I am, therefore, granting the application of Wpg. CFS for an order of permanent guardianship of A.S.A..