COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

134-21-CA

V.H., B.A. and W.P.

APPELLANTS

- and -

THE MINISTER OF SOCIAL DEVELOPMENT

RESPONDENT

V.H., B.A. et W.P.

APPELANTS

- et -

LA MINISTRE DU DÉVELOPPEMENT SOCIAL

INTIMÉE

V.H., B.A. and W.P. v. The Minister of Social Development, 2022 NBCA 70

CORAM:
The Honourable Justice Quigg
The Honourable Justice Green
The Honourable Justice LeBlond

Appeal from a decision of the Court of Queen's Bench:
December 2, 2021

History of Case:

Decision under appeal:
2021 NBQB 254

Preliminary or incidental proceedings:
None

Appeal heard:
June 21, 2022

Judgment rendered:
December 8, 2022

Counsel at hearing:

For the Appellant V.H.:
Ben Reentovich

For the Appellants, B.A. and W.P.:
No one appeared

V.H., B.A. et W.P. c. La Ministre du Développement social, 2022 NBCA 70

CORAM :
l'honorable juge Quigg
l'honorable juge Green
l'honorable juge LeBlond

Appel d'une décision de la Cour du Banc de la Reine :
le 2 décembre 2021

Historique de la cause :

Décision frappée d'appel :
2021 NBBR 254

Procédures préliminaires ou accessoires :
aucune

Appel entendu :
le 21 juin 2022

Jugement rendu :
le 8 décembre 2022

Avocats à l'audience :

Pour l'appelante V.H. :
Ben Reentovich

Pour les appelants B.A. et W.P. :
Personne n'a comparu

For the Respondent, the Minister of Social Development:
Chantal A. Landry

Pour l’intimée, la Ministre du Développement social :
Chantal A. Landry

THE COURT

The appeal is dismissed without costs.

LA COUR

L’appel est rejeté sans dépens.

The following is the judgment delivered by

THE COURT

I. Introduction

[1] This is an appeal of a guardianship order made by the application judge in favour of the Minister of Social Development with respect to the two biological children of B.A., the mother, and W.P., the father. While the original Notice of Appeal was filed by B.A., W.P. and the third appellant, V.H., the children's paternal grandmother, the latter filed a Supplementary Notice of Appeal, purporting to amend the previous grounds of appeal and replacing them with completely different ones. V.H. has pursued these grounds on her own, independent of B.A and W.P. At the hearing before the Court, B.A. and W.P. were neither present nor represented. Their Notice of Appeal was therefore abandoned.

[2] The Supplementary Notice of Appeal raises both procedural and substantive issues. It alleges the application judge breached the rules of natural justice and procedural fairness in not permitting V.H. to seek custody of the children before proceeding with the guardianship hearing. The application judge found V.H., although a named respondent, did not have standing in the guardianship proceeding. V.H. asserts she was not given an opportunity to address this point of law. She then argues the judge erred in law in finding that, as a named respondent to the guardianship application, she still had to apply for custody for the children to be returned to her.

[3] For the reasons that follow, V.H.'s appeal is dismissed.

II. Factual Context

[4] Since the beginning of their relationship, B.A., W.P. and their children have lived with V.H. in her home. There is no serious dispute that the evidence before the application judge fully supported her finding that the parents were incapable of properly

caring for their children. Both of their lives had been marred by serious drug addictions and repeated failed attempts at rehabilitation and testing for compliance with rehabilitation protocols. Moreover, they both had criminal records with periods of incarceration.

[5] The couple's first child, M.P., was born on June 16, 2018, and lived in V.H.'s house with her parents. The second child, A.P., was born on June 7, 2020. He showed signs of drug withdrawal at birth and, as a result, was immediately taken into protective care. He has never lived with V.H., who has never parented him.

[6] On June 19, 2020, the Minister was granted a custody order in respect of the two children and a third, older child of B.A.'s, T.N.R., a son from a previous relationship who also lived in the household at the time, but whose custody has since been granted to his biological father. The guardianship order at issue does not concern T.N.R., but evidence involving his time spent in V.H.'s house is germane to her appeal.

[7] On December 7, 2020, the Court of Queen's Bench granted an extension of the custody order.

[8] In relation to the substantive portion of V.H.'s appeal, the record contains many undisputed facts which are not supportive of her position that she should have been granted custody of M.P. and A.P., whether or not she needed to formally apply for custody. With respect to V.H., the record discloses:

a) her partner, one M.H., a man with a significant drinking problem who lived at the household for a period of time, was physically abusive toward T.N.R. when she was caring for T.N.R. while B.A. and W.P. were incarcerated;

b) she would not acknowledge to the social workers involved with the case that B.A. and W.P. were unable to provide a consistent, safe and stable environment for the children and was unable or unwilling to acknowledge the effects of their substance abuse on the children;

c) she failed to follow a safety plan that she had signed and which was prepared by a representative of the Minister and designed to protect the children, as a result of which the Minister would no longer approve her for such a plan;

d) she allowed people in her home who placed M.P.'s safety and security at risk;

e) during many house visits, she was observed by representatives of the Minister not providing discipline to the children;

f) she gave contradictory information to representatives of the Minister regarding her communications with B.A. and her care of T.N.R., who she acknowledged missed some days of school while he lived in her house;

g) while she could babysit the children for certain periods, at the time of the guardianship hearing, she was 63 years of age and in receipt of Canada Pension Plan disability benefits due to a back injury sustained in a motor vehicle accident in 2015. The injury restricted her mobility and made it difficult for her to kneel or bend over; and

h) she testified before the application judge that, while she enjoyed doing activities with the children and "helping out" when she could, if the children were to be returned to their parents, she would simply continue to provide "support" with their care.

[9] Against this backdrop, the application judge determined V.H.'s standing. This required her to assess whether V.H. qualified under the *Family Services Act*, S.N.B. 1980, c. F-2.2, as a "parent," a term defined as including "a person with whom the child ordinarily resides who has demonstrated a settled intention to treat the child as a child of his or her family." If that definition is met, the person is entitled to the same consideration as a custodial biological parent: *Province of New Brunswick, as*

represented by the Minister of Justice and Consumer Affairs v. C.M. and P.M., 2012 NBCA 45, 397 N.B.R. (2d) 321.

[10] The application judge found that, by current standards, there is nothing unusual about a grandparent playing a parental role in a grandchild's life by engaging in any number of assistive services. However, that does not demonstrate a settled intention to treat the grandchild as his or her own; providing such services does not permanently assume or supplant a biological parent's duty or obligation toward his or her child: *Children's Aid Society of Hamilton-Wentworth v. M.(A.)*, [1990] O.J. No. 1723 (QL) (U.F.C.).

[11] The facts of this case contrast sharply with those in *C.C. v. M.C.*, 2020 NBQB 234, [2020] N.B.J. No. 336 (QL), where Robichaud J. held an aunt and uncle who had raised a 15-year-old child since his infancy and who made all decisions in his life had clearly formed a settled intention to raise him as their own.

[12] The analysis is an objective one. As the application judge put it, would an ordinary bystander consider V.H. to have demonstrated a settled intention to raise M.P. as her own child against the evidentiary backdrop of this case?

[13] By her own admission, V.H. played no more than a supporting role to assist her son and daughter-in-law and never intended to replace them. Except for their brief periods of incarceration, the parents had always lived within the household with the children and made all of the important decisions regarding their lives before they were taken into protective care. As the application judge aptly put it, "the line between parent and grandparent was never blurred" (para. 113). At the hearing, V.H. testified as follows about her intended "parenting":

> Q. Okay. And we – we heard from [W.P.] and from [B.A.] that living with you might not be kind of the end goal. Might not be their long-term – long-term plan. How would you support them if they were to find a home of their own?

A. Well, if that's what they want to do that's – that's entirely up to them. I like havin' somebody in the house. It gets lonely when you're there by yourself. Somebody to talk to or watch a movie with or –

Q. And – and what – what help would you be able to provide them if – if they were to move somewhere else?

A. Anything they needed. Whatever. Whatever they asked me I'd do it. I always – when I do something I do it 100% or 110%. It's just – it's the way that I am.

Q. Is there anything else that you'd like the Court to hear about your – your grandchildren or – or your plan for your grandchildren?

A. Well, you know, as I get older there will be different things that we will – that we will do. Well – and that's hard for me to say what it'll be right now, but for now, we'll be doin' basically the same – same things. Maybe something will pop into my head, somethin' different I'm sure and – there will be all sorts of stuff.

Q. And – and when it comes to the things that you – because of your disability you struggle to do kind of the bending down and things like that, have – have you run into situations where you couldn't do something for the children??

A. Well, I worked out a way that I can get down if they're on the floor.

Q. Okay, what's that way?

A. I get right down and sit on my bum. Sometimes it's a little difficult to get up but I think that's because I'm roly-poly, but there isn't anything that I can't do for those kids. Sometimes life is about sacrifice and there isn't anything I wouldn't do for those kids. For my family. It's just the way I am. [Transcript, November 18, 2021, p. 26, ll. 7-22 and p. 27, ll. 1-20)]

[14] The application judge fully canvassed the procedural considerations related to the determination of V.H.'s standing and whether V.H. was seeking custody, as evidenced from the following excerpts from the transcript of the proceedings:

THE COURT: Okay, and [V.H.], why – is she applying for custody of the children?

MR. ADAMS: No, she has not brought a – she has not filed a custody application, no.

THE COURT: And are we agreed that it wouldn't be open to me to put the children in her care?

MR. ADAMS: Yes, that's correct.

THE COURT: We're all on the same page there?

MR. ADAMS: Yes, we are presenting her as part of the – the family plan on behalf of the Respondents.

THE COURT: Does that make her a party though? If she's not applying for custody, so then there would be two proceedings that I would be hearing at the same time, kind of thing. I'd be dealing with the Minister's first but – but I would have as a – as a potential back up to – to, you know, plan for myself the option of ordering that she – that the children would be put in her – in her custody. But, she's not asking for that, and so, I'm – I – I – I'm just mindful of the fact that if she's a party then you would have the right to examine and cross-examine witnesses on her behalf, but I'm not – I'm not convinced that she has that standing, in light of the pleadings that are before me, and, so – but I'm happy to hear from any – because this is a bit of a novel thing. I – I kinda went, when I first got the pleadings, I went looking for caselaw, I think, you know, [a] Justice [has] done it a number of times recently where he's heard cases where the Minister, in a private custody application, sort of, being heard one after the other or at the same time, and he's making a determination of all the issues. But that's not what I have in front of me here, near as I can tell. So, Ms. Landry, do you have any thoughts on this?

MS. LANDRY: Yes, I think what happened, so, back when the Minister filed their first application, they had listed [V.H.] as a Respondent.

THE COURT: Well, and she – she was –

MS. LANDRY: Yeah.

THE COURT: – they were all living in the same house and she was –

MS. LANDRY: Correct.

THE COURT: – arguably, acting in a parental capacity, because at – at one point I'm left with the impression that either one or both –

MS. LANDRY: Yeah.

THE COURT: – of the parents were incarcerated and, if that was the case, then, yes, she was acting in a parental capacity at that time.

MS. LANDRY: Yes. It's my understanding, and I don't know how long that would have been, prob– potentially, for –

THE COURT: It doesn't look that long.

MS. LANDRY: – and that's something that will – I'm hoping to get clarification on when the parents take the stand.

THE COURT: Yes.

MS. LANDRY: That they would have at one point, both of them, being incarcerated –

THE COURT: Right.

MS. LANDRY: – [W.P.] and [B.A.].

THE COURT: Yes.

MS. LANDRY: They had already been all living in the same home, so, during that time, [V.H.] took care of the children while the parents could not. By the time protective care was taken, [B.A.] had been released a few days before.

THE COURT: Okay.

MS. LANDRY: So she was certainly back in the picture. At the time when the Minister was trying to, I think, decide do we, you know, do we consider her a parent or not, I mean, we didn't – they didn't have a whole lot of facts, but certainly based on those that they knew, thought, well, we – we probably need to include her because she did provide care for the children right before the taking of protective

care. And I can tell you that since that time, there's thought to be come caselaw interpreting, you know, the definition of parent pursuant to the *Act*. You might recall, Justice, we had one earlier this year, I think in January, where the grandfather had applied –

[…]

THE COURT: I'm just trying to unmuddy the waters here because if I have to make a determination as to whether or not she's properly – I don't have a pleading in front of me that makes her a party. I really don't. I understand why you added her as a Respondent but, really, I think as – as long as you gave her notice of the Application –

MS. LANDRY: Yeah.

THE COURT: I think that she was a party that I would have given notice of the Application to.

MS. LANDRY: Right.

THE COURT: So that she could then file –

MS. LANDRY: Apply.

THE COURT: – an Application –

MS. LANDRY: Yeah.

THE COURT: – for custody –

MS. LANDRY: Yes.

THE COURT: – of one or both of the children. But she didn't do that, maybe she didn't do it because she thinks she's a party though, and that's my dilemma. But as I've read the materials, she's not asking for – she's saying, I'll be there with the – with the parents to support their parenting the children and, so, she's part of the parenting plan. But that makes her a witness and not a party. But I'm prepared to hear you, Mr. Adams, on this.

MR. ADAMS: Well, on the – on the, you know, acting in the – in the place of a parent or meeting the parental definition, it (ph) certainly an aspect that we will keep front of mind when it comes to the examination of –

THE COURT: No, I'm just trying to figure out whether or not she's properly a party to these proceedings.

MR. ADAMS: As the – as the family –

THE COURT: Because I would have to – be base – because based on the pleadings, I would have to make – if she's a party, then I need to make a determination of her rights in these proceedings, and I have legislation that gives biological parents' rights and – and the children have been taken from them, and I need to decide whether they should be given back. She's not applying for custody.

MR. ADAMS: Well, that's –

THE COURT: If I speak to her rights, I'm not entirely clear on what it is you're asking me to say, other than she was a tremendous support to – to her son and daughter-in-law and – and is – has – has taken a – a – a valuable interest in the well-being of these children. She does (ph), but I have to have pleadings that tell me the relief you're seeking and I don't have any. I know what relief they're seeking. All they have to do is say we oppose the guardianship and that's the relief they're seeking. They're here, they're opposing the guardianship, that's the relief they're seeking. What is the relief your client is seeking?

MR. ADAMS. It (ph) – the relief that she is seeking is the return of the children to the parents' care as part of that family plan[.]

[…]

THE COURT: What it is that's expected of – of me in –

MS. LANDRY: I – I –

THE COURT: – determining her rights, if any, and maybe I do need to turn my mind to that, but in any event, it would be one paragraph, because, as I understand it, again, she's not saying –

MS. LANDRY: Correct.

THE COURT: – if these two – if the parents of this child can't, in the view of the Court, can't care for the child, that she wants to get in the way of a guardianship by saying, well, give them to me.

> MR. ADAMS: That's correct.
>
> THE COURT: Right? So, that's not on the table.
> [Transcript, November 16, 2021, p. 6, ll. 21-23; pp. 7-10 to ll. 1-4; p. 11, ll. 20-23; pp. 12-14 to ll. 1-4; p. 16, ll. 9-21]

[15] The judge then ruled V.H. had no standing and was not seeking custody. In that process, she fully canvassed the best interests of the child criteria as defined in s. 1 of the *Act*, and no appeal is taken of that analysis.

[16] There is simply no merit to the assertion that the judge never considered the option of placing the children in V.H.'s custody. As noted, after reviewing the evidence and giving V.H. full opportunity to be heard, the judge determined V.H. had never been in a parenting position and, quite apart from that, had not demonstrated the ability, nor the capacity, to parent:

> If the Minister is granted guardianship, the children will be placed for adoption, which is expected to be a successful process. The odds are also excellent that the children will be kept together.
>
> […]
>
> Of these two competing plans, the Minister's is the more reassuring. The Minister's plan ensures a safe, loving environment for the children in the continued care of their foster parents until a transition to adoption.
>
> […]
>
> Faced with this lack of commitment, it is difficult to imagine that the Respondents will rise to the occasion for the children now when they did not do so for almost two (2) years. [paras. 139, 142, and 146]

[17] All of this is entirely consistent with the original Notice of Appeal filed by V.H., A.B. and W.P., which never contemplated custody being granted to V.H. As confirmed at the hearing, that issue was "taken off the table." She cannot now be heard to argue otherwise.

[18] The appeal is dismissed without costs.

[19] Considering the nature and effect of this decision, we direct, in accordance with s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, that it be published in the first instance in English and, thereafter, at the earliest possible time, in French.