Citation: AOCFS v VN et al, 2017 MBCA 95 Date: 20171002
Docket: AH16-30-08668

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

B E T W E E N :

ANIMIKII OZOSON CHILD AND FAMILY SERVICES	)	***K. M. Saxberg*** *and* ***S. C. Scarcello*** *for the Appellant*
(Petitioner) Appellant	)	
	)	***N. J. C. H. B. N.-S.***
- and -	)	*on his own behalf*
	)	
V. C. B. J. E. N.-S, W. T., F. D. J. C. (deceased) and N. J. C. H. B. N.-S. (legal guardian)	)	***S. R. Paul*** *and* ***T. L. Welsh*** *for the Intervener Sandy Bay Child and Family Services*
(Respondents) Respondents	)	
	)	
- and -	)	
	)	***J. B. Harvie*** *and*
SANDY BAY CHILD AND FAMILY SERVICES	)	***M. T. Gerstein*** *for the Intervener Southern First Nations Network of Care Child and Family Services Authority*
Intervener	)	
	)	
- and -	)	
	)	
SOUTHERN FIRST NATIONS NETWORK OF CARE CHILD AND FAMILY SERVICES AUTHORITY	)	*Appeal heard and Decision pronounced:* ***September 20, 2017***
	)	
Intervener	)	*Written reasons:* ***October 2, 2017***
	)	

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On appeal from: 2015 MBQB 208; 2016 MBQB 87

MONNIN JA (for the Court):

[1] This is an appeal by Animikii Ozoson Child and Family Services (AOCFS) from an order granting permanent guardianship of two children, S.N. and B.N. to a mandated child welfare agency, Sandy Bay Child and Family Services (Sandy Bay) notwithstanding that AOCFS was the agency seeking guardianship of the children under apprehension, and that Sandy Bay did not consent to being named guardian.

[2] AOCFS's appeal was granted at the hearing of this appeal with reasons to follow. These are those reasons.

[3] Following their apprehension, AOCFS sought a permanent order of guardianship for the children. After a lengthy trial, the trial judge found that the children were in need of protection. Despite that finding, the trial judge declined to make AOCFS the guardian of the children. He clearly had concerns with AOCFS's handling of these children. He wrote in his 2015 reasons (2015 MBQB 208 at para 82):

> In making the submission now (in its pursuit of permanent orders of guardianship in this trial) that the children have been irretrievably damaged and would continue to be, if permitted to return to the care of the respondents, AOCFS must in the court's view acknowledge its own complicity in the harm done.

[4] The trial judge then made the following order (at para 86):

> In all of the foregoing circumstances, and as referenced earlier at paragraphs 19 and 20 of these reasons for decision, I find that permanent orders of guardianship ought to be pronounced in this case, but decline to appoint AOCFS as permanent guardian of these children, and make an

> order, pursuant to s. 37(1)(a) of *the Act*, requiring the executive director of the Southern Authority, or his/her designate, to appear before me.

[5] In subsequent reasons, following the hearing ordered by him, the trial judge elaborated further on the reasons why he had proceeded in the manner that he had. He stated (2016 MBQB 87 at para 2):

> I then made an order pursuant to s. 37(1)(a) of *The Child and Family Services Act*, C.C.S.M. c. C80, (the "*Act*"), requiring the executive director of the Southern First Nations Network of Care (the "Southern Authority"), or his/ her designate, to appear before me, in order that I might receive requisite information and advice, so as to permit me to pronounce the permanent orders of guardianship in the name of another mandated child and family services agency subject to the Southern Authority's statutory oversight, or an alternative child and family services agency altogether. (See: *AOCFS v. V.N. et al*, 2015 MBQB 208).

[6] The trial judge then went on to appoint Sandy Bay as guardian of S.N. and B.N., notwithstanding the fact that Sandy Bay had never, and still to this day, has not consented to such an appointment being made.

[7] AOCFS appealed and Sandy Bay and Southern First Nations Network of Care Child and Family Services Authority (Southern) were granted intervener status.

[8] AOCFS and the interveners all take the position that the trial judge did not have the statutory authority to make the order that he did. We agree with them.

[9] The trial judge believed that he had the authority to proceed as he did by virtue of section 37(1)(a) of *The Child and Family Services Act*, CCSM c C80. That section reads as follows:

> **Powers of court**
> **37(1)** A judge or master may for the purposes of a hearing under this Part

> (a) compel on his or her own motion the attendance of any person and require that person to give evidence under oath and to produce such documents and things as may be required;

[10] Section 38 of the *Act*, which establishes the orders that may be made upon a finding that a child is in need of protection, must also be considered. The section provides:

> **Orders of the judge**
> **38(1)** Upon the completion of a hearing under this Part, a judge who finds that a child is in need of protection shall order
>
> (a) that the child be returned to the parents or guardian under the supervision of an agency and subject to the conditions and for the period the judge considers necessary; or
>
> (b) that the child be placed with such other person the judge considers best able to care for the child with or without transfer of guardianship and subject to the conditions and for the period the judge considers necessary; or
>
> (c) that the agency be appointed the temporary guardian of a child under 5 years of age at the date of apprehension for a period not exceeding 6 months; or
>
> (d) that the agency be appointed the temporary guardian of a child 5 years of age or older and under 12 years of age at the date of apprehension for a period not exceeding 12 months; or
>
> (e) that the agency be appointed the temporary guardian of a child of 12 years of age or older at the date of apprehension for a period not exceeding 24 months; or
>
> (f) that the agency be appointed the permanent guardian of the child.

[11] Further, and of prime importance to the disposition of this appeal is section 42 of the *Act*. It provides:

> **Child in care of the agency appearing**
> **42** The judge or master making an order that an agency shall be a guardian shall appoint as guardian either the agency appearing at the hearing or another agency when the agency appearing files that other agency's consent.

[12] A plain reading of sections 38(1) and 42 make it clear that when the trial judge decided to appoint an agency, he could only appoint the agency that applied for guardianship or one that consented to being appointed.

[13] In his reasons, the trial judge does not indicate that his decision to name Sandy Bay as the guardian of the children is based on his exercise of the *parens patriae* authority of the Court. Even if he had, we are of the view that he would have been in error in doing so. In *TD v Director (Child and Family Services)*, 2015 MBCA 74, Steel JA wrote (at para 30):

> I do not deny that this Court, as well as the Court of Queen's Bench, has overall jurisdiction as *parens patriae*. See *Children's Aid Society of Winnipeg v N.* (1979), 9 RFL (2d) 326 at 331. However, the *parens patriae* jurisdiction of the court can be resorted to only where the legislature has not assumed the jurisdiction, or if there is a gap in the legislation that assumes the jurisdiction. See *Beson et al. v Director of Child Welfare (Nfld.)*, [1982] 2 SCR 716; and *Garcia Perez v Polet*, 2014 MBCA 82 at para 42, 310 ManR (2d) 48.

[14] Clearly, the legislature has assumed jurisdiction of the subject matter of these proceedings and there is no gap in that legislation that would allow the exercise of the *parens patriae* jurisdiction in the circumstances of this case.

[15] Without going into the details of the trial which preceded the judge's seeking the involvement of an agency other than the agency which applied for guardianship, one can surmise that he was both frustrated and dissatisfied with the manner that AOCFS had dealt with the children in their care. But as Southern sets

out in its factum, if the judge had concerns regarding AOCFS's ability to provide care for the children, he had two options.

[16] The first option was that prior to finding that the best interests of the children required that they be made permanent wards, he could have exercised the powers given to him by section 37 of the *Act.*

[17] The second option was to bring his concerns to the attention of the statutory bodies and individuals having legislatively mandated obligations and powers to oversee agencies and the care provided to children in their care. See *Winnipeg Child & Family Services (Central Area) v T (WL)*, 1999 CarswellMan 396 (QB); *The Director of Child and Family Services v MES et al*, 2011 MBQB 1; and *Metis C, F & CS v BAAR and KCSS*, 2016 MBQB 125.

[18] The trial judge was no doubt well-meaning in the manner that he proceeded, but in the final analysis he was not permitted, by law, to proceed in such manner.

[19] Our deciding to allow the appeal and set aside the granting of guardianship to Sandy Bay should not be interpreted as our taking issue with the concerns that the trial judge had with the management of these children by AOCFS. Quite to the contrary, the appeal was allowed because the trial judge did not have the statutory authority to appoint Sandy Bay as permanent guardian.

[20] The concerns that the trial judge had are not resolved by the disposition of this appeal. Accordingly, and as we discussed with counsel at the hearing, we will be adopting the path laid out by Little J in *BAAR*, and that is that we will direct the Registrar of this Court to forward a copy of these reasons as well as copies of the

trial judge's reasons and the transcript of the trial to the Minister of Families and the Children's Advocate in order that the conduct of AOCFS can be reviewed.

[21] In summary, therefore, the appeal is allowed and AOCFS is to be made guardian of the children at issue in this case under the same terms that the trial judge had set out in making Sandy Bay the guardian of these children.

Monnin JA

Burnett JA

leMaistre JA