NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Community Services) v. B.F., 2003 NSCA 73

Date: 20030624
Docket: CA202056
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

B.F. and B.W. Respondents

Judge: Justice Elizabeth A. Roscoe

Application Heard: June 19, 2003, in Halifax, Nova Scotia (In Chambers)

Counsel: W. Bruce Gillis, Q.C., for the appellant
Andrew Ionson, for the respondent

Decision:

[1] The appellant, the Minister of Community Services, acting as a child protection agency, applies for a stay pending appeal of portions of an order of Chief Judge Comeau issued on May 26, 2003, pursuant the **Children and Family Services Act**, S.N.S. 1990, c. 7.

[2] The order provides that the respondent's four children, who are 3, 4, 5, and 7 years old, are to remain in the care of the parents subject to the agency's general supervision for a period of six months following the placement of services in accordance with s. 43(1)(f). The agency is ordered to provide funding for intensive in-home services supplied by a private organization, Conway Workshop, to commence within 45 days of the order. The services include the provision of a safe healthy environment and instruction and assistance with nutrition, hygiene, housekeeping, parenting techniques and decision making. The monthly cost of the services will be approximately $3,063 plus program expenses and supplies. Following the completion of the six months of services the matter is to be dismissed unless either party applies for a review.

[3] The children had been found to be in need of protective services on March 19, 2002 and an order for supervision by the agency had been issued on May 21, 2002. The problems in the home of the respondents that led to the involvement of the child protection workers appear to arise mainly from the limited intellectual capacity of the parents. The children face a number of challenges including possible cognitive and physical impediments and behavioural problems. There have been long-standing concerns with personal and dental hygiene, cleanliness and safety of the residence, nutrition, and lack of discipline and stimulation. There does not appear to be any allegation of intentional physical abuse of the children by the parents.

[4] On the appeal, which is scheduled to heard on October 17, 2003, the appellant's main arguments will be that the judge lacked jurisdiction to order that the agency pay for services to be provided to the family, and to extend an order for supervision beyond the time limits set out in the **Act**. As well, it will submit that since the type of services ordered by the trial judge had previously been rendered for extensive periods of time without significant improvement in the children's circumstances, an order for permanent care and custody to the Minister should have been made. The agency has been involved with the family on and off since

1995 and it claims that for eight months in 2001-2002 it paid for the provision of intense, constant in-home assistance to the parents. Before the trial judge, the respondents took issue with the quality and extent of the services previously provided. In his decision, reported as **Nova Scotia (Minister of Community Services) v. B.F.** [2003] N.S.J. No. 157, 2003 NSFC 8, Chief Judge Comeau notes:

> ¶ 13 On November 2001 the Agency contracted with the Conway Workshop Association to work with the parents through intensive in home support. The parents were in agreement to having this support and signed a document that they would co-operate with this service. Two support workers were placed in the home from early morning to late evening from November 2001 to Spring 2002. Part of this service was to improve cleanliness of the home and attendance to scheduled appointments. Progress according to the Agency was slow, cooperation was held back because of distrust of the Agency by the parents. A third worker was also placed in the home and the parents availed themselves of the work program at the Conway Workshop which continues.

[5] The agency seeks to stay the part of the order requiring it to fund the services. It is not seeking to have the residence of the children changed pending the hearing of the appeal. The application for the stay is brought pursuant to s. 49(3) **Act**, which provides as follows:

> 49 (3) Where a notice of appeal is filed pursuant to this Section, a party may apply to the Appeal Division of the Supreme Court for an order staying the execution of the order, or any part of the order, appealed.

[6] The test usually applied on applications for stays as set out in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) is commonly modified in matters involving custody of children. As stated by Justice Flinn in **Childrens Aid Society of Halifax v. B.M.J.**, [2000] N.S.J. No. 405 (N.S.C.A.):

> Justice Hallett, whose decision in **Fulton Insurance Agencies Ltd. v. Purdy** (1991), 100 N.S.R. (2d) 341 sets out the standard by which an application for a stay of execution of a judgment in a civil case is measured, recognized that a different standard is used in cases involving custody of children. He said at p. 344:
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> > That is not the only test: this Court has considered stays of custody Orders on the ground that if special circumstances exist that could

> be harmful to a child if the Order were acted upon before the appeal was heard, a stay would be granted (**Millett v. Millett** (1974), 9 N.S.R. (2d) 26 (C.A.); **Routledge v. Routledge** (1986), 74 N.S.R. (2d) 290; 180 A.P.R. 290 (C.A.)). These cases involved children's welfare, not monetary judgments. In **Millett** the stay was granted; in **Routledge** refused. In the latter case, Clarke C.J.N.S., stated:
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> > "In my opinion, there needs to be circumstances of a special and persuasive nature to grant a stay."

[7] As noted by Justice Flinn, the trial judge in a dispute over custody of a child, applying the best interests of the child test, has a unique discretion and advantage which calls for special deference from the appeal court. As well, he cautioned that the disruption caused by moving children from one residence to another and from one school to another, when there is a possibility that the moves are only temporary, should require the proof of special circumstances.

[8] It should be recognized, however, that in this case, neither the granting of nor the denial of the stay application will result in a change in the physical custody of the children. Neither counsel has suggested that the children will be at risk pending the appeal if the part of the order providing for funding of services is stayed. The agency would continue to have the general supervision of the children while in the parents' care and would be in a position to act quickly in the event of any new or elevated concern over the children's well-being. At this juncture, since this case appears to be more about time lines and funding issues than the interim custody of children, in my view it is appropriate to apply the traditional **Fulton** test. That is, the appellant must meet either the primary test, by satisfying the court that there is an arguable issue raised on the appeal, that the appellant will suffer irreparable harm if the stay is not granted, and that the balance of convenience between the parties favours the granting of the stay. Or, failing that, the appellant must satisfy the secondary test, that there are exceptional circumstances which would make it fit and just that the stay be granted.

[9] Counsel for the respondent properly conceded, and I am satisfied that the appellant has raised arguable issues on appeal. I am also satisfied that if the agency is required to pay for the services for the next four months and then the appeal is allowed, that it will be virtually impossible for it to be reimbursed for the expenditures made from either the respondents or the private association supplying the in-home workers. Real risk of non-recovery of monies paid pending the appeal,

if the appeal is allowed, is one of the factors which tends to establish irreparable harm. (See: **MacPhail v. Desrosiers**, [1998] N.S.J. No. 37, per Cromwell, J. A. at ¶ 20 and following.) As noted by Justice Cromwell, other relevant considerations include whether the appeal puts the full amount of the trial judgment at risk or whether it relates only to a portion of the award and whether the respondent has received or has been offered a significant payment pending the appeal. Here, it is clear that the issues raised on appeal place all of the funds payable by the appellant as a result of the order at risk. Furthermore, this is not one of those cases such as **Kelly v. Dillon** (1995), 145 N.S.R. (2d) 194 or **Campbell v. Jones and Derrick**, 2001 NSCA 138, where it would be appropriate to order a stay relating to some portion of the funds pending the appeal. I am satisfied that the appellant has established the probability of irreparable harm and has met the second branch of the **Fulton** test.

[10] There is no suggestion here that the respondents will suffer irreparable harm if the stay is granted. Although the family would probably benefit from the involvement of the support workers in the home, since it appears that the respondents adequately managed the basic requirements for several months prior to the trial, the absence of the home workers should not cause harm in the short term between now and the hearing of the appeal.

[11] Considering all the circumstances, and since there is no evidence that a partial stay will cause any risk of irreparable harm to the respondents, the balance of convenience favours the granting of the stay. If the appeal is dismissed, the order for services could presumably be easily reinstated.

[12] I would grant the stay as requested by the appellant. The provisions of the order of Chief Judge Comeau relating to the funding by the appellant of in-home assistance and instruction to the respondents is stayed pending the determination of the appeal. The supervision order will remain in effect pending the determination of the appeal, that is, the children will remain in the custody of the respondents subject to the supervision of the appellant agency.

Roscoe, J.A.