NOVA SCOTIA COURT OF APPEAL
Citation: ***K.B. v. Nova Scotia (Community Services)***,
2010 NSCA 75

Date: 20101013
Docket: CA 328959
Registry: Halifax

Between:

K.B. and B.J.

Appellants

v.

Minister of Community Services

Respondent

Publication Ban: Pursuant to s. 94(1) of the **Children and Family Services Act**

Judges: Hamilton, Beveridge and Farrar, JJ.A.

Appeal Heard: September 30, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Farrar, J.A.; Hamilton and Beveridge, JJ.A. concurring.

Counsel: Alfred A. Seaman, for the appellant
Amy Sakalauskas, for the respondent

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 94(1) OF THE <u>CHILDREN AND FAMILY SERVICES ACT</u> APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

Overview:

[1] The appellant K.B. is the father of H.B. who was born in July, 2008. B.J. is the mother of the child and, although named as an appellant in this proceeding, has not appealed the permanent care order and is not participating in this appeal.

[2] The child was apprehended by the Minister of Community Services (the "Agency") in early October, 2009. By written decision dated April 9, 2010 [2010 NSSC 131] and by order dated the 14th day of April, 2010, the Honourable Justice Douglas C. Campbell of the Nova Scotia Supreme Court (Family Division) found that the child continued to be a child in need of protection and ordered him to be placed in the permanent care and custody of the Agency. This is an appeal of that decision. For the reasons set out below I would dismiss the appeal without costs.

Background:

[3] This appeal concerns the permanent care and custody of H.B. His mother had a child in a previous relationship who was the subject of a permanent care and custody order in another proceeding. When she became pregnant with H.B. she, along with the appellant, went to the Agency requesting services in order to be in a position to parent the child after the child was born. As a result, the Agency's involvement pre-dated any court proceedings.

[4] In August, 2008, an initial interim hearing was held and it was found that there were reasonable and probable grounds to believe the child was a child in need of protective services. An interim order was issued placing the child in the care and custody of his parents subject to Agency supervision.

[5] By September of 2008 the parents had separated. A second order was issued placing the child in the care and custody of the mother subject to Agency supervision, with access to the father.

[6] By March of 2009 the Agency had determined that the mother was not the appropriate caregiver and placed the child in the care of the father subject to Agency supervision.

[7] The father continued to have supervised care of the child for approximately seven months. On October 9, 2009 the child was taken into the care and custody of the Agency and it sought an order for permanent care and custody.

[8] The Agency's position was that the father was not providing for the emotional needs of the child, was not committed to accepting the services being offered by the Agency and he had exhibited aggressive and antisocial behaviours towards Agency workers.

[9] The permanent care hearing was held over four days in February, 2010.

[10] At trial it was acknowledged by the Agency that the father could adequately meet the child's day-to-day physical needs such as provision of nutritious food, clothing and shelter. The issue for determination was whether the father could adequately meet the emotional, psychological and social development needs of the child.

[11] The trial judge determined that a return to unsupervised custody could only be achieved if the father underwent therapy for a considerable period of time and then only if success was achieved. The trial judge concluded that the father was not capable of meeting the emotional, psychological and social development needs of the child within the time frame mandated by the **Children and Family Services Act**, S.N.S. 1990, c. 5 (**CFSA**) and placed the child in the permanent care of the Agency.

Issues:

[12] The appellant has narrowed the grounds of appeal in his factum. The remaining issues may be summarized as follows:

> whether the trial judge adequately considered the evidence of substantial progress that had been made by the father to address the concerns of the Agency;

> whether the trial judge erred in not considering the evidence of access supervisors and other witnesses who had observed the father as a caregiver;
>
> whether the trial judge placed too much emphasis on hearsay evidence with respect to past or future harm.

[13] I will address the alleged errors individually, after discussing the standard of review.

Standard of Review:

[14] The Court's role on an appeal from a trial judge's decision is not to embark upon a fresh assessment of the evidence or substitute its own exercise of discretion for that of the trial judge. This Court may only intervene if the trial judge erred in legal principle or is shown to have made a clear error with respect to a factual finding that has materially affected the result (**Children's Aid Society of Cape Breton v. A.M.**, 2005 NSCA 58, ¶ 26). This standard applies whether the findings are based on the judge's assessment of credibility or whether it applies to inferences which the judge draws from the evidence (**A.S. v. Nova Scotia (Minister of Community Services)**, 2007 NSCA 82, ¶ 7).

[15] With respect to the trial judge's exercise of judicial discretion, the test is whether the trial judge erred in principle in directing himself in the exercise of discretion or that the result is so clearly wrong as to amount to an injustice (**Elsom v. Elsom**, [1989] S.C.J. No. 48 (Q.L.), ¶ 16).

[16] The issues raised by the father on this appeal all involve the trial judge's consideration of the evidence and the weight which he gave to that evidence. We can only interfere if the judge made a "palpable and overriding error", that is an error which is clear and affected the result or if he misdirected himself in the exercise of his discretion.

Analysis

Issue #1 Whether the trial judge adequately considered the evidence of substantial progress that had been made by the father to address the concerns of the Agency

[17] The father argues that the trial judge erred in fact in failing to give proper consideration to the substantial progress that had been made in his parenting skills. In his factum, the appellant lists 22 identified concerns in relation to the father's parenting and reviews and assesses the evidence with respect to each of those 22 issues. With respect, the appellant is asking us to reconsider the evidence and substitute our opinion for that of the trial judge.

[18] In his decision, the trial judge referred to the evidence of the father's therapist, Martin Whitzman, and commented on the progress being made by the father at ¶ 24:

> [24] Generally speaking, Mr. Whitzman expressed optimism that the father was making progress even though he had a lot more work to do. Mr. Whitzman indicated that if the child was returned to him, the father would need to complete this work and that he would need considerable amount of time to be successful. In short, while the agency concerns that were described above were true until the apprehension occurred, I have given considerable thought as to whether the experts and workers were not placing enough emphasis on the reversal of those concerns after the date of the apprehension of the child. On balance, I have concluded that this change occurred too late in the process for it to alter the path toward permanent care.

[19] The trial judge had evidence before him that up until the date of apprehension of the child there had been a lack of commitment and follow through by the father and a resistance to the Agency's services. After the date of apprehension the father had made some progress. However, he had not progressed to the point where the child could be returned to him without ongoing continued therapy for a considerable period of time and only if success was achieved through that therapy (at ¶ 25).

[20] In considering the child's best interests the trial judge must work within the time lines set out in the **CFSA**. As the trial judge noted, there is a rationale for the time lines and reasons for abiding by them (¶ 28).

[21] It has long been recognized that trial judges are in the best position to make determinations about the best interests of the child. More than 30 years ago the Supreme Court of Canada in **Adams v. McLeod**, [1978] 2 S.C.R. 621 held at p. 625:

> There is no need to cite any authority to delineate the task of a court upon an infant's custody issue. Time after time, and more particularly through all the latter part of this century, it has been said and repeated that the one cardinal issue is the best interest of the infant and that all else is secondary. How then is that best interest to be determined? Again our courts have been unanimous that the most authoritative pronouncement thereon is by the trial court judge who hears the evidence and assesses it. I commence with the statement by Lord Simmonds in *McKee v. McKee* [[1951] A.C. 352 (P.C.)], at p. 360:
>
> > Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

[22] Although the trial judge acknowledged that the appellant had made some progress between the date of apprehension of the child and the date of the trial, that progress was too late in the process to alter the result. In coming to this conclusion the trial judge was mindful of the child's sense of time as mandated by the **CFSA** and found permanent placement trumped reunification with the father (¶ 28). Although this decision carries a heavy burden for the father, it is the best interest of the child which carries the day.

[23] The Supreme Court of Canada in **Catholic Children's Aid Society of Metropolitan Toronto v. C.M.**, [1994] S.C.J. No. 37 said this about a child's sense of time:

> 44 That the length of these proceedings may have been one of the factors which has contributed to the attachment of S.M. for her foster family, and thus increased the emotional harm that would result from her removal from them, is a fact that is inescapable. The passage of time in matters of child custody and welfare over extended periods may, unfortunately, carry a heavy burden for all concerned. This

> is recognized by the Act in that a number of provisions mandate the timely resolution of cases and impose time limits on Children's Aid Society involvement with a family. In particular, s. 70(1), earlier reproduced, provides that proceedings under the *Act* should be completed within a two-year period. In the case at hand, Macdonald J. clearly turned her mind to this concern when she stated:
>
> > In this case, the intention of the *CFSA* and in particular section 70 have clearly been violated. Had section 70 been adhered to, the psychological bonding that has occurred between [S.M.] and her foster home would not have occurred to the extent that it has.
> >
> > My comments about the violation of s. 70 are not a criticism of any of the parties; it is a comment on the lethargy of the legal process which, unfortunately in this case, has thwarted the intentions of the *CFSA*.
>
> I share Macdonald's J.'s concerns with regard to the importance of reaching a speedy resolution of matters affecting children. The *Act* requires it and common sense dictates it. A few months in the life of a child, as compared to that of adults, may acquire great significance. Years go by crystallizing situations that become irreversible. This is exactly what happened here. The first time that S.M. was removed from the care of her birth mother she was one month old. The situation could have been easily remedied had the birth mother then been in a position to care for her daughter adequately. This did not happen. Now, over seven years later, the situation has drastically changed and, although the argument raised by the appellant in relation to delay is well taken, looking at the totality of the evidence and circumstances of the child, it has become inevitable that it is in S.M.'s best interests to be made a ward of the respondent society, with a view to her adoption by her foster family. The Court of Appeal so found and I concur.

[24] The trial judge was up against the statutory time lines set out in the **CFSA** and had to make the determination about what was in the best interests of the child. He concluded that it was in the best interests of the child to place him in the permanent care and custody of the Agency. In reaching this conclusion he did not make any palpable and overriding error of fact nor did he misdirect himself on a principle of law in the exercise of his discretion.

[25] The appellant also argues, under this ground of appeal, that the trial judge failed to recognize the availability of funding for services for the father. He argues this was the most significant factor in the trial judge’s decision and, thereby, he

made a manifest and palpable error of fact, which materially affected the outcome of the trial.

[26] I disagree. The appellant has mischaracterized the trial judge's findings. The trial judge did not find that the services were not available. Rather, there was insufficient evidence that they would be available in the community. He further found that even if they were available, the therapy would take a considerable period of time and there was no guarantee of success (¶ 25, ¶ 27).

[27] The consideration of funding for services was not the most significant factor in the trial judge's decision, as suggested by the appellant. His principal concern was that the appellant had not progressed to the point where he was capable of meeting the emotional, psychological and social development needs of the child.

[28] This focus is evident from the trial judge's review of the evidence in his decision. He references the reports of two psychologists, David Cox and Debra Garland. In particular, he cites extensively from Ms. Garland's report where she concludes that there are "significant deficits in [the appellant's] capacity to accurately identify and respond to [the child's] social, emotional and psychological needs (¶ 14).

[29] The trial judge was referencing the availability of services and the timing of the availability of services in his consideration of whether the father could remedy the deficiencies identified by the psychologists in a timely manner. He determined that he could not. The trial judge did not commit any error in considering the availability of services to the father nor did he place undue emphasis on it.

Issue #2 Whether the trial judge erred in not considering the evidence of access supervisors and other witnesses who had observed the father as a caregiver

[30] The appellant argues that the trial judge did not consider the evidence of access supervisors and other witnesses who had observed the appellant as caregiver. In particular, he argues that the evidence of Family Skills Worker Angela Sangster, Access Facilitator Lynn LeBlanc and the positive aspects of Martin Whitzman, the father's therapist were not adequately considered. He argues that the trial judge ignored the evidence of these individuals who testified

the father was focused on his son, cared for his physical needs and acted appropriately while in their presence.

[31] Again, I cannot agree with the appellant's position. It is clear from reading the trial judge's decision that he took into account the positive aspects of the evidence. Very early in his decision he says:

> [6] ... All of the workers and the experts who wrote reports concede that the father can adequately meet the child's day-to-day physical needs such as the provision of nutritious food, clothing and shelter. ...

As noted previously, the trial judge's concern was not with meeting the physical needs of the child but rather, whether the emotional, psychological and social development needs of the child were being adequately addressed. The trial judge referenced the evidence of access supervisors and other witnesses who observed the appellant as a caregiver. He referred specifically to the evidence of Ms. Sangster, and Access Facilitators Maureen Sullivan and Lynn LeBlanc. It is clear he took their evidence into consideration in making his determinations.

[32] Even if I were to conclude that he had failed to consider evidence of access supervisors and other witnesses (which I have not), our ability to interfere is nevertheless limited. We would only interfere if the alleged omission related to material evidence and reasonably appears to have affected the trial judge's conclusions (**Children's Aid Society of Halifax v. T.W.**, 2006 NSCA 15, ¶ 32). The appellant has not identified how any alleged omission by the trial judge would have reasonably appeared to have affected the outcome. The evidence which the appellant says the trial judge failed to consider does not address his ability to meet the emotional, psychological and social needs of the child. Even if the trial judge failed to consider it, it could not reasonably appear to have affected the outcome.

[33] I would dismiss this ground of appeal.

Issue #3 Whether the trial judge placed too much emphasis on hearsay evidence with respect to past or future harm

[34] The appellant argues that the trial judge placed too much weight on hearsay evidence with respect to past or future harm. In particular, he references the evidence of Ms. Leedham who expressed the belief that the child did come into

harm because of hearing his father cursing and yelling, by observing his father being reactive and because of the volatile relationship between his father and mother.

[35] During argument the appellant's counsel, appropriately, acknowledged that it was not an issue of hearsay but rather the weight given to observations and opinions of Ms. Leedham.

[36] The evidence was properly before the trial judge and it was evidence he could consider. The appellant is, again, asking us to re-weigh the evidence considered by the trial judge in reaching his conclusions. As stated previously, that is not our role.

[37] I cannot identify any error in the trial judge's consideration of this evidence.

[38] Finally, the appellant argued that the trial judge failed to properly consider the possibility of reapprehending the child as a way of providing the services needed by the father.

[39] The argument was essentially this — the trial judge could have granted custody to the father and, if the Agency believed that the child was in danger of harm, it could re-apprehend, thereby starting the time lines under the **CFSA** running again which would have allowed the father to obtain the services required.

[40] This argument is without any merit. First, it would fly in the face of the mandated statutory time lines in the **CFSA**, and secondly, would be contrary to this Court's decision in **Nova Scotia (Minister of Community Services) v. B.F.**, 2003 NSCA 119. In **B.F.** this Court concluded that the Court had no authority to order services beyond the statutory deadline (¶ 67 and 68). To proceed as the appellant suggests, would essentially be doing an "end run" around the provisions of the **CFSA** to allow services to be provided beyond the statutory deadline.

[41] The appellant must also fail on this argument.

Conclusion:

[42] I would dismiss the appeal without costs to either party.

Farrar, J.A.

Concurred in:

Hamilton, J.A.

Beveridge, J.A.