NOVA SCOTIA COURT OF APPEAL

Citation: D.M.F. v. Nova Scotia (Community Services), 2004 NSCA 113

Date: 20040924
Docket: CA 228448
Registry: Halifax

Between:

D.M.F. and S.A.P.

Applicants/Appellants

v.

Minister of Community Services

Respondent

Restriction on publication: pursuant to s. 94(1) of the **Children and Family Services Act**

Judge: Fichaud, J.A.

Application Heard: September 16, 2004, in Halifax, Nova Scotia, In Chambers

Held: Application dismissed

Counsel: Timothy D. Morse, for the applicant/appellant D.M.F.
Appellant S.A.P., in person
Thilairani P. Pillay, for the respondent

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT 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.**

Decision:

[1] Ms. D.F. and Mr. S.P. have appealed from the decision of Justice Douglas Campbell of the Supreme Court Family Division. Justice Campbell's order placed the three children of D.F. and S.P. in the permanent care and custody of the Minister of Community Services ("Agency"). Justice Campbell's order also stated that D.F. and S.P. shall have no access with the three children.

[2] D.F. and S.P. apply for a stay of execution of the provision in the order which denied access. The applicants submit that pending the determination of this appeal, they should have periodic supervised access with their three children.

Background

[3] The children are aged 6, 5 and 4. According to Justice Campbell's decision, in June 2001 there was a referral to the Agency that the parents yelled, cursed and used vulgar and derogatory language at the children. In October 2001 the Agency received a referral from the oldest child's school reporting the child had preferred not to return home to avoid verbal abuse and being locked in a room. In March 2002 and again in March 2003, the Agency received reports that the oldest child disclosed incidents of physical abuse from her mother.

[4] The Agency assisted the parents with a hands-on family skills training program at the home. This program ceased due to a lack of progress. In August 2003 the Agency apprehended the children. In September 2003, the Court ordered that the three children were in need of protection under s. 22(2)(g) of the ***Children and Family Services Act***, S.N.S. 1990 c. 5 ("***Act***") based on a substantial risk that the children would suffer emotional harm. There followed court orders, to which D.F. and S.P. either consented or offered no opposition, providing that the three children be placed in the temporary care and custody of the Agency with supervised access to D.F. and S.P. This was the situation up to the disposition hearing which is under appeal.

[5] In April 2004 the Supreme Court, Family Division conducted a three day trial to consider the Agency's plan for permanent care and custody of the three children. On June 23, 2004, under s. 41(1) (f) of the ***Act***, Justice Campbell issued the order placing the three children in the permanent care

and custody of the Agency, with a view to adoption, and denying any access to D.F. and S.P.

[6] Justice Campbell found:

> 20. . . . The evidence discloses that the children's out of control behaviours were extreme. Inside their apartment, the children would throw eggs, spill milk from the fridge, climb over furniture, pull over book cases, bump into walls and each other, yell and run around the apartment aimlessly. The children would mark furniture, throw books, keys, shoes and generally engage in aggressive behaviour. The children would attempt to escape the apartment. When the worker would leave the apartment, the parents would have to hold back the children and the worker would need to very quickly open and close the door behind her. On some occasions the children's escape was successful after which they would run about the hallways of the apartment building banging on doors of other tenants and refusing to abide by their parents' commands to return. One family support worker, Katherine MacQuarrie, testified that the children resembled "feral animals."

[7] Justice Campbell outlined the history of intensive services provided by the Agency and concluded that the Agency's services had been attempted, had failed and would be inadequate to protect the children in the future.

[8] The first disposition order was dated December 11, 2003, further to an application commenced in August 2003 when all three children were under six years of age. Under s. 45(1)(a) of the ***Act***, the maximum duration of all disposition orders could not exceed 12 months, meaning that temporary care and custody with supervised access could have extended to December 10, 2004. Instead, Justice Campbell ordered immediate permanent care and custody in June 2004. In his view the children urgently needed a process of emotional healing:

> 46. . . . Based on all of the evidence, including the opinions expressed by Ms. Eakin and others, I am satisfied that these children have been subjected to serious emotional harm that has caused psychological damage to them to an extent that the likelihood of repair has been compromised.
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> . . .
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> 54. Having reached the conclusions set out above, the practical legal options open to the court on the facts of this case are temporary care and permanent care. If this case were being heard at the outside statutory time limit, the former would not be a practical option on these facts because the child protection concerns are presently outstanding and are extremely serious. The only issue for the Court then

is whether within a reasonable time not exceeding the five and a half months remaining in the statutory time lines, this situation is likely to improve to the point of allowing a safe return of the children to their parents.

55. . . . More importantly, the children have so significantly missed out on appropriate development of their emotional, social, cognitive and disciplinary needs (over the years of their life when these developments are most critically needed) that permanency planning for these children takes on an urgent, if not already missed, time line. Their welfare cannot be put on hold while services to the parents would continue to be an experiment with a probably futile result.

56. . . . Because of the urgency of permanency planning for these children, I have concluded that it would not be reasonable to subject them to an additional five and a half months of services to promote their return to their parents.

. . .

58. In the context of the above note of statutory directions and the facts that gave rise to the protection finding, I have concluded that continued temporary care in the Agency with services would not be in the best interests of these children and is highly unlikely to promote a reunification with their parents. Although it may be too late to assist these children to the point of achieving their original potential for health, happiness and productivity in life, the prospect of assisting them in achieving their current maximum potential only exists if there is an immediate stable and stimulating home environment provided for them. I therefore direct that the children be placed in the permanent care and custody of the Minister of Community Services.

59. The Agency Plan is to place the children for adoption. The Act prohibits the placement for adoption if there is an access order for the children and their parents. For that reason and for the reasons that have given rise to the permanent care order, I can see no meaningful benefit to the children in the parents having access to them. . . .

Issue

[9] The issue is whether D.F. and S.P. have established the requirements for a stay of the access restriction.

Legal Principles

[10] Section 49(3) of the ***Act*** and s. 41(e) of the ***Judicature Act***, R.S.N.S. 1989, c. 240, permit the court to grant a stay. ***Civil Procedure Rule*** 62.10 (2) permits a judge to stay execution.

> A judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from.

[11] In ***Fulton Insurance Agencies Ltd. v. Purdy*** (1991), 100 N.S.R. (2d) 341 (C.A.) at para. 28, Justice Hallett stated the well known principles which have governed the exercise of discretion under ***Rule*** 62.10(2):

> [28] In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
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> [29] (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
>
> [30] (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[12] In child protection cases special principles infuse the ***Fulton*** tests. These principles have been summarized by Justice Cromwell in ***Minister of Community Services v. B.F.***, 2003 NSCA 125 at paras. 13, 19, and 22, by Justice Saunders in ***Family and Children's Services of Annapolis Co. v. J.D.***, 2004 NSCA 15 at paras. 10 - 14, Justice Bateman in ***D.D. v. Nova Scotia (Minister of Community Services)***, 2003 NSCA 146 at paras. 9 - 1 and Justice Flinn in ***C.A.S. of Halifax v. B.M.J.*** (2000), 189 N.S.R. (2d) 192 at paras. 29 - 31. I will summarize these principles without reproducing the cited passages.

[13] Although the ***Fulton*** test provides the format for analysis, under s. 2(2) of the ***Act*** in a child protection case the overriding factor is always the best interests of the child. This reformulates the "irreparable harm" and "balance of convenience" branches of the ***Fulton*** test. The standard civil tests of

irreparable harm to the applicant and balance of convenience between applicant and respondent are sterile in a child custody case. It is not the irreparable harm to the applicant (whether parent or Agency) or the balance of convenience between the litigants (parent and Agency) which governs. Rather the focus is on the child. It is highly unlikely that harm to the child would be compensable in money. So the "irreparable" concept recedes.

[14] In ***B.F.***, at para. 19, Justice Cromwell summarized the approach:

> The applicants must show a risk of harm produced by the combination of the continuing in force of the order under appeal and the delay until the result of the proposed appeal is known. The risk is that if the stay is withheld, their rights and the interests of the children will be so impaired by the time of final judgment that it will be too late to afford complete relief. On the other hand, this risk must be balanced with the risk of harm to the children if the stay is granted. The risk to be considered is that of harm to the children that could result from staying an order that may be affirmed on further review to be both lawful and in their best interests.

[15] This perspective also affects the deference which the judge considering a stay application must give to the trial judge's findings. The determination of the child's best interests is a delicate fact-driven balance at the core of the rationale for appellate deference. For these reasons, in ***B.M.J.*** at para. 31, Justice Flinn said that the Court of Appeal "shows considerable deference to the decision of a trial judge in custody matters" and will only interfere if the trial judge has "gone wrong in principle, or has overlooked material evidence." Justice Cromwell noted in *B.F.* at para. 13 that, because of the need for stability and finality in child custody, generally there must be "circumstances of a 'special and persuasive nature', usually connected to the risk of harm to the children, in order to persuade the court to grant a stay."

Application of Principles

[16] With respect to ***Fulton's*** first step, the arguable case, counsel for D.F. says generally that the trial judge misapprehended the evidence and misapplied the law, but says little else. I need not decide whether there is an arguable case. As will be discussed, the evidence fails to satisfy the other requirements for a stay.

[17] I have quoted the passages from the trial decision which state Justice Campbell's reasons for rejecting continued temporary care and custody to the Agency with supervised access to the parents, for the remaining five and a half months of the permitted statutory term. Justice Campbell emphasized

the "urgency" and "immediate" need for permanent care and custody, without access, to begin repair of the emotional damage done to these children. Continued access by D.F. and S.P. would hinder the healing.

[18] The affidavit submitted by the applicants says little on this topic. The only point in D.F.'s affidavit which touches the issue is her statement:

> THAT I am seeking the resumption of supervised access between myself and my children so that I may maintain my relationship with them pending the outcome of my appeal and so that the children may be disrupted as little as possible in the event my appeal is successful.

This does not address the trial judge's strong findings respecting the children's urgent and immediate needs.

[19] In response to the stay application the Minister submitted an affidavit of Andrea Boyce, a social worker, employed by the Department of Community Services. This affidavit attached case recordings of contacts with the children since the order for permanent care and custody. These recordings include the following note from August 4, 2004:

> This worker and foster care worker Suzanne Mercer made a visit to the foster home in which the three children are now residing. The foster parents report that the children are quite active. They are responding well to the directions the foster parents are giving them and they see that the children have made quite a bit of progress even in the last month and a half since being in the new foster home. The foster parents report that they feel the speech of the children is progressing quite well.
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> They reported that the day care has said that R. can be somewhat of a bully but that this seems to be improving a bit as well and the other day the day care reported that R. had a really good day. This worker provided the foster parents with contact information for the children's previous day cares so that the new day care can liaise with them if necessary.
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> The foster parent said that at first when the children came to their home they were scared of the water but they now all seem to love the water and the children showed the worker their new water toys. The foster parents said that S. and R. were talking one day and commented, S. said that if you're bad you'll be sent back to D.F. and R. had said oh no, as if he did not want that to happen. The foster parents feel that the children are quite athletic. S. seems to have a real interest in hockey and he is doing very well with his letter recognition. All of the children seem quite interested in swimming and will be pursuing swimming lessons in September if this continues.

> Although initially the plan was to hold S. back for a year before starting school, it seems that with the amount of progress he has made he will be ready to enter grade primary this September. It will mean that both R. and S. are starting primary in the same year but it will be requested that they are in different classes.
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> Part way through our visit in the foster home the children returned home from day care. They were very enthusiastic about greeting their foster parents and it was observed that as soon as they came into the house they all jumped on the couch to be with the two foster parents. They were able to sit and listen and interact while we had our meeting and they listened well when the foster parents asked them to do something. They were very pleased to show the worker's [sic] their bedrooms and worker felt that the areas were appropriate for the children.
>
> A. Boyce

[20] In a child protection case, consideration of irreparable harm and balance of convenience distills into an analysis of whether denial of the stay would harm the child and, if so, whether the stay's issuance or denial would better serve, or cause less harm to, the child's interest. The applicants have adduced no evidence to dissuade me from deferring to the trial judge's findings. The children's positive reaction to foster care cited in Ms. Boyce's note of August 24, 2004 supports Justice Campbell's view that separation of the children from the parents would be ameliorative.

[21] In my view, it is in the children's best interests that there be no access pending the appeal ruling. I dismiss the stay application, with no order as to costs.

Fichaud, J.A.