NOVA SCOTIA COURT OF APPEAL

Citation: ***J.M. B. v. Nova Scotia (Community Services)*** **.**, 2004 NSCA 92

Date: 20040721
Docket: CA 218677
Registry: Halifax

Between:

J. M. B.

Appellant

v.

Minister of Community Services and
J. R. M.

Respondents

Restriction on publication: ***Section 94(1) of the Children and Family Services Act***

Judge(s): Glube, C.J.N.S.; Hamilton & Fichaud, JJ.A.

Appeal Heard: June 28, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed, as per reasons of Hamilton, J.A.; Glube, C.J.N.S. and Fichaud, J.A. concurring

Counsel: William M. Leahey, for the appellant
James C. Leiper, for the respondent,
Minister of Community Services
J. R. M., self-represented respondent

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

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.**

Reasons for judgment:

[1] This appeal considers whether the trial judge, upon hearing an application for an order for permanent care and custody of a child under s. 42(1)(f) of the **Children and Family Services Act,** S.N.S. 1990, c. 5, as amended, after the time limit set out in s. 45(1) of the **Act** had expired, erred in his interpretation and application of s. 42 (4) of the **Act**:

> Limitation on clause (1)(f)
>
> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian.
> [Emphasis added]

[2] The only ground of appeal argued by the appellant was:

> Did the Learned Trial Judge err in ruling that in considering whether or not to make an Order for permanent care and custody pursuant to Section 42(1)(f) of the **Act**, the Court shall not, given the fact that statutory time limits had been exceeded, make any inquiry pursuant to Section 42(4).

[3] Given the limited nature of the sole ground of appeal, there is no need to review the facts in any detail. Briefly, it was determined on November 26, 2001 that there were reasonable and probable grounds to believe that the child, the biological daughter of the appellant and the male respondent, was in need of protective services.

[4] The interim hearing pursuant to s. 39 of the **Act** was completed on December 17, 2001. On March 22, 2002, the child was taken into care by the Minister and on March 28, 2002 an order was issued placing the child in the temporary care and custody of the Minister with supervised access to the appellant.

[5] The protection hearing pursuant to s. 40 of the **Act**, to determine whether the child was in need of protective services, was held on April 29 and 30 and May 1 and 7, 2002. On May 7, 2002, it was determined that the child was in need of protective services pursuant to s. 22(2)(g), (i) and (k) of the **Act** and it was ordered that the appellant be referred for a psychiatric assessment and then for counselling and therapy.

[6] A contested disposition hearing was scheduled for August 29 and 30, 2002. On August 19, 2002 the disposition hearing pursuant to s. 41 was completed by consent and the order provided for counselling and therapy for the appellant and therapy for the child.

[7] The child was under six years of age at the time of the application commencing the proceedings. Thus s. 45(1)(a) applies and provides:

> Total duration of disposition orders
>
> 45 (1) Where the court has made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed
>
> (a) where the child was under six years of age at the time of the application commencing the proceedings, twelve months;
>
> . . .
>
> from the date of the initial disposition order.

[8] After August 19, 2002, there were several interim court appearances. There were difficulties with the appellant's supervised access resulting in it being terminated for a period of time. The appellant terminated her counselling after the counsellor wrote a report she objected to, but she began counselling several months later with another counsellor. As a result of the lack of progress made by the appellant during the six months of counselling made available to her, by June 2003 the Minister had changed his plan with respect to the child from one of

trying to reunite the child with the appellant, to one of seeking permanent care and custody of the child.

[9] On August 15, 2003 the trial judge scheduled the trial with respect to the Minister's application for an order for permanent care and custody for January 5, 6, 7, 8 and 9, 2004. These trial dates were outside of the maximum time limit specified by s. 45(1)(a) of the **Act**, the trial judge having determined that it was in the best interests of the child that the time limit be extended to, among other things, ascertain whether ongoing further services would resolve the appellant's problems and allow the child to be reunited with her.

[10] On December 10, 2003 the appellant challenged the trial judge's jurisdiction to proceed with the trial given that the date was beyond the time permitted by s. 45(1)(a). This decision has not been appealed.

[11] The trial with respect to the Minister's application for an order for permanent care and custody took place on December 11, 2003, January 5, 6, 7, 8, 9 and 16, and February 9, 2004. On February 17, 2004, the trial judge rendered his decision placing the child in the permanent care and custody of the Minister, with no provision for access by either the appellant or the respondent father. The order for permanent care and custody issued March 22, 2004. It is this decision and order that is the subject of this appeal.

[12] The appellant's argument is set out in her factum as follows:

> 37.) It is the position of the Appellant that based on his interpretation of the decision of this Honourable Court's decision in **Nova Scotia (Minister of Community Services) v. B.F.** [2003] N.S.J. No. 405 (C.A.) the Learned Trial Judge concluded that he did not have the power to override the time limitation provision in Section 42(4) and thus did not make any inquiry as to whether or not the circumstances which had given rise to the original May 7, 2002 finding were unlikely to change in the foreseeable future. It is the position of the Appellant that the Learned Trial Judge did have jurisdiction to make this inquiry and that in fact he was required to do so before making an Order for permanent care in favor of the Respondent Minister. It is the position of the Appellant that because the Learned Trial Judge would not be required, in making such an inquiry, to extend by way of Order supervisory services of the agency beyond the absolute statutory time limit he was in fact obliged to make an Order dismissing the

> application if he found, upon analysis of the evidence, that the circumstances justifying the original Order for protection were not unlikely to change within "a reasonably foreseeable time." The appellant argues that the failure to make the inquiry under 42(4) is reversible error.
>
> 38.) It is the position of the Appellant that **B.F.** did not prohibit the Trial Judge from considering whether the best interest of the child should lead the Court to override the time limitation phraseology in Section 42(4). The failure by the Learned Trial Judge to consider overriding these time limitation provisions, based as it was on his analysis of the **B.F.** decision of this Honourable Court, meant that at no point in his decision did the Learned Trial Judge consider the issue raised by Section 42(4).

[13] The thrust of the appellant's argument at the hearing was that the trial judge erred by interpreting s. 42(4) as precluding him from considering whether the appellant's circumstances were likely to change in the foreseeable future since the hearing was beyond the statutory deadlines. She argued that such an interpretation of s. 42(4) could lead to unfair results by causing a trial judge to order permanent care and custody to the Minister, separating a child permanently from their parent, where the evidence indicated a parent would be likely to be able to parent successfully a month or two after the hearing.

[14] In paragraphs 49 to 51 of his decision the trial judge reviewed the facts and then considered the statutory framework governing the application before him, including s. 42(4):

> [49] Section 42(1) of the Act lists the remedies that can be given at a disposition hearing such as this one. Those remedies outlined in paragraphs (b) through (e) of subsection 1 are not available at this stage because they represent temporary arrangements. The court has no power to make such an order that operates beyond the statutory deadline as confirmed by the Court of Appeal in *Nova Scotia (Minister of Community Services v. B.F.)* at 2003 N.S.J. 405. The only options available to the court at this time are those available [in] section [42(1)](a) and (f). The former remedy is to dismiss the matter with a consequential return of the child to the mother. The latter authorizes the placement of the child in the permanent care and custody of the agency. Section 47(2) allows such a permanent care order to be made with or without access to a parent.
>
> [50] Section 42(2) directs that a court shall not make an order removing the child from the care of the parent unless the court is satisfied that less intrusive

> alternatives have been attempted and failed; have been refused by the parent or would be inadequate to protect the child. Section 42(3) requires the court to consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family.
>
> [51] Subsection 4 [of s. 42] requires that the court shall not make an order for permanent care unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits so that the child can be returned to the parent.

[15] After referring to these statutory provisions, he stated:

> [52] In my view, this case turns largely on its facts. The finding that the child was in need of protection was made at the time of the protection hearing after a contested trial. That finding is not to be revisited at a permanent care hearing. The question really is whether the child protection concerns which gave rise to that finding have been sufficiently addressed to allow for a safe return of the child to the mother. Because this case is beyond the statutory limits, it follows that there is no inquiry whether such a goal could be met through changed circumstances within a foreseeable time not exceeding the limits. The question is whether the agency has met its burden of proving that the child protection concerns have not, at this point in time, been sufficiently addressed to allow a safe return of the child to the mother.
> [Emphasis added]

[16] The trial judge then went on to indicate he was satisfied the appellant continued to have at the time of the trial a severe mixed personality disorder, as diagnosed by one of the experts who testified before him, and that her refusal to recognize that fact impaired her ability to be treated.

[17] The trial judge also concluded that the appellant had not sought or accepted sufficient treatment to correct her problems (notwithstanding that he had already delayed the hearing of the Minister's application by six months, to a time beyond the statutory time limits, to ensure the appellant had time to obtain treatment and counselling if she chose to knowing that the Minister was now seeking permanent care and custody of the child). He concluded that it would be unsafe to return the child to the appellant because of the ongoing personality disorder of the mother:

> On balance, I am compelled to conclude that the mother has a serious mixed personality disorder, that she has not accepted that fact and that she has not sought or accepted sufficient treatment to correct her problems. I am satisfied that it would be unsafe to return the child to her mother's care at this time. I am further satisfied that less intrusive measures have been attempted and failed and would be inadequate to protect the child; that the child is placed with a relative which is intended currently to be continued by the agency and that the changes that would have been necessary to return the child to the parent have failed to be made within the maximum time limits including the extension of them.

[18] This Court has a limited role in reviewing a decision of a trial judge made in a proceeding pursuant to the **Act**. Considering this appeal pursuant to s. 49 of the **Act** in light of the sole ground of appeal argued by the appellant, we are not to interfere with the trial judge's decision absent a finding that he has acted on a wrong principle of law: **T.B. v. CAS** (2001), 194 N.S.R. (2d)194 (CA) at ¶ 15. The appellant has not satisfied me that the trial judge acted on a wrong principle of law. I would dismiss the appeal.

[19] I am satisfied the trial judge interpreted and applied s. 42(4) as he should have in reaching his decision. He did not err in concluding that because the trial was taking place beyond the time limits referred to in s. 42(4), he was not required to consider whether it was likely the circumstances giving rise to the child being in need of protection were likely to change in the foreseeable future. The subsection specifically provides that the judge is to inquire as to the likelihood of circumstances changing "within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45." On the facts of this appeal s. 42(2) did not require the trial judge to consider whether the circumstances were likely to change in the foreseeable future, because on the plain meaning of the words of the subsection there was no foreseeable future left within the statutory deadlines.

[20] Responding to the appellant's arguments set out in ¶ 13, the appellant has not satisfied me that this interpretation of s. 42(4) is unfair. It takes into account all of the words in the subsection rather than ignoring the phrase, "not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45," as the appellant's suggested interpretation does. In a situation where these maximum time limits have expired and the evidence satisfies the trial judge that, although it is currently in the child's best interest not to be returned to

the parent, this may change in the foreseeable future, the trial judge may make an order for permanent care and custody of the child pursuant to s. 42(1)(f) with access to the parent. This would maintain contact between child and parent until the change occurred, at which time the Minister or the parent could seek to have the permanent care and custody order terminated pursuant to s. 48(8) of the **Act**.

[21] The appellant has not satisfied me that the trial judge misinterpreted **B.F.**. His comments in ¶ 49 of his decision as set out in ¶ 14 above, relating to his inability to order services outlined in s. 42(1)(b) through (e) inclusive beyond the statutory deadlines, are in accordance with **B.F.**

[22] Accordingly I would dismiss the appeal.

Hamilton, J.A.

Concurred in:

Glube, C.J.N.S.

Fichaud, J.A.