IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. J.A. B. , 2008 NSSC 136

Date: 20080507
Docket: SHFCFSA-053043
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

J. A. B. and S. B.

Respondent

Restriction on publication: 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: "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 relative of the child."

Judge: The Honourable Justice Douglas C. Campbell

Heard: April 14, 15, 16, 2008, in Halifax, Nova Scotia

Counsel: Elizabeth Whelton, for the applicant
Eugene Tan, for the respondent

By the Court:

THE FACTS:

[1] This is a matter brought by the Minister of Community Services (hereinafter referred to as "the agency") pursuant to section 42(1)(f) of the *Children and Family Services Act,* Stats N.S. 1990, c.5 (hereinafter referred to as "**the Act**") for an order placing the respondents' child in the permanent care and custody of the applicant.

[2] The respondents are respectively the mother and the father of the child. They had been dating in an on and off relationship for more than two years when the mother became pregnant. She was 15 years of age at the time of the birth on May *, 2007 (**editorial note- date removed to protect identity*). The father did not participate in this matter.

[3] The protection application was issued by the agency on May 29, 2007, after having taken the child into care almost immediately after the birth. The interim application and the protection hearing were completed by consent.

[4] The agency had become involved with the mother during her pregnancy after receiving a report from her family doctor who was concerned about the mother's young age and her apparent lack of family support in that she was living with her maternal grandmother who was in failing health. The doctor apparently felt that the mother could make use of the assistance of the agency leading up to and following the birth. This referral resulted in the agency becoming involved by way of the provision of various services on a voluntary basis.

[5] The mother testified that she was then confused as to the role of the social worker involved and thought that the social worker's mandate was to assist her in various ways including helping her to obtain social assistance. When the mother eventually learned that the agency had the capacity to seek temporary and eventually permanent care of her then unborn child, she was persuaded by others to dismiss their services and asked the social worker to terminate the agency's involvement in her life. As a result, insignificant progress was made by the agency in preparing the mother for her parenting of the child after the birth.

[6] A number of days prior to the child's birth, the agency assessed the risks and determined that the child should be taken into temporary care at birth. In keeping

with its policy, the agency did not communicate that decision to the mother. While that policy is justified on the basis that knowledge of the decision could cause a prospective mother to hide the fact of the child's birth from the agency the sudden nature of the apprehension that followed would not unexpectedly set the stage for an unwelcome reaction from the mother.

[7] A notice of the taking into care was provided to the mother on the day the child was born and the baby was physically taken into care the next day. The mother and certain of her relatives were very upset at this development; understandably so especially in light of the circumstance that they had not foreseen it.

[8] A number of services were put in place for the mother including family skills and personal counselling. The agency then began to work with the mother in developing a plan of care for the child that would result in reunification.

[9] At the young age of 15 years and having dropped out of school at grade eight, the mother faced next to impossible barriers from a financial, emotional and skills point of view. Her own mother had been unable to care for her due to

personal issues and therefore she had been sent to live with her maternal grandmother. For approximately six to eight months while in grade six she lived with her mother's sister, hereinafter referred to as her "aunt". She then began living with her maternal grandmother and over time the consistent deterioration of her grandmother's health placed her at least in part in the role of caregiver at a time in her life when she needed to be cared for.

[10] While the mother would have preferred to have had the care of the child herself, she quickly began to formulate a plan by which her aunt would be very directly involved in the child's upbringing. The agency proceeded to meet with the aunt and to assess her circumstances. Initially, the plan was that both the baby and the mother would live at the aunt's home which was occupied by herself and her daughter.

[11] There was evidence of some discord between the mother and her aunt over the years and at one point the mother had stated to the agency workers that her aunt had been physically abusive to her. At trial, she recanted that allegation saying that she had lied about it because she was then of the belief that her aunt was trying to

take her baby away from her. She saw the abuse allegations as a method of sabotaging that development.

[12] The mother nonetheless agreed to participate in the then plan involving her aunt. Comments made by her to the effect that she would do anything to get her child back and that she would ignore her aunt's nagging may have been taken by the agency workers to indicate a lack of true commitment by her to a life at her aunt's home. When her comments are measured against the stress, frustration and even a degree of hopelessness that would accompany a sudden and unexpected apprehension of her newborn, it is difficult to fault her. I have concluded that her remarks were simply a reflection of her sense of desperation designed to show the extent of her desire to parent her child.

[13] In keeping with agency policy, the plan at the aunt's home would require its approval as a restricted foster home. This engages the services of the foster care section of the department. It appears that it was that process which caused the plan to need to be changed. For that approval to be granted, the baby would have to be under the mother's aunt's care and the mother would have to live elsewhere, possibly with an uncle. With this physical arrangement, the mother would take on

the role of an access parent rather than the more active day to day role in the care of the child that might have come from her having lived there. While this amended plan was not the mother's preference, she expressed a willingness to co-operate since it would be a method of keeping the baby in her life and with her family. I have concluded that there was merit to this change by virtue of the evidence as to the mother's parenting skills and lack of commitment to agency services along with her lack of insight about her deficits.

[14] When the mother's aunt was approached with the suggestion that she would take full care of the baby, subject to the mother's access, she indicated that she would want to get legal advice to better understand all of the legal implications for her that would arise from that arrangement.

[15] It would appear that the next step in the planning would be for the mother's aunt to affirm her willingness to act in a custodial capacity after receiving legal advice. The agency workers did not hear back from the mother's aunt until December 17, 2007 (a number of months later) and her phone call on that date was to convey her angry concern over having been allegedly misquoted by the agency

on an unrelated matter. No response to the question of her taking full care of the baby without the mother living there was then made.

[16] In the meantime, the protection finding was made, ultimately by consent, on August 20, 2007 and the Parental Capacity Assessment was completed by the IWK Assessment Services department on November 30, 2007. That assessment ended with two recommendations; first, that the child be placed in the permanent care of the agency and second, that if in the event a family member brought forward a plan, such family member should be subjected to a Parental Capacity Assessment before the agency indicated its position with respect to such a plan. In early January, 2008, the agency filed a plan of care by which it sought an order for permanent care and custody of the baby.

[17] At a hearing on January 21, 2008, counsel for the mother indicated that she intended to contest the permanent care application and would be putting forward a plan of care for the child. Trial dates were then set for five days commencing April 14, 2008. At a pre-trial conference on February 19, 2008, the court directed the mother to file her plan of care in writing within two weeks of that date. This was not done.

[18] A settlement conference was held with another judge on March 28, 2008. When that process failed to settle the matter, the settlement conference judge gave further directions for trial including a requirement that the mother file an affidavit from herself and any family members involved in the plan by April 7, 2008. That deadline was not met.

[19] At a pre-trial conference held on April 9, 2008, counsel advised that the mother had forwarded a plan to counsel for the agency on March 27, 2008 but had not filed it with the court. In fact, that plan was a repeat of the settlement conference position filed with the settlement conference judge.

[20] On the morning of the commencement of the trial a sworn affidavit was filed with the court which outlined the mother's plan of care which was substantially the same, apparently, as her settlement conference position. It may be that an unsworn copy was available to counsel for the agency a few days earlier. In any event, the formal plan of care was filed at the eleventh hour. While it contained alternatives similar to the first plan and the amended plan worked up with the agency, the fact

that those plans seemingly dissolved between late July of 2007 and the days leading to the settlement conference in late March 2008 is significant.

[21] The above chronology of events was happening in the context of many other activities and events. The services offered for the mother's counselling (with two different counsellors) had ended without much accomplishment. The possibility of the mother attending a recently designed government program for housing of young mothers had been developed but then failed when the mother stopped attending school in October, 2007 - a requirement for obtaining the social assistance which would allow the housing program to be accessed. The mother had indicated she was attending school when in fact she was not after October, 2007. The mother's uncle who had expressed some ability to assist in the plan had become occupied with other circumstances. The subject aunt did not habitually attend visitation with the child and prior to trial had never seen the child except at one access visit when the child was about four days old.

[22] On a positive side, the mother had completely given up her relationship with the child's father in which she had been the victim of physical and other abuse. The

access visits had been going relatively well and a number of access reports confirm that fact.

[23] The evidence discloses that the placement of the child in foster care had worked out very well and the child was prospering. The agency plan is for adoption of the child by an already identified family.

THE ANALYSIS:

[24] Counsel for the mother argues for one of three forms of order. First, he seeks an order placing the child with the mother subject to the supervision of the agency. He argues that there are a number of months left in the statutory time line which would allow the agency to provide services to the mother which would enable her ultimately to parent the child on her own. For this plan, living arrangements were vague, at best.

[25] In the alternative, he argues that the child be placed in the care of the aunt with the mother living at her home, taking part in the day to day care of the child but recognizing the aunt as the primary caregiver, all of which would be subject to

the supervision of the agency for some period of time within the statutory deadlines. For this plan, restricted foster home funding was not approved.

[26] In the further alternative, he asks for an order placing the child in the care of the aunt with the mother residing elsewhere and having a right of access to the child subject to the supervision of the agency for some period of time within the statutory deadlines. Under all three alternatives the agency's supervision would end, at the very latest, at the statutory deadline.

[27] Section 42(2) of **the Act** requires that the court shall not make an order removing the child from the care of a parent unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family, have been attempted and failed, have been refused by the parent or would be inadequate to protect the child.

[28] Subsection 3 of that section says that before making a temporary or permanent care and custody order, "the court shall ... consider whether it is possible to place the child with a relative, neighbour or other member of the child's

community or extended family ... with the consent of the relative or other person".

[29] The case law is clear that the onus is on the parent to bring forward a plan from such persons for the agency's consideration. In this case, the only person so presented is the mother's aunt.

[30] In the case of *Family and Children's Services of Cumberland County v. C.R., M.R. and A.R. [2003] N.S.J. No. 537***,** Judge Milner of the Family Court of Nova Scotia commented on placement considerations as between a known foster home and the home of the parent. He stated commencing at paragraph 73:

> "...the court should concentrate on whether the natural family's home is adequate in providing safe and healthy environment for the children.
>
> The natural family's plan will succeed or fail on its own merits. If the children would be safe and secure in that home and the court would otherwise decide to place the children in that home, the decision should not be different because there is or might be a better home somewhere else.
>
> The decision on where to place the children should not be made by comparing the family's home with a foster home or an adoptive home. The long term foster home or the adoptive home is usually not identifiable, and even if it were, any family, regardless of its merits, would be at risk of failing to measure up to the best available alternative."

[31] The above noted passage would apply with equal force in comparing the foster home to a relative's home.

[32] In this case, I am required by the above noted passage from **the Act** to give appropriate consideration to the desirability of placing the child with a relative.

[33] The concern that first gave rise to the agency's involvement in this case was the very young age of the mother at the time of the expected birth and the inadequacy of support systems within her family. The domestic violence concern has disappeared by the father's absence.

[34] While it is often possible for a mother as young as fifteen years (in this case now sixteen years) to provide a safe and adequate home for her child, that is usually the case because of resources made available to assist her. A sixteen-year old does not usually have access to independent funds to pay for living expenses, often has heavy commitments in terms of educational pursuits and sometimes needs emotional and skills support in order to take on the task. Those resources are often obtained from a family member or members. That is not to say that a school-

aged mother can never offer a safe and adequate plan for independent parenting. Rather, young age, incomplete education and insufficient family support present significant challenges to the task.

[35] In this case, the mother's own support was provided by her grandmother whose health had deteriorated to the point where the grandmother was not able to offer a plan. The child's mother was unavailable to be involved in a plan. Indeed, the only family plan came when the mother's aunt offered to allow the mother and child to live with her. The exact definition of the respective roles of the mother and the aunt in regard to the upbringing of the child was less than clear mainly because the plan had not fully developed before it changed.

[36] As mentioned above, the assessment of the aunt's home and plan for purposes of approving her home as a restricted foster home was conditional upon the aunt taking full care and custody of the child (subject to some degree of agency supervision) with the mother living elsewhere. It is significant to note that when that change, acknowledged by the court to be appropriate, was adopted by the agency, the aunt allowed a number of months (above noted) to pass without providing a commitment to take on such a role. She must not be faulted for

requiring some time to obtain legal advice before offering her decision but it is very curious that she would allow such a period of time to pass, especially when she knew trial dates were approaching for a requested permanent care order. Despite two separate deadlines being given by the court to file such a plan in writing, it did not occur until days before the commencement of the trial. This event does not present the picture of a type of long term family commitment that should exist in order for the court to favourably consider this family plan.

[37] In addition, there was evidence that at a time when the mother had lived with the aunt there had been some degree of acrimony. Even if I accept the mother's recant of the allegation of physical abuse by the aunt, it was acknowledged by both the mother and the aunt that there had been tension and difficulties in their relationship. Both were asking the court to accept the fact that they had recently repaired their relationship. The prospect of that dramatic and important change does not come without risk. The history of these relationship difficulties does not offer comfort to the court for this plan.

[38] The Parental Capacity Assessment presented by I.W.K. Assessment Services recommends permanent care with a view toward adoption. It also recommends

that if a family plan is presented, such family members should be subjected to a parental capacity assessment. Partly because of the significant delay in receiving a commitment from the aunt to take part in such a plan, there has been no such assessment. The court is left without the assistance that might have come from such an assessment.

[39] The aunt has full time employment and is also pursuing university-level education. In addition, she commented that upon graduation she might seek employment in another province. While none of those factors would be fatal to the aunt's involvement in this plan, they raise, when considered in addition to the above noted issues, a concern about the aunt's ability to commit on a long term basis to the raising of this child. I had the impression that she would have preferred to have provided some form of temporary assistance until the mother can establish herself in a full parenting role. Having dropped out of school in grade eight, the mother would be unlikely to establish herself in that way in the short term.

[40] I gave considerable thought to the fact that there are a number of months left before the agency reaches the statutory deadline whereby it must either obtain an

order for permanent care or an order to dismiss the proceedings. This gives rise to consideration of an order for temporary care with services leading to a reunification. While, on the one hand, a primary mandate for the agency and a goal for the court is to reunite apprehended children with their parent or parents, there is no principle that states that the entire time frames outlined in the Statute must be exhausted before permanent planning should be introduced. On the facts of this case, the mother resented the agency's involvement and did not commit herself to the development she needed, which might have achieved through the provision of agency services. The father of the child is not involved in the child's life and, when involved with the mother, did not provide for her in a positive way.

[41] Based on the evidence before me, I am satisfied that the circumstances that gave rise to agency concerns are unlikely to change within a reasonably foreseeable time within the maximum time limits. The child is very young and as such needs permanency planning sooner rather than later. For the mother's plan to succeed, there needs to be a serious commitment to a long term home that provides a safe environment for the child. I am not satisfied that such a long term commitment is offered by any of the mother's alternative plans. I am satisfied that an order for permanent care and custody of the child is in the child's best interest

and that less intrusive alternatives, including the suggested family placement, would be inadequate to protect the child. From the child's birth until the trial date, less intrusive alternatives were attempted and, in my opinion, have failed.

[42] I will sign an order for the permanent care and custody of the child, which order shall provide for no access by the mother or the father to the child.

J.S.C. (F.D.)

Halifax, Nova Scotia