CANADA
PROVINCE OF NOVA SCOTIA
2010

SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)
Citation: Nova Scotia (Community Services) v. B.B., 2010 NSSC 244

Date: 20100416
Docket: 69220
Registry: Sydney

Between:

Minister of Community Services

Petitioner

v.

B.B. and J.H.

Respondents

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Kenneth **C**. Haley

Decision: Oral Decision given on April 16, 2010

Heard: April, 2010, in Sydney, Nova Scotia

Written Decision: June 22, 2010

Counsel: David Raniseth, Counsel for the Petitioner
Allan Stanwick, Counsel for Respondent, Ms. B.
Jill Perry, Counsel for Mr. H.

By the Court:

INTRODUCTION AND BACKGROUND

[1] This is the application of the Minister of Community Services requesting the Court to find that there are reasonable and probable grounds to believe that the children J.R.H., born June *, 2007 and M.R.H., born October *, 2008 are children in need of protective services pursuant to s. 22 (2) (b) of the *Children's and Family Services Act* and that they should be placed in the care and custody of the Respondents subject to the supervision of the Applicant pursuant to s. 39 (4) (b).

[2] An interim hearing was commenced on March 24, 2010 and scheduled for conclusion on April 8, 2010. The proceeding proceeded by way of affidavit evidence as per Rule 70.13 (7). Counsel for the Minister of Community Services marked as Exhibit No. 1 the Affidavit of Michelle MacLean which detailed "areas of concerns" regarding the overall supervision that B.B.. provided her children. In the Affidavit , Ms. MacLean stipulates at paragraph 12 that she had no contact with the Respondent(s) after February, 2010.

[3] Ms. MacLean confirmed on cross examination that her concerns were noted during the currency of a previous protection proceeding that was subsequently dismissed on February 23, 2010.

[4] The Protection Worker's evidence was introduced through the affidavit of Jennifer Barter and marked as Exhibit No. 2.

[5] Ms. Barter's affidavit references some historical information regarding the previous protection proceeding commenced on September 3, 2008 and October 27, 2008.

At paragraph 18 Ms. Barter states:

> "On February 23, 2010 it was determined there was insufficient time to hear all of the evidence in relation to the case before the end of the statutory time limit on February 24, 2010 and the Court ruled that it would not be in the best interest of the Respondent's children to extend the time for the hearing or all of the evidence beyond February 24, 2010 and as a result the Minister's application was dismissed."

[6] At paragraph 19 Ms. Barter references December 2, 2009, December 11, 2009 and January 11, 2010 as dates where concerns were noted by the Minister. Counsel for the Minister advises the Court this intended evidence was not put

before the Court in view of the above referenced dismissal, which the Court notes was not appealed by the Minister.

[7] The Minister, thus, convened a risk management conference on February 26, 2010 and Ms. Barter states at paragraph 21 of her affidavit:

> "After reviewing the history of the Minister's involvement on this file, it was determined that there continues to be concerns with respect to B.B..'s judgment and her ability to see and anticipate risk to the children and she has not demonstrated the ability to apply the information she has learned in terms of caring for her children and as a result her ability to supervise continues to be a concern"

[8] At paragraph 22 Ms. Barter states:

> "The Minister also concluded that as B.B.. continued to have indirect contact with Mr. H. and as she plans to reunite with him this remains a concern as J.H.. has not demonstrated an ability to remain drug free for a significant period of time."

[9] There was no cross examination on this affidavit. The Respondents called no evidence in response to the application submitting that the Applicant has not met it's burden and that this proceeding should be dismissed.

ISSUE

[10] Has the Applicant discharge it's burden and established that on a balance of probability there are Reasonable and Probable Grounds to believe that the Respondents' children are in need of Protective Services?

LAW

[11] Justice M. Lynch of this court stated in **Children's Aid Society of Halifax v T.W. and A.J.W. 2004 Carswells N.S. 61** paragraph 11 as follows:

> [11] It was found at the Five-day Hearing that there were reasonable and probable grounds to believe that the children were in need of protective services pursuant to s. 30 of the *CFSA*. That finding was based solely on the Protection Application and supporting affidavit from the Minister. At the completion of the Interim Hearing it must be determined whether there are reasonable and probable grounds to believe that the children are in need of protective services after hearing all of the evidence presented at the Interim Hearing. It is not a heavy burden that the Minister must meet, however, they must prove their case on the balance of probabilities. In making the decision the Court can consider any evidence that it considers to be credible and trustworthy.
>
> [12] The Court must consider as the paramount consideration the best interests of the children. The Court must also respect the integrity of the family and ensure that the proceedings are the least intrusive possible in the circumstances. The Court must conduct an analysis and reach a considered conclusion based upon the evidence before it. The question to be asked and answered in the

> affirmative is whether it is reasonable to conclude that there probably is and that there likely is a sound basis to believe that an eventual hearing will result in a granting of the Minister's application for a finding that the children are in need of protective services. **Family & Children's Services of Kings (County),**191 N.S.R. (2d) 178 (N.S.Fam. Ct.).

[12] The Supreme Court of Canada case **C.R. V McDougall,** 2008 SCC53 has outlined

the evidentiary test regarding the balance of probabilities at Paragraph 46 as

follows:

> (46) Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge find for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[13] And at paragraph 49:

> In the result, I would reaffirm that in civil case there is only one standard of proof and that is proof on a balance of probabilities. In all civil case, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

POSITION OF THE PARTIES

[14] The Applicant submits that only a portion of evidence was heard by this Court prior to the previous proceeding being dismissed. The Applicant refers to it as "at most a partial hearing". The Minister's counsel further submits the issue as to whether or not there were reasonable and probable grounds to believe the children were in need of protective services was not dealt with by the Court, thus issue estoppel does not apply.

[15] The Respondent submits the principals of Res Judicata or issue estoppel do not apply in this case. The Respondent acknowledge and agree that the previous dismissal cannot be Res Judicata on the new protection proceeding because there was a different issue to be judicially determined at the Permanent Care Hearing than there is at the present time.

[16] The Respondent's position can be summarized as follows:

> 1. The Minister must satisfy the Court on the balance of probabilities that it is reasonable to conclude that a protection application will likely be successful. While this is not a heavy burden, it is still a burden to be met.
>
> 2. The Court must make this determination based on the available evidence at the time of the s. 39 hearing.

> 3. The Minister in the case at bar presented no evidence of contact with the Respondents since the Court's dismissal of the prior proceedings on February 23, 2010.
>
> 4. A protection application which contains no current evidence fails to meet the s. 39 burden - regardless of the nature /outcome of past proceedings.
>
> 5. It is open to this Court to consider evidence from past proceedings, no matter what the outcome, by virtue of s. 96 of the ***Children's and Family Services Act***.
>
> 6. Evidence from past proceedings should be linked with current evidence and then the totally of that evidence assessed to determine if a current finding is justifiable.
>
> 7. By failing to put forward any current evidence whatsoever, the Minister is - in effect - asking the Court to revisit the decision to dismiss made on February 23, 2010 under the guise of a new protection proceeding.
>
> 8. A dismissal of protection proceedings has the same effect whether or not it flowed from a full hearing on the merits or a ruling with respect to timelines. A dismissal is a dismissal. The evidence from the proceeding that is dismissed, however, may still be admissible at a subsequent proceeding.

[17] The Respondent further submit that s. 96 of the Children and Family Services Act clearly contemplates the admissibility of historical evidence. However it is submitted the issue of protection should not be based solely on the basis of historical evidence and reference Justice Lynch's commentary with respect to

the necessity of basing findings on the circumstance as they exist at the time of the hearing.

ANALYSIS

[18] The concerns noted by the Minister in this Protection Application are historical in nature. There is no evidence before this Court which post dates the dismissal of the earlier proceeding. Further, there is no evidence before this Court that the Minister entered upon any investigation and/or received any complaint referrals regarding the respondents subsequent to the dismissal date of February 23, 2010. The Court does not dispute the fact the Minister may have continuing concerns, but they have failed, in the Court's view, to articulate their concerns with "sufficiently, clear, convincing and cogent evidence" to satisfy the balance of probabilities test.

[19] At paragraph 28 of the ***Children's Aid Society of Halifax v T.W. & A.J.W. (Supra)***,

Justice Lynch stated as follows:

> [28] There may have been a risk of harm to the children from living in unsanitary conditions but these conditions have been

> eliminated. I do find that at the time the Minister visited the Respondents' home on May 9, 2003 and the first visit on November 20, 2003 that there were reasonable and probable grounds to believe that physical harm would come to the children if they continues to live in those conditions. However, I must base my decision on the circumstances as they existed at the time of the Interim Hearing. The unsanitary health concerns in the home have been alleviated. I do not find that this is a chronic situation. It is a home where five children live and it will rarely, if ever, be uncluttered and pristine. I do not find that the condition of the home provides me with reasonable and probable grounds that the children are in need of protective services."

[20] The evidence before Justice Lynch enabled her to make a comparative determination on the evidence that the initial concerns that would have satisfied the reasonable grounds test had been eliminated by the time of the Interim Hearing and she stated:

> "However, I must make my decision on the circumstances that exist at the time of the Interim Hearing."

[21] Absent a follow up investigation which may have yielded new or additional information in the matter, I find the contents of the Minister's evidence falls short of meeting their evidentiary mandate.

[22] In sum, the Minister has not put forward any current evidence with respect to these parties. The evidence from the previous proceeding is not inadmissible. It is simply insufficient to ground a new protection proceeding. In the absence of any new evidence it is not possible for this court to make a finding of current reasonable and probable grounds to believe that the parties' children are in need of protective services. The Ministers attempt to restart the proceeding in the absence of any new evidence amounts to an attempt to have the court revisit a decision which has already been made.

CONCLUSION

[23] Based upon all of the evidence presented and submissions of counsel, I do not find that under s. 22 (2)(b) of the ***Children's & Family Services Act*** that there are Reasonable and Probable grounds to believe that any of the Respondent's children are in need of protective services. On the test as set out above, it is not reasonable to conclude that there probably is or likely is, a sound basis to believe that an eventual hearing will result in a finding that these children are in need of protective services.

[24] The Respondents appear to perceive the Minister's involvement to be intrusive. That is unfortunate, but they may none the less fully benefit from continuing voluntary services and the Court would encourage them to do so.

Also the Minister of Community Services always maintains it's investigative mandate regarding the protection of children and this decision in no way affects their ability to continue to investigate their protection concerns.

[25] S. 39 (2) of the ***Children and Family Services Act*** states as follows:

> "Where at an Interim Hearing pursuant to subsection 1 the Court finds that there are no reasonable grounds to believe that the child is in need of protective services the Court shall dismiss the application and the child if in the care and custody of the Minister shall be returned forthwith to the parent or guardian."

[26] As a result I dismiss this application accordingly.

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J. Kenneth C. Haley