SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. K.B. & B.J., 2010 NSSC 131

Date: 20100409
Docket: SFHCFSA-059990
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

K. B. & B.J.

Respondents

Restriction on publication:

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT S. 94(1) OF THE **CHILDREN AND FAMILY SERVICES ACT, S. N. S., 1990, CHAPTER 5** 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."

PUBLISHERS OF THIS CASE FURTHER TAKE NOTE THAT IN ACCORDANCE WITH S. 94(2) NO PERSON SHALL PUBLISH INFORMATION RELATING TO THE CUSTODY, HEALTH AND WELFARE OF THE CHILDREN.

Editorial Notice

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

Judge: The Honourable Justice Douglas C. Campbell

Heard: February 15, 16, 17 and 18, 2010 in Halifax, Nova Scotia

Counsel: Amy Sakalauskas, counsel for the Applicant
Linda Tippett-Leary, counsel for K.B,, Respondent
David Morrison, counsel for B.J., Respondent

By the Court:

[1] This is an application by the Minister of Community Services (hereinafter referred to as "the agency") for an order for permanent care and custody of one male child (hereinafter referred to as the "child") whose biological parents are the Respondents in the preceding. The female Respondent will hereinafter be referred to as the "mother" and the male Respondent will hereinafter be referred to as the "father". The child was born on July *, 2008 and at the time of the trial was approximately 2.5 years of age.

[2] The mother had a child in a previous relationship who became the subject of a permanent care and custody order in another proceeding. When she became pregnant with the subject child, the Respondents approached the agency, after having received legal advice to disclose the pregnancy and to request services in order to be in a position to parent the child after he was born. As a result, there was agency involvement that predated the court proceeding.

[3] By August 2008, the protection application was commenced resulting in an interim order placing the child with the Respondents subject to agency supervision. When the interim hearing was completed in September of that year, the Respondents had separated and this second order placed the child in the care of the mother subject to supervision with access to the father. By March of 2009, the agency determined that the mother was not the appropriate caregiver and placed the child in the care of the father subject to the agency supervision.

[4] The father continued to have supervised care of the child for approximately seven months. In early October 2009, the agency filed a plan seeking permanent care and custody of the child based largely on the fact that the father was not committed to accepting the services being offered by the agency and had shown certain aggressive and antisocial behaviors toward the workers. A few days later, the mother complained that she had been assaulted by the father (which the father denies) and the agency took the child into care and placed him in a foster home.

[5] At the trial, the mother did not present a plan other than to support the father's plan which was that the child would be returned to his care. He would continue to reside in his mother's home where his brother and sister-in-law also live with his mother. He had terminated his employment in order to care for the child and was in receipt of social assistance. In the event that he should decide to return to the workforce, his mother, his brother and his sister-in-law were available to provide daytime care.

[6] The father, never having had children in the past, concedes that he has some parenting deficiencies. His counsel relies on those cases which make it clear that the test for a permanent care order is not that there are alternative caregivers available who would be capable of doing a better job of raising a child. Instead, the test is whether the father can do a "good enough" job. 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. That being the case, this decision turns on whether or not the father can adequately meet the emotional, psychological and social developmental needs.

[7] Early in the litigation process psychologist David Cox was retained by the agency to prepare a psychological report in order to make an assessment of what, if any, services the father should be provided in order to promote the safe return of the child to his unsupervised care. He concluded that the father would face a number of significant challenges in establishing himself as a parent after pointing out both positive and negative factors. His report recommends personal counseling and access to a Family Support Worker for as long a period of time as possible to assist him in anticipating, preventing and addressing the challenges he will encounter in establishing himself as a parent. It was further recommended that he pay sufficient attention to his physical health and pain management arising from certain historical injuries.

[8] In his testimony, Mr. Cox identified that the father tends to minimize areas of difficulty such as family dysfunction and that he tends to blame others when things go wrong. Mr. Cox commented that he showed characteristics of paranoid personality traits. There was an indication that he registered a high score in a test for possible risk of child abuse. He testified that he saw these to be major concerns. Mr. Cox commented that the prognosis for change should be described as “very guarded” because the father does not have sufficient insight into his need for change.

[9] Much later in the litigation process, Registered Psychologist Debra Garland prepared and filed a Parental Capacity Assessment on December 14, 2004. Her work began before the child was taken into care and was completed a number of weeks thereafter. She administered a number of psychological tests as well as a clinical interview with the father.

[10] Ms. Garland concludes that the father “is likely to be an impulsive and immature individual who has a tendency to seek immediate gratification of his wishes often without apparent concern for the consequences”.

[11] At page 13 of her report, Ms. Garland concludes that his MMPI-2 pattern “is consistent with a diagnosis of personality disorder”.

[12] At page 18, she lists three concerns: his resistance to involvement in services; his limited parenting skill and knowledge of child development; and, his vague and poorly conceived plan of care for his son.

[13] At page 19 she stresses the importance of appropriate development for children socially, emotionally, psychologically and physically stressing that the physical requirements may be the most “elemental” and that the other listed needs are more complex and require greater skill in the parent. Later in the report she concludes that the father is not likely to provide for these additional needs of the child.

[14] At page 21 of her report, Ms. Garland states that the father "is probably capable of meeting [the child's] most basic physical needs in terms of food and shelter, however, there are significant deficits in his capacity to accurately identify and respond to his social, emotional and psychological needs."

[15] At page 24 of her report, Ms. Garland states:

> "The current assessment has determined [that the father's] parental capacity is poor. This determination is based on [his] superficial compliance/involvement with the agency, his limited knowledge and skill, and his avoidance of assuming responsibility for his removal from his care.[He] has difficulty in relationships in general, has low tolerance for frustration which seems to result in anger, and threats. There has been little indication that [he] is able to provide a stable, structured, and consistent home for [the child].
>
> Overall, [he] seems to have developed a manner of interacting with people and his environment that relies heavily on denial and anger. He is not an overly skilled parent yet he is resistant to the notion of gaining greater skill or knowledge. [His] support system appears to be his brother, sister-in-law, and his mother who lives in the * for six months of the year.
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> In consideration of all the above factors the prognosis for improvement of parental capacity for [him] is poor. [He] has had considerable opportunity for active involvement with the services. He fails to recognize his limitations with regard to knowledge and skill; he has difficulty disengaging from [the mother]. He is quick to become agitated and angry with others; his focus seems to have been diverted from [the child]. These concerns interfere with [his] current parenting capacity and the likelihood for change".

[16] After stating the above conclusions, Ms. Garland recommends that the child be placed in the permanent care of the agency with a plan for adoption.

[17] Testimony from other workers involved in services such as the Family Skills Worker and access supervisors was, generally speaking, consistent with the findings and conclusions in the above mentioned expert reports.

[18] Family Skills Worker Angela Sangster provided weekly sessions to teach family skills. She testified that progress was slow because there was a lot of inconsistency with the father's attendance and follow-through. She expressed concerns over safety issues in the home environment and allowing the child to have food while not in a high chair. She indicated that the father was resisting services for some time but that he had lately improved. She indicated that only the basic needs were being adequately met. She considered her concerns to be serious.

[19] Access Facilitator Maureen Sullivan expressed some concerns about the father's approach during supervised access sessions at the departmental facility. For example, she indicated that the father would read a story to the child but that he would fail to talk about the story so as to motivate the child's thinking.

[20] Access Facilitator Lynn LeBlanc made similar observations commenting, for example, that the father does not accurately read the child's "cues". She conceded that the father shows affection appropriately and utilizes appropriate tone of voice and that the child shows attachment.

[21] Tamara Leadham is a Long Term Social Worker with the agency. She described the decision to place the child with the father instead of the mother under supervision occurred because the mother had become overwhelmed with the task. That occurred on February 24, 2009. By September 23, 2009 the agency made a decision to apply to the court for permanent care. She explained that those involved in the decision had concluded that the father's ability to meet the child's needs were reducing rather than improving, that his behavior had become volatile, that he was expressing anger about the agency involvement, that he would speak about matters in the presence of the child that were inappropriate for the child to hear, and that after a hazard in the home was pointed out, it continued to exist at the next visit. She confirmed that there was a general concern about the father's ability to meet the child's developmental needs. There were also safety concerns with respect to the environment in the home. She confirmed the father's ability to meet the basic physical needs of the child.

[22] Despite the negative descriptions of the father's parenting abilities above referred to, it was of great concern to the court as to whether those observations were premature in the following sense. A large portion of the agency concerns were founded on the fact that the services were not effecting positive change because of a lack of commitment and follow-through by the father coupled with a lack of insight with respect to his deficits. There can be no doubt that that was true up until the time when the child was taken into care.

[23] Martin Whitzman was the father's therapist. He confirmed the lack of cooperation and commitment to treatment by the father. However, he was very clear that there was a complete change in cooperation and commitment at the time that the child was taken into agency care. Mr.Whitzman indicated that the father became focused as a result and that it opened a "whole new level" of opportunity for therapy.

[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.

[25] This trial occurred at the end of the overall Statutory timelines. Based on the decision of the Court of Appeal in Nova Scotia (Minister of Community Services) v. B. F. [2003] N.S.J.405, the court has no authority to order services beyond that deadline. I accept Mr. Whitzman's opinion that the child could not be returned to the father without his continuing with the therapy. It follows that a full return to unsupervised custody could only be achieved if the work involved in that therapy was ongoing for a considerable period of time and then only if success was achieved.

[26] Pursuant to section 42 (1) of the Children's and Family Services Act, Statutes N.S. 1990, c.5 the court is limited in its jurisdiction in ordering relief. The types of orders contemplated by subsections (b) through (e) can only be made as temporary orders throughout the proceeding. When the litigation reaches the final outside timeline (as is the case here), the only options available to the court are to dismiss the matter and return the child to a parent pursuant to subsection (a) or to grant the order for permanent care and custody pursuant to subsection (e).

[27] If I terminated the proceedings and returned the child to the father, the agency involvement would come to an end and the services of Mr.Whitzman would not be affordable to the father. There was insufficient evidence that the therapy could be otherwise provided in the community. It follows that there is no way that the father could meet the conditions set out by Mr. Whitzman to allow for a return of the child to his supervised or unsupervised care.

[28] It goes without saying that to permanently separate the child from his parents is an extremely invasive event. It was clear from the evidence that this father is very dedicated to his son and that he would have had a lot to offer if he could have made the changes in therapy that were required. He has become a victim of the statutory timelines. However, there is a rationale for timelines and for abiding by them. The competing interests of early permanency planning for a young child and reunification of a child with a parent must be assessed. Unfortunately, this child is at an age where permanency planning must trump reunification. I will therefore order that this child be placed in the permanent care and custody of the agency.

[29] I am satisfied that all of the requirements of section 42 of the Children and Family Services Act, supra, and all other requirements of that Act have been met.

[30] It is the plan of the agency that the child be placed for adoption. The father would want to have court ordered access until the adoption occurs or perhaps even afterward if the adoptive parents were open to it. The agency takes the position that court ordered access to the parent can sometimes discourage prospective adoptive parents from engaging in the adoption process. For that reason, the order will be silent as to the access of the parents. Having said that, I would urge the agency to consider allowing unofficial access for so long as it does not interfere with permanency planning for the child.

Campbell, J.