SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. R.B., 2011 NSSC 370

Date: 20111012
Docket: SFHCFSA-068631/
SFHCFSA-073934
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

R.B. & D.R.

Respondent

Editorial Notice

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

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.

Judge:	The Honourable Justice Douglas C. Campbell
Heard:	September 22, 23, 26, & 27, 2011, in Halifax, Nova Scotia
Written Decision:	October 12, 2011
Counsel:	Pamela J. MacKeigan, counsel for the applicant Lola Gilmer, counsel for the respondent, R.B. Kymberly Franklin, counsel for the respondent, D.R.

By the Court:

[1] This is an application by the Ministry of Community Services, (hereinafter referred to as " the Agency") for permanent care and custody of two male children pursuant to section 42(1)(d) of the *Children and Family Services Act*, Stats. NS 1990 chapter 5 (hereinafter referred to as "the Act"). The respondent, R.B. (hereinafter referred to as "the mother"), is the mother of the two children who are the subject of these proceedings. The respondent, D.R. (hereinafter referred to as "the father"), is the father of those children.

[2] D.B., born January *, 2010 (hereinafter referred to as the "20-month-old boy" or "the older boy"), is the older child of the respondents and was taken into care by the Agency on February 4, 2010 when he was less than one month old.

[3] D.R.B.R., born January *, 2011 (hereinafter referred to as the "eight-month-old boy" or "the younger boy") is the younger child of the respondents and was taken into care by the Agency at his birth.

[4] The mother had a female child before the respondents met. That female child was the subject of a child protection supervision order for a child welfare agency in *. The respondents moved from there to *, Nova Scotia, whereupon the * Agency referred the couple to the * Agency. The child died in infancy on June 1, 2009, while she was the subject of a child protection supervision order there. An autopsy report was less than conclusive with regard to the cause of her death. The parents believe the cause was Sudden Infant Death Syndrome.

[5] The child welfare concerns which prompted the agency to take the 20-month-old boy into care included a report of domestic violence by the father against the mother, mental health issues with respect to the mother, lifestyle issues, including a history of drug and alcohol use by both parents and deficiency in parenting skills, particularly with respect to the mother.

[6] As mentioned above, the mother has had previous involvement with child protection agencies. She has had eighteen involvements with the police including a drug and alcohol overdose in 2006. On January 6, 2009, RCMP in * were called in relation to an alleged assault between the respondents. On June 4, 2010, the father was charged with assaulting the mother after a complaint by the mother. She later recanted this allegation after reconciling with him. The mother has a history

of depression and there was evidence that she would not take her prescribed medication at times.

[7] There was evidence that the now deceased child was not being afforded appropriate medical attention. That child contracted a potentially fatal disease referred to by initials as MRSA. While the autopsy report did not conclude that this disease played a role in the child's death, there was evidence that there were certain vaccinations and follow-ups that should have been afforded to the child by the parents and were not. I can not draw a connection between this lack of attention and the child's death. However, even if there was no such connection, the lack of medical attention is a child protection concern. Also, on the morning of the child's death, neither parent reacted to the fact that the child had not woken for her bottle at the usual overnight hour or to the fact that she was sweating on her forehead two hours later. Ultimately the parents began their day without rechecking the child. This raises concerns about their parenting skills.

[8] Family support worker, Angela Sangster indicated that the mother had failed to recognize child development problems for both boys and that she needed skills training in respect of nutrition, safety and child-proofing, budgeting, age-appropriate discipline, behavior management, age-appropriate activities and stimulation, toilet training and balancing her attention with the boys. On the other hand, Ms. Sangster, along with a number of other witnesses, testified that the mother shows great love and affection for both boys. Her report, dated September 8, 2011, comments that "… my contact has been minimal and as such I've seen very little progress to date."

[9] Deborah Garland conducted a psychological assessment. Her first attempt to do so failed because the mother failed to participate sufficiently. Ms. Garland's second effort resulted in a report dated September 12, 2011, being ten days before the trial. At page 22 of her report she states:

> The concern with regard to (the mother) is that it is clear she follows (the father's) lead and while she is not intellectively incapable, emotionally she appears dependent upon him which leads to her impaired decision-making. There does not seem to be any acceptable manner in which to explain a weapon, drugs and the scale found in their home and these are factors that speak to lifestyle choices incompatible with adequate parenting capacity.

> (The mothers's) current parenting capacity would be characterized as poor, based on her limited use of services, avoidance/denial of recurring problems, and limited commitment to visits with her children.

And further on the same page she states:

> … The only possible way for (the mother) to provide adequate and safe care of the children would be by way of an assisted living situation such as Adsum Center where she could access on-site parental guidance and education with clear expectations of compliance in behavior. However, (the mother) does not appear capable of severing her ties to (the father) which would likely need to occur in order for her to have any opportunity of success. Therefore, it is recommended that (both children) are placed in the Permanent Care of the Minister of Community Services with a view for adoption.

[10] Donna Touchie is a counselor who has a Masters Degree in social work who provided counseling to the mother. In her report dated October 25, 2010, she confirmed that the purpose of her counseling with the mother was to provide support and therapeutic treatment so the mother could resolve any mental health concerns. Ms. Touchie confirms that the mother had not been open to therapy and that she does not show any insight into what would need to be done in order to have her children returned to her care. She concluded that it is not likely that (the mother) is likely to benefit from counseling at this time.

[11] On November 23, 2010, Social Worker Wendy Green wrote to the Agency to terminate her involvement in the intended parental capacity assessment for the respondents because of their lack of participation.

[12] Services that were offered by the Agency included a social worker to assist the family, a social worker for the child to provide supervision in the home, access facilitators, a family skills worker, addiction prevention and treatment services, individual counseling for the mother, random urinalysis tests for both respondents and a self referral request to the "new start" program to deal with issues of violence in the home. In addition a parental capacity assessment including a psychological assessment was to be provided.

[13] I have concluded based on the evidence that this package of services constituted an appropriate plan designed to assist the respondents in order to have these boys safely parented by either or both of them.

[14] A number of Agency witnesses testified with respect to the lack of participation by the respondents in regard to all of those services. For example, the first attempt at psychological testing to be done by Deborah Garland partnering with Wendy Green could not be finished because the parties failed to cooperate with the process. Appointments were made with respect to the various services and there was testimony from a number of witnesses about missed visits with the children and the general failure to participate in services by the respondents. As a result of this lack of cooperation, the Agency apprehended the eight-month-old boy at birth on January 12, 2010 given that the child welfare concerns that caused the older boy to be taken into care had not been addressed in a meaningful way.

[15] In April of 2011, the respondents and the Agency attended a Settlement Conference with a Judge of this court. By this time, the respondents had articulated some insight into the need for Agency services in order to have any realistic expectation of a return of their children to their care. In effect, the settlement was that the same services would begin with a fresh start, that the respondents would fully cooperate and participate and that the goal was to remedy the child welfare concerns in order to reunite the children with their parents.

[16] All of the service providers who testified confirmed that for at least the months of May and June of 2011 there was significant cooperation and participation in services by both respondents. An exception was that it came to pass that the father was subjected to house arrest because of a criminal matter and was therefore not able to participate in exercising access with the children. Significantly, there was a consensus that the mother's stated commitment was driven by the father's encouragement. After July 29, 2011, the progress came to a significant downturn. On that date, the local police were executing a warrant to search the respondents' apartment and therein found an unregistered handgun, approximately ten grams of marijuana and a set of weighing scales. They were both arrested. Both of the respondents among others were charged with possession of that drug for the purpose of trafficking and various gun related offenses. The father was remanded to jail after the charge given that it represented a breach of a previous probation order. The mother was released. Both will be entering a plea on a date subsequent to this trial.

[17] Before and after the arrest, the new found cooperation with Agency services dissipated. For example, individual counseling for the mother with Family Therapist, Martin Whitzman did not occur from June 29, 2011 until August 24,

2011, despite four appointments having been set during that time frame. Several home visits with Family Support Worker, Angela Sangster were missed between August 3, 2011 and September 7, 2011, as was the case with three sessions during parent/child access sessions. Ms. Sangster reported that there continued to be parenting skills deficits and that there continued to be a definite need for this service. She had concerns about child development, child safety and nutrition along with the use of foul language by the mother in the presence of the children. Other service providers testified about a similar pattern of missed participation and lack of cooperation during this time frame. Given that the trial for permanent care was underway on September 22, 2011, a lack of participation in services during the times referred to above was of critical importance.

[18] On the opening day of the trial, the mother filed a plan in the form of an affidavit which included ending her relationship with the father (who was then still incarcerated) and to move to * to live with her grandparents and to go to school. The plan included a willingness to report to * child welfare agency and to participate in whatever services were required there. She indicated a commitment by the grandparents to allow her to live with them for as long as it may take. There is no dispute that she purports to have a strong and loving relationship with those grandparents despite evidence of a physical altercation with her own parents who also reside in *. This plan would be based on the return of both children to the mother's care.

[19] The outside statutory deadline with respect to the older boy had already expired by the end of the trial. It follows that the only alternatives for the oldest child that the court may order from among the remedies set out in section 42 of the Act are either to return that child to one or both parents or to make an order for the permanent care and custody of him by the Agency.

[20] There are other options available to the court with respect to the younger boy. That is so because there are approximately ten months remaining in the outside statutory deadline for him. Virtually all of the outcomes outlined in section 42 of the Act are available for this child which would include a return to the mother under a supervision order or a continuation of the temporary care and custody order. Either of these alternatives would enable the mother to have the benefit of continued services designed to assist her in resolving the child welfare concerns so as to potentially achieve a return of the child to her.

[21] It is useful to note that the protection finding pursuant to section 40 of the Act was made in the context of a contested hearing before another Judge. Given the fact that there was insufficient participation and cooperation with the services by the respondents that were deemed to be needed to reverse the factors that allowed the protection finding to be made, I have concluded that those protection concerns continue to exist. As such, there would be substantial risk in returning either or both children to either parent at this time. Indeed, the father, being incarcerated, has confirmed that he is not making a plan for a return of the children to him. Instead, he supports the mother's plan.

[22] Having reached the conclusion that I cannot return the older boy to the mother because the child welfare concerns have not been addressed by her, the only other choice I have pursuant to section 42 of the Act is permanent care and custody to the Agency with respect to that child. Accordingly, I will sign an order with respect to the older boy that provides that he shall be in the permanent care and custody of the Agency.

[23] Counsel for the mother has urged me to return the eight-month-old boy to the mother so that she can implement her plan to move with him to *. Another option is to continue the temporary care and custody order thereby leaving that child in foster care while the mother continues to participate in services in Nova Scotia. Because of my conclusion that the mother has not sufficiently participated in services to address the child protection concerns, return of that child at this time should not be done.

[24] This means that I do not need to analyze or to comment on the propriety of the mother's plan to return to *. I will however say that her decision has come too late in the court process for its merits to be assessed. There would have been problems in her leaving Nova Scotia until after her criminal matter has been dealt with because she faces an undertaking to the relevant criminal court not to do so. As mentioned above, only a plea date is known. Trial dates, if necessary, or sentencing dates, if applicable, may be many months away. Counsel for the mother indicated that they would seek to change the prohibition against leaving the province on her undertaking to come back for whatever court appearances are needed. I have no way of assessing whether that would be permitted by the criminal law court.

[25] I have given careful consideration to the prospect of continuing the younger child in foster care while the mother participates in services with the goal of an eventual return to her care. In respect of that possibility, counsel for the Agency reminded the court of the case law which confirms that the outside statutory deadlines are not there to guarantee a maximum opportunity for a parent to take advantage of remedial efforts up to and including that final date. I agree that it is open to the court to make a permanent care order, thereby ending the statutory process, as early as the first disposition deadline.

[26] Counsel for the Agency has argued based on evidence from the Social Worker that there is a reasonable likelihood of being able to place these two boys in one adoptive home if permanent care of both of them is ordered. Continuing with the temporary care order for the eight-month-old boy might impair that possibility. Counsel for the mother argued that the Agency could find an adoptive home that would take the older boy now and the younger boy later if a return to the mother is not ultimately possible. I find that proposition to be too speculative. Many things could happen to spoil that plan. First, it may be difficult to find an adoptive parent who would go along with such a scheme. Second, even if such person is found, that person could not unconditionally commit since circumstances, such as a pregnancy or financial difficulties, could cause such a commitment to be abandoned.

[27] The objective of keeping two siblings together in one household where they may be adopted if permanent care of both children is granted is a very valid goal and must be given considerable weight. On the other hand, to keep a child with his mother to be raised by her is also a very important factor and one which in isolation is probably deserving of more weight than the sibling connection factor.

[28] Section 42 (4) of the Act states:

> The court shall not make an order for permanent care and custody ... unless the court is satisfied that the circumstances justifying the order are unlikely to change time within a reasonably foreseeable time not exceeding the maximum time limits…

[29] While ten months of time left within the statutory limits to work with this mother seems like a considerable amount of time and offers a tempting resolution, the court must not apply that thinking in a vacuum. The fact of the matter is that

the child protection concerns relating to this child are the same concerns that applied to the Agency involvement for the older child which has resulted in my decision to order permanent care. In applying the above noted subsection to the facts of this case, I cannot ignore the reality that the mother has already had maximum time limits and beyond for the older child within which to make changes that would reverse the child protection concerns. She has not been able to succeed. There is no reason for me to conclude that it is likely that she will be able to do so in the next ten months.

[30] I must also note that when the Agency offered the mother a second chance at services, it was made clear to her that it would be a final opportunity. In the face of that reality she repeated her earlier record of failing to cooperate and participate in services. There is no reason for me to be optimistic that there would not be a further and similar failure if she is given yet another chance.

[31] The fact that the criminal matter remains outstanding and that the charges could result in a penalty that would interfere with her parenting is also a factor. I am aware that by the time this decision is seen by the mother, it is also possible that the charges will have been withdrawn.

[32] In rendering his protection finding after a contested hearing in this case, Justice Williams of this court stated in reference to his decision relating to these respondents: "this is not close for me". Not only is that a very blunt and deep description of the seriousness of the child protection issues, it should also have been a very clear message to the parents that they had a lot of work to do. Their failure to cooperate with the Agency and participate more fully with child access and other services causes me to have very little confidence in the mother's ability to do so in the next ten months.

[33] A young child such as this one needs permanency planning. Without a substantial likelihood of success by the mother in dealing with her issues, it would be unfair to the child for the court to gamble for another ten months instead of beginning permanency planning now.

[34] Taking into account all of the evidence from the service providers and of the mother, and considering all of the evidence, I conclude that it would be in the best interest of the younger child that he be placed in the permanent care and custody of the Agency as I have done above with the older child with a plan for adoption of

both children without access to the mother or father except to the extent that the Agency offers access for either a final visit or such other time as the Agency may propose. I will sign orders for both children to that effect. In doing so, I make all the necessary findings under the Act including the findings under section 42 of the Act.

CAMPBELL, J.