

SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. A.C.*, 2015 NSSC 111

Date: 20150410

Docket: *Halifax*, No. SFHCFSA-087487

Registry: Halifax

Between:

MCS

Applicant

v.

A.C., M.C.Jr. and M.C.

Respondent

Judge: The Honourable Justice Beryl A. MacDonald

Heard: Written Submissions by counsel

Counsel: Amy Sakalauskas, for the Applicant
Bruce W. Gillis, counsel for M.C.
Kimberly Franklin, counsel for A.C.
Terrance Sheppard, counsel for M.C.

By the Court:

[1] On August 21, 2013 the Minister of Community Services (the Minister) commenced a Children and Family Services Act Protection Proceeding that resulted in two children (the older children) of A.C. (the Mother) and her former partner M.C. (the Father) being placed in the care of the Father under supervision with access between the children and the Mother as arranged by the Minister. Previously these children had been in the shared custody of the Mother and the Father.

[2] There were also three other children involved in this proceeding – the children of the Mother and her new partner, her husband, (the Husband). One of these younger children exhibited extremely concerning injuries indicative of deliberate child physical abuse.

[3] Because the Mother and the Husband argued that all of the children should be in their care under supervision, a 4 day “placement hearing” was scheduled commencing December 4, 2013. The Father was required to respond to this application because he could not merely rely on the Minister’s representations that the older children should remain in his care under supervision. The Mother and the

Husband were contesting the Minister's decision to place the older children in the Father's care.

[4] All Respondents were to file their affidavits by November 22, 2013. The Father filed two affidavits on November 22, 2013. The Mother and the Husband filed three affidavits on November 25, 2013 in which there were allegations that the Father abused the older children. Because of this the Father, and possibly other witnesses he may wish to call, would need to give oral evidence on direct during the placement hearing. This requirement complicated the process and was one reason I required the parties to discuss how the matter would proceed at the opening of the hearing on December 4, 2013. After discussion the parties concluded that the hearing would need to be adjourned, primarily because of the allegations made against the Father by the Mother and the Husband. The Minister intended to investigate the allegations to determine whether it would continue to support the placement of the older children in the Father's home. I directed that other scheduled matters could be bumped to allow for an early date for completion but when the parties attended at the scheduling office they arranged for hearing dates commencing March 10 to March 14, 2014, later than I had expected.

[5] At the Disposition Hearing held January 10, 2014 filing instructions were given for the placement hearing to be held in March. The Minister was to file its

documents two weeks before the hearing and the Respondents one week before.

There was discussion about what may happen if the Minister decided the children should not be in the Father's care and the necessity for an earlier return if they were taken out of his care.

[6] The Mother and the Husband filed 9 affidavits on January 22, 2014 many of which contained further allegations of abuse of the older children by the Father.

[7] At a Review Hearing on February 5, 2014 the Minister informed the court, it could not substantiate the allegations against the Father and as a result it still supported the placement of the older children with the Father. The parties were to return on February 10, 2014 to inform the court about whether the placement hearing was to proceed.

[8] On February 10, 2014 the Mother and the Husband informed the court that the placement hearing should continue because they were pursuing a finding that the Father did abuse the older children and their placement should either be with the Mother and the Husband or in Foster Care. The Minister and the Father raised the issue about whether the court could examine the decision of the Minister in respect to the abuse allegations and make contrary findings. Because there was no time to continue to receive submissions and because the decision on this point may

affect the placement hearing set for March the parties decided to use March 11 for a discussion about the jurisdictional and procedural issues raised by the remedy request made by the Mother and the Husband. Filing dates were set for the briefs to be filed by each party. The remaining March dates were released.

[9] On March 6, 2014 the Mother filed additional witness affidavits about the abuse of the older children by the Father and the conflictual relationship between the Mother, the Husband and the Father.

[10] On March 11 submissions were heard and I decided I did have jurisdiction to consider the abuse allegations and determine whether the older children were to remain in the care of the Father. I discussed how many witnesses each party would likely call including additional family member witnesses who had come forward to provide care to the older children to prevent them from being moved to a foster care placement if neither of their parents were considered suitable. The hearing was rescheduled to June 5, 2014 until June 13, 2014. The Mother and the Husband were to file their affidavits by April 11, 2014. The Minister and the Father were to file their material before April 25, 2014. The parties were to inform each other about the witnesses each intended to cross-examine.

[11] The Father filed 4 affidavits on April 28, 2014.

[12] By conference call arranged for June 4, 2014 the court was informed the placement hearing would not proceed. Counsel for the Father had been informed by counsel for the Mother and the Husband about this decision approximately one week before. The conference call was to deal with issues relating to the Protection Proceeding but also to determine whether one of the hearing dates could be used to have the court order the Father to participate in counselling in respect to the ongoing conflict that exists between the Father, the Mother, and the Husband. The Father's counsel was not prepared for this type of hearing and his client was not prepared to consent to counselling unless he understood exactly what type of counselling was requested and the recommended counsellor. The Minister was not prepared to make counselling a condition of the Father's continuing care of the older children. In addition the Father wanted costs because the majority of his involvement in this proceeding was required because of the allegations made by the Mother and the Husband, none of which have been proven. His involvement in the overall proceeding would have been minimal and the majority of his legal costs related to defending himself against the abuse allegations.

[13] I set the matter down for July 25, 2014 to hear cost submissions and I required the Mother and the Husband to inform the court on that date whether they

were still requesting a hearing to provide evidence to convince me that I should order the Father to attend counselling.

[14] I heard cost submissions on July 25, 2014 and gave an oral decision reserving my decision on costs until the conclusion of the Disposition Hearing commencing January 5, 2015 and continuing until January 16, 2015. The issue about counselling for the Father remained as was the issue about whether the Father had abused the older children. These remained as issues to be resolved at the Disposition Hearing scheduled for January 5 to January 16, 2015. A Settlement conference was scheduled and a further pre-trial prior to the Disposition Hearing. The Father had to participate in these procedures because the Mother and the Father would not agree to his continuing to care for the children unless he had counselling.

[15] On January 5, 2015 the court was informed that there would not be a hearing. The protection proceeding in respect to the older children was to be terminated leaving those children in the care of the Father. The parties were to resolve the Mother's arrangements for these children in an already scheduled *Maintenance and Custody Act* Variation Application. The protection proceeding in respect to the younger children would be subject to a "roll over" proceeding.

Deadlines for providing further submissions on the cost issue were provided. I have read and considered those submissions.

[16] I have frequently commented upon the principles considered by the court in cost awards. I do not intend to repeat those in this decision. While a request for a cost award in Protection Proceedings is rare it is not prohibited. In addition this is not a request for costs against the Minister but against a party Respondent who put another Respondent through considerable legal expense to defend himself against very serious allegations none of which were ever proven.

[17] The Respondents argue that their requests for hearings were made in the best interest of the older children and with their safety as their primary concern. Their requests were not frivolous, vexatious or malicious. They argue that if the Father had agreed to third party mediation or counselling “to assist all three parents in co-parenting”, as requested in April 2013, subsequent hearings would not have been necessary. What the Mother and the Father failed to appreciate is that the Father, understandably, was not prepared to engage in counselling to co-parent with persons who allegedly had physically abused their young child particularly when the Minister was not requiring him to do so as a condition of his parenting.

[18] Several hearings were scheduled and only at the last minute cancelled by the Mother and the Husband. They had ample opportunity to prove their case against the Father and did not do so. The Minister's investigation into the allegations and its conclusion that the allegations were not substantiated did not deter the Mother and the Husband from their continuing attacks against the Father even to the point of neglecting the real issue – their care of the youngest three children. Their actions prolonged this proceeding and their allegations were without merit. Costs are justified in this case, costs for which the Mother and the Husband shall be jointly and severally liable.

[19] By January 19, 2015 the Father's legal costs were approximately \$26,000.00. Not all of these costs can be attributed to the actions taken by the Mother and the Husband although the primary focus of the hearings scheduled for December, 2013, March 2014 and June 2014 and the affidavits to which I have made reference were about the placement of the older children in the care of the Father. In addition had the Mother and the Husband accepted that the placement with the Father was appropriate the protection proceeding in respect to the older children could have been terminated and parenting issues relating to their care dealt with in an *Maintenance and Custody Act* Variation Application.

[20] The Father's counsel could not provide a breakdown of the legal costs to differentiate between costs associated with defending against the abuse allegations and those associated only with the Protection Application absent those allegations. As a result this is an appropriate proceeding for a lump sum award. The Mother and the Father have argued a cost award will negatively impact their ability to care for their children. I understand this award will require them to budget their resources carefully but the Father has had to find the financial resources to pay his counsel and that affects his ability to provide for the older children. I award costs in the amount of \$10,000.00.

Beryl A. MacDonald, J.