

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. CML*, 2017 NSSC 204

Date: 2017-07-27

Docket: *Sydney* No. 99168

Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

CML

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: July 24, 25, 26 and 27, 2017, in Sydney, Nova Scotia

Oral Decision July 27, 2017

Written Release: July 28, 2017

Counsel: Danielle Morrison, for the Applicant
Jill Perry, for the Respondent
Steve Jamael, for the Non-Party seeking leave

By the Court:

Introduction

[1] MM, the maternal grandmother, wants to be added as a party to this child protection proceeding so she can more effectively advance her claim. The grandmother's goal is to have custody of her 18-month-old grandson, BMCLM. The grandmother dearly loves the child and desperately wants the chance to provide a home for him.

[2] The grandmother states that she is physically, financially and emotionally capable of providing the child with the stability, love and nurture that he needs and deserves. In addition, the grandmother is adamant that she can protect the child from his mother, CM.

[3] The mother is the respondent in this proceeding. The mother supports the grandmother's motion to be added as a party and to have custody of the child. The mother does not want the child placed in the permanent care of the Minister. The mother wants the child to be raised by family.

[4] The Minister is strenuously opposed to the grandmother's attempt to be added as a party. The Minister states that the grandmother is unable to protect the child from the mother. The mother is an IV drug user, primarily of hydromorphone and opioids. She has struggled with IV drug use for over 25 years. The mother's many attempts at recovery were unsuccessful. The Minister argues that the grandmother's historical conduct proves that the grandmother has not and will not be able to shield the child from the destructive impact of the mother's chaotic and dysfunctional lifestyle.

Issues

[5] The only issue which I must decide is whether the grandmother should be granted party status. Before delving into my analysis of this issue, I will briefly identify relevant background and procedural facts to provide context.

Background and Procedural Information

[6] The child was born in early January 2016 and remained in the hospital for about two months. The child was born an addict because the mother used drugs while she was pregnant.

[7] The child protection application was filed on January 15, 2016. Initially, the child was placed in the interim care and custody of the Minister with a provision for supervised access. After the child was released from hospital in March 2016, the Minister agreed to place him in the supervised care of the grandmother and grandfather. The Minister also agreed that the mother could live with the grandparents because the mother had entered a recovery program and was actively participating in services, although all contact between the mother and child was to be supervised.

[8] On April 13, 2016, a protection finding was entered against the mother based on a substantial risk of physical harm pursuant to s. 22 (2) (b) of the *Children and Family Services Act*. The first disposition order was granted on July 7, 2016. This order, and two subsequent review orders, continued the child's placement in the supervised care of the grandparents.

[9] In December 2016, the Minister discovered that the mother was continuing to use drugs. The Minister instructed both the mother and grandmother about the risk of harm. The Minister confirmed that the mother could no longer live with the grandparents and that the mother was not allowed to return to the home unless first authorized by the Minister. The mother and grandmother acknowledged these rules.

[10] In March 2017, the Minister applied to terminate the supervision order after the Agency discovered that the mother and grandmother were not following the case plan. The mother was continuing to use drugs, was involved with crime, was entering the home, and was having unauthorized contact with the child. As a result, the child was placed in the temporary care of the Minister with a provision for supervised access.

[11] Following a Risk Conference, the Minister filed a plan for permanent care and custody with no provision for access. The Minister intended to pursue adoption. In response, a family placement came forward. After completing their investigation, the Minister agreed that the child would be safe if he was placed in the custody of family relatives, DP and JP.

[12] In June 2017, the process of transitioning the child to the care of the relatives began. The transition appeared to be going smoothly. The relatives and the child were forming an attachment. The relatives lovingly welcomed the child into their home and family.

[13] A final docket appearance was scheduled for the end of June. It was anticipated that consent orders would be registered such that the child protection proceeding would be dismissed in favour of a *Maintenance and Custody Act* order in which custody of the child would be vested in the relatives.

[14] Regrettably, the consent orders did not issue because the family placement unravelled in the face of inappropriate conduct by the grandmother. The relatives withdrew their application. The child was placed with foster parents. The Agency moved forward with its plan for permanent care.

[15] In a bid to avoid a permanent care order, the 72-year-old grandmother put forward a plan to have the child placed in her custody. The grandmother's plan was supported by the mother, while the Minister disputed the relief sought.

[16] The permanent care hearing was scheduled to be heard in July 2017. After hearing dates were assigned, the grandmother filed a motion to be added as a party so that she could more effectively advance her custody claim. The Minister contested the motion.

[17] At the request of all counsel, the permanent care hearing was delayed until the standing application was determined. The standing application was held on July 24, 25, 26 and 27, 2017. The following people testified at the hearing: the grandmother, MM, AM, DP, JP, Noel Halloway MacDonald and Krista Morrison. Written and oral submissions were advanced. The oral decision was delivered on July 27, 2017.

Analysis

[18] Should the grandmother be granted party status?

Position of the Grandmother

[19] The grandmother states that she should be granted party status for several reasons, including the following:

- She and the child have a strong familial bond.
- She provided the child with consistent loving care; the child thrived under her care.
- Her home was always clean and appropriate.
- She has the support of family and friends to assist with transportation and child care.
- She is no longer thinking with her “heart”. The grandmother has taken concrete steps to distance herself from the mother, such as changing the locks to her home and applying for a peace bond.

[20] Given these factors, the grandmother states that when compared to other alternatives, the child’s welfare will be enhanced by granting her party status.

Position of the Mother

[21] The mother states that the grandmother should be granted party status for several reasons, including the following:

- The grandmother is a very good parent. She raised three children; only one has an addiction. The Agency never complained about the grandmother’s ability to parent.
- The grandmother’s indiscretions in respect of the mother must be placed in context. The grandmother loves the mother. The grandmother watched her daughter struggle with addiction for many years. To her credit, the grandmother has supplied the mother with the love, support, understanding and forgiveness that she needs to successfully overcome her addiction. At times the grandmother made errors in judgement and for this she is deeply sorry.
- The grandmother now fully appreciates the harm that could have occurred because of the mother’s addiction. She will not repeat the same errors in the future. The grandmother knows that she can no longer trust the mother.

- Although having a rocky start in life, the child developed into a happy, loving boy who has met all developmental milestones and is doing well. This positive outcome is in large part due to the grandmother's unconditional love and commitment.
- The grandmother and the child have a strong and healthy bond. The Agency admits that the grandmother is the child's primary attachment figure.

[22] The mother states that when these factors are considered, and in comparison to other alternatives, the child's welfare will be enhanced by granting the grandmother party status.

Position of the Minister

[23] Although the Minister does not dispute the positive attachment between the grandmother and the child, she nonetheless cannot support the grandmother's bid to become a party to this protection application for the following reasons:

- The child must be freed from the "web of despair" that the mother's lengthy addiction has caused the family. The child deserves better.
- The grandmother cannot be trusted to protect the child. She consistently misled the Agency about the state of the mother's progress. She consistently hid important information from the Agency. She failed to report the mother's breaches to the Agency. The grandmother consistently placed the mother's interests in priority to the interests of the child. In so doing, the grandmother placed the child at a substantial risk of harm.
- The grandmother only changed her locks and applied for a peace bond because the Agency removed the child from her care. Further, these steps have done little to reduce the risk of harm. The grandmother continues to keep in contact with the mother through a third party. The grandmother even recently bought a cell phone for the mother. The grandmother did not sever her relationship with the mother.
- The grandmother's age and health are also concerns. The grandmother's claim that she was in good health is false. In fact, the grandmother suffers from headaches and arthritis. She takes either hydromorphone or morphine, or both, which she likewise failed to report to the Agency.

- At 72 years of age, the grandmother may not be able to provide a long-term placement for the child. Further, the grandmother did not prove that she had a network of support who would be able to provide long term care should she become incapacitated. For example, the grandmother's son testified that he and his wife would not assume a custodial role, even though the Agency confirmed that it would support such a plan.
- The grandmother did not prove that when compared to other alternatives, the child's welfare will be enhanced by granting her party status.

Legislation and Law

[24] Section 36 (1) (f) of the *CFSA* provides the court with the jurisdiction to add "any other person" as a party "at any stage in the proceeding pursuant to the *Family Court Rules*." The civil burden is on the person making the application.

[25] In **S.S. v. Nova Scotia (Community Services)**, 2016 NSCA 4, Bryson, J.A. at para 6, confirmed the three part test to be applied when considering a motion for party status. The test is as follows:

- Whether the non-party seeking standing has a direct interest in the proceeding's subject matter.
- Whether the non-party seeking standing has a familial, or some other, relationship with the child.
- Whether there is a reasonable possibility, when compared to other alternatives, that the child's welfare may be enhanced by granting the non-party standing and hearing the relevant evidence.

[26] Further, the *CFSA* contemplates family placement in appropriate circumstances, see for example ss. 42(1)(c) and 42(3). These provisions, however, must always be viewed from the perspective of the best interests of the child as stated in s. 2(2) of the *Act*, and in **Family and Children's Services of King's County v. B.D.**, [1999] N.S.J. 220 (C.A.).

[27] When responding to a family placement request, the court must be responsive to reasonable alternatives, where such placements are "sound, sensible, workable, well-conceived and have a basis in fact": **Children's Aid Society of Halifax v. S.M.R. and B.** 2001 NSCA 99 at par. 29. In addition, the family

member advocating a competing plan must produce cogent evidence of the plan's viability, as noted in paras. 53 and 54, which state as follows:

[53] The agency is not required to investigate each and every family placement proposal. The burden of persuasion is upon those advocating a competing plan to advance the most compelling and sensible alternative they can muster.

[54] There is an obligation upon the person advocating a competing plan to present some cogent evidence with respect to it. In that way, the merits and viability of the proposal will have some foundation in fact which might then be adequately assessed by the trial judge. Should time permit and circumstances warrant, it may well be that the plan put forward as a worthwhile family placement option will require further investigation, perhaps in some cases a complete home study report. However, not every possible placement alternative will require such a response.

[28] Past parenting evidence is also relevant when assessing risk of harm. Although [t]here is no legal principle that history is destiny", past parenting is relevant as it may signal "the expectation of risk": **D.(S.A.) v. Nova Scotia (Minister of Community Services)** 2014 NSCA 77, para. 82. The court is concerned with probabilities, not possibilities. Therefore, where past history aids in the determination of future probabilities, it is admissible, germane and relevant: **Nova Scotia (Minister of Community Services) v. L.M.** 2016 NSSC 80.

Decision

[29] I reject the grandmother's motion to be added as a party because she failed to meet the burden upon her. Although the grandmother showed she has a direct interest in the proceeding, and was involved in a familial relationship, she did not prove the third branch of the test. The grandmother failed to prove, that when compared to other alternatives, that there was a reasonable possibility that the child's welfare would be enhanced by granting her party status and hearing the relevant evidence.

[30] Rather than proving the grandmother's case, I find that the evidence overwhelmingly supports the Agency's position that the grandmother's lack of insight and judgement will place the child at a substantial risk of physical harm if he was to be returned to her care. In such circumstances, the child's welfare will not be enhanced. I make this finding for the following reasons:

- From December 2016 onward, the Agency repeatedly told the grandmother and mother that the mother was no longer allowed to enter the grandmother's home or to have unauthorized contact with the child. They both understood the clear direction of the Agency. Unfortunately, the mother entered the grandmother's home on at least three occasions, and once with the direct consent of the grandmother despite the Agency's prohibition. The grandmother did not immediately report these violations to the Agency. By allowing contact and by failing to report, the grandmother placed the mother's interests above the interests of the child. The grandmother placed the child at a substantial risk of harm.
- On two occasions, the grandmother did not report to the Agency that a third party had called police to respond to disturbances at the grandmother's home. The disturbances were caused by the mother's demands for cigarettes and money on one occasion, and by the mother's upset over the preparation of baby bottles on another occasion. By failing to report, the grandmother placed the mother's interests above the interests of the child. Further, conflict in the home is never in a child's best interests.
- When questioned by the Agency, the grandmother consistently reported that the mother was doing fine and that she had no concerns about the mother's conduct or possible drug use. The Agency relied on the grandmother's statements, which were subsequently discovered to be false. By misleading the Agency, the grandmother placed the mother's interests above the interests of the child and also failed to protect the child.
- The grandmother failed to recognize or report any concerns that were suggestive of drug use by the mother. This despite being aware of the mother's long-standing addiction, at least since the mother was 18 years old, and despite receiving instruction from a Family Support Worker on the signs of drug use. For example, the grandmother did not recognize or report that the mother was leaving the home for several hours a day throughout the week, or that the mother was sick in bed after being dismissed from the methadone program, or that the mother was moody, demanding and angry at times, or that the mother's theft charges might be suggestive of drug use. By failing to recognize or report signs of drug use, the grandmother placed the mother's interests above the interests of the child and failed to adequately protect the child.

- The grandmother misled the Agency and the court in respect of her own health and drug use. The grandmother initially stated that she had no health problems. Later in her evidence, the grandmother said that she was taking either morphine or hydromorphone, or both, for headaches and arthritis. The grandmother's prescription drug use was only disclosed during the court hearing, even though these types of drugs were regularly abused by the mother. The grandmother professed no insight as to why this information was relevant or why this information should have been disclosed. In addition, the grandmother professed shock upon learning that the mother told Addiction Services that her family supplied her with drugs. The grandmother professed shock upon learning that the mother had repeatedly stolen the grandmother's medication. The grandmother did not even have the foresight to monitor her medication. The grandmother's lack of insight and judgement is deeply troubling. How can the grandmother be expected to protect the child when she lacks insight on such fundamental matters?
- The grandmother consistently minimized the mother's drug use. In her affidavit, the grandmother said that the child "had to stay in the hospital for two months due to health reasons." The grandmother failed to state that the child was in the hospital because he was born an addict as a result of the mother using drugs while pregnant. The grandmother acknowledged that she did not seek help from the Agency for the mother during the mother's pregnancy. The grandmother feigned a lack of knowledge about the mother's current drug use, stating that she never personally observed the mother injecting or using drugs. The grandmother is unwilling to admit the extent of the mother's addiction. How can the grandmother be expected to protect the child when she lacks insight into the mother's addiction?

[31] In summary, I find that the grandmother fails to appreciate the extent of the mother's addiction. The grandmother refuses to recognize the signs of drug use in the mother. The grandmother consistently protects the mother. The grandmother's serious errors in judgement placed the child at a substantial risk of harm in the past and I infer will do so in the future.

[32] Further, the evidence points to the conclusion that the grandmother will continue to make excuses for the mother and will continue to be enmeshed in the mother's dysfunctional life. For example, the grandmother has not severed her relationship with the mother. Despite having a peace bond, the grandmother

continues to have contact with the mother via a third party. The grandmother even purchased the mother a cellphone and is paying for the plan.

[33] The mother's IV drug use has created a destructive and dysfunctional lifestyle, one which is marked by criminality, chaos and conflict. To support her drug habit, the mother lies, steals and manipulates. The grandmother was dragged into the mother's world, and at times, acted as an enabler of the mother's addiction. The child must be protected from this world, even if this means that the only reasonable alternative is a permanent care and custody order, a fact which will not be known until the permanent care hearing is concluded.

Conclusion

[34] This decision was a difficult one. The grandmother clearly loves the child and wants what is best for him. The grandmother and the child have a strong attachment. Attachment, however, is not the sole factor that must be considered. I must apply the law. In so doing, I find that despite the grandmother's love for the child, and despite their strong attachment, the grandmother failed to prove that there is a reasonable possibility, when compared to other alternatives, that the child's welfare may be enhanced by granting the grandmother standing. The grandmother's motion is dismissed without costs.

Forgeron, J.