SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. RMN*, 2017 NSSC 270

Date: 2017-10-16
Docket: *Sydney* No. 100455
Registry: Sydney

Between:

Nova Scotia (Community Services)

Applicant

v.

RMN and MC

Respondents

Judge:	The Honourable Justice Theresa Forgeron
Heard:	August 11; September 5, 6, 7, 8 and 20; and October 16, 2017, in Sydney, Nova Scotia
Oral Decision:	October 16, 2017
Written Release:	October 23, 2017
Counsel:	Tara MacSween for the Applicant Shannon Mason for the Respondent, RMN MC on his own behalf, not participating

That s. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication. S. 94(1) provides:

> 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.

1990, c. 5

By the Court:

Introduction

[1] This decision is about a mother, RMN, and her eighteen-month old son. The mother sincerely loves her son and wants to have care and custody of him. The mother wants to provide her son with a home. Even though the mother admits that she has a mild intellectual disability, she nevertheless denies that her disability creates protection concerns. The mother states that she has the capacity to raise her son in a supportive and loving family environment. She states that she should be given the opportunity to do so.

[2] In contrast, the Minister of Community Services seeks a permanent care order. The Minister states that the son cannot be placed with the mother because of ongoing protection concerns. The Minister asserts that protection concerns are linked to the mother's lack of capacity, lack of an adequate support system and lack of insight. The Minister states that in the circumstances, a permanent care order is the only viable option that is in the son's best interests.

Issues

[3] In order to decide this case, I will answer the following three questions:

- Does the son remain a child in need of protective services?
- Should a permanent care order issue?
- If a permanent care order issues, should access be awarded?

[4] Before addressing these issues, I will briefly review background and procedural facts to provide context.

Background and Procedural Facts

[5] The mother is 40 years old. She is diagnosed with a mild intellectual disability. She currently lives on her own and is responsible for her own day-to-day needs.

[6] In addition to the son, the mother has two other children. The mother's oldest child J is 22 years. The oldest child unsuccessfully battled addiction issues for several years. The mother's second child, L, is 15 years old. The 15 year old lives with her biological father and attends high school.

[7] Child protection authorities became involved with the mother in 2016 while she was pregnant with the son. During this time, the Agency played a supportive role, offering services and assistance. In addition, the Agency also candidly reviewed their concerns surrounding MC, the son's father. The son's father has an extensive child protection history involving substance abuse and violence. The Agency did not want the mother to continue to associate with the son's father.

[8] The son was born in April 2016. Two days after his birth, the Minister took the son into care. The son has remained in the care and custody of the Minister since that time. The mother exercised supervised access throughout the proceedings.

[9] Court proceedings began with interim hearings held on April 26 and May 18, 2016. The protection finding was entered under s. 22(2) (b) of the ***Children and Family Services Act*** on July 19, 2016. The first disposition order was granted on October 4, 2016. Subsequent disposition reviews were held on December 14, 2016; February 28, 2017; May 1, 2017; and July 26, 2017.

[10] As part of the case plan, the mother was required to participate in services which included family support sessions and a parental capacity assessment. Dr. Landry completed the parental capacity assessment on November 28, 2016. Following the Agency's review of this assessment, and in conjunction with all other available and relevant facts, the Minister determined that she would seek a permanent care order. The mother is strenuously opposed to the Minister's plan.

[11] The permanent care trial was held on the following dates in 2017: August 11 and September 5, 6, 7, 8 and 20. Thirteen witnesses testified during the hearing: Dr. Sandra Scherbarth, Dr. Reg Landry, Nicole Sheppard, Doug Thorne, Jamie Barrett, Catherine Morrison, RR, Wendy Aboud, Donna Mikkelson, Amy Donovan, RMN, Cathy Viva, and SMN. The court's oral decision was given on October 16, 2017.

Analysis

[12] **Does the son remain a child in need of protective services?**

Position of the Minister

[13] The Minister states that the son remains a child in need of protective services under s. 22 (2) (b) and (k) of the ***Children and Family Services Act*** for a number of reasons, including the following:

- Dr. Landry testified that the mother has an intellectual disability which negatively impacts on her cognitive ability and executive functioning. Healthy problem solving skills remain an ongoing challenge.

- Dr. Landry states that the mother does not have the capacity to parent on her own.

- The mother's plan that would have the maternal grandmother provide the necessary support is not a viable option. The Minister states that the maternal grandmother cannot provide the support that is required to compensate for the mother's parenting deficits.

- The mother's lifestyle continues to place the son at risk because the mother engages in risky behaviour and is involved in conflictual relationships.

- The mother lacks insight and fails to assign priority to the son.

Position of the Mother

[14] In contrast, the mother states that the son is no longer a child in need of protective services for a number of reasons including the following:

- Dr. Landry diagnosed the mother with a mild, not severe, intellectual disability. He also noted that this impairment is not necessarily a barrier to parenting.

- Dr. Landry confirmed that the mother could meet the son's basic needs, although she would likely experience difficulty with "curveballs" that inevitably arise. He stated that the mother would benefit from extended support.

- The mother found the support that Dr. Landry recommended. The mother states that the maternal grandmother is willing and capable of providing additional care and directing the mother should problems arise. The mother

plans to live with the maternal grandmother, and together they would raise the son, as they had with the mother's two older children.

- The mother has many strengths as a parent. She is consistently affectionate, attentive and loving. The son is appropriately fed, changed, soothed and held during every access visit. Very few access visits were missed. The mother took her parental role seriously.

- The mother engaged well with the family support worker.

- The mother does not use drugs or alcohol. Her home is clean and appropriate. She is not involved in criminal activity.

- The mother successfully raised two children before the son was born. RR testified that he had no concerns with the mother's parenting.

[15] In countering some of the arguments of the Minister, the mother notes as follows:

- The mother is not the cause of her older son's drug use. Further, the older son is doing well with his current addiction treatment.

- The mother would not allow the older son to have unsupervised contact with the son.

- The mother is no longer involved with the son's father. She does not intend to resume a relationship with him in the future. She will not allow the father to have access to the son.

Law

[16] I will now review the law that I applied in reaching my decision.

[17] This permanent care hearing is the last of the disposition reviews. In conducting this disposition review, I must assume that the orders previously made were correct at the time. At this stage, I must determine whether the circumstances, which resulted in the original order, still exist, or whether there have been positive or negative changes, or whether new factual circumstances have arisen, such that the son is no longer in need of protective services: sec. 46 of

the ***CFSA***; and **Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.),** [1994] 2 S.C.R. 165, at paras. 35 to 37.

[18] The Minister bears the burden of proof. It is a civil burden of proof based on a balance of probabilities. The Minister must present evidence that is sufficiently clear, convincing and cogent: **C. (R.) v. McDougall,** 2008 SCC 53. The phrase "clear, convincing, and cogent" does not create an additional or heightened level of proof. Rather, the Minister must prove why it is in the best interests of the son to be placed in the Minister's permanent care and custody according to the legislation.

[19] In making my decision, I am mindful of the threefold legislative purpose set out in s. 2(1) of the ***CFSA***- to promote the integrity of the family, to protect children from harm, and to ensure the best interests of children. The paramount consideration, however, is the best interests principle as stated in s. 2(2) of the ***Act***.

[20] The ***CFSA*** must be interpreted according to a child-centered approach, in keeping with the best interests principle as defined in s. 3 (2) of the ***Act***. This definition is multifaceted. It directs the court to consider various factors unique to each child, including those associated with the child's emotional, physical, cultural, and social developmental needs, and those associated with risk of harm.

[21] As the Minister is seeking to permanently remove the son from the care of the mother, s. 42(2) of the ***CFSA*** is invoked. This section confirms that the court must not remove a child from parental care, unless less intrusive alternatives were attempted and failed, or were refused by the parent, or would be inadequate to protect the child. The obligation to provide services is not without restrictions as noted by Flinn, J.A. in **Children's Aid Society of Shelburne (County) v. S.L.S,** 2001 NSCA 62 at para. 36.

[22] The Minister relies primarily upon s. 22(2)(b) of the ***CFSA*** in support of her position that M remains a child in need of protective services. The Minister states that there is a substantial risk that the son will suffer physical harm caused by the mother's failure to adequately supervise and protect the son.

[23] Substantial risk is defined in s. 22(1) of the ***Act*** as meaning a real chance of danger that is apparent on the evidence. In **M.J.B. v. Family and Children's Services of Kings County**, 2008 NSCA 64, para 77, Bateman, J.A. confirmed that in relying upon "substantial risk", the Minister need only prove that there is a real

chance that the future abuse will occur, and not that future abuse will actually occur.

[24] The Minister also relies on past parenting history. Although "[t]here is no legal principle that history is destiny", past parenting history is relevant as it may signal "the expectation of future 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.

[25] In **Nova Scotia (Minister of Community Services) v. Z. (S.)** 1999 NSCA 155, Chipman, J.A. confirmed the relevance of past history at para 13 wherein he states as follows:

> [13] I am unable to conclude that the trial judge placed undue emphasis on the appellant's past parenting. It was, of course, the primary evidence on which he would be entitled to rely in judging the appellant's ability to parent B.Z. In **Children's Aid Society of Winnipeg (City) v. F.** (1978), 1 R.F.L. (2d) 46 (Man. Prov. Ct.) at p. 51, Carr, Prov. J., (as he then was), said at p. 51:
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> > ... In deciding whether a child's environment is injurious to himself, whether the parents are competent, whether a child's physical or mental health is endangered, surely evidence of past experience is invaluable to the court in assessing the present situation. But for the admissibility of this type of evidence children still in the custody of chronic child abusers may be beyond the protection of the court ...

[26] Past parenting history, however, does not necessarily determine current protection status. Most caregivers do have the capacity to effect positive and permanent lifestyle changes, even in the face of significant historical parenting deficits.

[27] Further, when assessing risk of harm, I agree with the mother's counsel. The court does not demand perfection in parenting. Rather, the question to be asked is whether adequate parenting can be achieved within the statutory timeframe: **CAS of Cape Breton Victoria v. J.S**. [2005] NSJ No. 271 (C.A.)

Decision

[28] In reaching my decision, I considered the burden of proof, as well as the statutory scheme outlined, and the applicable case authorities. In making credibility findings, I applied the law set out in **Baker-Warren v. Denault**, 2009

NSSC 59, as approved in **Gill v. Hurst,** 2011 NSCA 100. In addition, I made inferences in keeping with the comments of Saunders, J.A. in **Jacques Home Town Dry Cleaners v. Nova Scotia (Attorney General)**, 2013 NSCA 4. My analysis was also based on the application of the law to the facts presented in the testimony. In addition, I also carefully reviewed and considered the able and thorough submissions of each of the parties.

[29] Further, in reaching my decision, I refuse to entertain the suggestion that a continued protection finding can be entered under s. 22 (2) (k) of the ***Act.*** The Minister only raised this issue for the first time in closing submissions. If the Minister truly wanted to pursue this ground, she should have made it clear from the outset to ensure that the mother had an opportunity to prepare and present her case with this submission in mind.

[30] Therefore, for the purposes of this decision, I only considered the continued protection finding under s. 22 (2) (b) of the ***Act***. And in respect of s. 22 (2) (b), I find that the Minister did prove there is a substantial risk that the son will suffer physical harm if he was placed in the mother's care for three reasons - lack of parenting capacity, lack of a support network and lack of insight.

Lack of Parenting Capacity

[31] The mother does not have the capacity to parent on her own. I accept Dr. Landry's findings that the mother has an intellectual disability which negatively impacts on her parenting. Dr. Landry was qualified as an expert in the field of psychology including parenting capacity.

[32] Dr. Landry confirmed that the mother's test scores fell in the extremely low to low range. For example, the mother achieved an overall full scale IQ that fell in the extremely low range. She also scored in the extremely low range on the verbal comprehension index, the perceptual reasoning index, and on subtests assessing auditory attention and concentration and immediate working memory. The mother fared slightly better in the cognitive processing speed test, scoring in the low end of the low average range. Overall, the mother's intellectual abilities are significantly below average.

[33] These scores explain why the mother displays such profound difficulty with reasoning and problem solving skills. For example, the mother's cognitive limitations led her to refuse medical treatment during her pregnancy. This refusal placed the lives of the mother and the unborn son in jeopardy. Further, cognitive

challenges were also exhibited during access visits. The mother had to be directed and prompted on some very basic skills during access. On other occasions, the mother failed to implement parenting approaches meant to advance the son's development, such as tummy time.

[34] I infer that the mother's limitations with cognitive functioning will continually cause parenting deficits that will place the son at a substantial risk of physical harm. The mother simply does not have the capacity to evaluate, plan and deliver safe solutions to novel problems which will consistently arise as the son develops and matures.

Lack of a Support Network

[35] The mother requires a supportive network if she is to safely parent the son. She does not have such a network in the maternal grandmother. The seventy-eight year old maternal grandmother cannot offer the support that the mother and the son require for two reasons. First, the maternal grandmother does not appreciate the extent of the mother's challenges, often brushing off concerns that were raised by counsel. The maternal grandmother stated that she would be there to babysit and occasionally direct, but would otherwise allow the mother to parent the son. Second, the maternal grandmother has her own limitations arising from age and health concerns. She cannot provide the long term support that is required in the circumstances.

Lack of Insight

[36] The mother lacks insight. This lack of insight will place the son at a substantial risk of harm. Examples in support of this conclusion include the following:

- The mother does not appreciate significant safety risks. The mother allowed a homeless young person, who she had just met, to stay overnight in the mother's home. The mother directed this young person to leave once the mother discovered that the young person was stealing. The mother also allowed another teenager to live with her and assist with rent and housework, while misrepresenting the truth of the nature of the living arrangement. The mother lacks insight into the concerns surrounding these choices.

- The mother does not fully appreciate the risks arising from her older son's addiction. The older son is an IV drug user who has been in and out of detox for several years. The mother minimized and understated his addiction issues. Over the years, the mother repeatedly suggested that the older son had conquered his addiction only to be proven wrong. The mother blindly suggests that the older son would never cause harm to the son. The mother does not appreciate the dangers implicit in an addiction lifestyle. Supervised access is not the solution in such circumstances.

- The mother lacks insight into the risks associated with the son's father and people like him. Before the son was born, a protection worker explained the agency's concerns surrounding the son's father. The mother was aware that the agency did not want her to associate with the son's father. The mother refused to follow that advice. The mother continued to engage in a relationship with the son's father despite his abuse towards her and despite his abuse of alcohol. The mother does not truly appreciate the risks associated with a dysfunctional and abusive relationship. The mother's recent vow to sever all ties with the son's father rings hollow.

- The mother is a naïve and vulnerable person who often makes poor choices in friends. Her friendships are often conflictual and at times abusive. The mother told Dr. Laundry that she was seriously assaulted by two friends because they thought she was "going to rat them out." The mother told Ms. Donovan that another acquaintance, DS, was threatening her because of a dispute surrounding an ex-boyfriend. Other disputes with other friends or acquaintances were also reviewed during the contested hearing.

Summary

[37] In summary, I find that the mother's plan does not alleviate the protection concerns that led to the son being taken into care. The son would be at a substantial risk of harm if he was to be placed in the care and custody of the mother because of the mother's failure to adequately supervise and protect the son. The substantial risk of harm is linked to the mother's lack of parenting capacity, lack of a support network and lack of insight. The son therefore remains a child in need of protective services.

[38] **Should a permanent care order issue?**

[39] At this stage of the proceeding, given that the statutory time limit expired on October 4, 2017, I have only two available options. I must either dismiss the proceeding or grant a permanent care order: **N.J.H. v. Nova Scotia (Minister of Community Services)** 2006 NSCA 20, at para. 20. There is no middle ground. Because the son remains a child in need of protective services, I find that it is in his best interests to be placed in the permanent care and custody of the Minister.

[40] **If a permanent care order issues, should access be awarded?**

[41] Section 47(1) of the ***Act*** states that once an order for permanent care and custody issues, the agency becomes the legal guardian of the child, and has all the rights, powers and responsibilities of a parent for the child's care and custody. Section 47(2) of the ***Act*** provides the court with the authority to make an order for access in limited circumstances: **Children & Family Services of Colchester (County) v. T. (K.),** 2010 NSCA 72 at paras 39 to 42.

[42] In **Nova Scotia (Minister of Community Services) v. H. (T.),** 2010 NSCA 63 Fichaud, J.A., states that after a permanent care order has issued, there is a de-emphasis on family contact, and instead priority is assigned to long-term stable placement at para. 46. In **Mi'kmaw Family & Children's Services v. L. (B.),** 2011 NSCA 104, Oland J.A. held that a trial judge erred when she did not fully address access issues upon a permanent care order issuing. In **P.H. v. Minister of Community Services and R.W.** 2013 NSCA 83, at paras 98 to 119, Farrar, J.A. confirmed earlier appellate decisions which placed emphasis on permanency planning over family contact.

[43] I am unable to award ongoing access to the mother despite the fact that the mother has a warm and loving relationship with the son and despite the fact that access, for the most part, was positive and healthy. I am unable to grant access based upon my understanding of the legislation and the case law. The son needs love, finality and a home free from protection concerns. Access would impede adoption and permanency planning. Access between the mother and son will therefore be terminated subject to usual transitional visits.

Conclusion

[44] The Minister has proven that protection risks continue to exist and that the son would be at a substantial risk of physical harm if he was placed in the care and custody of the mother because of serious issues linked to a lack of parental capacity, a lack of a support network and a lack of insight. The Minister has proven

that it is in the son's best interests to be placed in her permanent care and custody as the statutory time limits expired on October 4, 2017. The mother failed to prove that access should be ordered.

[45] Counsel are thanked for their efforts, presentations and submissions. Ms. McSween is to draft and circulate the order.

Forgeron, J.