FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. L.S., 2013 NSFC 28

Date: 20131209
Docket: Shelburne No. 023992
Registry: Yarmouth

Between:

Minister of Community Services

Applicant

v.

L.S.

Respondent

Publication restriction:

Publishers of this case please take note that Section 94(1) of the Children and Family Services Act applies and may require editing of this judgment or its heading before publication.

Section 94 provides:

94(1) No person shall publish or make a public information that has the effect of identifying a child who is a witness or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or a guardian, a foster parent or a relative of the child.

Editorial Notice

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

Judge:	The Honourable Judge John D. Comeau, JFC
Heard:	October 23, 2013, in Yarmouth, Nova Scotia
Counsel:	Donald Harding, Q.C., for the Minister of Community Services Sara B. Allen, for the Respondent, L.S. Colin Fraser for the child D.

Introduction / The Application

[1] This is a disposition pursuant to section 41 of the *Children and Family Services Act*.

[2] The Respondent L.S. consents to permanent care and custody of her child D., born February […], 2002. As for this agreement the Court is satisfied that there has been compliance with section 41(4)(b)(c) with respect to the child and the Respondent L.S. both had counsel who provided independent legal advice.

Issue: Access following an order for permanent care and custody

Facts:

[3] The relevant facts with respect to this type of application are outlined in the Minister's Plan of Care and evidence at the protection hearing. Concerns expressed were that the Respondent mother was physically and emotionally abusive to the child D.. She is unable to meet her own emotional needs, struggles with boundaries, poor impulsivity, poor social communication and accepting responsibility for her own behaviours. She has poor parenting skills and accepting criticism for same.

[4] In the Parental Capacity Assessment prepared by Susan J. Hastey, Ph.D. she refers to the high score in the parental attachment subscale.

[5] This is included in some of the testing she carried out in formulating her report:

> **"Parental Attachment**
> **(Percentile Score = 90)**
>
> The Parental attachment subscale was designed to assess the intrinsic investment the parent has in the role of parent. This subscale is expected to determine the parent's motivational level to fulfil the role of parent. This construct was consistent with the idea of internal working models of attachment as presented in the literature of Bowlby (1969).
>
> The presence of a high score on this subscale suggests two possible sources of dysfunction. The first source may be that the parent does not feel a sense of emotional closeness to the child. The absence of emotional bonding may be reflected in a rather cold pattern of parent-child interaction. The second source of dysfunction may be the parent's real or perceived inability to observe and understand the child's feelings and/or needs accurately. Low levels of parental monitoring and vigilance in relation to their child's behaviours are common features of parents who earn high scores. This Assessor believes that L.S. has challenges particularly in regard to a combination of L.S. not being able to separate her own needs from those of her daughter and L.S. also projecting frustration at not having her own social and emotional needs met onto her daughter. The result of this is often inappropriate frustration shown by L.S. toward D. with a further result is that D. becomes confused, upset and cannot understand the situational behaviour of her mother. This Assessor has observed such behaviour in working with mother and daughter together. When L.S. was corrected for interrupting and talking too frequently during a task, she immediately accused her daughter D. of interrupting her as well as this Assessor."

[6] The child was the subject of a proceeding which was dismissed by order dated November 22, 2004. It stated the child D. was no longer in need of protective services. By interim order dated January 11, 2013, the child who had been apprehended was placed in the temporary care of the Minister with access to the Respondent mother arranged through the minister's agents. This would have been supervised access and the same type of access was confirmed in the protection order.

[7] The *Children and Family Services Act* provides the court with jurisdiction to order access following an order for permanent care and custody.

[8] In the case before the Court, the Minister's adoption worker in her affidavit spoke of her duties as an adoption worker. She says that the long term goal for D. is adoption. She points out the following starting at paragraph 8.

> "8. I am aware that adoption is the identified goal for D..
>
> 9. In most instances children placed in permanent care and custody will shortly thereafter have a final visit with their birth family to be clear that reunification is not the goal.
>
> 10. Children require time to grieve the loss of their birth family in order to accept and understand their option for the future. Post permanent care and custody

access between a birth parent and child must be weighed against the potential for such to compromise the child's adjustment toward an adoption placement.

11. According to statistics compiled by the Department of Community Services, as of October 5, 2013 there were 120 waiting families approved for adoption in Nova Scotia. Of these families 29 expressed an interest in potentially adopting a female child of 11 years of age.

12. As part of the training and assessment process, adoptive applicants are asked to identify what level of needs or type of circumstances they are willing to accept in a prospective adoptive child. It is common for adoptive applicants to be hesitant or non accepting of adopting a child who has regular direct contact with a birth parent. If a child is older, has special needs and has access with a birth parent the prospects for an adoptive home is reduced even further.

13. Waiting and approved families have devoted many years to the approval process. This process is emotionally straining. If an adoptive family has the opportunity to adopt two children and one child has an access order they will be more likely to choose the child without an access order. Adoptive families in general would be highly intimidated by the court process and would not wish to be involved in any applications to the court.

14. The most common post adoption contact between a child and his or her birth parent is done annually via non identifying correspondence such as a letter or

photograph of the child. The Department Adoption Social Worker facilitates the transfer of this contact in most cases.

15. Indirect or direct contact arrangements are made possible through an "Openness Agreement" which is signed jointly by the adoptive family and the birth parent. This document is not legally binding and is totally dependent on the cooperation of the adoptive parents.

16. Careful consideration must be given to ensure that ongoing contact with the birth family is not only beneficial to the child but does not impede the child's ability to move forward and enjoy a healthy attachment to the adoptive parents.

17. Given D.'s age consideration would be given to her wishes with regards to future contact with her birth mother.

18. It is my experience that children with no behaviour issues and own special needs are more likely to be adopted. Based on this, the likelihood of securing an adoptive family for D. is greater. If an access order is in place this will impede our ability to find an adoptive home for D. and delay placement.

19. It is my experience as an Adoption Social Worker that the granting of an Access Order with an Order for Permanent Care and Custody will significantly reduce if not eliminate the chances of acquiring an appropriate adoptive home for D.."

The Law

[9] The *Children and Family Services Act* provides:

> "47(1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.
>
> (2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
> (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
>
> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access."

[10] The Court has also been referred to the decision of the Nova Scotia Court of Appeal in *P.H. v. Nova Scotia (Community Services)*, 2013 NSCA 83. Justice Farrar for the majority referred to s. 47(2) in applying the facts in that case at p. 34.

> "The trial judge, here, had clear and uncontradicted evidence from Sally Rivers of the CAS Brantford that an access order would "severely limit" their ability to find a permanent home for the child. The appellant acknowledges that she had a factual burden to establish special circumstances justifying an order for access post permanent care. However, the special circumstances must be such that it would not bar a future permanent placement. By virtue of s. 47(2) access that would impair a future permanent placement is deemed not to be in the child's best interests."

[11] Colin Fraser was appointed counsel for the child D.. He met with the child on September 20, 2013. She was a little hesitant to tell Mr. Fraser what she wanted as far as visits with her mother. She said she was okay with not having visits with her mother but wanted to be able to call her from time to time after permanent care. On his visit on October 15, 2013 D. thought she might like to continue seeing her mother. She now sees her one hour twice a week and would like that to continue.

[12] The Respondent mother in her affidavit starting at paragraph 10 sets out why she wants access.

> "10. I am afraid that if there is no court order for access, that D. may not know or understand how to contact me, or that she may feel like she is not allowed, and therefore our relationship would suffer or be non-existent.
>
> 11. I want to make sure I am available for D. when and if she needs to reach out to me. I want her to know I am available to her and there is no reason she is "not allowed" to contact me.
>
> 12. I am the only family member that D. has in her life and I am worried that she will lose all of her sense of her family and who she is if we are unable to see one another.
>
> 13. I believe that seeing D. on a regular basis would allow us to maintain a relationship and that she would be able to find comfort in that routine. She has already been through so much since this started.
>
> 14. I understand that if D. is adopted, that this may affect access. I understand that if an adoptive family comes forward that is not supportive of continued access, that access may be terminated.

> 15. I would be satisfied with seeing D. once a month, as this would provide a routine for D. without interrupting the life she is building now. If the Agency insists that visits be supervised I believe my parents would be willing to supervise the visits.
>
> 16. I believe it is in D.'s best interests to maintain a relationship with me through structured access and that her desire to maintain a relationship with me should be respected."

[13] In her brief, counsel for the Respondent mother referred to the decision of *Mi'kmaw Family and Children's Services v. L.I.*, 2012 NSSC 412 which is a decision of the Nova Scotia Supreme Court (Family Division). She says this case indicates there may be circumstances following permanent care when an access order should be made.

[14] Justice Farrar in *P.H. supra* is critical of Justice Legere Sers decision in *L.I. supra*.

> "Legere Sers, J.'s approach and the appellant's argument before us would result in a repetitive analysis of the wide-ranging best interests factors listed under s. 3(2), which would have already been considered as part of the permanent care decision. Looking afresh at, say, "the child's relationships with relatives" under (b) or "the bonding that exists between the child and the child's parent or guardian" under (d) could unravel the permanent care determination and undermine the Agency's plan for a permanent placement."

[15] Justice Farrar indicated with *P.H.* the Appellant's reliance on *L.I.* was misplaced.

[16] In *K.T. (Children and Family Services of Colchester County v. K.T.*, 2010 NSCA 72) Chief Justice MacDonald referred to his conclusions from reading s. 47.

> "First, the Agency effectively replaces the natural parents. This puts the onus on the natural parents (or guardian) to establish a special circumstance that would justify continued access.
>
> Second, by virtue of s. 4(2)(a) and (b), an access order must not impair permanent placement opportunities for children under 12. Section 47(2)(c) is consistent with this. It provides that if no adoption is planned then access will be available."

[17] The child in *P.H. supra* was born June […], 2002 and been in continuous care since September 22, 2010. Permanent care was ordered in 2012. The decision in this case is applicable to children under or over the age of 12. Reference is made in *P.H. supra* to the issue of best interests at page 20.

> "It is inaccurate to speak of a "gap" or deferral of the best interests analysis, either under the CFSA or through the Court's interpretation of the *Act*. There is no break in consideration of the child's best interest. The Judge will only order permanent care if it would be best for the child, and then the Minister be responsible for ensuring the placement plans are in the child's best interest. … If the plan leads to adoption, a court once again resumes oversight of the child's best interests in order to approve the adoption."

[18] Referring to s. 47(2) Justice Farrar makes the following comment with respect to access at page 23.

> "As long as the Minister is planning for adoption, can there ever be a "special circumstance" that justifies making an order for access? This Court has effectively said "yes but rarely". This Court has interpreted s. 47(2)(d) to read "some other special circumstance justifies making an order for access" and access will not

> impair the child's opportunities for permanent placement if that is what the Agency is planning.
>
> Access must be considered within the context of the Minister's long term plan of care … and then it makes logical sense to ensure access is only ordered if it will not impair those plans."

Conclusion / Decision

[19] The decision of Justice Farrar in *P.H. supra* is the guide of how to deal with access following permanent care and the Court is bound by this decision.

[20] In the long term Plan of Care, the Minister is opposed to access following permanent care because it is the intent that the goal is to have D. adopted. The child has expressed a desire to seek minimal contact with her mother but this could be available in an openness agreement. This is described by the adoption worker as an agreement between an adoption and birth family and this issue is commonly taken up with the adoptive parents when an adoption is being considered.

[21] She agrees that older children have more attachments to birth parents.

[22] Permanent care has been ordered and the Minister is now the parent of the child. Access is to be considered within the Minister's plan which is a long term stable placement in an adoptive family. There are no special circumstances here

that would warrant access to continue, in fact, this would be contrary to the child's ability to be adopted.

[23] The Respondent's application for access is dismissed.

John D. Comeau, JFC.