NOVA SCOTIA COURT OF APPEAL

Citation: *C.R. v. Nova Scotia (Community Services)*, 2019 NSCA 89

Date: 20191119
Docket: CA 487717
Registry: Halifax

Between:

C.R.

Appellant

v.

Minister of Community Services

Respondent

Restriction on Publication: s. 94(1) of the *Children and Family Services Act*, S.N.S. 1990, c. 5.

Judge:	The Honourable Justice M. Jill Hamilton
Appeal Heard:	September 20, 2019, in Halifax, Nova Scotia
Subject:	Child Protection; In Need of Protective Services; S. 22(2)(b), (g) and (k)
Summary:	The judge found the appellant's daughter continued to be in need of protective services and that it was in the child's best interests to be placed in the permanent care of the Minister. A permanent care order was granted.
Issues:	Did the judge apply the wrong test in determining there continued to be a substantial risk under s. 22?
Result:	Appeal dismissed without costs. The test for substantial risk continues to be that set out in *M.J.B. v. Family and Children's Services of Kings County*, 2008 NSCA 64. When deciding whether there is "substantial risk", a judge must only be satisfied that the "chance of danger" is real, rather than

speculative or illusory, "substantial", in that there is a "risk of serious harm or serious risk of harm" (*Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, paras. 104, 106 and 117), and it is more likely than not (a balance of probabilities) that this "risk" or "chance of danger" exists on the evidence presented. The whole of the judge's reasons indicate the future harm that she concluded there was a real chance could occur—the young child's needs would not be met if the mother stopped taking her medications as she had in the past. She did not err in considering the mother's past actions in assessing future risk. Neighbours, police and the Minister are not in a position to be able to ensure they are there as safety nets each time a crisis arises.

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Judges:	Beveridge, Hamilton and Farrar, JJ.A.
Appeal Heard:	September 20, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Hamilton, J.A.; Beveridge and Farrar, JJ.A. concurring
Counsel:	Raymond Kuszelewski, for the appellant Peter McVey, Q.C, for the respondent

Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act* 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.

Reasons for judgment:

[1] The appellant mother appeals from the March 25, 2019 Order of Beaton, J., as she then was, that placed her daughter (then three and a half years of age) in the permanent care and custody of the respondent Minister of Community Services. She says the judge erred in finding her daughter remained in need of protective services on any or all of the three grounds set out in s. 22(2)(b), (g) and (k) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 (substantial risk of future physical harm, substantial risk of emotional abuse and substantial risk of neglect).

[2] I would dismiss the appeal.

Background

[3] The judge described the background in her reasons (2019 NSSC 84):

> [9] J. [the child] was born in November 2015 and was residing with the Respondent [the mother] in their home. The child was taken into care in March 2016 at age 4 months and the Respondent was involuntarily hospitalized for a period of time. The child was found in need of protective services in June 2016 and placed with the Respondent's mother, who had relocated to this province. The grandmother was required to supervise the Respondent's contact with J. and all three resided together. In October 2016 the grandmother left Nova Scotia and J. was placed in the Respondent's care under a supervision order; the Respondent was taking medication by injection and was under the care of a mental health team which included regular contact with a psychiatrist.
>
> [10] By early 2017 the Respondent had chosen to switch from injections to oral medication; that spring the Respondent was also referred to a psychologist (but did not pursue that care). The child was in daycare and the Respondent completed family skills programming and was pursuing employment. In early July 2017, the proceeding was terminated.
>
> [11] By December 2017 the Respondent was no longer taking prescribed medication nor accessing mental health services and therapy, and the child was no longer in daycare. This second proceeding commenced with apprehension of the child and the Respondent was again involuntarily hospitalized for a period of time. Eventually discharged under a Community Treatment Order ("CTO")

pursuant to the *Involuntary Psychiatric Treatment Act*, the Respondent then had no choice but to receive medication by injection. The Respondent was also re-connected with mental health professionals, with whom treatment continues at this time.

[12] The child has been in the temporary care and custody of the Applicant for the duration of this second proceeding. At first disposition the child was found in need of protective services pursuant to s.22(2)(g) of the *Act* (risk of emotional abuse). The Respondent continues to exercise regular, supervised access at home and in the community, which by all accounts has gone very well. Most of J.'s life has been spent supervised by or in the care of the Applicant.

[4] The judge set out certain themes that arose from the Minister's evidence:

[13] The Court heard the expert evidence of the Respondent's former psychiatrist, Dr. E. Dini, treating psychiatrist, Dr. T. Pellow, treating psychologist, Dr. C. DeFreitas, and treating family physician, Dr. P. Somers. From among the evidence of those witnesses certain themes emerged:

i. The Respondent is intelligent, articulate (both as demonstrated in the Respondent's evidence) and resourceful. Since first being diagnosed with a mental health condition many years ago, the Respondent has for periods of time been hospitalized, and at other times been able to function in the community, living independently and employed.

ii. The Respondent is unwilling to accept the medical diagnosis of a permanent and irreversible delusional disorder, maintaining instead that the correct diagnosis is depression and/or post-traumatic stress disorder. As a result, the Respondent demonstrates a lack of insight about the diagnosed condition.

iii. The Respondent's ability to function independently in the community is and will remain contingent on engaging in all aspects of the care plan(s) identified by treating physicians and professionals, including taking prescribed medication. The medication is crucial to allowing the Respondent to carry on day-to-day in spite of the delusional thinking.

iv. The Respondent has historically been resistant to treatment at various periods, including not attending appointments with mental health professionals, unilaterally ending relationships with physicians, and not taking prescribed medication or being resistant to medication due to concerns about side-effects.

v. Since the birth of J. the Respondent has twice "gone off" the prescribed medication, which culminated both times in the Respondent's mental health deteriorating to a point where the Respondent's delusional thinking was profound and disturbing.

> vi. The Respondent has worked hard to try to make progress in discrete areas such as employment and is generally attentive to matters of physical health. The Respondent's thinking around conspiracy theories and paranoia is exacerbated when in conflict with authority figures and by times this has impacted the Respondent's efforts to pursue goals.
>
> vii. After learning the Minister intended to seek permanent care of J. during this proceeding, the Respondent instructed health care providers not to provide any further information/records to the Applicant.
>
> viii. Within days prior to the hearing of this matter, the CTO previously imposed by Dr. Dini binding the Respondent to a treatment plan was discontinued. Among other matters, it had required the Respondent to take prescribed medication for the diagnosed mental illness, and failure to do so would alert the treating physician.
>
> ix. The discontinuance of the CTO coincided with the Respondent's mother, who had acted as statutory decision-maker for the Respondent under the CTO, advising the Respondent's treating psychiatrist that she would only continue in her role as statutory decision-maker pursuant to the *Personal Directives Act*. (The Applicant [Minister] only became aware of this development during the hearing).
>
> x. Various of the expert witnesses expressed uncertainty about the implications of the *Personal Directives Act* for the Respondent's future obligation to adhere to treatment but were clear that absent a CTO the Respondent was not bound to take medication, and there was no longer a mechanism to monitor whether the Respondent did so.

[5] She noted the bases for the Minister's position that the child was at risk of future harm:

> [15] The child protection social worker, Ms. Brooks, testified as to the history of the proceeding and the Applicant's concerns that the child is at risk of future harm because of the Respondent's historical non-compliance with a prescription medication regime, ongoing abuse of certain over-the-counter medication, termination of relationships with prior physicians and lack of insight into the mental health diagnosis. The worker questioned how the Applicant could be confident the Respondent would properly care for J. in the future given a "pattern" of only complying with treatment for certain periods of time, and only as long as needed to satisfy the Applicant during the previous child welfare proceeding, with that concern having been heightened by the recent removal of the CTO.

[6] The judge reviewed the evidence presented on behalf of the mother. She concluded the individuals who were proposed to be part of the safety plan for the child were not sufficiently informed so as to appreciate the potential risks to the

child presented by the mother's mental health. She noted the mother admitted to not taking prescribed medications in the past, avoided answering questions about whether she accepted the diagnosis of delusional disorder and explained away, minimized and sometimes denied the historical events and social and professional interactions that indicated what occurred when her mental health deteriorated in the past. The judge concluded:

> [20] … The Respondent spoke well and was able to communicate a clear position, however the Court is left less than confident by that evidence that future risk to the child connected to any failure of the Respondent to adhere to treatment (therapy and medication) can be properly managed.

[7] The judge found the child continued to be in need of protective services due to the real possibility that the mother would not adhere to medical treatment in the future in the same way she avoided treatment in the past:

> **Issue No. 1 – Does the child remain in need of protective services?**
>
> [21] The Court must be persuaded on a balance of probabilities that a "substantial risk" is posed to the child. In *Nova Scotia (Minister of Community Services) v. S.C.*, 2017 NSSC 336, Jollimore, J. summarized the test for assessment of substantial risk:
>
> > 35. "Substantial risk" is a real chance of danger that is apparent on the evidence: subsection 22(1) of the *Children and Family Services Act*. It is the real chance of physical or emotional harm or neglect that must be proved to the civil standard. That future physical or emotional harm or neglect will actually occur need not be established on a balance of probabilities: *MJB v. Family and Children Services of Kings County*, 2008 NSCA 64 at paragraph 77, adopting *B.S. v. British Columbia (Director of Child, Family and Community Services)*, 1998 CanLII 5958 (BCCA), at paragraphs 26 to 30. (Emphasis in original)
>
> [22] I do not need to be persuaded the risk will occur. At this time, the circumstances which existed at the time the protection finding was made continue. There remains a real possibility that, as has happened in the past, the Respondent will not adhere to treatment in the future, which would pose a considerable and substantial risk to the child's well-being. The Respondent's own evidence helps to support the conclusion that it is more probable than not that the future will not look substantively different than the past, in terms of the Respondent's willingness to adhere to a plan of treatment that is essential to functioning as a care-giver to the child. Having been persuaded the child remains in need of protective services owing to the existence of a substantial risk, I turn to the second issue.

[8] She then found a permanent care order was in the best interests of the child.

Standard of Review

[9] The standard of review is as set out in *A.M. v. Children's Aid Society of Cape Breton-Victoria*, 2005 NSCA 58:

> [26] This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg [County] v. G.D.** , [2003] NSJ No 416 (Q.L.) (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.B.T.** (2002), 207 N.S.R. (2d) 109; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at paras. 10 - 16.

Analysis

[10] The mother argues the judge erred in finding that her daughter was in need of protective services under s. 22(2)(b), (g) and (k) of the *Act*, which provide as follows:

> **Child is in need of protective services**
>
> 22 (1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.
>
> (2) A child is in need of protective services where
>
> (a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;
>
> (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);

> …
>
> (g) there is substantial risk that the child will suffer emotional abuse and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the abuse;
>
> …
>
> (k) there is a substantial risk that the child will experience neglect by a parent or guardian of the child, and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the harm;

[11] The mother says the judge applied the wrong test in determining there continued to be substantial risk to her daughter under s. 22. She says the correct test required the judge to make separate findings that (1) there was a real chance of danger, (2) the real chance of danger was apparent and (3) the real chance of danger was apparent on the evidence. Only if these three findings were individually made by the judge was she to apply the balance of probabilities test to the combined definition, "a real chance of danger that is apparent on the evidence".

[12] I disagree with the mother's interpretation of the test to be applied by a judge in determining whether there is substantial risk under s. 22. There is nothing in the wording of the *Act* or in the case law supporting such a piecemeal approach.

[13] Rather, the test is as set out previously by this Court in *M.J.B. v. Family and Children's Services of Kings County*, 2008 NSCA 64:

> [77] The **Act** defines "substantial risk" to mean a real chance of danger that is apparent on the evidence (s. 22(1)). In the context here, it is the real chance of sexual abuse that must be proved to the civil standard. That future sexual abuse will actually occur need not be established on a balance of probabilities (**B.S. v. British Columbia (Director of Child, Family and Community Services)** (1998), 160 D.L.R. (4th) 264, [1998] B.C.J. No. 1085 (Q.L.) (C.A.) at paras. 26 to 30).
>
> (Emphasis in original)

[14] When deciding whether there is "substantial risk", a judge must only be satisfied that the "chance of danger" is real, rather than speculative or illusory, "substantial", in that there is a "risk of serious harm or serious risk of harm" (*Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, paras. 104, 106 and

117), and it is more likely than not (a balance of probabilities) that this "risk" or "chance of danger" exists on the evidence presented.

[15] I am satisfied the judge applied the correct test. In paragraphs 21 and 22 of her reasons, set out in paragraph 7 above, the judge referred to this test. There is nothing in her reasons to indicate she did not correctly apply it. She recognized it was not necessary for the evidence to show on a balance of probabilities that future physical harm, emotional abuse or negligence would actually occur for there to be a real chance of danger. Several times in her reasons she referred to the need for the Minister to prove on a balance of probabilities that there was a substantial risk to the child.

[16] The mother argues the judge erred by not specifying the future harm that she concluded there was a real chance could occur. While the judge did not state specifically the nature of this future harm beyond referring to the child's well-being, a reading of the whole of her reasons satisfies me she accepted the Minister's position on future harm—that the three and a half year old child's needs would not be met if the mother again stopped taking her prescribed medications:

> [4] The Applicant argues the Respondent's mental health condition presents a risk of future harm to J. such that the child cannot be adequately protected absent a permanent care order. The child, presently three and half years of age, has twice been in care since birth, which the Applicant asserts is primarily due to the Respondent's unwillingness to adhere to a course of prescribed treatment. Both apprehensions of the child came about when the Respondent's mental health deteriorated to the point the Respondent's very paranoid, anxious and irrational thoughts and behaviors came to the attention of police, in chaotic episodes where **the Respondent's mental health crisis left [her] unable to focus on the presence of or needs of the child**.
>
> (Emphasis added)

[17] The mother says the judge erred by relying on past circumstances to assess future risk. She says the evidence does not support a finding by the judge that her historical non-compliance with a prescription regime indicates a real chance of harm to the child, because there was no evidence indicating her daughter suffered physical harm, emotional abuse or was neglected when on prior occasions she was unable to care for her daughter after she stopped taking her prescribed medications and her mental health deteriorated. She says the actions of her neighbours, the police and the Minister in the past prevented such harm and their future actions in such circumstances would do the same.

[18] First, the judge made no error in considering the evidence of the mother's past actions in assessing future risk. This is appropriate as pointed out by the judge in paragraph 30 of her reasons:

> [30] In coming to my conclusions, I am mindful of the Court of Appeal's observation in *S.A.D. v. Nova Scotia (Community Services)*, 2014 NSCA 77 regarding the correlation between past history and future risk:
>
> > [82] The trial judge found (para 30) that "the best predictor of future behaviour is past behaviour". That was Mr. Neufeld's testimony (above para 55) and was supported by the evidence of Ms. Boyd-Wilcox (above paras 49, 53). There is no legal principle that history is destiny. But a trial judge may, based on the evidence in a particular case, find that past behaviour signals the expectation of future risk … .
> >
> > (Emphasis in original)

[19] Second, the fact the child does not appear to have suffered any physical harm or emotional abuse or neglect in the past—when the mother was unable to look after her due to the deterioration of her mental health after she failed to adhere to treatment—due to the actions of neighbours, police and the Minister, does not mean the judge erred in concluding that there was a real chance of danger to the child. There is no guarantee such timely interventions would take place in the future. Neighbours may not become aware of what is happening inside the mother's home in time to alert the police and the Minister to allow them to prevent harm to the child. Neighbours, police and the Minister are not in a position to be able to ensure they are there as safety nets each time a crisis arises.

[20] I would dismiss the appeal without costs.

Hamilton, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.