NOVA SCOTIA COURT OF APPEAL

Citation: *K.W. v. Nova Scotia (Community Services)*, 2022 NSCA 68

Date: 20221108
Docket: CA 515948
Registry: Halifax

Between:

K.W.

Appellant

v.

Minister of Community Services and
D.M. (by the *Guardian ad litem*, Susan Sly)

Respondents

Restriction on Publication: Pursuant to s. 94(1)
Children and Family Services Act

Judge:	The Honourable Justice Anne A. S. Derrick
Appeal Heard:	October 21, 2022, in Halifax, Nova Scotia
Subject:	Child Protection. Permanent Care Orders. Children in Need of Protection. Neglect. Timeliness.
Summary:	Appeal from Permanent Care and Custody Orders with respect to three children taken into temporary care by the Minister due to severe neglect. K.W. engaged in services with Community Services. The children made significant gains in foster care. The judge found K.W. had made little progress and concluded a further temporary care order could not be justified. She was not satisfied the circumstances that led to the children being taken into care were likely to change before the statutory deadline for disposition. She determined that permanent care and custody orders were the only alternative.
Issue:	Did the judge commit any errors in her application of the law or findings of fact?

Result: Appeal dismissed. The judge applied the law correctly. She made no mistakes in her factual findings; they were all strongly supported by the evidence. The evidence showed very serious neglect of the children when they were in K.W.'s care. It did not show she had made sufficient progress in addressing the circumstances that caused the neglect. There was no evidence that gave the judge confidence the children could be properly cared for by K.W. She loved her children but the evidence did not show she was capable of parenting them.

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Judges:	Beveridge, Bourgeois, Derrick, JJ.A.
Appeal Heard:	October 21, 2022, in Halifax, Nova Scotia
Written Release	November 8, 2022
Held:	Appeal dismissed, without costs per reasons for judgment of Derrick, J.A.; Beveridge and Bourgeois, JJ.A. concurring.
Counsel:	K.W., appellant on her own behalf Sarah Lennerton and Deanna Bru, for the respondent Kelsey Hudson, for the *Guardian Ad Litem*

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:

Introduction

[1] On May 4, 2022, Justice Elizabeth Jollimore of the Nova Scotia Supreme Court, Family Division, pursuant to s. 42(1)(f) of the *Children and Family Services Act*, S.N.S. 1990, c.5 ("*CFSA*"), placed Ms. W.'s three children in the permanent care and custody of the Minister of Community Services. This concluded proceedings under the *CFSA* that had been ongoing since the children were lawfully taken into temporary care in January 2021.

[2] Justice Jollimore ordered D.M., the oldest child and a teenager, to be made a party to the proceedings and, under s. 37(2A) of the *CFSA*, appointed Susan Sly as the child's *guardian ad litem*.

[3] Ms. W. was the children's only parent as their father had died in 2018.

[4] These proceedings started after Community Services ("the Agency") received a referral that raised concerns about their living conditions. Once Community Service workers became involved the primary concern became the children's neglect. Ms. W. received significant services to help her provide better care for the children. However, Justice Jollimore found her to have made little progress by the time of the April 2022 hearing. She concluded it was in the children's best interests to remain in the permanent care and custody of the Minister. She also viewed the circumstances as unlikely to change before June 28, 2022, the final date for a disposition. She decided there was no alternative other than to order the three children into the permanent care of the Minister.

[5] Having carefully considered Ms. W.'s submissions, Justice Jollimore's reasons, and the record in this case, I find there is no basis for overturning the orders for permanent care and custody. Justice Jollimore correctly applied the law—the best interests of the children test (s.46(4), *CFSA*) and the "circumstances unlikely to change within a reasonably foreseeable time" test (s. 46(6), *CFSA*). Her decision is well supported by the evidence she had before her. I would dismiss Ms. W.'s appeal.

Standard of Review

[6] An appeal is not a re-trial of the evidence from the contested hearing before Justice Jollimore. As a Court of Appeal, we have a limited role. There is a standard

we must use when reviewing a trial court's assessment of the evidence. We may only interfere with findings of fact if the judge made a "palpable and overriding error", that is, an error which is clear and affected the result (*Nova Scotia (Community Services) v. A.S.*, 2007 NSCA 82 at paras. 7-9). We have to apply this standard—also known as a clear and material error—in our review of Justice Jollimore's application of the "best interests" test to the facts of this case. This same standard applies to her findings that the children's circumstances were unlikely to change before the deadline of June 28, 2022.

Justice Jollimore's Findings of Fact Concerning the Condition of the Children When They were Taken into Care

[7] When the children were taken into care by the Agency, they were living with Ms. W., her elderly parents, and Ms. W.'s nineteen-year-old son in a densely cluttered apartment. Ms. W. acknowledged hoarding and that the apartment was neither sanitary nor safe. It was extremely congested, dirty, and infested with cockroaches. She does not dispute what Justice Jollimore, with references to the evidence, described about the condition of the children in her oral decision:

> When the children were brought into care their needs were great. Then six-year-old H., "was unable to walk up and down stairs", and she fell, "regularly on stairs and flat ground when walking." H.'s brother, then 12 years old, was "challenged by stairs." He struggled to put on socks. He didn't know what steps were involved in taking a shower. Both these children were overweight. The youngest, then three and a half years old, wasn't toilet trained. Her front teeth were visibly decayed.
>
> The older children said that they had never seen a dentist and didn't remember getting any vaccinations or needles. Ms. W. says the oldest child was vaccinated but the younger children were not because their father didn't agree with vaccines. All three children were booked for dental surgery, occupational therapy, and physiotherapy. The two older children completed psycho-educational assessments while the youngest was referred to Nova Scotia Hearing and Speech. All three children needed glasses. The older children have received counselling and they're involved in organised recreational activities.
>
> A month after coming into care D. was able to identify some letter sounds. He could identify letters with minimal errors, and he started making addition questions and learned how to write his numbers. Appreciate that he was then 12 years old. D. was assessed in October 2021 by Jennifer Denney-Hazel, who was agreed to be qualified as an expert in psychology. His language skills, listening vocabulary, listening comprehension, vocabulary, and sentence repetition, were all in the limited to low-average range. His phonological skills were well below the level expected for his age. His ability to learn, recall, and recognize

> meaningful information was in the low-average range, while his visual perception and motor skills were below the accepted level. His spelling skills were weak, and his math skills were extremely low. His communication, functional academics, and social skills were measured at extremely low, while his understanding of health and safety, leisure, self-care, and self-direction were in the limited or low-average range.
>
> H.'s psychological assessment was completed by Caitlin Neily in September 2021. Ms. Neily was agreed to be qualified as an expert in psychology. She found that H.'s intellectual ability rated in the average range, while her verbal skills, math skills, reading, writing, and arithmetic, her communication, her understanding of health and safety, leisure and social skills were all in the very low or extremely low range.
>
> These findings aren't surprising given the children's lack of social interaction and education. The foster parents provided insights into the children's circumstances that were more stark. For example, D. didn't know to take his clothes off to shower or to apply shampoo to wet rather than dry hair. The children had seldom been outside.

Justice Jollimore's Findings of Fact in Relation to Ms. W.

[8] The contested child protection hearing before Justice Jollimore took place on April 20, 21 and 22, 2022. The statutory timeline under the *CFSA* for determining the care and custody of the children was due to end on June 28, 2022.

[9] The evidence before Justice Jollimore indicated that although Ms. W. had not refused any services, had attended counselling sessions regularly and completed requested assessments, she had made little progress in addressing housing, income assistance eligibility and parenting capacity issues. Concerns remained high about Ms. W's adaptive functioning and problem-solving, and her ability to function independently without her parents.

[10] The Agency had urged Ms. W. in January 2021 to apply for Income Assistance and find suitable housing. Ms. W. applied for Income Assistance and secured a three-bedroom apartment only in March 2022, just before the start of the hearing. Her housing challenges were worsened by the size of the household she intended to maintain. This included a total of seven people—her parents, her adult son, and the three children, if they were returned to her. She testified her parents would eventually be moving out although she indicated she was expecting to share expenses with them in order to pay the household bills.

[11] Justice Jollimore concluded the evidence showed Ms. W. had not made the progress required to dispel the concerns about her capacity to satisfactorily care for the three children. In her decision she found:

- There was no budget that showed how Ms. W. would be able to afford the apartment and related expenses. The monthly rent for the apartment was $1500 with extra amounts for cable, electricity, and heat (Ms. W. testified that her parents had pension income, although not from employment, and her adult son was unemployed and did not contribute to household expenses).

- By the time of the hearing in April 2022 there had been no opportunity for the children to spend time with Ms. W. in the apartment. Agency workers had not been in the new apartment to assess if Ms. W. was keeping it in better condition than the apartment where she had been living with the children in January 2021 (according to Ms. W., she had only started to occupy the apartment shortly before the hearing and had not invited any workers to visit her there).

- There was no evidence Ms. W. had the ability to maintain a safe and hygenic home. Justice Jollimore said: “Agency staff couldn’t observe if there was healthy food, stimulating books or toys, or a usable tub or shower”.

- There was no evidence, such as photographs produced by Ms. W. (for example, of the motel where she lived for approximately three months in 2022) that alleviated the concerns she was unable to maintain an appropriate environment for the children that was clean and stimulating.

- Ms. W. brought junk food rather than healthy snacks to access visits. Despite discussions with social workers and family support workers over the summer and into September 2021, Justice Jollimore noted she came to visits with sugary drinks for the children.

- Ms. W.’s access visits were largely inactive. Their healthier diet and more active lifestyle in foster care led to the two older children losing considerable weight, in D.M.’s case, fifty pounds.

[12] Justice Jollimore found Ms. W. had made inadequate progress:

> To the extent that it has been possible to observe Ms. W.’s parenting through the limited lens of access visits, Ms. W. has not changed her parenting sufficiently

> that it's now in the children's best interests to be returned to her. From this perspective, it remains in the children's best interest to be in the Minister's care…

[13] The remaining issue Justice Jollimore had to address was whether the circumstances that justified the earlier temporary care orders were likely to change before the final disposition deadline of June 28, 2022. Section 46(6) of the *Act* expressly provides that a judge is not to keep granting temporary care orders if the circumstances are unlikely to change within a reasonably foreseeable time not exceeding the maximum time allowable under the legislation. Referring to the decision of this Court in *Nova Scotia (Minister of Community Services) v. L.L.P.*, 2003 NSCA 1, Justice Jollimore noted correctly that the Agency did not have to wait until the maximum time limit under the *CFSA* to bring an application for permanent care. In other words, Justice Jollimore was entitled by law to make a permanent care and custody orders in favour of the Minister before June 28, 2022.

[14] *L.L.P.* explained:

> **24** The maximum statutory time limits for a proceeding are set out in section 45 of the *Act*…At the end of these periods a court must either dismiss the proceeding or order permanent care and custody. The time frames within which the proceeding must be resolved are necessarily short in deference to the "child's sense of time", as is recognized in the recitals to the *Act*:
>
> > AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this *Act* and proceedings taken pursuant to it must respect the child's sense of time;

[15] In her reasons, Justice Jollimore went on cite *P.H. v. Nova Scotia (Minister of Community Services)*, 2013 NSCA 83 where this Court held it was in the children's best interests to not prolong the child protection proceedings "any longer than absolutely necessary" (Jollimore, J.'s oral decision).

[16] As noted in *P.H.*, a child's best interests are not served by the uncertainty associated with child protection proceedings being drawn out (para. 87). In a recent decision this Court once again observed, "It is well recognized that children have a different sense of time than adults and *CFSA* proceedings and the attendant statutory timelines, are responsive to a child's need and sense of time" (*K.F. v. Nova Scotia (Minister of Community Services)*, 2021 NSCA 81, para. 43).

[17] Justice Jollimore's decision respected these principles.

[18] Justice Jollimore took account of the testimony of Megan Power, the long-term social worker assigned to Ms. W. and the children. It was Ms. Power's evidence that returning the children to Ms. W. would require continued Agency involvement for approximately six months. The children would first have to be transitioned from foster care and the Agency would then have to monitor Ms. W. and the children together to ensure the necessary improvements in the children's circumstances were stable and enduring. Justice Jollimore found the problems that led to the children being removed from Ms. W. had to be fixed before the children left the care of the Agency. Monitoring by the Agency would safeguard against new risks arising or previous risks re-emerging.

[19] In her reasons, Justice Jollimore explained the significance of Ms. Power's evidence to the issue of whether the circumstances that led to the children being taken into temporary care were likely to change before June 28, 2022:

> …Even if the children are returned immediately there isn't enough time to monitor the family to the standard Ms. Power suggests of three months. Appreciate that the Minister's primary concern is the children's neglect.

[20] Justice Jollimore went on to review the facts that led her to the conclusion further temporary care orders could not be justified and permanent care and custody orders were the only alternative.

[21] Ms. W. had been involved in counselling for 13 months, from March 3, 2021 to mid-April 2022. There was no evidence that Ms. W. had acquired insights into the children's neglect. The expert evidence from the psychologist, Dr. Kathleen O'Conner was that Ms. W.:

> Displayed very limited insight into the nature and depth of the Agency's concerns with her home environment and into the significant concerns with her children's development that have unfolded since they were placed into foster care.

[22] Justice Jollimore observed that although Ms. W. said she understood what parenting the children appropriately required, she had not demonstrated her ability to address her children's needs if they were returned to her care. She detailed what was missing:

> …I appreciate that while the children are in foster care it's difficult to demonstrate an ability to meet these needs. However, Ms. W. hasn't offered any evidence to me of what she has done, like telling me about the nutritious meals that she has made or that she has assumed responsibility for making meals rather

> than continuing to have her father provide the meals, which were not nutritious. She hasn't told me that she has consistently brought healthy snacks to her access visits or engaged the children in active play during these visits. She hasn't found a doctor or an optometrist who are taking on patients. She hasn't put the children's names on the provincial list of people who are seeking a family doctor. She hasn't described any changes she's made to her life in the past year such as cleaning routines for her accommodations, laundry routines, shopping for healthy food, meal preparation. She's only recently referred herself to a community-based support program, and she's made no inquiries about tutors or counselling for the children.

[23] Referring to the Minister's secondary concern after neglect, the unfit living conditions of Ms. W.'s apartment in January 2021, Justice Jollimore found no evidence of Ms. W. having resolved the problem. Ms. W. provided no evidence to show improvement in how she had maintained her living accommodations since the children were taken into care.

[24] Justice Jollimore concluded the circumstances that led to the children being in temporary care were unlikely to change before June 28, 2022. She referred to there being no evidence "in practical, tangible terms" that Ms. W. could ensure the children's health and safety and proper development. She found there to have been "too little progress to date" to expect the necessary changes by the statutory deadline.

Ms. W.'s Grounds of Appeal

[25] Ms. W. appeals the permanent care and custody orders. She says she has learned from her past mistakes and should have been given another chance to parent her children. She says what she has accomplished since the children were taken by the Agency has not been recognized and she has not been treated fairly.

[26] In written submissions for the appeal Ms. W. responded to the concerns raised in the evidence before Justice Jollimore. She said:

- She took a long time to find housing because of Covid restrictions and the affordable housing crisis. These challenges were not recognized by Justice Jollimore. Ms. W. finally found an apartment thanks to the intervention and assistance of a friend.

- She has eliminated the clutter by getting rid of surplus items. She now knows not to accumulate things she does not need. Using black garbage bags to store stuff was “a huge mistake”.

- She is now on Income Assistance. Her delay in applying was because she has “seen what it can be like for people to get their money even after they are approved”. (In cross-examination before Justice Jollimore, Ms. W. agreed she had all the necessary information and instructions to enable her to apply for Income Assistance in August 2021).

- She has learned from her mistakes and deserves a second chance.

- Her children mean everything to her and she misses them terribly.

- Her children always had food, clothing, and any medication they needed.

- She assumed enrolling her children in school and getting them on a waiting list for a doctor, which she had not done, would be required once they were back in her care.

- She did not take the children sugary drinks on access visits.

[27] In oral submissions at the appeal, Ms. W., assisted by a friend, raised supplementary issues that included: her lawyer should have called additional witnesses; the Agency did not help her find housing; when they took the children, the Agency workers did not check the apartment to see there was food and clothing; the garbage bags in the apartment were there because she was moving; she had proof the children were vaccinated; and she would sometimes ask Agency workers questions but would not get any answers.

[28] I note in testimony before Justice Jollimore, Ms. W. had said the children were not vaccinated because their father was opposed to vaccinations. This was consistent with the Agency’s inquiries with Public Health which turned up no vaccination records.

[29] Ms. W. did not specify what the questions were that she posed to Agency workers or how the answers may have been relevant to the concerns about the children’s neglect.

[30] In her testimony before Justice Jollimore, Ms. W. did not indicate there were witnesses who could provide additional evidence. She has not claimed her lawyer was ineffective, merely saying at the appeal hearing he should have called workers who transported the children to and from access visits.

Did Justice Jollimore Commit Any Errors?

[31] All the facts on which Justice Jollimore based her decision were established by evidence at the hearing. She considered and applied the correct law. There is no basis for reversing her decision.

[32] As Justice Jollimore found, it is clear Ms. W. loves her children and cares deeply about them. She engaged in services offered by the Agency and faithfully attended appointments and assessments. This was not enough. Justice Jollimore had to be satisfied it was in the children's best interests to be returned to Ms. W.'s care. She carefully reviewed the evidence and decided it was not. She looked at whether the circumstances that led to the children being in temporary care were likely to change before June 28, 2022. She concluded it was not reasonably foreseeable that change would happen: the deadline was approaching and between January 2021 and April 2022, Ms. W. had made too little progress.

[33] As Justice Jollimore detailed in her reasons, Ms. W. made very little progress on a number of fronts. Finding appropriate housing was one of them. There can be no question the housing search for someone of very limited financial means like Ms. W. would have been challenging, particularly as the affordable housing crisis worsens in the Halifax Regional Municipality. The evidence is not clear whether Ms. W. called the housing support worker whose number was provided by the Agency in October 2021.

[34] Suitable accommodations for the children was only one of the issues identified by Justice Jollimore in her assessment of whether the Minister's application for permanent care and custody orders should be granted. As I have reviewed, in her reasons Justice Jollimore focused primarily on the profound levels of neglect experienced by the three children and Ms. W. having not shown the significant progress needed to provide them with a healthy, safe, and stimulating environment.

[35] Justice Jollimore applied the law correctly. She made no mistakes in her factual findings; they were all strongly supported by the evidence she had from the hearing. The evidence showed the very serious neglect of the children at many

levels when they were in Ms. W.'s care. It did not show that Ms. W. had made sufficient progress in addressing the circumstances that caused the neglect. There was no evidence that gave Justice Jollimore confidence the children could be properly cared for by Ms. W. The evidence showed that Ms. W. loves her children—and they love her. However, it did not show that she is capable of parenting them.

Disposition

[36] Justice Jollimore's decision to order Ms. W.'s children into the permanent care and custody of the Minister of Community Services was soundly based in the law and the evidence. Ms. W.'s appeal is dismissed, without costs.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Bourgeois, J.A.