NOVA SCOTIA COURT OF APPEAL

Citation: *WM, NL v. Nova Scotia (Community Services)*, 2024 NSCA 7

Date: 20240112
Docket: CA 525815
Registry: Halifax

Between:

WM and NL

Appellant

v.

Minister of Community Services and DM,
as Litigation Guardian of AM

Respondent

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

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	December 1, 2023 and December 15, 2023, in Halifax, Nova Scotia
Subject:	*Children and Family Services Act* - permanent care and custody; child in need of protection – fresh evidence
Summary:	At the final disposition hearing the judge found the child was still in need of protection and placed the child in the permanent care and custody of the Minister. The ongoing protection finding was anchored in NL's (the child's mother) substance abuse issues and WM's (the child's father) inability to mitigate the risk NL posed to the child. The child's parents appealed, alleging the judge erred in her factual findings. After the Notice of Appeal was filed the circumstances of this cases significantly changed—the child's mother (NL) is now

deceased. The appellant father made a motion to introduce fresh evidence pertaining to her death and contended this change of circumstances negates the judge's protection finding—a prerequisite to permanent care placement with the Minister.

Issues: (1) Should the fresh evidence be admitted?
(2) If so, is the fresh evidence dispositive of the appeal?

Result: Fresh evidence admitted and is dispositive of the appeal. The death of NL effectively eliminates the underlying substantial risk the judge found. It can no longer be said the child remains in need of protection—a prerequisite finding to a permanent care placement with the Minister.

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Judges:	Van den Eynden, Scanlan, Derrick, JJ.A.
Appeal Heard:	December 1, 2023 and December 15, 2023 in Halifax, Nova Scotia
Held:	Fresh evidence motion granted, appeal allowed, per reasons of Van den Eynden, J.A.; Scanlan and Derrick, JJ.A. concurring
Counsel:	Alan Stanwick, for the appellant Sanaz Gerami, for the respondent, Minister of Community Services Brianna Renou, for the respondent, DM

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 (WM) appeals an order for permanent care and custody respecting his child AB who is 13 years of age.

[2] In the court below, during the protection phase of the proceedings, the judge (Justice Pamela Marche of the Nova Scotia Supreme Court, Family Division) found AB to be a child in need of protection (2022 NSSC 45). The presenting risk underpinning the judge's finding was NL's (the child's mother) long standing substance abuse struggle, coupled with WM's inability to protect AB from NL. The judge held:

> [114] The substantial risk of harm arises from NL's substance abuse and WM's resumed cohabitation with NL in conjunction with his current attitude towards NL's addiction problem. …

[3] The Minister tried to persuade the judge that independent of NL, WM presented additional risks to AB. The judge rejected the Minister's assertions:

> [114] … The Minister did not satisfy me that substance abuse, violence, or inadequate parenting on the part of WM posed a substantial risk of harm for [AB].

[4] The Minister did not appeal the judge's sole protection finding and rejection of the additional grounds advanced by the Minister respecting WM.

[5] During the final disposition hearing (2023 NSSC 185) the judge had to determine whether AB remained a child in need of protective services. If so, she would then need to address whether it was in AB's best interests to be placed in the permanent care and custody of the Minister.

[6] WN and NL opposed the Minister's plan for permanent care and custody. The judge summarized their respective positions:

> [13] WM seeks a return of AB to his care and custody and a termination of the proceeding. WM does not agree that AB was ever at risk of harm and, should AB be at risk, he would act as the protective parent to ensure AB is safe. WM believes AB wishes to return home and was improperly influenced when communicating h[is/er] preferences to the Guardian, DM.
>
> …
>
> [15] NL supports WM's position. In her affidavit evidence, NL claims she is sober and has the tools and skills to remain sober. In her final submissions,

> however, NL acknowledges that her substance abuse issue poses a substantial risk of harm to AB.

[7] The position adopted by the child's litigation guardian was:

> [18] The Guardian supports the position of the Minister and believes AB remains at risk of harm and that it is in h[is/er] best interest that a permanent care order be issued.

[8] The judge found AB remained in need of protective services and it was in AB's best interest to be placed in the Minister's permanent care and custody. The judge reasoned:

> [1] This is a decision about whether AB should be placed in the permanent care and custody of the Minister. … The Court must determine whether the circumstances that resulted in the protection finding … still exist or whether the situation has changed such that AB is no longer in need of protective services.
>
> …
>
> [32] At the conclusion of the contested protection hearing (see **Nova Scotia (Community Services) v. NL, WM**, 2022 NSSC 45), I concluded:
>
> *WM did not display sufficient insight or concern [a]bout the risk posed by NL in terms of NL's serious addiction problem. WM's attitude in this regard seriously diminished his credibility in terms of his willingness to guard AB against the risk associated with NL. If the substance [a]buse issue is not a topic of discussion, it is not clear how WM can protect against it.*
>
> [33] I found the Minister had established, on a balance of probabilities, that WM's resumed cohabitation with NL posed a substantial risk of harm to AB given WM's demonstrated attitude towards NL's serious addiction issue.
>
> [34] I must turn my mind now to whether circumstances have changed sufficiently to remove the risk of harm. I conclude they have not. AB remains at substantial risk of harm.
>
> [35] In her final submissions, NL acknowledges her substance abuse issues pose an ongoing risk of harm to AB. **The salient issue, then, is whether WM will act as a protective parent by ensuring AB is not exposed to the risk of harm presented by NL.**
>
> …
>
> [40] WM cannot be relied upon to be a protective parent for AB if he cannot be honest [a]bout the risk. Counsel for NL argues the adage "actions speak louder than words" should apply when assessing whether WM has sufficient insight to act as the protective parent. Certainly, the Minister has been prepared, in the past, to rely on WM to fulfill this role. That being said, there have also been times in

> the past when WM has allowed NL access to AB, contrary to court order. Within the context of significant past child protection involvement and considering the totality of evidence of past proceedings and the current proceeding, the inability or unwillingness of WM to admit that NL was using, or even possibly using, cocaine intravenously in March 2022 means that I cannot rely upon him to protect AB from risk of harm in the future.
>
> [41] Having found that AB remains at substantial risk of harm, I cannot return AB to WM's care. The time limit embodied within the *Act* has expired and no alternate plans for placement have been put forward. However, before I place AB in the permanent care and custody of the Minister, I must also satisfy myself that such a placement is [in] AB's best interest.
>
> …
>
> [44] I take no pleasure in making this decision. It is clear to me that WM and NL deeply love each other and their children, including AB. However, I have no choice, based on my assessment of the evidence, to conclude that AB remains a child in need of protective services. It is in h[is/er] best interest to be placed in the permanent care and custody of the Minister. The Minister will make arrangements for a final visit between AB and h[is/er] parents. The Minister will prepare the Order.
>
> [Emphasis added to para [35]]

[9] The judge was mindful of the concerning protection history; however, her reasons make clear the ongoing protection finding was anchored in NL's substance abuse issues and WM's inability to sufficiently mitigate the risk NL posed to AB.

[10] WM and NL appealed, claiming critical factual findings the judge made reveal palpable and overriding errors. They explained in their factum:

> 33 It is submitted that the trial judge's finding that because the Appellant, [WM] did not admit that the Appellant, [NL], was using or cocaine intravenously, that he could not be relied upon to protect [AB] from risk of harm in the future, is clearly wrong, unreasonable or unsupported by the totality of the evidence.
>
> 34 It is further submitted that the totality of the evidence does not establish, on a balance of probabilities, a real chance of danger to [AB], if [AB] was returned to the care and custody of the Appellant, [WM]. Rather, the chance of danger is, at best speculative.
>
> 35 In summary, it is submitted that the trial judge erred in finding that the child, [AB], born [**], remained "a child in need of protective services".

[11] Since the filing of the Notice of Appeal and written submissions to this Court, the circumstances of this case have changed significantly. On November 30, 2023, an RCMP news release confirmed NL's death and indicated a homicide investigation is underway.

[12] WM seeks to admit fresh evidence on appeal respecting the death of NL, in particular, the RCMP news release. The news release is appended to the affidavit of Mr. Stanwick (counsel for WM and the late NL).

[13] The Minister and Litigation Guardian acknowledge NL is deceased. There is nothing before this Court suggesting WM is implicated in her tragic death.[1] Nor did the Minister or Litigation Guardian seek to introduce any fresh evidence on appeal related to any new substantial risks posed by WM since the granting of the permanent care order. Had they been aware of any such risks, it was open to them to also bring forward a motion to introduce fresh evidence on appeal.

[14] WM argues the death of NL fully negates the judge's finding that AB remained a child in need of protection under the *Children and Family Services Act*[2] (*CFSA*) at the time of the final disposition hearing.

[15] The Minister contends the permanent care and custody order should remain in place and it is open to WM to pursue an application under s. 48 of the *CFSA* to terminate a permanent care order.

Should the fresh evidence be admitted?

[16] *Civil Procedure Rule* 90.47(1) permits this Court to admit fresh evidence where there are "special grounds". As explained in *Armoyan v. Armoyan*, 2013 NSCA 99, leave to appeal to S.C.C. refused, 35611 (6 February 2014):

> [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. *Nova Scotia (Community Services) v. T.G*. 2012 NSCA 43, paras 77-79, leave

[1] After the hearing of this appeal on December 15, 2023, I take notice of the well publicized RCMP update confirming that two individuals (neither of which are WM) have been charged with offences related to NL's death.
[2] S.N.S. 1990, c. 5.

> to appeal denied [2012] S.C.C.A. 237, and authorities there cited. *McIntyre v. Nova Scotia (Community Services*), 2012 NSCA 106, para 30.

[17] Further, as it relates specifically to child protection proceedings and the consideration of the best interests of children, this Court said in *K.B. v. Nova Scotia (Community Services)* 2013 NSCA 32:

> [18] Section 49(5) of the *Act* permits the Court of Appeal to receive "... further evidence relating to events after the appealed order." *Nova Scotia Civil Procedure Rule* 90.47 allows the court to receive evidence on "special grounds" on "any question as it directs." In considering a fresh evidence motion in a child protection appeal, this Court will apply the *R. v. Palmer*, [1980] 1 S.C.R. 759 criteria but modified to ensure that the Court of Appeal has current evidence that would bear on a child's best interests: *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)*, [1994] 2 S.C.R. 165; *Children's Aid Society of Cape Breton v. S.G.* (1995), 142 N.S.R. (2d) 57 (C.A.) ¶15; *Children's Aid Society of Cape Breton v. L.M.* (1998), 169 N.S.R. (2d) 1 (C.A.) ¶43; *A.L.F. v. Children's Aid Society of Cape Breton-Victoria*, 2004 NSCA 2 at ¶6.

[18] Although both the Minister and Litigation Guardian acknowledge the fresh evidence of NL's death meets the *Palmer* test for admission; they nevertheless suggest we not admit it. To me, the adoption of this position is incongruent.

[19] I would admit the fresh evidence. The admissibility test is satisfied. Of particular note, there is no question the fresh evidence is highly relevant and likely would have affected the result in the court below. The judge's finding that AB remained a child in need of protection rested upon NL's continued involvement in AB's life and WM's inability to mitigate this specific risk.

[20] The death of NL is undeniably a consequential change in circumstances. It directly impacts the foundation upon which the judge placed AB in the permanent care of the Minister.

[21] As to the Minister's suggestion, supported by the Litigation Guardian, that the change in circumstances (NL's death) could be addressed by WM making an application under s. 48 of the *CFSA* to terminate the permanent care order—it is sufficient to say that is not the route WM has chosen. He has chosen to continue his appeal. That is understandable in the circumstances of this case.

[22] In my view, the appeal can be disposed of based on the fresh evidence. In effect, the death of NL eliminates the underlying substantial risk the judge found. Therefore, it can no longer be said AB remains a child in need of protection—a

prerequisite finding to permanent care placement with the Minister under the *CFSA*.

[23] In light of this determination, I need not address the alleged errors raised by WM respecting the judge's factual findings that underpinned her conclusion AB remained a child in need of protection and a permanent care order should be imposed. The appeal is allowed because NL's death removes the basis for the specific protection concern identified by the judge.

[24] As observed earlier, the judge rejected the Minister's contention that WM presented substantial risk to AB independent of NL. Further, I reiterate there is no evidence before us respecting any new substantial risks posed by WM since the granting of the permanent care order. Should the Minister become aware of any such risks in the future, new protection proceedings can be initiated.

Costs

[25] There is one further issue to be addressed. It pertains to the costs incurred by the Minister in preparing an extensive supplemental appeal book (3129 pages).

[26] The Minister is responsible for preparing the transcript; however, it is the appellants' responsibility to file an appeal book in compliance with *Civil Procedure Rule* 90.30. The appeal book was grossly deficient. The deficits included missing affidavits, submissions to the judge and trial exhibits.

[27] Appellant counsel did not acknowledge any deficiencies when they were brought to his attention in advance of the appeal by both counsel for the Minister and this Court. Nor did he rectify the deficient filings. Rather, on very short notice, the Minister stepped in at the request of the Court to supplement the record.

[28] In these circumstances, the Minister's conservative request for costs ($500) for the filing of the supplemental appeal book is not unreasonable. Nor would it be unreasonable to award them against Mr. Stanwick personally in these circumstances, particularly, as the governing rules make it clear what must be included in the appeal book and counsel's refusal to acknowledge the glaring omissions. However, I would decline to order costs in this instance. Rather, Mr. Stanwick is on notice that *Civil Procedure Rule* 90.30 must be carefully reviewed and followed respecting any further appeals he brings before this Court.

Conclusion

[29] In conclusion, I would admit the fresh evidence and allow the appeal. Accordingly, the order for permanent care and custody must be set aside. No costs are awarded for preparation of the supplemental appeal book.

Van den Eynden, J.A.

Concurred in:

Scanlan, J.A.

Derrick, J.A.