FKCFSA-092045

FAMILY COURT OF NOVA SCOTIA
Cite as: *Nova Scotia (Community Services) v. K.S*., 2016 NSFC 2

Between:

MINISTER OF COMMUNITY SERVICES

Applicant

and

K.S,, A.C., G. and C. T.

Respondents

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

JUDGE: **The Honourable Judge Marci Lin Melvin**

HEARD: **December 7th, 9th and 14th, 2015**

DECISION: **January 10, 2016**

COUNSEL: **Sanaz Gerami, for the Applicant, Minister of Community Services**
Marc Charrier, for the Respondent K. S
Nicole Mahoney, for the Respondent A. C.
Michael Coyle, for the Respondent G. T.

Summary of Facts

[1] This matter involves two children. The eldest was born November […], 2011, and is now four years old. The youngest was born November […], 2012, and is now three years old. Both children have difficulties; the youngest having special needs. Both children have had numerous placements – parents, grandparents, foster care – in the thirty-one plus months they have been the subject of child welfare proceedings, and the time in between the two ***Children and Family Services Act*** applications.

[2] The first application before the Court was as a result of child welfare concerns and agency involvement dating to January 5, 2011. That application was

dismissed in favour of an order under the ***Maintenance and Custody Act***, granting custody of the two children to the paternal grandmother. One of the conditions of the order was that the children not be in the unsupervised care of their parents. When this was breached the applicant commenced the application presently before the Court and took the children into care.

[3] At all stages, of the second application – currently before the Court – the parties consented, or did not oppose, the children remaining in temporary care until the final review hearing. The only plan competing with that of the applicant for permanent care was that of the Respondent father's: to place the children with his father under another ***Maintenance and Custody Act*** order. As the respondent father had brutally attacked the paternal grandfather in October 2015, the applicant did not support this plan.

History of Proceedings

Prior Child Welfare Proceedings

[4] The Court reviewed prior child welfare proceedings which commenced on July 27th, 2012, for the eldest child, and on January 22nd , 2013, for the youngest, as an order pursuant to the ***Children and Family Services Act***, Section 96, was granted by consent on October 7, 2015. These concerns included physical neglect, risk of physical harm, substance-abuse by the respondent father, a history of domestic violence, respondent father's significant criminal records, and respondent father's inability to manage appropriately dealing with situations when he became angry or frustrated.

[5] Initially, the eldest child remained with the respondent mother under a supervision order, and the parents were not to be together in his presence. There were various issues with this and when the youngest child was born and it was determined he wasn't thriving, the decision was made to take both children into care.

[6] The respondent father spoke with agent, Twila Burton on January 18, 2013, and said he had done a lot of thinking during his time in incarceration and he knew he had to change so he could be around for his children.

[7] Ms. Burton, in her Affidavit of January 2013, noted for the proceedings involving the youngest child that the respondent father: "… has been observed to be appropriate and caring [with the children] and has indicated his willingness to work with the agency and engage in services to address any concerns."

[8] However on February 13, 2013, the respondent mother reported another incident of domestic violence and that she feared for her life. The police were called. The respondent father was arrested and the respondent mother went into a transition house.

[9] On January 14, 2014, the paternal grandmother and her husband - G & C.T. - made application and were granted party status.

[10] At the commencement of the permanent care hearing, the paternal grandmother and her husband presented a plan of care to have custody of both children, pursuant to an order under the ***Maintenance and Custody Act***. The child welfare proceedings terminated on February 18, 2014, and an order issued the same day giving the parental grandmother (and spouse) custody and primary care.

[11] All parenting time to both parents was to be supervised, and there were a number of other provisions which required compliance.

Present Child Welfare Proceedings

[12] Due to the paternal grandmother not following the terms of the ***Maintenance and Custody Act*** order that parenting time be supervised, and upon receiving several referrals that the respondent mother had unsupervised parenting time with the children for days at a time, the agency took the children into care once again on July 15, 2014.

[13] The application presently before the Court is pursuant to section 22 [2] [b] and [g], substantial risk of physical and emotional harm. The children remained in the care of the applicant with supervised parenting time to the respondents until the final review when the applicant decided to seek permanent care.

[14] At the review application on February 10, 2015, the respondent father seemed to be doing well. He had been working with the counselor regarding domestic violence and was described as "… engaged, serious and genuine in pursuing treatment."

[15] He was willing to participate in urinalysis and hair follicle testing. He had attempted to make a self-referral to addiction services.

[16] The applicant had been allowing the children to visit with him at his apartment two times a week with a third visit in another location. He denied that there were any concerns of domestic violence with his new partner.

[17] The respondent father was attending family support with Duncan Gould who noted he: "… presents well and is working hard." Mr. Gould had also advised that the respondent father had reported being sober for six months, that he planned to go to school and talked about this being a turning point in his life. He also noted that the respondent father interacted with his children very well, and that he communicated with the children in a gentle and loving manner. Further, the respondent father's apartment with his girlfriend was clean and tidy, and his girlfriend was supportive of him having the children.

[18] The respondent father told an agent, for the Applicant that he had a potential problem with alcohol and wanted to have a solid plan in place to stop drinking.

[19] He was not forthcoming however about his criminal involvement. He was sentenced to house arrest for three months on March 26, 2015, and it was noted that he was relieved and determined to work hard to correct his life and have his children placed with him. In spite of this, it appears the applicant was still willing to work with him because on April 15, 2015, the applicant decided to amend the plan changing the respondent father's parenting time from fully supervised to partially supervised visits.

[20] The situation changed again on April 24, 2015. The applicant was advised by the Halifax regional police, that the respondent father was breached on April 12, 2015, for having shown signs of intoxication. The respondent father noted that this was a "slip up" but it would not happen again. At the second review hearing on May 22, 2015, the applicant determined that, based on the information pertaining to the respondent father's "slip up", they would hold off on moving towards partially supervised visitation at that time.

[21] By September 1, 2015, the applicant had amended it's plan yet again. The respondent father had been doing so well that the new plan was to place the children in the care of the respondent father. He had attended twenty-two sessions at New Start Counselling, and the plan notes that the applicant father: "... has been able to reconnect to the values that are important to him, such as trust, honesty, caring and respect." He had completed an eight week parenting group, worked with family support worker Duncan Gould since December 2014 who described him as: "patient and loving with his sons", attended counseling with addiction services with a focus to maintain sobriety and abstinence and met monthly to develop relapse prevention and address issues that underlie harmful alcohol use as well as participated in random urinalysis.

[22] The applicant was proposing that the children would be returned to his care at the court appearance on September 2, 2015, pursuant to the supervision of the agency.

[23] The situation changed once again when on September 2, 2015, the applicant advised the Court of a referral received the previous day. It alleged an incident of domestic violence between the respondent father and his present girlfriend in front of the children. The applicant noted this was quite concerning and there had been no chance to investigate, therefore the applicant was not prepared to place the children with the respondent father until an investigation was completed.

[24] The parties agreed to extend the timelines in the best interest of the children given the circumstances and the Court adjourned the matter to September 8, 2015.

[25] On September 8, 2015, it was determined that because of the incident of domestic violence in the presence of the children, and further reports from the Halifax Police Department of domestic violence on June 6, 2015, with the same partner, and two breaches of probation by drinking on July 18, 2015, and August 8, 2015, that the children would not be returned to the respondent father. The children remained in the temporary care of the applicant with supervised parenting time to all respondents.

[26] The Court was advised however that the applicant was still open to considering a family placement and the paternal grandfather had come forward to put a plan in place for care of the children. The respondent father supported this plan.

[27] On October 14, 2015, the Court was advised that the applicant was seriously considering the paternal grandfather's plan and hopeful they would be successful with this placement.

[28] The final game changer for the applicant was set out in an Affidavit filed by agent Catherine Callahan on November 25th, 2015. She stated that the applicant had been giving serious consideration to the paternal grandfather's plan, however on October 27, 2015, the paternal grandfather reported that on October 25, 2015, he had been beaten up by his son - the respondent father – who had been drunk when he arrived.

[29] Based on the above, the Applicant no longer sought family placement and instead sought permanent care.

Evidence

[30] The Court has reviewed all of the evidence filed and presented during the hearing for permanent care.

[31] The evidence of the applicant was standard. The Court does not intend to review it any more than as noted above in the history of the proceedings. What is clear from both past and present evidence, and the Court so finds, is that the applicant made concessions in an attempt to ensure these children were either placed with the respondent parents, or grandparents, before at the 11th hour determining that permanent care was the only possible option that would be in the best interest of the children.

[32] The evidence pertaining to the children is that they both have difficulties. At least the youngest has specialized needs. They have been exposed to the respondent father's incidents of domestic violence, the eldest at the age of four reporting recently of an incident of domestic violence between the respondent father and his girlfriend while in a car, with both children scared and crying. There is evidence that the eldest child is exhibiting signs of violent behaviour. Both children have been in care for a total of thirty-one months of their young lives.

[33] The respondent mother has her own difficulties and did not present a plan. Neither did the respondent grandmother.

[34] The only respondent to present a plan was the respondent father. The Court noted his demeanour during his testimony. He testified on cross-examination that he needed to do work on his problem with alcohol and it had never sunk in before that it was a problem.

[35] He had started seeing Mary Hewitt at addictions counseling in February 2015. He wanted to do the services to better himself as a parent because he eventually wanted to have care of his children but wanted to get his drinking under control.

[36] He wanted his father to care for his children until he was fit to do so himself. He testified that his father was in agreement with this and that he would respect the peace bond his father had against him: "one-hundred-percent".

[37] When cross-examined by Ms. Gerami as to whether or not he understood the importance of following a Court order, he said that in the past his actions would

not have supported that statement but he was “one-hundred-percent” ready to support this.

[38] The respondent father was cross-examined regarding his criminal record. It is extensive and there are multiple convictions for breaches of an undertaking/Court order in provincial court. Based on the evidence this Court further finds the respondent father has breached the Family Court order pertaining to alcohol use a number of times as well. The Court finds the testimony of the respondent father - that he understands the importance of following a Court order - to be disingenuous.

[39] The respondent father presented as polite and respectful on the stand. Certainly the evidence of the various service providers have described him in similar fashion.

[40] It is an interesting dichotomy to compare his court room demeanor against the evidence of his alcoholism and domestic violence and the repercussions caused from these two serious problems.

[41] The Court finds that the respondent father genuinely wants to be a better person, has worked valiantly to find that person, but has considerable more work to do.

[42] The paternal grandfather testified for the respondent father. He presented as a meek and gentle individual. The Court finds him to be a credible witness.

[43] The respondent grandfather’s evidence was that he was committed to caring for the children, had arranged for daycare and schooling, recognized that the youngest child had significant health needs and was committed to taking him to his needed appointments. He had even arranged for the respondent grandmother and her husband to have access with the children two weekends a month and the respondent father having parenting time supervised by her. He would have supervised the respondent mother’s parenting time as well.

[44] His evidence was the pivotal in this matter. His evidence was that on October 25, 2015, the respondent father attacked him in his own home.

[45] He stated this was not the first time that the respondent father had been violent with him neither was it the first time he had called the police. He said that his son has ongoing problems of anger and violence.

[46] His evidence was that typically he would be assaulted by the respondent father, would call the police to tell the police that his son had attacked him, but charges would not be filed. Then sometimes the respondent father would get angry with him because he talked to the police and would come back and beat him up again. He said because of this cycle he had lost faith in reporting this violence to the RCMP and didn't feel it could be stopped.

[47] He testified that on October 25, 2015, emergency services had treated him for head injuries, put him in an ambulance, he went to the hospital where he had stitches for injuries to his face, and a fractured skull. Although he was offered reconstructive surgery in Halifax he didn't choose to go because the Court hearing was coming up. He applied for a bond pursuant to Section 810 of the Criminal Code against the respondent father. This was granted by consent. The respondent father is not to go near the paternal grandfather for twelve months.

The Law

[48] The burden of proof in all child welfare proceedings is proof on a balance of probabilities.

[49] The Court must always be guided by what is in a child's best interest. Section 2 (2) of the ***Children and Family Services Act*** provides:

> ***In all proceedings and manners pursuant to this act, the paramount consideration is the best interest of the child.***

[50] Additionally, section 42 [1] provides: ***"…at the conclusion of the disposition hearing, the Court should make one of the following orders in the child's best interest…"*** The factors to be considered when making a decision in the child's best interest are numerated in section 3 [2] of the ***Children and Family Services Act***. The Court has considered all of these factors in making this decision.

[51] The Court may consider evidence of past parenting history which may or may not be relevant to the present circumstances.

[52] Neither an agency nor the Court need to wait until a child suffers abuse or neglect at the hands of his parents. A child is in need of protective services where there is a substantial risk of harm. It is well known that a substantial risk of harm means a real chance of danger that is apparent on the evidence.

[53] As noted in **M. (K. L.) v Nova Scotia (MCS)**, 2007 NSCA 100, ***"…evidence of past parenting practices is highly relevant where the current child welfare proceedings overlap the former"***.

[54] Having considered the above, this court has concluded that contextually "overlap" does not of necessity refer to chronology, but rather when the circumstances in a child welfare proceeding mirror those of a previous proceeding involving the same parties and the risk and concerns remain essentially the same. Then previous evidence should and can have significant weight.

[55] If a Court is satisfied on the evidence that services provided by the applicant were not successful in addressing current or historical protection concerns, then the Court must find that the child protection concerns that existed at the time of taking the children into care, still exist at this time. In this case, the respondent father maintains he found some of his own services and availed himself of them. This factor gives significantly more weight to whether existing protection concerns have been effectively addressed. The dedication and commitment it takes to finding one's own service providers and getting treatment is a powerful testament to the respondent father's will to better himself. That even these services failed him is an equally powerful testament to the fact that the protection concerns still exist.

[56] As held by Forgeron, J., in **MCS v. N. L.** , 2011 NSSC 35:

> ***An examination of past circumstances helps the Court determine the probability of the event reoccurring. 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.***

[57] The Court has considered the past history of this matter, but even without the past history, the facts of the Application presently before the Court provide significant and relevant evidence to make a determination in the best interest of the children.

[58] Even without any additional evidence a Court would have the gravest concerns given the facts of this case.

[59] Child welfare legislation is child focused. Although the Court can consider a parent's circumstances, and obviously must give serious consideration to the

integrity of the family, the heartbeat of all child welfare legislation is the best interest of the child.

[60] Prior to the Court granting an order for permanent care and custody, the Court must ensure that the requirements pursuant to section 42 (2), (3), & (4) of the ***Children and Family Services Act*** are met. As the Court has noted several times in this decision, the applicant has worked with the respondent father to promote the integrity of his family. The services have been attempted and failed time and time again.

[61] The Court finds that in this matter, the applicant went above and beyond in the hopes that these children would not become the subjects of a permanent care hearing.

[62] As noted in **N.S. (MCS) v LLP** [2003] NSJ No. 1 (C.A.):

> *any service-based measure intended to preserve or reunite a family unit, must be one which can effect acceptable change within the limited time permitted by the Act. If a stable and safe level of parental functioning has not been achieved by the time of final disposition, before returning the children to the parents, the Court should generally be satisfied that the parents will voluntarily continue with such services or other arrangements as are necessary for the continued protection of the children, beyond the end of the proceeding. Ultimately, parents must assume responsibility for parenting the children. The Act does not contemplate that the agency shore-up the family indefinitely."*

Analysis

[63] The applicant and the respondent father worked together throughout so that the respondent father could better his parenting abilities, wrestle his personal demons into submission, and be the best father he could possibly be. Where services were not put in place by the applicant, the respondent, to his own credit, as noted by his counsel, Ms. Mahoney: "…had to obtain these services from public service providers."

[64] What is most interesting is the pattern that seems to have developed. The respondent father would get very close to having more time with the children, or the children being placed in his care, or the children being placed in his father's care, and then the respondent father would sabotage the plan.

[65] The evidence was that the respondent father did very well with this counseling, was kind and loving with his children, recognized that he had an alcohol problem and wanted to deal with it. He would have a life-changing experience, for instance being incarcerated, and on another occasion receiving only house arrest when he was perhaps expecting imprisonment, and he would promise that he would do better and be the person he needed to be to raise his children.

[66] However it seems as if some sort of self sabotage set in, ensuring none of his plans of parenting his children became reality. In the time the respondent father has been before the Court, his life has been spotted with short-lived epiphanies.

[67] The original application brought by the applicant noted that the agency had been concerned since January 5, 2011, due to issues of physical neglect, risk of physical harm, the respondent father's substance abuse, domestic violence, significant criminal involvement, and inability to manage inappropriately deal with situations when he becomes angry and frustrated. This present application is based on a substantial risk of physical and emotional harm.

[68] Reviewing all of the evidence the Court finds little has changed and the pattern that has been set up regarding the current proceedings has culminated in the brutal assault on the respondent's own father.

[69] The court finds this evidence very troubling.

[70] First of all, the applicant and indeed the respondent father, have gone through some effort to ensure multi-layered services for the respondent father to get help so he could parent his children.

[71] Second, the applicant did not determine to seek permanent care in spite of the many setbacks the respondent father suffered but continued to support him. When it became apparent that the respondent father was not capable, at this stage in his life, of parenting the children, the applicant was on board with the children going with the paternal grandfather.

[72] And then the respondent father brutalized the paternal grandfather. The only family hope for these children, the only chance of the respondent father having more time to redeem himself to be a good father to these children, and the respondent father, for whatever reason, violently attacked his one hope.

[73] Which is why this evidence is so troubling. If so much effort by various service providers could go into ensuring services to the respondent father, and the respondent father would have an epiphany that he was going to do better every time he slipped up, and the applicant continued to support some sort of family placement for these children, until this last time when he brutalized his father, and then the respondent father comes to Court for the permanent care hearing putting his father forward as his only plan for the care of the children, what confidence could the Court have in affirming this plan? What could the respondent father possibly be thinking to ask the Court to give his children to a man who requires reconstructive surgery as a result of being beaten by him?

[74] The Court has considered a family placement with the paternal grandfather. A Court must be mindful if placing children with family members is in their best interest and if there is a substantial or even a significant risk of harm in considering a family placement.

[75] The Court finds on a balance of probabilities that the paternal grandfather would not be able to protect these children from the respondent father should he attend the paternal grandfather's home in the condition he did on October 25, 2015, given the circumstances of this incident and the brutality as earlier noted. The court finds based on the paternal grandfather's evidence and demeanour, that he fears the respondent father.

[76] Although the respondent father testified he would obey the peace bond "one-hundred-percent", based on the evidence of his previous breaches and his short-lived epiphanies to do better, the Court does not find this evidence to be credible.

[77] The Court finds that the respondent father does well for a time and then, for reasons not in evidence, he cannot control his behaviour manifesting violent tendencies.

[78] A Court is not obliged to consider unreasonable alternatives. The statutory obligation requires the Court to assess the reasonableness of any family alternative put forward. In ***Children's Aid Society of Halifax v T. B.*** [2001] N. S. J. No. 225 [C. A.], the Court held: ***"…by reasonable I mean those proposals that are sound, sensible, workable, well conceived and have a basis in fact."***

[79] The Court finds that to place these two children with the paternal grandfather, given his evidence of long standing violent tendencies against him by

the respondent father, is not a sound, sensible, workable or well-conceived family alternative, which may, in fact, place the children at grave risk.

[80] The Court has also given consideration to the provision with respect to time limits and considered the jurisprudence relating thereto. The time limits in this matter are at the end, but a Court does not have to defer the decision to order permanent care until the maximum statutory time limits have expired.

Conclusion

[81] Making a decision for permanent care is indeed one of the most serious decisions a Court can make. If it is at all possible to decide otherwise in the best interest of the children, any Court would make that decision. The Court has great sympathy for the respondent father, who has valiantly attempted to be a better father. But the Court is not "parent focused." The Court can only be child focused to make a decision that is in the best interest of these children. I have considered all of the evidence before this Court and afforded it the appropriate weight.

[82] The Court finds that the children remain in need of protection.

[83] The Court finds that all reasonable services to the respondent father from which he might benefit were provided to him. The plan to place the children with the paternal grandfather is fraught with risk, therefore, there is no sound, sensible, workable or well-conceived family placement before this Court. Regrettably, the Court finds that the circumstances of the respondent father are unlikely to change in the reasonably foreseeable future.

[84] It is in the best interest of the children that they have a final stable placement and continuity of care.

[85] The Court finds on a balance of probabilities, it is in the best interest of these children, that an order for permanent care and custody be granted with no provision for access. In deciding this the Court has taken into consideration the evidence before the court including the violence experienced by these children and the many different placements (parental, grand-parental, and foster care) in which these children have found themselves. The agency is planning adoption of the children, the children are only three and four years of age, and there are no special circumstances pursuant to relevant statute and jurisprudence considerations.

[86] Although the Court has no jurisdiction to order this, given all of the above, the Court would like the applicant to give serious consideration to both children being adopted by the same family so they have some stability and familiarity in their lives.

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Marci Lin Melvin, J.F.C.

January 10, 2016