FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. M.K., 2014 NSFC 23

Date: 2014-02-09
Docket: FKCFSA-088684
Registry: Kentville, N.S.

Between:

M.C.S.

Applicant

v.

M.K.and T.T.

Respondents

Editorial Notice:	Identifying informaiton has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge Marci Lin Melvin
Heard	January 30, 2014, in Kentville, Nova Scotia
Submissions:	February 10, 2014
Counsel:	Sanaz Gerami, for the Applicant Donald Fraser, for the Respondent, MK Michael Coyle, for the Respondent TT

Oral Decision: February 10, 2014

By the Court:

Facts:

[1] M.K. delivered a child, A.S., on November […], 2013,who was taken into care at birth. The reasons for the apprehension are perhaps twofold:

(1) Historical (the Respondent mother has four children who due to Ministerial involvement are no longer in her care); and,

(2) The infant had been exposed to some degree of substance use/abuse/misuse while in utero, and displayed symptoms of withdrawal at birth. M.K. is on methadone, and admitted to some use of alcohol and recreational use of marijuana during her pregnancy. The infant displayed physiological reactions – jitteriness, twitching, and other symptoms of withdrawal, at birth. The infant's urine toxicology screening was positive for methadone and the metabolites of THC (as a result of marijuana use).

[2] Both Respondents consented to a finding that there were reasonable and probable grounds to believe the child was in need of protective services, on a without prejudice basis, at both the 5 day and 30 day stage.

[3] The Respondent, T.T., was noted as the biological father, but did not participate in the protection hearing as the court was advised that DNA testing is being done to determine if he was indeed the biological father. He does have legal counsel who advised the court that his client would not be presenting evidence and not participating.

[4] M.K. has had parenting time with the infant. She has been pumping her breast milk since birth and freezing it with the intention of feeding it to A.S. The evidence is that she was advised by the attending physician that due to her marijuana use, and the best practice guidelines for breast feeding, that she should not breast feed A.S. due to potential ill effects of ongoing marijuana exposure.

Issue:

[5] Has the Applicant established, on a balance of probabilities, that there is a substantial risk the infant, A.S., will suffer physical or emotional harm if returned to the Respondent mother, M.K.?

Evidence:

[6] Dr. Michael Nash testified for the Applicant. He was the attending physician and had prepared the discharge summary, which was filed. His report set out what he believed to be

contraindications for breast feeding: "Similarly, irregularity in the dosing of methadone in mom would be potential relative contraindication, although not an absolute one. His urine toxicology screening was positive for methadone and the metabolites of THC. Accordingly, per best practice guidelines breast feeding was contraindicated due to potential ill effects of ongoing marijuana exposure."

[7] On direct examination as to what discussions he had with M.K. about breastfeeding, Dr. Nash testified: "We spoke about breast feeding once we had confirmed that there was evidence of marijuana in the urine and simply put… any illicit substance with use that is either laid in or ongoing after delivery is thought to be a contraindication to recommending breast feeding." He continued: "A mom who is breast feeding, if she is using marijuana, may have a given drug level herself but that could be concentrated much higher than her own blood levels within breast milk which is felt to be the reason behind perhaps why exposure is so potentially harming to an exposed baby. The effects they can run into can be delayed motor development. They can have problems with, difficulties with their tone. Difficulties with the sucking reflex to feed." (Counsel for M.K. objected at this time saying it was 'opinion" evidence and Dr. Nash had not been qualified as an expert. The Court ruled the objection was noted and indicated the it would go to weight.)

[8] On cross-examination by Mr. Fraser for M.K., Dr. Nash testified he was aware M.K. had breast fed previously but was not aware if she was using marijuana at the time.

[9] Ellen Reid, testified for the Applicant. She is the casework supervisor for this file. Her affidavit was filed with the Protection Application and Notice of Hearing. As is most often the case, the casework supervisor simply paraphrases the information from the case notes as recorded by the agents. Her cross-examination by Mr. Fraser for M.K., lasted a mere six minutes and lent little to the process.

[10] What was surprising to the Court was when this witness withdrew, Mr. Coyle, on behalf of Respondent, T.T., suddenly stood and objected to the historical evidence contained in Ms. Reid's affidavit. His client wasn't a party to the historical evidence, and the court was unclear as to Mr. Coyle's reasoning for the objection (given it had nothing to do with his client, who may or may not be the child's biological father), and as well as his timing. Further, Mr. Coyle was not calling evidence, had filed no affidavits, and had indicted to the court at the outset that it was "not likely" he would be participating.

[11] Nonetheless, his objection to the historical evidence that M.K. had a history of child protection concerns regarding a significant history of substance abuse, domestic violence, prostitution, other criminal activity, and inadequate parenting, was noted.

[12] Annette Davidson testified for the Applicant. She is the social worker in charge of this case. Mr. Fraser for M.K., on cross-examination tendered the results from his client's hair follicle test. After considerable "to-ing and fro-ing" between Mr. Fraser and Ms. Gerami, the Court's ruling, in absence of further explicatory evidence to the contrary, is that the hair follicle test results for alcohol use are negative.

[13] Mr. Fraser also cross-examined Ms. Davidson as to her affidavit regarding suspected cocaine use by M.K. The hair follicle test was negative for cocaine use. The Court finds there is no compelling evidence regarding M.K. using cocaine while pregnant with A.S.

[14] Mr. Coyle again participated and cross-examined the witness with respect to Dr. Nash's suspicions that the baby was withdrawing from cocaine.

[15] Respondent mother, M.K. testified. In her affidavit, dated January 29, 2014, she admitted to being on a methadone program and to recreational marijuana use. She admitted her desire to breast feed A.S., said she was told that she couldn't, but not told why. She testified she had breast-fed three of her other children while on methadone and using marijuana and no concerns were ever raised by anyone. She said neither her own doctor, nor the pediatrician she had during her first three pregnancies "…advised me that I should not breast feed my first three children because I was using marijuana."

[16] On cross-examination by Ms. Gerami, M.K. was asked if she used marijuana while pregnant with A.S. She replied: "Yes, and with three other children." When asked if she saw a problem with that, she responded: "No, Ma'am." She further testified: "During pregnancy I was told that quitting marijuana was more harmful than continuing."

[17] In the case notes, filed as part of M.K.'s affidavit, it states: "[M.K.] talked about her plan to use frozen breast milk when he comes home." When cross-examined on this point, she testified that she couldn't change [Dr. Nash's] mind but she wanted to know what his arguments were. Ms. Gerami asked: "So you are very clear about what Dr. Nash told you?" M.K. responded: "Yes."

[18] When asked about whether she still intended on breast-feeding A.S. with marijuana in her system, M.K. replied that the goodness of breastfeeding outweighed any ill effects that might be caused from the use of marijuana. She said she wanted another opinion as her other doctors had not objected to it or advised her it was harmful to the child. She admitted in cross-examination that A.S. was her fifth child, and was taken into care at birth, further that she had supervised contact with her other four children not in her care.

Analysis:

[19] The CFSA defines "substantial risk" to mean a real chance of danger that is apparent on the evidence. (s.22(1)).

[20] The Minister made application for a finding that A.S. was in need of protective services pursuant to the CFSA, sections 22(2), (b) and (g), which state:

> **"(2) A child is in need of protective services where:**
>
> **(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a) [clause (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];**
>
> **(g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does treatment to remedy or alleviate the harm [clause (f) states the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.]"**

[21] In **M.J.B. v. Family and Children's Services of Kings County**, [2008] N.S.J. No. 299 (C.A.), paragraph 77 succinctly sets out the test in these types of cases. The civil standard of proof is called "the balance of probabilities". And if the assertion being made is that there **is** a substantial risk that an event will occur in the future, the weight of the evidence **clearly** must show that the risk of the future event **is** more probable than not. It is the risk, not the actuality, which must be proven on a balance of probabilities.

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[23] The Court observed M.K. on the stand. It is palpably obvious that she wants her baby back. It is also clear that she is determined to breast-feed him. The Court observed her to be recalcitrant in her beliefs. Her testimony with respect to this issue was sometimes disingenuous, she flirted with the questions, and it was apparent to the court that she intended to breast-feed A.S. no matter what anyone told her. She clearly believes that breast milk is what is best for him.

[24] The Court does not disagree that - in normal circumstances - breast milk is nature's most perfect food for a baby. And although the Court no evidence before it to make that finding, it is simply common sense.

[25] What is also common sense is that if a medical professional tells a mother that there is something she is doing that could potentially cause harm to the baby, that she will stop doing it.

[26] If there is a substance in her body, a disease that she has, a food that she eats, a liquid that she drinks, a drug that she takes, something that she smokes, **anything** with a potential that could possibly cause any harm to the baby, through the transmission of breast milk or in any other way, is it not common sense to say: "I won't do it. I don't want to hurt my baby in any way. Perhaps what the doctor is saying is not accurate, perhaps I don't understand his reasons, perhaps I breast-fed my other children while I smoked marijuana, **BUT** now that I know it might be harmful, I don't want to take that chance."

[27] Dr. Nash, although not qualified as an expert, did testify that he told M.K. she should not breast-feed because of the THC concentrations in her breast milk. Dr. Nash's testimony was that he told M.K. that marijuana is known to cause higher concentration levels [of THC] in breast

milk and that a number of neurological side effects can be seen over time with continued exposure. It is not expert evidence. It is simply evidence of what Dr. Nash told M.K.

[28] M.K. confirmed in her testimony that she was clear about what Dr. Nash had said regarding her not breast feeding A.S.

[29] There is no evidence before the Court that THC levels in breast milk are harmless to a nursed infant or child.

[30] Given that A.K. was taken into care at birth, given that the Minister believes the child is in need of protective services, given that the Minister's concerns with this baby include THC (not to mention the methadone M.K. has been on since 2002) passing through her breast milk and harming the child, there are two common-sense solutions to a mother in M.K.'s position might consider: give up smoking marijuana, or give up on the idea of breast-feeding A.S.

[31] The issue before the Court, now that it has been "fine-tuned", is: if the substantial risk of harm to a child is the harm of possible neurological difficulties because the child has been nursed with breast milk containing concentrated levels of THC, has the MCS proven that there is a substantial risk that this event will occur in the future, and has the weight of the evidence shown that the risk of the future event is more probable than not? What evidence is before the Court that shows on a balance of probabilities that if the child were to be returned to M.K. she would breast feed, and continue to smoke marijuana?

[32] M.K. did not testify that she was going to give up smoking marijuana. She did not testify that she would not breast feed A.S.

[33] The Court finds as a fact that M.K. has smoked marijuana for many years, did while pregnant with at least four of her children, and continues to use it 'recreationally'. The Court finds as a fact that MK. Is determined to breast feed A.S. and has been pumping her milk and freezing it. The Court finds as a fact that Dr. Nash told M.K. that levels of THC in breast milk could cause harm to a nursed child. The Court finds there is no evidence before this Court to refute that THC in breast milk could cause harm to a nursed child.

HISTORICAL EVIDENCE

[34] With respect to the historical evidence before the Court, although justice should be blind, justice should not be blind-sided. Mr. Coyle's unusual objection seemingly on behalf of Mr. Fraser's client with respect to the historical evidence contained in exhibit 2, bears comment.

[35] The Court is familiar with M.K. and M.K.'s history. Not only is there some evidence of M.K.'s history before the Court in the original affidavit filed with the Protection Application, but the Court remembers M.K. from other court appearances. Affidavits filed with the Protection Application contain information which allow the Court to make a finding that "there are reasonable and probable grounds to believe the child is in need of protective services" at the initial stages.

[36] It is different at the Protection stage, which is where we are now. Although her history may have precipitated the infant's taking into care, it is not the primary focus of this protection hearing. The Court believes that in most instances, people are able to change, and there is always a hope, a chance, that this will be one of those instances.

[37] For now, however, at this point in the proceedings, the Court must determine if the Applicant established, on a balance of probabilities, that there is a substantial risk the infant, A.S., will suffer physical or emotional harm if returned to the Respondent mother, M.K.

[38] As previously noted, T.T. did not present evidence, and his counsel had initially indicated he would likely not be participating. Given there is no evidence adduced on his behalf, the Court must make a finding on the evidence that ***is*** before the court.

[39] And as the Court noted earlier, based on the ruling in the NSCA's case of M.J.B., if the assertion being made is that there is a substantial risk that an event will occur in the future, the weight of the evidence **clearly** must show that the risk of the future event is more probable than not. It is the risk, not the actuality, which must be proven on a balance of probabilities.

[40] The Respondent M.K.'s own evidence combined with the evidence of Dr. Nash has shown the Court that there is a substantial risk of physical harm to the child, A.S., if returned to M.K. The weight of the evidence clearly shows that the risk of the future event is more probable than not.

[41] The MCS has proven on a balance of probabilities a substantial risk of physical harm.

[42] The Court finds A.S. to be in need of protective services pursuant to section 40 (4) of the CFSA.

[43] Having said that, there is a clear solution here, and I would strongly recommend counsel discuss this with their clients.

[44] The Court reserves the right to provide written reasons.

Marci Lin Melvin, J.F.C.