FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (*Community Services) v. L.D.***,** 2014 NSFC 25

Date: 2014-06-08
Docket: FKCFSA-084679
Registry: Kentville

BETWEEN:

Minister of Community Services

Applicant

-and-

L.D., N.K., A.M.D, D.H., and K.D.

Respondents

DECISION

JUDGE:	The Honourable Judge Marci Lin Melvin
HEARD:	April 17 and 28, 2014
WRITTEN SUBMISSIONS:	Minister of Community Services on May 6, 2014 Respondent N.K. on May 21, 2014
ORAL DECISION:	June 8, 2014
COUNSEL:	Sanaz Gerami, for the applicant Minister of Community Services David Hirtle, for the respondent N.K.

By the Court:

INTRODUCTION

[1] The Applicant Minister filed an application pursuant to the *Children and Family Services Act*, s. 45(5)(a), for a review of the order granted January 16, 2014, seeking to add a condition that the Respondent N.K. participate in a risk assessment. The Respondent N.K contested the application.

ISSUE

[2] Should the Respondent N.K. participate in an assessment pertaining to a risk of physical and sexual harm towards a child?

RELEVANT SECTIONS OF *CHILDREN AND FAMILY SERVICES ACT*

[3] When reviewing the application, the court must consider s. 46 of the *Children and Family Services Act* (hereinafter referred to as 'the *Act*'). For the purposes of this application, these include the following:

> (1) A party may at any time apply for review of a supervision order or an order for temporary care and custody, but in any event the agency shall apply to the court for review prior to the expiry of the order or where the child is taken into care while under a supervision order…
>
> …
>
> (4) Before making an order pursuant to subsection (5), the court shall consider
>
> (a) whether the circumstances have changed since the previous disposition order was made;
>
> (b) whether the plan for the child's care that the court applied in its decision is being carried out;
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> (c) what is the least intrusive alternative that is in the child's best interests; and
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> (d) whether the requirements of subsection (6) have been met.

> (5) On the hearing of an application for review, the court may, in the child's best interests,
>
> (a) vary or terminate the disposition order made pursuant to subsection (1) of Section 42, including any term or condition that is part of that order;
>
> (b) order that the disposition order terminate on a specified future date; or
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> (c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 43 for supervision orders and in Section 45 for orders for temporary care and custody.

[4] The guiding principle in child welfare proceedings is the best interests of the child. That principle is the heartbeat of the family court, trumping any other argument.

[5] The legislation codifies the purpose and paramount consideration of the *Act* in s. 2:

> (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.

[6] Further factors a court considers when making a determination as to what is in a child's best interests – and this list is not exhaustive – are set out in s. 3(2) of the *Act*:

> Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> …
>
> (l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
>
> (m) the degree of risk, if any, that justified the finding that the child is in need of protective services;
>
> (n) any other relevant circumstances.

EVIDENCE

[7] The court has considered all of the evidence before the court and afforded appropriate weight to all relevant aspects.

[8] Kendra Mountain testified on behalf on the Minister; N.K. and Mr. Armand De Grenier testified on behalf of the Respondent.

[9] Ms. Mountain testified that prior to January 2014 she was unaware N.K. had child protection involvement with other agencies. In addition, the Minister argues they became aware that N.K. did not participate in services to address the risk of physical or sexual harm. They led evidence with respect to information in other agency files of sexual harm and inappropriate touching regarding two twelve-year-old children as well as physical harm of a two-year-old child. During a session with his current partner, the counselor noted his girlfriend was "scared" of what N.K. would do when he went home and the counselor developed a safety plan for her (Exhibit 3).

[10] N.K.'s counseling with Mr. De Grenier was to address anger and stress. N.K.'s evidence is that he is currently living with an eighteen-year-old girl and has been with her for four years. Another of his children's mothers was under sixteen. He is thirty-one. He admitted on cross-examination that the child saw him with his present girlfriend, a much younger woman.

[11] Mr. Hirtle argued his client was not convicted of any of the charges; they are a decade old. His client has had care of another child until the child's mother was able to care for the child again. Neither of the previous agencies had provided his client's counselor with information regarding these matters. Further, the Minister withheld information from the court that his client had not been convicted of these charges.

ANAYLSIS OF THE LAW

(a) Child Centered

[12] The jurisprudence is clear on proceedings under the *Act*: it is a child-centered, not a parent-centered, lens through which the court must view the evidence. Further, in the well-known case of *King v. Low*, [1985] 1 S.C.R. 87, at p. 39, the court writes:

> ".... the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child....Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside."

[13] Forgeron, J., held in *MCS v. LH and BS*, 2011 NSSC 41, that the *Act* must always be interpreted using a child centered approach in keeping with the best interests principle in s. 3(2) of the *Act*.

[14] The Minister argued that this directs the court to consider the various factors unique to each child, including those associated with the child's emotional, physical, cultural and social developmental needs, as well as those associated with the risk of harm.

[15] The Minister further argued:

> **"**Parental rights, for instance, the right not to undergo what may be intrusive testing for the purpose of a risk assessment, should not be a consideration in determining whether it is in the best interests of a child for the Court and the parties to have an understanding of what level of risk, if any, his father may pose."

[16] Counsel for the Respondent N.K. agreed, stating:

> "Ms. Gerami is correct. This review application is not about what is in the best interests of Mr. K. It is not about parental rights…"

[17] It is obvious that both parties are therefore clear on the focus of the court.

(b) Is a Risk Assessment of N.K. in Best Interest of Child?

[18] Mr. Hirtle argued the Minister failed to demonstrate how a risk assessment on N.K. for determining the risk of physical and sexual harm is in the child's best interests, when there is no evidence before the court that N.K. ever posed a physical risk or sexual risk to "…either of his male children." Further, Mr. Hirtle noted that the Minister had not provided the details of what such an assessment would entail, who would prepare it and how long it would take.

[19] The court finds that the Minister has shown that N.K. has a history of having relationships with females, who are considered children under the *Act*. Section 3(1)(e) defines a child as a person under the age of sixteen, unless the context requires otherwise. The Minister has also shown that N.K. was charged with assault and sexual assault on children, although no convictions were entered on those charges.

[20] In *Nova Scotia (Community Services) v. A.M. and J.W*., 2012 NSSC 343, Wilson, J., ruled:

> "…the withdrawal of the criminal charges with respect to the allegations of sexual touching and sexual assault involving J.D. do not reduce the substantial risk of sexual harm to the children in the future."

Although the Respondents appealed this decision, the Nova Scotia Court of Appeal dismissed the appeal in an order dated March 1, 2013.

[21] The test is a different test in criminal court versus civil court. So, while in criminal court, the charges had to be proven beyond a reasonable doubt; in civil court, the test is on the balance of probabilities. This was not raised as an issue and no one in these proceedings disputed that test. The civil standard is, however, a very different test.

(c) The Court's Authority to Order Assessments

[22] The court may order various assessments as are in keeping with the best interests of a child. As early as the interim hearing, when the parties initially appear before the court, the court can make an order pursuant to s. 39(4)(g) for a "referral of the child or a parent or guardian for psychiatric, medical or other examination or assessment." Section 43 of the *Act* deals with supervision orders; s. 44 with temporary care orders and both sections afford the authority to the court to impose reasonable terms and conditions including the ordering of assessments. Both sections go so far as to state that the assessments may be ordered for:

> "… the assessment, treatment or services to be obtained for the child by a parent or guardian or other person having the care and custody of the child [and] the assessment, treatment or services to be obtained by a parent or guardian or other person residing with the child."

[23] There is no manual with additional instruction as to why the legislature provided the courts with this as a "reasonable term and condition". Common sense would dictate that an assessment can be ordered not only to assist the child or the family, but also to assist the court in determining what is in the best interests of the child.

[24] Further, it must be noted that the sections do not specify what type of assessment must be ordered but merely if one is ordered that it fall within the definition of "…reasonable terms and conditions."

(d) Findings of Substantial Risk of Physical and Emotional Harm versus Minister's Concern of a Risk of Sexual Harm.

[25] N.K.'s counsel argued:

> "…the grounds of protection which exist in the Disposition Order which is sought to be reviewed do not allege a need of protective services under section 22(2)(c) or 22(2)(d). Therefore, it is Mr. K.'s position that the court lacks the jurisdiction to Order a sexual assessment where there are no grounds of protection in any way related to sexual harm or risk of sexual harm."

[26] The protection finding was made on ss. 22(2)(b) – a substantial risk that the child will suffer physical harm - and (g) – a substantial risk that the child will suffer emotional harm - of the *Act*, not ss. 22(2)(c) – that a child has been sexually abused - and (d) - a substantial risk that the child will be sexually abused. The Minister did not address this issue in her brief and did not file a response to the Respondent's post-trial brief to address this issue.

[27] In *MCS v. S. and B.*, 2002 NSSF 11 (CanLII), Williams, J., stated:

> "Where past events are alleged to impact upon the future welfare (or risk) to children, the Court must go beyond simply asking whether the events have been proven on the balance of probabilities. The welfare or best interests of children are the paramount concern where custody or access issues are in question.
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> In *E.S. v. D.M.* [1996] N.J. No.216 (Nfld. S.C.-U.F.C.) Puddester, J. stated (at paragraph 11):
>
> > Overall then with respect to the burden of proof, the position supported by the authorities is that in a case of this nature the ultimate issue does not 'stop' at whether or not an incident, or incidents, of past abuse have been established on the balance of probabilities. Rather, the task of the court is to consider the evidence as to abuse properly before it, within the context of all the circumstances, including the reasonable power of each party to adduce relevant evidence, and to determine whether, on the balance of probabilities, under unrestricted access there is established a significant or substantial risk of future physical and/or emotional harm to the child.
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> In *C.C. v. L.B.* [1995] N.J. No 386 (Nfld.S.C.-U.F.C.) Green, J. stated:
>
> > Thus a finding, on the burden of proof applicable to admissible evidence, that it has not been established that sexual abuse in the past did occur, does not shelve the issue of abuse. The court must go on and determine whether, on the totality of all admissible evidence, there is a real or substantial risk of future harm to the children resulting from potential sexual abuse even though it has not been proven in the past to the level required by the applicable standard of proof.
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> The application of that standard of proof must consider the risk of harm, the greater the risk of harm, the more the need for caution. It

must, however, be a real risk of harm."

[28] The court must first look at what is in the best interest of the child and then is directed by s. 2(2)(m) of the *Act* when making an order in a child's best interests to consider the degree of risk, if any, that justified the finding that the child is in need of protective services, and s. 2(2)(n) any other relevant circumstances.

[29] Therefore, in response to Mr. Hirtle's argument on behalf of his client as to the jurisdiction of the court given the finding of a substantial risk of harm the child will suffer physical and emotional abuse, but not anything of a sexual nature, the court disagrees. The court's unimpeachable duty and obligation to ensure the best interests of the child are met far outweighs a specification of abuse, given the circumstances of the case. And even if that were not the test, the court had to apply, and the definitions of sexual, physical and emotional abuse were the only issues in question, sexual abuse by its very nature is both physical and emotional abuse in its most heinous incarnation.

(e) Section 46 Application

[30] In the case of *Catholic Children's Aid Society of Metropolitan Toronto v. C.M.*, 1994 CanLII 83 (SCC), the Supreme Court of Canada confirmed that on a status review the court must conduct a two-fold examination. The court first must determine if the child continues to be a child in need of protection requiring an order for protection, and then the child's best interests must be examined.

[31] In *Children's Aid of Halifax v. C.V. and L.F.*, 2005 NSSC 170, Smith, A.C.J. writes:

> "…the Court must consider the best interests of the child which the Supreme Court has confirmed is an important and, in the final analysis, a determining element of the decision as to the need for protection. The Court confirmed that the need for continued protection may arise from the existence or absence of the circumstances that triggered the initial Order for protection or from circumstances which have arisen since that time."

CONCLUSION

[32] The court has considered all of the evidence and finds the child remains a child in need of protective services.

[33] The court's focus is what is in the child's best interests and finds the evidence of N.K.'s past, previously unknown, which could impact upon the best interest and future best interest of the child, constitutes a change in circumstances, pursuant to s. 46(4)(a).

[34] The Applicant has shown a change in circumstances material and significant to warrant a variation of the order.

[35] The court finds it is in the best interest of the child that N.K. participate in an assessment to determine if there is a risk that he will physically or sexually harm the child. A risk assessment to determine if N.K. poses any risk of harm to the child is a reasonable term and condition to impose given the evidence before the court.

[36] The court finds that the Minister has proven on a balance of probabilities that there is a risk of harm. Although N.K.'s counsel argued his client has never harmed any of his male children, there is compelling evidence that he has harmed children, and the court does not concern itself with gender when there is a risk of harm.

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Judge Marci Lin Melvin