FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. S.S.*, 2016 NSFC 5

Date: 2016-02-16
Docket: FTCFSA No. 092300
Registry: Truro

Between:

Minister of Community Services

Applicant

v.

S.S. and G.P.

Respondents

Restriction on Publication: Pursuant to s. 94(1) of the *Children and Family Services Act*, S.N.S. 1190, c.5.

Judge:	The Honourable Judge Jean Dewolfe
Heard	January 11, 2016, in Truro, Nova Scotia
Counsel:	Amanda Dillman, for the Applicant Sheila McDougall, for the Respondent, S.S. Respondent G.P., not present

By the Court:

Introduction

[1] This is an application by the Minister of Community Services ("the Minister") for permanent care and custody of a three year old child, K.. K. has been in the temporary care and custody of the Minister since July 31, 2014. The Respondent, S.S. is K.'s mother. She seeks the return of the child to her care. The Respondent, G.P. is K.'s father. He did not retain counsel and has not been involved in the proceeding, or had any access to K. since April 2015.

[2] The Minister and S.S. both indicated that they have not known how to contact G.P. since May 2015. In October 2015, the Court dispensed with the necessity of serving G.P. with ongoing documentation in this proceeding. As G.P. remains unreachable, the Court is prepared to proceed with this matter in his absence and without notice to him.

Background

[3] G.P. and S.S. separated shortly after K.'s birth. However, it appears they still had periodic reconciliations and contact.

[4] S.S. had two older children placed in permanent care in 2004, following concerns of unfit living conditions, mental health issues, substance use and neglect. S.S had her first child at the age of 16.

[5] G.P. told S.S. and Agency workers that he has "approximately 12" other children with whom he has no contact.

[6] Two referrals came to the Agency's attention regarding the Respondents in 2012-2013, in addition to one regarding G.P and a new partner.

[7] On July 29, 2014, RCMP attended at S.S.'s home in the Truro area. G.P. and S.S. were present with K. G.P. had lacerations on his face. S.S. was intoxicated. G.P. told police that he and S.S. had had an argument and S.S. had slapped and clawed his face. S.S. was charged with assault and released on an Undertaking to not have contact with G.P.. On July 31, 2014, S.S. and K. were found with G.P. at his home. K. was taken into care.

[8] The Agency's concerns initially related to K.'s exposure to domestic violence, and S.S.'s use of substances. They also had concerns about G.P.'s history of aggression and violence.

[9] K. has remained in the temporary care and custody of the Minister since July 2014. She has had regular supervised access with S.S..

[10] G.P. has not had or sought access since the spring of 2015. In May 2015, G.P. advised the Agency that he was "couch surfing" and had no fixed address, and was in no position to participate in services.

[11] K. was initially placed in a foster home, then moved to a kinship placement with S.S.'s sister from December 2014 to June 2015. When that placement broke down she was placed in another foster home, where she currently resides.

[12] S.S. admits to using marijuana between May and late August 2015. As a result, the Minister, following the recommendation of Meredith Burns' parental capacity assessment, changed its Plan to permanent care and custody for K..

Proceedings

[13] Interim Orders were issued on August 7, 2014 and August 28, 2014. A Protection Order was granted on October 30, 2014 on the basis of sections 22(2)(b), (g) and (i) of the *Children and Family Services Act* ("the *Act*"). At that time, the Respondents were to participate in family skills work, domestic violence counselling, and were to submit to random drug testing/hair follicle testing.

[14] The initial Disposition Order, dated January 22, 2015, added the requirement of participation in a Psychological/Parental Capacity Assessment. Disposition was reviewed and renewed on April 16, 2015, July 9, 2015 and October 8, 2015.

[15] The current review proceeding was heard on January 11, 2016

[16] The statutory timeline expired on January 22, 2016.

Evidence

[17] The Minister introduced a number of affidavits from Agency workers. Michelle MacLean and Holly White provided affidavits, testified and were cross examined. Affidavits of Rachelle Sweeting, Christine Trainor, Greg Taylor, and Jonna Francis were admitted by consent without cross examination.

[18] A letter from the solicitor for Mi'kmaw Family and Children Services was admitted by consent. It stated that if K. were placed in the permanent care and custody of the Minister, the Mi'kmaw Agency would be seeking transfer of the child, if a Mi'kmaw home had not been identified for her by the Minister.

[19] The Minister submitted three Parental Capacity Assessments. The first dated July 7, 2003, and the second dated October 25, 2004, were prepared by Dr. Jolaine

States, psychologist with respect to S.S.'s older children, and were admitted by consent.

[20] Meredith Burns' report, dated July 31, 2015, addressed S.S.'s ability to parent K.. Ms. Burns testified and was cross examined.

[21] In addition, the Minister introduced reports of Carolyn Scott, S.S.'s therapist, and Kristen Shauss, K.'s therapist. Ms. Shauss' report came in by consent. Ms. Scott testified and was cross examined.

[22] The Minister entered by consent toxicology reports and collection notes for S.S. and an opinion from Dr. Bassam Nassar regarding these reports. In addition, the Minister submitted Case Recording Reports, Child in Care Recording Reports and Access Facilitation Notes as business records with consent of S.S.'s counsel.

Dr. Bassam A. Nassar

[23] Dr. Bassam A. Nassar, a medical biochemist reviewed S.S.'s toxicology reports. In his report dated November 25, 2015, he noted that S.S. tested positive for "cannabinoids" for seven consecutive tests between August 14, 2015 and September 4, 2015. She also tested positive on September 9, 2015 after having a clean test on September 6, 2015. The remainder of S.S.'s 13 tests between

September 10, 2015 and November 16, 2015 were negative for substances. In Dr. Nassar's opinion, these test results did not accord with a single use of marijuana as originally reported by S.S. to the collection nurse on August 14, 2015.

Dr. Jolaine States

[24] Dr. Jolaine States, psychologist, assessed S.S.'s ability to "provide safe, protective care" to her oldest daughter who at the time of her initial assessment was four years old. A year later, Dr. States did a re-evaluation with respect to S.S.'s parenting ability shortly after the birth of S.S.'s second child. In Dr. States' opinion, S.S. lacked insight into her parenting deficiencies, and her mental health and drug use compromised her ability to parent.

[25] Dr. States noted that S.S. had participated in family support work, and during the proceeding had attended detox.

Meredith Burns

[26] Ms. Burns was qualified as an expert in psychology and in particular, assessing parental capacity.

[27] Ms. Burns found it difficult to get S.S. to provide information. She attributed this to a systemic mistrust, in particular as she is a child of a residential school

survivor. Ms. Burns felt that this mistrust affected most of S.S.'s services, at least initially.

[28] Ms. Burns also noted that S.S.'s first language was Mi'kmaw, and felt this was a factor in her communication difficulties. Ms. Burns asked S.S. if she would like to note any cultural differences in parenting practices. S.S. responded by saying that there may be differences, but could only provide as an example, Aboriginal parents wishing to take children to Sweat Lodge Ceremonies. Ms. Burns also interviewed Alanna Lee, an Aboriginal social worker with Legal Aid. Ms. Lee provided information to Ms. Burns on culturally appropriate parenting. She explained that while Mi'kmaw people understood the need for structure, boundaries, and consequences for behavior, as a people, their approach is different than Canadians in general.

[29] Ms. Burns received access notes and family skills session reports. She also observed S.S. and K. during a visit in May 2015. Ms. Burns noted a bond and affection between mother and daughter. However, she observed that S.S. had difficulty in being able to control K.'s acting out behaviors, and did not at times takes control of a situation in order to protect K. (e.g. holding her hand in a public place).

[30] Ms. Burns felt that S.S. is aware of boundaries and is able to provide guidance "as they are understood in her culture". Ms. Burns also noted that S.S. is "warm and nurturing", "patient", "self-reflective" and "honest". However, S.S. was not aware that a lax approach to parenting can harm a child, and she often viewed disciplining as being "mean" to the child.

[31] S.S. related a family background in which she had been removed from her mother's care and had witnessed domestic violence and substance abuse.

[32] S.S. told Ms. Burns that she had been sober and had not used drugs or alcohol from 2011 to the summer of 2014 when she relapsed by using alcohol. She also maintained that she had once again stopped using alcohol and drugs in August 2014, a month after K.'s apprehension. Ms. Burns identified anxiety as an underlying factor in S.S.'s struggle to maintain sobriety.

[33] S.S. admitted to Ms. Burns that G. P. had been abusive to her from the outset of their relationship, and that the abuse had worsened over time. She also disclosed that she had known that he had 12 other children, with whom he had no contact. In addition, she indicated that he had told her that he had outstanding child sexual abuse charges relating to one of his daughters, arising from hiding in a closed and watching a man rape her.

[34] Ms. Burns questioned S.S.'s appreciation of the risks to which she had exposed K., in light of her decision to stay with G.P. despite repeated domestic violence, and to maintain contact with him until May 2015. She also noted that S.S. did not seem to appreciate the seriousness of G.P.'s inaction while his other daughter was assaulted. Ms. Burns noted that despite participation in a domestic violence prevention program in 2013, S.S. had chosen to return to her relationship with G.P. in 2014.

[35] Ms. Burns identified S.S.'s finances and loneliness as two factors which might cause her to put her own needs before K.'s. She weighed these factors against S.S.'s current sobriety, her current position on domestic violence, her desire to be a good parent to K., and her commitment to Mi'kmaw values and spirituality.

[36] She recommended continued monitoring for the remaining five months in this proceeding, and a different approach to parenting education. She concluded that if S.S could remain sober, improve her control of K.'s behaviours and stay aware from violent relationships, then K. could be returned safely to S.S.'s care. Otherwise, she recommended that K. be placed in permanent care.

[37] In her testimony at the hearing, Ms. Burns was asked if she supported K. being returned to S.S., given S.S.'s admitted use of marijuana between late May and late August 2015. Ms. Burns offered her opinion that based on S.S.'s history, her anxiety, her continued association with people who use substances, and in light of her relapse in 2015, the likelihood of future relapse increased. She noted that S.S. did not seek help during her most recent relapse until July 2015, approximately two months after she began using.

[38] As a result, Ms. Burns recommended that K. be placed in the permanent care and custody of the Minister.

Carolyn Scott

[39] Carolyn Scott was qualified to provide expert evidence in the area of psychology with particular expertise in the area of addictions. S.S. participated in counselling with Ms. Scott from October 2014 to September 2015, usually in weekly sessions.

[40] The focus of this counselling was primarily addictions. Ms. Scott noted that S.S. was working with someone at the Mi'kmaw Healing Centre with respect to domestic violence, and therefore this was not a primary focus in her counselling.

[41] Ms. Scott described S.S. as "a trauma survivor" who is likely to use "crisis coping and mechanisms", (i.e. not looking forward and planning but instead reacting in the moment). Ms. Scott testified that for a trauma survivor, underlying anxiety makes it easier for individuals to feel overwhelmed and relapse to drug and alcohol use.

[42] Ms. Scott diagnosed S.S. with "a substance dependence disorder in early remission". She expressed her opinion that S.S. required long term treatment, and that a period of stay at the Mi'kmaw Healing Centre would be good for S.S., as she would be less likely to relapse in a supportive setting. She testified that she is less concerned when people relapse using marijuana as opposed to alcohol or opiates.

[43] Ms. Scott commented favourably on S.S.'s supports, i.e. group addictions counselling, acupuncture, and attendance and use of sponsors at both Narcotics Anonymous and Alcoholics Anonymous groups. She expressed her opinion that S.S had "really tried" to overcome her use of substances and that she participated well and obtained additional services on her own. She noted also, that S.S. persevered after her relapse, and appears to have been sober since September 2015.

Holly White

[44] Holly White is K.'s child in care worker. She testified that K. had made gains in her current placement, and that she is now a very verbal and well-functioning little girl. She no longer had night terrors as she did at the outset of temporary care.

[45] On cross examination she testified that despite K.'s placement with family, and with a "culturally sensitive" foster home, K.'s "primary" language was now English, whereas she was identified as speaking primarily Mi'kmaw when she was first taken into care.

Michelle McLean

[46] Michelle McLean, the social worker who has been responsible for S.S. and K. since the summer of 2015, provided two affidavits. These affidavits, in conjunction with the affidavits of previously responsible social workers, Rachelle Sweeting and Christine Trainor, summarized the progress of this matter.

[47] Ms. McLean testified that in August 2015 the Agency had been intending to transition and expand access in S.S.'s home, and to provide attachment therapy for S.S. and K. However, after the first positive toxicology results were received, they

decided to follow Ms. Burns' recommendation to seek permanent care. Services other than access for S.S. ceased at that time, as the Agency felt S.S. could not modify her circumstances sufficiently, with an adequate period of supervision, in the remaining five months of Agency involvement.

[48] Ms. McLean recounted a conversation with S.S. in August 2015, where she reported that she only had used marijuana once to help her with a "panic attack".

Greg Taylor

[49] The affidavit of Greg Taylor, adoption worker, stated that access post permanent care would limit adoption opportunities for K., as most possible placements will not agree to ongoing access.

Jonna Francis

[50] The affidavit of Jonna Francis, family support worker, outlined her work with S.S. between September 2014 and August 2015. Ms. Francis found it difficult at times to engage S.S. in the material, and on occasion S.S. would not attend for family support work. Ms. Francis regularly included K. in S.S.'s sessions. She noted that at times S.S. did not adequately plan for her time with K.. She observed limited verbal communication between S.S. and K. during some visits. She

regularly noted that S.S. appeared to find it difficult to set limits for K., and inconsistently demonstrated her understanding of concepts covered in family support sessions.

Kristen Shauss

[51] Kristen Shauss' report indicated that K. and her foster mother had attended "to address past trauma and strengthen the connection between her and her foster mother". Ms. Shauss reported that K. had improved "in all spheres of functioning", and that this therapy should continue into January 2016.

S.S

[52] S.S submitted an affidavit, testified and was cross examined. She also submitted a letter from the Mi'kmaw Family Healing Centre, and a letter from the Native Council of Nova Scotia regarding the programs and services accessed by S.S.. Both letters were entered by consent.

[53] In her affidavit, S.S. outlined her plan for K.'s return to her care. She emphasized the importance of K. learning the Mi'kmaw traditional way of life, culture, language, dance, traditional healing and spiritual practices, and to "engage with and actively participate within a First Nations community". S.S. currently

lives off reserve, but in her testimony she committed to moving to the Mi'kmaw Healing Centre with K. for a year. She believed this would provide her with easy access to native programming and assist her in maintaining her sobriety.

[54] S.S is registered to attend an adult learning program and has reserved a spot for K. in the daycare K. had previously attended. She indicated that she has participated with programs at the Healing Centre, as well as programming at Addictions Services. She has sought out and attended parenting and anger management courses at the Women's Resource Centre and at the Native Council, and has investigated parenting programs at Maggie's Place. She attends Narcotics Anonymous and Alcoholics Anonymous meetings regularly, and has a sponsor for each organization.

[55] S.S. admitted in her affidavit to a "brief" alcohol relapse in the summer of 2014, and another relapse (marijuana) between the end of May and the end of August 2015. She attributes her latest relapse to an attempt to cope with anger and grief after a friend's suicide.

[56] S.S. admitted that she had initially told the collection nurse and Michelle McLean that she had only used marijuana on one occasion, but later admitted that she had used this drug regularly for approximately three months.

Issues

[57] The issues are as follows;

1. Has S.S made sufficient progress to allow her to adequately parent K. without a substantial risk of harm?

2. If permanent care and custody is ordered, should access be ordered?

Law

[58] This application is made pursuant to the *Act*.

[59] The Court is required to make a disposition that is in the child's "best interests": S. 42(1). The factors which the Court must address in reaching this determination are set out in S. 3(2):

> "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:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of the family;
>
> (b) the child's relationships with relatives;
>
> (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
>
> (d) the bonding that exists between the child and the child's parent or guardian;
>
> (e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
>
> (f) the child's physical, mental and emotional level of development;
>
> (g) the child's cultural, racial and linguistic heritage;

(i) the merits of a plan for the child's care proposed by an agency, including proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the care;

(l) the risk that the child may suffer harm through being removed, 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 circumstance."

S. 42(2) provides:

"The court shall not make an order removing the child from the care of a parent or guardian unless the Court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,

(a) have been attempted and failed;

(b) have been refused by the parent or guardian; or

(c) would be inadequate to protect the child."

S. 42(3) states that:

"Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person."

S. 42(4) provides that:

"The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably unforeseeable time not exceeding the maximum time limits based on the age of the child, set out in

> subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c.5, s.42"

[60] The Minister must prove on a balance of probabilities that there continues to be a substantial risk that the children will suffer harm pursuant to Section 22(2) of the *Act*.

[61] The test which must be applied is not whether other plans for the child will provide the best parenting, but rather whether the parents can provide "good enough" parenting without subjecting the children to a substantial risk of harm.

[62] The statutory time limit has expired, therefore this Court must either return the child to S.S. or make an order for permanent care.

Analysis

[63] The Minister submits that K. continues to be at substantial risk for physical harm, emotional harm, and repeated exposure to domestic violence.

[64] This Court accepts the Minister's view that S.S.'s actions in continuing her relationship with G.P. in 2014 and continuing contact with him until 2015, as indicative of S.S.'s continued lack of insight in this area.

[65] The Minister cites S.S.'s substance abuse as posing a significant risk to K.. Meredith Burns testified that alcohol abuse and drug use by a parent can put a young child at risk in a number of ways.

[66] S.S.'s testimony is that she can maintain sobriety despite her relapse in 2015. She is willing and able to reside at the Mi'kmaw Family Healing Centre, an alcohol and drug free location, for a year if K. is returned to her. She also has Alcoholics Anonymous and Narcotics Anonymous sponsors and group supports.

[67] S.S. has sought out additional supports for herself in the community in relation to her addictions. She is willing to voluntarily attend at services in the community and available on Reserve, relating to her addiction and parenting.

[68] S.S.'s problems with addictions are long standing. Carolyn Scott identified several positive factors which would mitigate S.S.'s chances of relapse: i.e., she did not give up after her relapse in 2015, she relapsed with marijuana, not other drugs or alcohol, she participated fully and sought additional assistance on her own, and in her opinion, she is sincerely trying to remain drug and alcohol free.

[69] S.S. cites her regular contact of Alcoholics Anonymous and Narcotics Anonymous sponsors and the fact that she is willing to live at the Mi'kmaw Family Healing Centre, as evidence that she will not use substances, and therefore K. will

not be at risk. The Court is concerned that once Agency supervision is lifted, S.S.'s use of sobriety supports will lag. The Court notes that S.S.'s use of substances is longstanding, and while S.S. reports long periods of sobriety (e.g. between 2011 and 2014), she has ultimately relapsed.

[70] The Court accepts Meredith Burns' testimony that S.S.'s untreated anxiety accentuates the risk of relapse. She has abstained for significant periods of time before and then has relapsed. Her 2015 relapse was for a significant period of time. S.S. initially did not report the relapse or seek help until she was forced to do so during drug testing, and even then she lied and said she had only used marijuana on one occasion.

[71] K. is a young child whose life has been significantly disrupted. She is doing well now, but the Court finds that the risk of further substance abuse relapse by S.S. is too great for this child. She needs stability and continuity. The Court finds that on the balance of probabilities S.S. cannot provide this for K. due to the high risk of substance abuse in the future.

[72] It is clear from the access notes and S.S.'s testimony that there is a great deal of love between mother and daughter. This Court accepts Ms. Burns' opinion that S.S.'s inability to discipline and set limits for K. leave her at significant risk of

physical harm. While recent notes from access visits show an improvement in access, it appears that this may be due to K.'s behaviours improving as opposed to any improvements in S.S.'s parenting.

[73] This Court must address the best interests of K., in particular s.3(2)(a),(b), and (g), relating to supporting K.'s Aboriginal culture and language. The Court finds that the Minister has satisfactorily addressed this factor in committing to a Mi'kmaw placement, and in the alternative, turning that responsibility over to Mi'kmaw Children and Family Services.

[74] S.S.'s ability to meet the cultural and language needs of the child do not outweigh the significant ongoing risks associated with her substance use and parenting deficiencies.

[75] Therefore, the Court finds that K. remains a child in need of protective services.

[76] No family or community placements have been presented to the Court.

[77] The Court finds that all reasonable services to promote the integrity of the family have been attempted and failed. It was noted by counsel for S.S. that services for her, other than supervised access, ended when the Minister made the decision to pursue Permanent Care and Custody. I find that no potential services

that could have been offered between September 2015 and January 2016 would have been sufficient to meet the concerns with respect to S.S.'s substance use and parenting.

[78] This Court accepts the Minister's plan to have K. placed in permanent care and custody with a view to adoption as being in the child's best interests.

Access

[79] S.S. seeks ongoing access to the child, K..

[80] The Plan of Care of the Minister is that K. will be placed for adoption without access to the Respondents. The evidence of Greg Taylor, adoption worker, is that an access order would restrict the adoption pool for the child.

[81] Section 47(2)(a) and (d) of the *Act* provides as follows:

> "47(2) Where an order for permanent care an custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
> > (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for placement…
> >
> > …(d) some other special circumstance justifies making an order for access"

[82] The Nova Scotia Court of Appeal considered s.47(2)(d) of the *Act* in **Children and Family Services of Colchester County v. K.T.** 2010 NSCA 72 at paras. 39-41:

> "39 Therefore, from my reading of s. 47, three conclusions relevant to this appeal are clear. First, the Agency effectively replaced the natural parents. This puts the onus on the natural parents (or guardian) to establish a special circumstance that would justify continued access. Second, by the virtue of ss.47(2)(a) and (b), an access order must not impair permanent placement opportunities for children under 12. Section 47(2)(c) is consistent with this. It provides that if no adoption is planned then access will be available. This highlights the importance of adoption as the new goal and the risk that access may pose to adoption. Third, for children under 12, the "some other special circumstance" contemplated in s.47(2)(d), must be one that will not impair permanent placement opportunities.
>
> 40 Therefore to, rely on s.47(2)(d) as the judge did in this appeal, the (special) circumstances must be such that would not impair a future permanent placement. When then would s.47(2)(d) apply? Consider for example a permanent placement with a family member which will involve contact with the natural parent. Presuming that the adopting parents would be content with that arrangement, the adoption would not be deterred. See **Children's Aid Society of Cape Breton-Victoria v. M.H.**, 2008 NSSC 242 at para. 25.
>
> 41 In short, access which would impair a future permanent placement is, by virtue of s.47(2), deemed not to be in the child's best interest. This represents a clear legislative choice to which the judiciary must defer."

[83] There are no special circumstances so as to justify access post permanent care. The Minister is planning to place this child permanently for adoption. I find that access would impede the child's opportunity for a permanent placement. There will be no access except for a final visit as arranged by the Agency.

Jean Dewolfe/JFC