FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. A.B., 2013 NSFC 16

Date: September 16, 2013
Docket: FKCFSA-075202
Registry: Kentville

Between: THE MINISTER OF COMMUNITY SERVICES

Applicant

and

A.B., K.D. and P.D.

Respondents

IN THE MATTER OF: The children S.B. (Born September […], 2000),
A.B. (Born September […], 2000),
J.D. (Born March [..], 2008), and
J.B. (Born August […], 2010)

DECISION

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

Judge: The Honourable Judge Marci Lin Melvin

Heard: Kentville, Nova Scotia

Dates Heard: June 17, 18, 19, 21 and 27, 2013

Counsel: Donald B. MacMillan, counsel for the Minister of Community Services
David Hirtle, counsel appearing on behalf of A.B.
Timothy Peacock, counsel appearing on behalf of K.D.
Oliver Janson, counsel appearing on behalf of P.D.

By the Court:

[1] (1) **Application and History of Proceedings**

[2] The Protection Application is dated April 24th, 2011. It sought a finding that four children (S.B., A.S.B., J.D., and J.B.) were in need of protective services pursuant to the ***Children and Family Services Act***, sec.22(2)(a)(b) & (g): that the children had suffered physical harm, or there is a substantial risk the children may suffer physical or emotional harm.

[3] At the 5 Day Stage on May 2nd, 2011, the Court found there were reasonable and probable grounds to believe the children were in need of protective services and ordered the children to remain in the care of the Minister, with access to the Respondents.

[4] On May 16, 2011, the continuation of the interim hearing, consent to the finding echoed the terms of the 5 day order.

[5] The pre-protection and protection hearings were combined and the parties agreed on June 9, 2011, to a finding that the children were in need of protective services. The terms of the order remained the same.

[6] At pre-disposition on August 17, 2011, both Respondents were incarcerated. K.D.'s counsel advised his client wanted the children to be placed with the maternal grandmother, P.D. The Minister was opposed to this plan.

[7] The Agency Plan of Care was filed with the Court on August 8th, 2011, seeking permanent care of all four children.

[8] On August 31, 2011, the disposition hearing was started on a ***pro forma*** basis and scheduled to continue November 21, 22, 23 and 24, 2011. At that time P.D. attended Court with counsel Christine Lazier, and advised she was seeking party status. Two months later, P.D.'s quest for standing was abandoned.

[9] On October 27, 2011, the parties consented to an order for temporary care.

[10] On December 14, 2011, the Court was informed K.D. would be granted day parole in January 2012 and full parole by July 2012. A.B.'s counsel had no instructions. The matter was adjourned to February 7, 8 & 9 of 2012.

[11] On January 26, 2012, Brock Beazley withdrew as counsel for A.B. and Peter vanFeggelen took over the case.

[12] On February 2, 2012, Peter vanFeggelen requested a parental capacity assessment advising he would not be prepared to proceed on the dates set for continuance of the disposition. The matter was adjourned to April 16, 18 & 19, 2012.

[13] On February 7, 2012, the parties consented to a further order for temporary care and custody.

[14] On April 16, 2012, the parties consented to a continuation of the temporary care order. The matter was adjourned to June 13, 2012.

[15] On June 13, 2012, the Court was advised Respondent, K.D.'s parole had been revoked, and the parental capacity assessment would not be available for 2 ½ months. A pretrial was set for September 19, 2012. The hearing was adjourned until October 1, 2, 3 & 4, 2012.

[16] Oliver Janson appeared on September 19, 2012 seeking standing to add maternal grandmother, P.D. as a party for custody of the two youngest children. D.B. MacMillan, for the Minister, said they would not support the children being placed with P.D.

[17] On September 24, 2012, with all but A.B.'s counsel present, the Court received a call that Peter vanFeggelen had "retired" from the practice of law effective immediately. The Respondent, A.B., was once again without legal counsel.

[18] On October 15, 2012, David Hirtle was present on behalf of Respondent, A.B. The issue of standing for P.D. still had not been heard, and A.B.'s new counsel didn't believe he could be ready for hearing by the end of April.

[19] The parties were back in Court on October 24, 2012 and dates were set for P.D.'s leave application for December 19 & 20, 2012 and dates for disposition, January 7, 8, 9 & 10, 2013.

[20] The matter was again before the Court on November 21, 2012, as a letter had been filed by D.B. MacMillan indicating the Minister neither consented nor objected to P.D.'s application for leave. The Court granted leave for P.D. to be added as a party. Oliver Janson, on behalf of P.D., requested disclosure.

[21] On December 20, 2012, Oliver Janson for P.D., requested a parental assessment to be done on P.D.

[22] The issue of time lines were again discussed and all Respondents agreed that it was in the best interests of the children to have "the full picture." Counsel for the Minister neither consented nor objected.

[23] An assessment was ordered and the continuation of the Disposition hearing was once more rescheduled to March 25, 26, 27 & 28, 2013.

[24] On March 13, 2013, the Court was advised Mr. Graham was requesting more time to do the parental capacity assessment on P.D. Hair follicle testing for P.D. was also an issue. The matter was again in Court March 20, 2013, and the matter scheduled for June 17, 18, 19, 20 & 21, 2013.

[25] The continuation of the disposition hearing commenced on June 17, 2013. David Hirtle, counsel for A.B., asked that he be excused for participating in the hearing, as his client was incarcerated for the murder of the mother of the two oldest children and would not be participating or putting a plan forward.

[26] (2) **Issues**

> (1) What is in the best interests of the children J.B. and J.D. - that they be placed in the permanent care of the Minister of Community Services, or that the matter be dismissed?

[27] (3) **Facts**

[28] The four children originally subject to this proceeding lived with the Respondents A.B. and K.D., and were taken into care by the Minister of Community Services on April 24, 2011.

[29] The Respondent, P.D., is the biological grandmother of the two youngest children, J.B. and J.D., mother of the Respondent, K.D., and made a party to these proceedings on November 21, 2012.

[30] Subsequent to the application, the Respondent, K.D., was incarcerated, where she remains as of the date of the hearing. Shortly before the hearing, the Respondent, A.B., was arrested on charges of murder, relating to the disappearance ten years ago of the mother of the two oldest children, A.S.B. and S.B. He is also incarcerated.

[31] No plan, other than that of the Minister of Community Services for permanent care, was put forward for the two oldest children, who were placed in permanent care.

[32] There are two plans before the Court for the care of J.D. and J.B., the two youngest children:

(a) The Minister of Community Services plan for permanent care;

(b) The Respondent, P.D.'s plan that J.D. and J.B. be placed with her, with supervised parenting time for her daughter, K.D., once she (K.D.) is released from the correctional facility.

[33] P.D. made an application pursuant to the Maintenance and Custody Act, R.S.N.S. ch 160, to be named as guardian and for primary care of the children. This application was filed on June 17, 2013, the first day of this hearing.

[34] (4) **Pertinent Legislation**

[35] At this late stage in the proceedings, the Court has only two options pursuant to the ***Children and Family Services Act***, **RSNS, Ch. 5, s. 42(1)** which reads:

> **(1) At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:**
>
> **(a) dismiss the matter;**
>
> **(b) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.**

[36] In the making of such an order the Court must also consider the following,

(abbreviated to conform to the facts of this case):

> 42 **(3) Where the court determines that it is necessary to remove the child from the care of a parent ..., the court shall, before making an order for ... permanent care and custody pursuant to clause ... (f) of subsection (1), consider whether it is possible to place the child with a relative, ... with the consent of the relative or other person.**
>
> **(4) 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 foreseeable time not exceeding the maximum time limits, based upon 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.**

[37] The reason for being limited to only two options is due to the time limits imposed by s. 45 of the ***Act*** which reads:

> **Where the Court has made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed:**
>
> > **(a) where the child was under six years of age at the time of the application commencing the proceedings, twelve months; or**
> >
> > **(b) where the child was six years of age or more but under twelve years of age at the time of the application commencing the proceedings, eighteen months, from the date of the initial disposition order.**
>
> **(2) The period of duration of an order for temporary care and custody, made pursuant to clause (d) or (e) of subsection (1) of Section 42, shall not exceed:**
>
> > **(a) where the child or youngest child that is the subject of the disposition hearing is under three years of age at the time of the application commencing the proceedings, three months;**
> >
> > **(b) where the child or youngest child that is the subject of the disposition hearing is three years of age or more but under the age of twelve years, six months; or**

> **(c) where the child or youngest child that is the subject of the disposition hearing is twelve years of age or more, twelve months.**

[38] The time limits have been extended by consent of the parties, and the disposition hearing was commenced on a ***pro forma*** basis within the time frame. However, this matter has significantly stretched the mandatory time lines set by the Legislature.

[39] The Disposition Hearing was held pursuant to s. 41 of the Act.

> **(3) The court shall, before making a disposition order, obtain and consider a plan for the child's care, prepared in writing by the agency and including ...**
>
> > **(d) where the agency proposes to remove the child from the care of a parent or guardian,**
> >
> > > **(I) an explanation of why the child cannot be adequately protected while in the care of the parent or guardian, and a description of any past efforts to do so, and**
> > > **(ii) a statement of what efforts, if any, are planned to maintain the child's contact with the parent or guardian; and**
> >
> > **(e) where the agency proposes to remove the child permanently from the care of custody of the parent or guardian, a description of the arrangements made or being made for the child's long-term stable placement.**

[40] (5) **<u>EVIDENCE</u>**

[41] (Mr. Janson filed written submissions July 23, 2013, Mr. Peacock on August 2, 2013, and from Mr. MacMillan on behalf of the Minister of Community Services on August 22, 2013.)

[42] The Minister called numerous witnesses, some more relevant than others.

(1) Coleen Shepherd conducted a parental assessment on the parents, but as neither were presenting a plan, centered her evidence around the two youngest children. Concerns at both births were drug/alcohol withdrawal and possible fetal alcohol syndrome disorder. When the children were released from the hospital, they were apparently doing well. The child, J.D., has symptoms relating to FASD.

(2) Shannon Lynn MacLeod, an adoption worker with the Department of Community Services, testified to adoption chances for older children, so it is unclear as to what effect that would have on the two younger children.

(3) Kevin Reid Graham, who prepared a parental capacity assessment on P.D. He was supportive to some degree of P.D. Her counsel argued:

> **Significantly, Mr. Graham, at the end of the day, does not feel that P.D.'s past history of drug use is an area of concern. He is encouraged by the new path that P.D. has taken over the past 10 years. He notes that she has demonstrated stability. He indicated that he had no reason to feel that she was not being sincere or forthright in discussing her past use of drugs and her subsequent abstinence. ... He feels it is in the past and one should be encouraged with the steps she has taken to take control of her life, (pages 177-184 of transcript).**

[43] Mr. Graham testified that if the children did not have special needs, he would have recommended she parent one or both children.

[44] In his assessment summary Mr. Graham concludes, however, that even though her heart is in the right place in wanting to care for her two grandchildren, because of their very special needs, in part due to the substance abuse of their parents, she cannot comprehend the scope of those needs. He states it would be overwhelming and stressful for all concerned if she were to do this.

[45] He also noted:

> **I am also concerned about the possible plan of K.D. moving back into the home of P.D. and the children if they were placed there. I do not believe that P.D. could assert herself against K.D.'s influence leading to more potential harm for the children.**

[46] He recommends permanent care for both children.

[47] (4) Jennifer Dawn Lewis testified that she had significant contact with the youngest child, J.B., who has been referred to Nova Scotia Hearing and Speech, as the child has had significant difficulties. J.B. however is making progress.

[48] (5) A.A. (Sandy) MacIntosh, gave evidence on behalf of the Minister.

[49] (6) Annette Davidson also testified on behalf of the Minister. The Court has concerns with respect to this witness's testimony, in particular what she referred to as the "low lights" she provided to her lawyer regarding P.D.

[50] Mr. Janson, on cross examination of Ms. Davidson, brought to the Court's attention that the negative points in her Affidavit were merely the "low lights" of an access facilitator's report. Mr. Janson argues:

> **It is interesting to note that Ms. Davidson cut and pasted only the "low lights" of the visits as documented by Ms. Forbes. Ms. Davidson admits that she only provided the "low lights" to her counsel (page 477 of the transcript). Unfortunately, her edited version ended up being attached to her Affidavit. Had it not been noticed, that only an edited version of Ms. Forbes notes were being submitted, then the Court would have been left with a skewed view of what happened at the visits. Ms. Davidson swore to the Affidavit as being the notes of the access visit. Ms. Davidson admits that she only briefly checked her Affidavit before it was filed with the Court on the 17th of June.**

[51] Mr. Janson also argues that the Agency did very little to assist P.D., consider her as a kinship placement, or see past her history with the agency to give these two children a chance of being with family. Considering the evidence of Ms. Davidson, the Court finds merit in these assertions.

[52] Only two witnesses testified for the Respondent: Tammy Reid and P.D. herself.

[53] (7) Tammy Reid was in support of P.D. having the children. She is an early interventionist and works with families with special needs children. She is familiar with fetal alcohol syndrome disorder and stated she could help J.B. as he too suffers from fetal alcohol syndrome disorder.

[54] (8) P.D. testified on her own behalf. Clearly she wants to raise her grandchildren. She has spent a significant amount of time with them. She has not had an easy life, but seems to have risen above her past.

[55] The evidence that P.D. would allow her daughter K.D., the children's mother, to return to her home and live with her and the children, once released from prison, however, as well as P.D.'s apparent denial that these children are not high needs, causes the Court concern.

[56] The Court did not hear evidence from K.D., although she was present for the hearing. She is in prison, and did not present a plan. For similar reasons, no evidence was heard from A.B.

[57] (6) **ANALYSIS**

[58] The Court has to determine on a balance of probabilities if it is in the best interests of the children to place them in the permanent care of the Minister or to dismiss the matter. If the matter is dismissed, the children cannot go back to their parents as both are incarcerated. An order would have to be granted forthwith giving P.D. custody under the ***Maintenance & Custody Act***.

[59] Prior to making an order for permanent care, the Court has to consider s. 42(3), that is, placing the children with a relative (in this case, P.D.) with the

relative's consent. If, however, the children were placed with the relative (P.D.) the Court would have to be convinced that P.D. could protect the children from the chaos to which they were exposed while they lived with their parents. If the Court is satisfied dismissing the matter and granting P.D. custody would not adequately protect the children, then the Court has to consider permanent care.

[60] It is always a determination of what is in the children's best interests.

[61] Potential family placements versus permanent care and custody has been and continues to be an important and necessary focus of the Court.

[62] Mr. MacMillan argues: "...I recommend to this Court, the decision of the Nova Scotia Court of Appeal expressly adopting the decision in **Family and Children's Services of Kings County v. B.D. [1999] N.S.J. No. 220 (C.A.)** at paragraph 19, the principles taken from the trial decision in **N.S. (MCS v. S.B. [1999] N.S.J. No. 144 (Fam. Ct.)**"

> **" The word 'possible' [in section 42(3)] must be read in the context of the whole of the *Act* and in a fashion consistent with the stated purpose of the Act, Section 2(1). Extended family is a placement alternative that is desirable and consistent with the Act, as is support for families and alternatives that minimize the intrusiveness of these actions. Any placement alternative, however, must be considered in the context of the needs and best interests of the child. Section 3(2) defines family security and**

> **relationships as a consideration in determining the child's best interests not an overriding trump to the child's best interests."**

[63] In the case of **Halifax v. S.G., [2001] N.S.J. No.153 (C.A.) Para. 21**, the Court said:

> **"As the Court stated in Family and Children's Services of Kings County v. D.B., supra, at ss. 19, the provisions of the Act giving priority to family placement and requiring that the least intrusive alternative be pursued must be interpreted and applied in the context of the Act as a whole and in light of its paramount purpose to further the best interests of the children. All placement alternatives must be considered in the context of the needs and best interests of the children."**

[64] The Court must also be satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time so that the child can be returned to a parent or guardian. (S. 42(4))

[65]There are a number of undisputed facts the Court must consider: the unrefuted evidence of the heinously abusive home life J.B. and J.D. had with their parents, even when P.D. was with them. The children were enveloped in a drug culture so all-encompassing that their mother was not even drug or alcohol-free when she was pregnant with them and as a result the children are suffering from varying degrees of difficulties, certainly one child with some degree of FASD; possibly both. P.D.'s

evidence is that she tried valiantly to get help, and that she spent so much time with them in their home because she knew what was going on and wanted to be there to make sure the children were safe. The Court accepts her evidence that P.D. tried her very best to keep the children safe under the circumstances.

[66] The problem is this: P.D. presented as a soft-spoken, gentle person; she clearly loves her grandchildren. But the Court would have serious concerns as to how P.D. would ever be able to stand up to K.D., once K.D. is released from prison, or A.B., if he were. P.D. was not able to do so in the past. There is no evidence that she would be able to do so in the future. P.D.'s evidence came across as being näive, to the point where it affected her credibility.

[67] In fact, the Court noted her to be näive, and, Mr. Graham's evidence also noted her to be näive (at page 247 of the transcript). Mr. Graham says:

> **"...I felt she was kind of naive ... the tipping point for me is whether she has the capacity now ... to take care of two children full time with the needs that these children are presenting."**

He goes on to say at page 248:

> **"...if the children were not challenged with such special needs and maybe if we had one child I'd have no concerns about P.D. being able to meet parenting needs. Well maybe some limited."**

[68] He testified he simply didn't think she could parent these two children with the kinds of needs they have concluding:

> **"...it would just be overwhelming for her."**

[69] Having observed P.D. and carefully considered her evidence, the Court finds merit in the proposition that parenting these children would be overwhelming for anyone, but perhaps especially for P.D. with the added detriment of having to try somehow to regulate and monitor K.D.'s parenting time with them.

[70] As noted earlier, K.D. did not give evidence. However, there is evidence before the Court regarding K.D. in Stephen Theriault's psychological assessment of K.D., as part of Exhibit 17.

[71] Mr. MacMillan for the Minister argues:

> **K. D. chose to be present throughout the disposition hearing, but for her own reasons declined to forward any evidence much less put a plan before the Court. She is and must be regarded as silent with respect to J. and J.'s futures. Out of her own best interests better she be silent than be subject to cross examination out of which the merits of any future contact by her with these children could be subject to judicial scrutiny. The only one proposing any contact by K. D. with J. and J. in the future is P. D. and, in the Applicant's mind, P.D.'s motives are a transparent veneer.**

> **Then of course A.B. Sr., currently remanded on allegations of murdering his first common-law partner, (K.D.'s predecessor) will at some point, sooner or later, have the opportunity to re-involve himself in the custody/access mix as an MCA order would provide that opportunity.**
>
> **In opposition to any disposition that affords the remotest opportunity for K.D. and her mother to in any fashion jointly raise J. And J., the Applicant recommends to the Court a close reading of Stephen Theriault's psychological assessment of K.D., being part of Exhibit 17. In this report the reporting psychologist at excerpts from page 4 notes indicia "... indicative of Anti-Social Personality Disorder ... her ability to make a good first impression disguises characteristic exploitiveness ... interpersonal relationships are likely to be shallow and dependent or exploitive ...she has an irritable and vindictive reaction to even minor pressures ... strong feelings of dependency and a tendency to subordinate herself to a stronger and hopefully nurturing order ... both anxiety and depressive symptoms ..."**

[72] P.D. has a fractious history with K.D. K.D. and A.B. lived with P.D. for 3 - 4 months in 2006; K.D. and A.B. were using drugs in P.D.'s home, and P.D. testified she didn't even want to go home anymore and her landlord had to help her remove them. She said after that she was at K.D. and A.B.'s home "fairly frequently."

[73] P.D. testified she called Children and Family Services regarding A.B.'s behaviour, she "called the cops," she felt threatened by A.B., she "knew he did something" to K.D., and A.B. "... almost killed [K.D.] numerous times is what she ... told me." She knew K.D. was using drugs when she was pregnant with J.D. When K.D. and A.B. moved to Grand Pré, she knew they were using drugs on a

daily basis. P.D. said she made calls and reported them the "... whole six years they were together." P.D. saw A.B. be aggressive towards her 79 year old father and said he was scared of him. P.D. identified an exhibit which consisted of syringes, needles and a mortar and pestle from A.B. and K.D.'s kitchen cupboard. P.D. testified K.D. told her she drank considerably during her pregnancies, and that her parole was revoked because she breached the conditions by associating with "unsavory characters." P.D. testified that she did drugs, including with K.D., when K.D. was pregnant, including cocaine.

[74] In spite of all of the above and more, P.D. still intends to allow K.D. parenting time with the children once her term of imprisonment is up.

[75] This is very concerning to the Court. Based on the evidence, the Court finds this situation could quickly devolve into a dynamic that is not in the children's best interests and would put them at risk of harm.

[76] J.B. and J.D.'s human provenance is a burden no child should ever have to bear. If the Court dismisses this matter, that human provenance will always be with

them. Is that in their best interests? Section 2(2) of the ***Children and Family Services Act*** sets out:

> **"In all proceedings and matters pursuant to this *Act*, the paramount consideration is the best interests of the child."**

[77] P.D. has not said she was K.D.'s backup plan. But the Court finds it interesting that P.D. had counsel and advised the Court she was seeking standing at an earlier stage in the proceedings, only to exit when K.D. was planning on early release, and then to re-apply after K.D.'s parole was revoked. K.D.'s counsel told the Court on October 27, 2011 that his client planned to file a Plan of Care when she was released from prison, her day parole to commence January 2012, and on November 2, 2011, counsel was advised P.D. was not pursuing standing. When K.D.'s parole was revoked, P.D. once again made an application for standing.

[78] The Court finds P.D. may indeed be K.D.'s back-up plan, certainly as far as at least keeping the children in the family are concerned

[79] In the case of **Halifax v. D.H. [2006] N.S.J No. 217 (C.A.) para. 34**, the Court notes:

> **"In view of the wealth of information in [the] possession of the Agency which did not remotely favour Ms. S. [the paternal grandmother] as a custodian for the children, the Agency cannot be faulted for declining to conduct a home assessment. As the evidence unfolded, however, it was clear that an assessment was neither necessary nor appropriate. It speaks volumes that Ms. S. was presenting as a back-up alternative only. Incredibly, she continued to support return of the children to their mother notwithstanding the mountain of evidence demonstrating the chronic neglect in their parent's care." Children's Aid Society of Halifax v. D.H. [2006] N.S.J. No. 217 (C.A.), para. 34.**

[80] Several witnesses have testified that these children have special needs.

[81] Exhibit 10, written by Pediatrician, William Vitale, on child, J.D., stated: "[J.D.] has strong signs of fetal alcohol spectrum disorder, including conformation of lips and philtrum, ... hyperactivity and distractibility, language and motor milestones ... he should be delayed one year in school entrance."

[82] P.D. testified she didn't have enough time with the children to know if they had special needs. Kevin Graham testified P.D. might be in denial about the children having special needs.

[83] Regardless, most unfortunately, J.D. and J.B. require special attention.

[84] **CONCLUSION**

[85] After considering all of the evidence before the Court and affording it the weight the Court believes it merits, the Court finds, on a balance of probabilities, that it would not be in the best interests of these children to be in the care of P.D. P.D. does not understand the needs of these children. P.D. is not able to control K.D. and never has been able to do so, and the prospect of P.D. allowing K.D. parenting time is alarming.

[86] If K.D. and A.B. were not in the picture, if P.D. understood the seriousness of the children's needs, if parenting these two children with their special needs was not overwhelming, if the children's human provenance was not such a burden for them to bear, if P.D. were more than just a potential "back up plan" for K.D., and if P.D. did not plan on allowing K.D. parenting time, the Court may have found otherwise. P.D. presented as a caring grandmother but the Court must only consider what is in these children's best interests. The Court orders that J.B. and J.D. be placed in the permanent care of the Minister of Community Services.

_____

M. Melvin
A Judge of the Family Court
for the Province of Nova Scotia