IN THE FAMILY COURT
FOR THE PROVINCE OF NOVA SCOTIA

Citation: M.H. v. Nova Scotia (Community Services), 1993 NSFC 1

Date: 19930120
Docket: F.Y. 92Y0129
Registry: Yarmouth

Between:

M.H.

Applicant

- and -

The Minister of Community Services

Respondent

Restriction on publication:	CFSA 94(1)
Judge:	His Honour, Judge David A. Milner A Judge of the Family Court
Heard:	December 2, 1992 at Yarmouth, Nova Scotia
Written Decision:	January 20, 1993
Counsel:	M.H., the Applicant, representing himself Reinhold M. Endres, Q.C., counsel for the Respondent

TO PUBLISHERS OF THIS CASE:

PLEASE TAKE NOTE THAT SECTION 94(1) OF THE **CHILDREN AND FAMILY SERVICES ACT** APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADINGS BEFORE PUBLICATION

SECTION 94(1) PROVIDES:

> 94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

INTRODUCTION

[1] This is an application by M.H. to have his name removed from the Child Abuse Register pursuant to Section 64(2) of the **Children and Family Services Act,** S.N.S. 1990, c. 5 (the "Act"). It is the first such application to come before the Court for consideration since the Act came into force on September 3, 1991.

[2] On August 24, 1992 the Applicant was convicted of assault in Provincial Court contrary to Section 266 of the Criminal Code. The assault was committed against a thirteen year old boy.

[3] As a result of the conviction, the Applicant's name was automatically entered on the Child Abuse Register pursuant to Section 63(2)(b) of the Act and Section 63(1)(u) of the Regulations and the following notice was sent to the Applicant on August 28, 1992:

> You are hereby notified that your name has been entered in the Child Abuse Register. A copy of the Registration which appears in the Child Abuse Register is attached.
>
> This is to advise you that you may apply to the Family Court at any time to have your name removed from the Child Abuse Register.

[4] On September 16, 1992, this application to the Family Court was made by M.H. to have his name removed from the Register.

[5] The Minister of Community Services is required to maintain a Child Abuse Register in accordance with the provisions of the Act and authorized regulations. Section 63 of the Act provides:

> 63(1) The Minister shall establish and maintain a Child Abuse Register.
>
> (2) The Minister shall enter the name of a person and such information as is prescribed by the regulations in the Child Abuse Register where
>
> (a) the court finds that a child is in need of protective services in respect of the person within the meaning of clause (a) or (c) of Subsection (2) of Section 22;

(b) the person is convicted of an offence against a child pursuant to the Criminal Code (Canada) as prescribed in the regulations; or

(c) the court makes a finding pursuant to Subsection (3).

(3) The Minister or an agency may apply to the court, upon notice to the person whose name is intended to be entered in the Child Abuse Register, for a finding that, on the balance of probabilities, the person has abused a child.

[6] Section 3(1)(e) defines a "child" to mean "a person under sixteen years of age unless the context otherwise requires".

[7] Section 62 of the Act provides the following:

In Sections 63 to 66, "abuse" of a child by the person means that the child

(a) has suffered physical harm, inflicted by the person or caused by the person's failure to supervise and protect the child adequately;

(b) has been sexually abused by the person or by another person where the person, having the care of the child, knows or should know of the possibility of sexual abuse and fails to protect the child; or

(c) has suffered serious emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour, caused by the intentional conduct of the person.

[8] The Governor in Council has made Regulations pursuant to the Act including Regulation 63(1) which provides as follows:

63 (1) For the purpose of clause (b) of subsection (2) of Section 63 . . . the following offences are hereby prescribed by reference to the appropriate section numbers of the Criminal Code of Canada;

(a) 151 – sexual interference
(b) 152 – invitation to sexual touching
(c) 153 – sexual exploitation
(d) 155 – incest
(e) 159 – anal intercourse

(f) 160(3) – bestiality in the presence of or by a child
(g) 170 – parent or guardian procuring sexual activity
(h) 171 – householder permitting sexual activity
(i) 172 – corrupting children
(j) 173(2) – indecent exposure
(k) 212(1)(h) – aiding, abetting or compelling a person to engage in prostitution
(l) 212(1)(j) – living on the avails of prostitution
(m) 215(1)(a) – failure to provide necessaries
(n) 218 – abandoning child
(o) 220 – causing death by criminal negligence
(p) 221 – causing bodily harm by criminal negligence
(q) 235 – murder
(r) 236 – manslaughter
(s) 239 – attempted murder
(t) 244 – causing bodily harm with intent
(u) 266 – assault
(v) 267 – assault with weapon or causing bodily harm
(w) 268 – aggravated assault
(x) 269 – unlawfully causing bodily harm
(y) 271 – sexual assault with a weapon
(z) 272 – threats to a third party or causing bodily harm
(aa) 273 – aggravated sexual assault
(ab) 279 – kidnapping

[9] Section 66 provides that information contained in the Register is confidential and limits access to the information to certain persons and situations. A person whose name has been entered is entitled to inspect the information relating to that particular entry. With the approval of the Minister a child protection agency may be given certain information when investigating whether a child is in need of protective services. When a person is applying to be a foster parent, to adopt a child, or to work with children, information may be disclosed on written request about a particular person, but only with the written consent of that person.

Section 64(2) of the Act provides:

> (2) A person whose name is entered on the Child Abuse Register may apply to the court at any time to have the person's name removed from the Register and, if the court is satisfied by the person that the person does not pose a risk to children, the court shall order that the person's name be removed from the Register.

BACKGROUND INFORMATION

[10] The Applicant is an intelligent forty-five year old man who resides near Yarmouth, Nova Scotia. He is a university graduate and is self-employed in the Yarmouth area. He is the owner of several apartment units one of which was formerly occupied by H.S. and her five children. I shall refer to the oldest of her children as "Billy". It was against Billy, then aged thirteen years, that the Applicant was convicted of assault.

[11] The Applicant and H.S. became involved in a close relationship beginning around the end of 1990. The relationship resulted in the birth of a sixth child to H.S., a daughter born in August of 1992. That daughter is the subject of a contested custody application brought in Family Court by M.H. and not yet resolved by the Court.

[12] Although it is a separate proceeding, the Applicant considers the Child Abuse Register to be a major obstacle in his claim for custody of his daughter. He sees the entry on the Register to be a "trump card" held by H.S. in those proceedings and it appears to be the main reason why he is making this application to have his name removed at this time.

[13] The Applicant maintains that he does not now and has never posed a risk to children despite the conviction for assault against Billy which resulted in the entry on the Child Abuse Register.

[14] During the course of their relationship H.S. permitted the Applicant to fulfil a parenting role in relation to her five children, and in particular he was involved in matters of discipline. Acting as a step-parent, the Applicant emphasized the need for the boys (aged 13, 12 and 10 years) to do their school homework. They had not

been doing well in school and he recognized the need for improvement. Because of this he was unpopular with them, particularly with the oldest boy, Billy.

[15] On the evening of January 20, 1992, while at home, Billy was verbally abusive towards the Applicant and, as an attempt at discipline for the unsuitable language used, the Applicant forcibly, and with strong resistance from Billy, carried him to the bathroom and held him still while he washed Billy's mouth with soap. Billy testified (in these proceedings, as a witness called by the Applicant) that the Applicant banged his head twice on the floor. The Applicant stated that he had merely held Billy's head still to prevent being hit by it while washing his mouth.

[16] Billy's mother was at home at this time and was aware of what was happening on January 20th. No complaint was made to the authorities until February 23, 1992 when she contacted the Children's Aid Society. As the result of a police investigation which began on February 25, 1992 an assault charge was laid and was tried in Provincial Court in August. In whatever manner the evidence unfolded in Provincial Court, M.H. was convicted of assault and placed on probation.

[17] Apart from the incident on January 20th, Billy testified that the Applicant had never hit him. The Applicant maintains that this was the only time in his life that he has ever been charged with assault and that he has never abused children.

[18] The Applicant also testified that he loves children and has a good relationship with other children. He has four young children living in another country, and not in his custody. He has two children living in the Yarmouth area. Neither of these two children is in his custody although he has access rights in relation to the older child and is currently seeking custody of the younger child. Several years ago he taught children in school or kindergarten for a short while, and got along well with them and had no problems.

[19] The Applicant called a young mother of two young children to testify on his behalf. She is a neighbour and has been a tenant of his since June or July of 1992. She testified that the Applicant's young son appears to enjoy being with him during periods of access and that her own children, boys aged 6 and 8, both like him. She said that she is quite content to leave her children in his care and has no concern about their safety.

[20] The Applicant feels that he is not any risk to children and that the assault was a "technical" assault at best and confined to the unique circumstances of his relationship with H .S., which has since ended.

[21] Because of depression resulting from the breakup of the relationship, the custody dispute, assault charge, and conviction, the Applicant arranged (following discussions with his probation officer) to see a psychiatrist or psychologist; however he did not require that person or any other professional to offer an opinion to the Court as to whether or not he might pose a risk to children.

COMPARISON WITH FORMER LEGISLATION

[22] Prior to September 3, 1991, there was a Child Abuse Register maintained under the **Children's Services Act** (now repealed).

[23] Entries on the old Register were as a result of administrative decisions without the necessity of any judicial consideration. Upon entry, the person whose name was entered had to be notified and that person could apply to the Court to have the name and information struck from the Register.

[24] Under the **Children's Services Act** the only direction to the Court on an application to strike was found in Section 44(3) which provided:

> (3) In considering an application . . . , the court or a judge thereof may exercise its or his discretion as to whether the information should remain in or be struck from the child abuse register.

[25] Cases under the former Legislation have held that the burden of proof was not on the Applicant, but remained on the Respondent Minister or Administrator responsible for maintaining the Register to show that there had been some kind of abuse by the Applicant and that the recording should not be struck from the Register. [See for example: *W.L. v. Minister of Community Services* (1990), 101 N.S.R. (2d) 181 (Ferguson, J.F.C.) and *D.M.E. v. Minister of Social Services* (1987), 80 N.S.R. (2d) 46 (Daley, J.F.C.)]

[26] Under the new Act the Register entry can only be made following a specific judicial finding as required by Section 63(2) or (3) of the Act. The burden of proof is clearly on the Applicant, under Section 64(2) to satisfy the Court that "the person does not pose a risk to children".

[27] The Applicant was permitted to lead evidence during the hearing to explain the nature of the assault. Without appearing to re-try the criminal case I felt that it would be useful for the Family Court, in deciding whether or not the Applicant poses a risk to children, to understand something of the circumstances in which the assault was committed.

[28] Clearly the Family Court has no jurisdiction to interfere with the criminal conviction entered by the Provincial Court. The only way for the Applicant to challenge the conviction is by way of appeal. There has been a notice of appeal filed by the Applicant; however, it appears that nothing more has been done in the appeal process. It should be noted that, if the appeal did proceed and if it were successful, Regulation 59(2) would appear to require the automatic removal of the appellant's name from the Register.

[29] A decision in this case is confined to the evidence, findings and issues in this specific proceeding and should not be construed as a variation of the Provincial Court's decision or as a decision in any other proceeding before the courts.

"**RISK TO CHILDREN**"

[30] The definitions of "abuse" in Section 62 of the Act coincide with some of the definitions in Section 22 of what is meant for a child to be "in need of protective services".

[31] There is no definition in Section 64 of what is meant by "risk to children"; therefore, I think the Legislature must have intended the meaning to be the same as the risk defined in Section 22, *i.e.* "substantial risk", or "a real chance of danger that is apparent on the evidence".

[32] It would appear inconsistent to interpret "risk", for example, as the "possibility" of harm. Such an interpretation would in my view place an unfair and

excessive onus on an Applicant and does not appear to be the intention of the Legislature.

PRESUMPTION OF ABUSE, AND REVISITING THE CONVICTION

[33] Under the new Act each entry on the Register results from a judicial finding in one of the three different situations specified in Section 63(2).

[34] An entry under Section 63(2)(a) or (c) results from a specific finding that the person has "abused" a child [within the meaning of Section 62, and reference to Section 22(2)(a) and (c)] and therefore it is appropriate that the name should be placed in the Child Abuse Register.

[35] An entry under Section 63(2)(b), however, does not result from such a finding. In most cases, I suspect, the Child Abuse Register and the definitions of "abuse" under this Act are not under consideration by the particular criminal court. The judge or jury, in whatever province the trial occurred, might not even be aware of the **Children and Family Services Act** of Nova Scotia, or, if they were, it would not be a proper consideration in finding the accused person guilty or not guilty of the particular crime.

[36] Similarly, an accused person in entering a guilty plea to a criminal charge (and her/his lawyer providing advice) might not have given any thought to the existence or the implications of Section 63(2)(b) of the Act.

[37] In providing that the name of such a person be automatically placed on the Child Abuse Register the Legislature has created a presumption that the person has abused a child within the meaning of Section 62 of the Act.

[38] Any legal presumption may be rebutted; the onus of doing so being on the person against whom it operates.

[39] For these reasons I think the Court should allow an Applicant (in a conviction-based entry) considerable scope in leading evidence about the circumstances of the conviction in order to rebut the presumption of abuse (but not to disturb the conviction, since only an appeal can do that).

[40] For example, as in the case at bar, the Applicant should have been able to lead evidence (and he did, by calling Billy as his witness) to attempt to prove that the child (although assaulted within the meaning of Section 266 of the Criminal Code) did not suffer physical harm [s. 62(a) abuse definition] or did not suffer serious emotion harm [s. 62(c) abuse definition].

[41] The presumption would normally be more difficult to rebut in the more serious criminal convictions.

[42] Because there is no presumption of abuse in entries under Section 63(2)(a) and (c), I think the Court should not ordinarily permit the circumstances of the specific abuse finding to be revisited during an application to remove a name. In those cases it would appear that the emphasis in an Applicant's case should be on changes occurring since the finding.

EVIDENCE REQUIRED

[43] The Legislature, not being able to foresee the many different circumstances which might arise, has decided to permit any person who feels that her or his name should not remain on the Child Abuse Register to ask the Family Court to remove it.

[44] No specific direction is given to the Court as to the kind of evidence which an Applicant should be required to present. For example, there is no requirement, as there could have been, that the Applicant must file a report by a qualified professional person or call such a person as a witness to state that the Applicant does not pose a risk.

[45] The Court appears to have been given the discretion to consider each application on its own merits and with its own unique circumstances. Each Applicant is free to decide what evidence to offer in an attempt to satisfy the Court that the person does not pose a risk to children. In many cases (particularly in the more serious criminal convictions or abuse findings) a psychiatric, psychological or other professional assessment would be necessary, along with the other evidence, to satisfy the Court.

BURDEN OF PROOF

[46] Under Section 63(3) of the Act the burden of proof on the Minister or an agency to establish abuse (resulting in entry on the Register) is "on the balance of probabilities". It would appear that the burden on an Applicant for removal, under Section 64(2), should be no heavier.

[47] As to the standard of proof required, in cases such as these, I agree with the views expressed by Grant, J. in *H.(P.) v. H.* (1985), 72 N.S.R. (2d) 104 (N.S. Sup. Ct. - T.D.) at page 108:

> It is a civil action in which proof is to be on the balance of probabilities or by a preponderance of evidence. Where the allegation is one involving the commission of a criminal offence the standard of proof, although not required to be beyond a reasonable doubt, is by a strong balance of probabilities or a strong preponderance of evidence commensurate with the gravity of the offence or conduct alleged.

CONCLUSIONS

THE PRESUMPTION OF ABUSE:

[48] If the Applicant can satisfy the Court that the criminal assault did not amount to abuse as defined in the Act then his name should be removed from the Register without further consideration. He would have to prove that the child has not experienced any of the three circumstances described in Section 62: physical harm, sexual abuse, or serious emotional harm.

[49] The evidence before the Court is consistent with the conclusion that the child suffered some physical harm. Billy's testimony is that he had a headache resulting from the incident. There is no evidence which I consider satisfactorily rebuts that. Perhaps there is evidence which could have shown that the headache was not very serious or that it was not related to the assault; however, there was no such evidence produced.

[50] I therefore conclude that the presumption has not been rebutted and the name should not be removed without further consideration.

THE OVERALL APPLICATION:

[51] Four witnesses were called to give evidence at the request of the Applicant. The Applicant also testified. The Respondent did not call any witnesses.

[52] I have carefully considered the evidence and submissions on behalf of the parties. I thank Mr. Endres and Mr. H. for their written submissions which have been most helpful.

[53] The criminal assault was a relatively minor one in comparison with other assaults and the presumed abuse which would exist on conviction for the other Criminal Code sections listed in Regulation 63. That is not to condone the use of excessive force in the discipline of a child; however, it is relevant to examine the degree of the assault in assessing risk.

[54] The assault took place a year ago, in the context of a stressful family relationship which no longer exists. The Applicant is no longer acting as a step-parent to five children, including three boys entering their teens.

[55] I accept, as reliable evidence, the testimony of the Applicant and H.C. (the neighbour) that the Applicant has a good and loving relationship with other children. I am satisfied on the evidence offered to the Court that the assault was an isolated event and not part of a pattern of violence. I am satisfied that the Applicant did not intend to physically harm the child.

[56] After considering all of the evidence and applying the law as I understand it to be I am satisfied that the Applicant, M.H., does not pose a risk to children and I therefore order that his name be removed from the Child Abuse Register.

JUDGE DAVID A. MILNER
A Judge of the Family Court

for the Province of Nova Scotia