IN THE FAMILY COURT OF NOVA SCOTIA
Citation*: Nova Scotia (Community Services) v. D. W.*, 2009 NSFC 23

Docket: FLBCFSA-064588
Registry: Bridgewater

Between:

Minister of Community Services

Applicant

v.
D.W., M.T.
and J.S.

Respondents

Restriction on publication: PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING 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.

Judge: The Honourable Judge William J. Dyer

Heard: October 7, 2009 at Bridgewater, Nova Scotia

Decision: October 26, 2009

Revised Decision: The text of the decision has been revised to protect the identity of certain parties. This revised version is released on November 16, 2009.

Counsel: Philip S. Gruchy, for the Applicant
A. Franceen Romney, for the Respondent, D.W.
Jennifer Rafuse, for the Respondent, M.T.

Shawn P. D'Arcy, for the Respondent, J.S.

By the Court:

[1] This proceeding under the **Children and Family Services Act** ("**CFSA"**) concerns three children: S. (almost five years old), R. (about three years of age), and L. (soon to be one year old). D.W. is the mother of all three children. M.T. is L.'s father. And J.S. is the father of R. and S.

[2] The main focus of a recent hearing was on S. and where she should reside pending the disposition hearing. A secondary issue was whether J.S. should be the subject of a psychological assessment.

Background

[3] At the first interim hearing on June 4th, after determining that there were reasonable and probable grounds to believe that all of the children were in need of protective services, I placed S. in the temporary care and custody of the Minister of Community Services ("the agency") and placed her siblings in the care of D.W. and M.T., subject to agency supervision, on specified terms and conditions. The interim hearing was completed on July 13th when the status quo was maintained for all practical purposes.

[4] In my absence, another judge conducted a brief protection hearing on September 11th (on the understanding that the judge would not be seized with the case). The judge made a finding that each child was in need of protective services with the consent of M.T. and J.S. *via* their respective lawyers. D.W. did not consent to the finding under section 40 of the **CFSA**, but neither did she oppose it. The judge did not make any decisions about S.'s placement nor did she rule on the psychological assessment issue. The matter was returned to my docket for hearing on those issues.

The Evidence

From the Agency

As will appear from social worker Rochelle Tanner's August 5th affidavit, it was J.S. who prompted the local agency's involvement when he went on a quest, starting in

mid-October 2008, to determine the whereabouts and circumstances of his two children. It was learned that D.W. and M.T. were in the Ottawa, Ontario area, that there was child protection agency intervention there, and that S. had been taken into care. Reportedly, D.W. wanted J.S. to assume S.'s care. Understandably, the Ottawa agency first wanted a home study because J.S. had not previously parented his daughter full-time, there were questions about residence adequacy, and there were concerns surrounding his family history and lifestyle. (D.W. had disclosed that J.S. had no family support and limited accommodations.)

[5] By the end of November, J.S. had confirmed a past history of heavy alcohol use; and countered with allegations of significant drug and alcohol use by D.W. By mid-December, the Ottawa agency had nixed any suggestion that S. could or should be placed with J.S. in the boarding house situation which then prevailed.

[6] Fast-forward to late July 2009, and the worker reported that J.S.'s living circumstances were still in a state of flux and perceived by the agency to be inadequate. Paragraphs 13 and 14 of the worker's August 5th affidavit capture the essence of the agency's stance at that time.

[7] Tanner's September 4, 2009 affidavit discloses that J.S.'s contact with S. was continuing, under agency supervision. There were no concerns expressed about the father's interaction with his daughter during access visits. From the foster home, it was learned that the placement was going well but that S. could be strong-willed and there was a perceived need to be firm with her, at times. The worker also continued to monitor D.W. and M.T.'s circumstances. (For the purposes of this decision, it is unnecessary to elaborate on the contents of the worker's September 4th affidavit in this regard.)

[8] In early August, the worker learned from J.S. that his living circumstances still had not stabilized. He was still living at a rooming house, although he reiterated his plan to find something more suitable and permanent. The worker stressed that the agency needed to visit and assess the place where he planned to parent S.; and J.S. undertook to keep the agency informed.

[9] By mid-August, J.S. wanted his access to occur at the home of his uncle where, he said, he planned to relocate. However, the worker explained that it would be necessary to conduct a home visit and for discussions to be held with the other occupants of the home about the living arrangements. As of September 4th, J.S. was

continuing to exercise regular access and had started to participate in family support sessions. However, by that date, the agency still had not been given a "green light" to visit the home where J.S. proposed to live with his daughter.

[10] Tanner's October 5th affidavit recounts her visit to assess J.S.'s circumstances at the uncle's home. Paragraphs 4 and 5 contain a succinct summary of her findings and concerns. Location and the physical surroundings were not identified as issues. As at the hearing, the uncle still had not been interviewed.

From D.W.

[11] D.W. submitted an affidavit on September 29th in which she said that she and J.S. lived together in early 2004 but separated in 2005. S. was born in November 2004. D.W. alleged that J.S. had alcohol and substance abuse problems, at the time. She denied she deliberately thwarted his parenting efforts and countered that he did not actively seek parenting time. She maintained there were "many" discussions about her relocation to Ontario before this occurred and implied he was neither able or willing to parent the children full-time.

[12] D.W. did not deny she asked the (Ottawa and local) agencies to contact J.S. in or about May 2009 with a view to possible assumption of S.'s care. But, she says she was frankly skeptical about his willingness or ability to parent. She now firmly opposes J.S. taking on the role - ostensibly because of his accommodations, and/or concerns about alcohol consumption, and/or lack of specificity in his plan of care. There was little elaboration or explanation by D.W. about the reversal in her position. She claimed the uncle was a heavy user of alcohol in the past. And she wrote that the property is very isolated ie., "back in the woods".

[13] In any event, J.S. addressed the concerns in a supplementary affidavit filed just before the hearing started and, to some extent, in his testimony.

[14] By her own admission, D.W. is not in a position to resume S.'s care at this time. The reasons are set out in the last several paragraphs of her affidavit. There is some indication that she and M.T. may relocate to the Halifax Regional Municipality. In the meantime, D.W. wants access to continue and she says her plan is still to have her daughter returned to her care. D.W.'s position is that S. should remain in her temporary foster placement pending the disposition hearing.

From M.T.

[15] M.T. has offered no affidavit evidence which might assist the court at this stage.

From J.S.

[16] J.S.'s first affidavit devotes attention to the history of his relationship with D.W., going back to 2004. Following the parties' separation, they agreed to an order which provided for joint custody of S. with primary care vested in D.W.. He was awarded reasonable access, including specified minimums. There is no alcohol or drug use prohibition in the order which was prepared by D.W.'s lawyer. The order was approved in late March 2005.

[17] J.S. said access was problematic because the parties lived in different communities and neither had transportation.

[18] At some stage, there was a failed attempt at reconciliation. J.S. blamed D.W. for most of the later conflict and had little, if anything, positive to say about her. When R. was born in mid-January 2007, J.S. said the parties were still living together. However, D.W. left the home with the children that month (paragraph 10).

[19] J.S.'s first affidavit is vague about dates and events in the aftermath of the separation. However, it is known that he moved in with his father and later left. Access became problematic once again with J.S. laying all the blame at D.W.'s doorstep. (In testimony, he admitted he had only had access a couple of times between the summer of 2007 and April 2009.) Contact was complicated when she struck up a relationship with M.T. and became transient within the Province and finally relocated to Ontario without consulting him (he said). I note that D.W.'s evidence was to the effect that there was discussion before her departure and an implication that he was indifferent.

[20] J.S. did not take any court action or any other formal steps to address his concerns; and he admitted many months passed before he heard from the Ottawa

agency about S. Even then, due to his finances and accommodations, he could not realistically assume his daughter's care on terms acceptable to the agency.

[21] J.S. presented an emotionally charged version of the events following D.W.'s return to the Province of Nova Scotia and about the start of the current proceedings. Several of the concluding paragraphs of his affidavit are ripe with personal opinion and surmise. Much of the content is inflammatory and argumentative. I have disregarded the offending portions.

[22] When the first affidavit was signed, J.S. said he was living at a rural community with an uncle and his partner in a large four-bedroom house wherein S. would have her own room. In testimony, he stated he was not living full-time at that residence - rather boarding in a local town where he is enroled in school. He hopes to attend a community college next year. Assuming he is awarded care, he said he will move in with his uncle for the balance of the academic year and move (with S.) before starting at the college next year. Asked why he has not moved before now, he said he could not find suitable accommodations.

[23] J.S. was not employed last summer (2009) even though he was not attending school. He cited the demands of this case, but did not elaborate. He receives public assistance benefits which he expects will increase if he achieves S.'s care.

[24] J.S.'s October 6th affidavit asserts that the agency's recent assessment of his residential circumstances was positive and that the agency's representatives offered no suggestions for improvement or change. He wrote that the residence is beside the local elementary school which S. could attend. (That obviously contradicts D.W.'s claims about remoteness and isolation.)

[25] In testimony, J.S. stated he has contacted school officials about enrolment but he said nothing about the school's programs or his daughter's educational needs. There was no mention of S.'s medical or dental requirements or what is in place should the need arise. In testimony, he admitted he has not spoken to his physician about his daughter.

[26] As mentioned, J.S. attends school most days. Should he move back to Queens County, he said he has made arrangements to leave the school in time to

meet his daughter at her school at the end of each day. He said he can work at home for S.'s so-called in-service days and other days when there are no classes.

[27] Neither his uncle or his uncle's partner will assist with parenting or child care. Unspecified friends and family members will assist J.S. with transportation. It was also said that there are plans to cover emergencies should they arise. But, he was vague about those who will provide care and supervision in his absence, to otherwise help. He continues to meet with the assigned family support worker. That worker has not provided an affidavit or any reports to the court.

[28] A parenting plan by J.S. still had not been presented to the agency as of October 5th; it landed on October 6th.

[29] Access to S. continues but not at J.S.'s residence. He sees his daughter once weekly in the Digby area; and she meets him locally one day, each weekend. (S. attends school during the week.) The drive is long - about 1.5 hours, each way. This arrangement means the father travels once weekly for access; and his daughter does the same, but on weekends. The agency plans to reduce the intensity of supervision if things go well. Geography admittedly makes access inconvenient. However, consideration is being given to moving all access to J.S.'s residence at some later stage.

[30] There are reports from the foster parents about upset after one recent visit. The cause is undetermined, so far. There is also an unsubstantiated disclosure by the child alleging that J.S. hit her on one occasion. Significantly, however, J.S.'s visits are still supervised so any inappropriate conduct is unlikely of recent vintage.

Discussion/Decision

[31] Although the subject did not garner much attention in court, I find that the parties' resumed cohabitation for an extended period of time and the procreation of a second child brought the March 2005 court order to an end and that it is no longer in force or binding upon the parties insofar as S. is concerned. And, J.S. has not started a formal application under the **Maintenance and Custody Act** for custody and care of S..

[32] For **CFSA** purposes, the agency argued it is premature to transition S. to J.S.'s home because of the lengthy period of separation, the limited amount of

father/daughter contact (so far), the need for gradual reintroduction and adjustment, and a duty to complete its investigations. That D.W. is on the record as intending to seek repatriation is another background factor, but it is not decisive.

[33] The history of frequent relocations and the widely recognized need of very young children for stability and certainty can also be cited as relevant.

[34] With respect, however, it is surprising that J.S. did not do more sooner in preparation for possible placement of his daughter. He has been on notice since the Ottawa agency intervened months ago. Proceedings have been underway in Nova Scotia since early June. He has had the benefit of legal counsel since the very first court appearance. Yet, his written plan did not arrive until quite recently and spans only nine paragraphs, in total.

[35] The court was reminded that the agency's "due diligence" obligations which, in this case, were tethered to J.S.'s plan and progress, or lack thereof. While his sincerity is not in doubt, he did not put a formal placement plan on the table until the last moment. Accordingly, I accept the submission that the agency was not in a position to finally assess or finally recommend anything except maintenance of the status quo. As mentioned, investigation of his residence did not occur until September 18th and one of the occupants has yet to be interviewed.

[36] The current and proposed arrangements are confined to about 15 lines of commentary in the worker's last affidavit, the nine paragraphs authored by J.S. and his lawyer, and relatively brief courtroom testimony. At this stage, I do not have to make any final assessments of credibility. However, with respect, J.S.'s testimony did not inspire confidence for his broad assertions that he is ready, willing and able to parent full-time, with agency support. I find he has not fully thought through the ramifications of his plan; and he has not presented the agency or the court with enough detail or corroborating evidence to sustain it. Importantly, there is little or nothing in J.S.'s evidence about his understanding of his daughter's past behaviors and problems, her present needs, or the challenges of transition. (It will be recalled that the first affidavit filed on behalf of the agency is laden with disclosures by the mother about S.'s behaviors and challenges which led to placement outside the home while in Ottawa.)

[37] The child's attachment and bonding, or lack thereof, with her mother will be the subject of a psychological assessment of mother and daughter, in addition to a

broader assessment of D.W. I emphasize these are psychological - not psychiatric assessments. Despite J.S.'s estrangement from his daughter (even if not of his making or choosing), he is not prepared to similarly engage in an assessment.

[38] Moreover, J.S. has not (in his reply evidence) addressed serious allegations by D.W. regarding his family of origin or other issues such as alleged alcohol and substance abuse – which, if true, could potentially impact on his present capacity and ability to parent his daughter alone at a relative's house and, when he is able, at completely independent accommodations.

[39] Offsetting some of this, in fairness, is the fact that the agency has had many months to investigate D.W.'s broadsides against J.S., notably the alleged alcohol or drug use. In the intervening time, the allegations have not been substantiated nor has the agency introduced credible evidence that the father has significant shortcomings when it comes to general parenting capacity or skills. Indeed, a parental capacity assessment has not been sought – only a psychological assessment.

[40] The purpose of the **CFSA** is not only to protect children from harm but also to promote family integrity and to assure the best interest of children. The paramount consideration, however, is the best interests of the child. I am also alert to the preamble to the legislation and its sometimes competing declarations when applied in real life. For our purposes, it is important to remember that the statute vests primary responsibility for the care and supervision of children with their parents and that children should be removed from that supervision, either partly or entirely, only when all other measures are inappropriate. This notion is reinforced by section 39 (7) which, by the conclusion of the interim hearing, requires the court, when assessing risk to a child's health or safety, to consider less intrusive placement options before sanctioning agency care and custody. That standard was met by mid-July.

[41] The disposition hearing has yet to be scheduled. When it is heard, the parties will have a chance to fully present their respective cases. In the meantime, the court must remain focused on the child and her best interests. In a less than perfect world less than perfect parenting is the norm. Perfection is not the standard by which any of the Respondents' parenting and plans will be weighed. But, in the present context, I conclude that J.S. has failed to demonstrate on a balance of probabilities that S.'s interests will be best-served if she is uprooted from her current placement and summarily placed in the uncertain environment that J.S. left with his evidence.

[42] In the result, I order that the Protection Order stand, unvaried, pending the disposition hearing. Temporary care and custody remains vested in the agency.

[43] I am satisfied that a psychological assessment of J.S. will prove helpful to the court for disposition purposes. Both the mother and daughter are being similarly assessed. I conclude that an assessment of J.S. will complement the findings and recommendations flowing from assessment of the others. I find an assessment would not be unduly intrusive in the circumstances. I will suggest that it would be naive to believe that any attachment and transition issues the child may be experiencing, or may yet face, can be addressed without some reference to the father's psychological profile which, in turn will assist the professionals, and J.S., in developing their respective action plans. Also worthy of investigation is whether or not any of J.S.'s actions (or inaction and delay on several fronts) are attributable to underlying personality traits or pathologies and, if so, how supports and services might be tailored to best address them.

[44] I order that J.S. be the subject of a psychological assessment to be conducted by the same professional assigned to assess the mother and child.

[45] Order accordingly.

Dyer, J.F.C.