FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. D.M., 2010 NSFC 34

Date: 2010 09 10
Docket: FLBCFSA-071548
Registry: Bridgewater

Between:

Minister of Community Services

Applicant

v.

D. M. and M. E.

Respondents

Publication restriction: 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.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge William J. Dyer

Heard: September 8, 2010, at Bridgewater, Nova Scotia

Oral Decision: September 10, 2010

Written Release of Oral Decision: January 27, 2011

Counsel: Philip Gruchy, for the Applicant
Robert Chipman, for the Respondent, D. M.
David Hirtle, for the Respondent, M. E.

By the Court:

[1] D. M. (M.) and M. E. (E.) are the parents of two children, T., about 16 months old and A., now about 2 ½ months old. The Minister of Community Services (the agency) has operations in Queens and Lunenburg Counties. Linda Jensen is a veteran social worker with the Lunenburg District Office. The agency's case is based on her affidavit evidence which included, among other things, the following:

[2] On August 5th a public health nurse made a routine attendance at the children's home to check on the newborn, who was just one month old at the time. The evidence is that the nurse observed several marks on one of the baby's legs which appeared to be bruises and resembled the imprints of three fingers. Reportedly, when confronted, the parents asserted they had not seen the marks or bruises before and had no explanation for them.

[3] The nurse made a referral to the local child protection agency which decided to immediately investigate. A police officer was enlisted and accompanied another social worker, Amanda Cail, to the home. The social worker also observed bruising. There was discussion with the parents about the child's condition, her caregivers, the child's supervision and care, and related issues.

[4] The children were seen at a local hospital by unnamed professionals who, in turn, made a referral to the Child Protection Team at the IWK Hospital at Halifax.

[5] Another social worker, Yves Bouchard, accompanied the parents and the mother's grandfather to the IWK on August 6th. Pediatrician Dr. Kim Blake and social worker, Donna Best, were the lead Team members.

[6] Mr. Bouchard was sourced for assertions that M.' family was involved with the agency for several years to and including May, 2006 when M. was a teenager. The presenting issues were serious and reportedly included defiance, smoking and drug use, suicidal ideations, self-marking with a razor blade, and other concerns. The police had reportedly intervened as a result of alleged assaults and threats to kill. M. was then living with the maternal grandmother, who as it happens, was also an alleged victim. The maternal mother was also cited as a victim or complainant.

[7] None of the foregoing has been disputed by M..

[8] M. disclosed to Bouchard she had a drug addiction which she overcame about 3 years ago but admitted some casual use of soft drugs since. M. told Bouchard that E. did not care for either child on his own. M.' grandparents were cited as supports and as providing care for T. "every morning". M. also referred to a female friend as a support. There was no elaboration on the friend's role or contact with one or both of the young children.

[9] M. and E. were cooperative with the examinations at the IWK. Indeed, they were given permission to room-in when A. was admitted to the hospital subject to staff supervision, etc. as need be.

[10] On August 7th the agency received a preliminary report from Dr. Blake. The net result was that there was concern that A. may have been abused. Further testing was ordered. There was then elevated concern because the parents, as just mentioned, were already rooming-in at the hospital.

[11] Based on what were then considered to be unexplained injuries and given that the parents had been identified as the child's primary caregivers, the agency made a decision the same day to take the infant and her sibling into care.

[12] An IWK physician reviewed the Team's preliminary findings with the parents and discussed other tests which had been requisitioned. Another worker, Debbie Taylor, became involved, ventured an opinion on the medical situation and invited explanations from the parents. M. denied deliberately harming A., denied knowledge of the cause of A.' "apparent injuries", and expressed some knowledge of so-called "shaken baby" matters.

[13] The parents were upset and angry when the children were taken into care. At this stage, I draw no adverse inferences from their reactions.

[14] An agency supervisor, Terry Chaytor, consulted with the Public Health Nurse on August 8th. The nurse reportedly described M. and E. as unreceptive to home visits after A.' birth. I receive that evidence as contextual.

[15] By August 9th, the Queens County Office of the Minister had decided to transfer the file to the Lunenburg District Office.

[16] M.' mother and both of her grandparents spoke with Bouchard on August 9th. M. had obviously told them what had happened and about the children's current situation. There was some discussion about the condition of A.' eyes as observed by family members in the recent past.

[17] Bouchard reportedly logged that the same family members present that day alleged that E. used marijuana regularly and that he can be aggressive when not consuming it. M.' grandfather was sourced as disclosing at least one observed incident when E. had pushed M.. One of the adults present posited that E. had the infant in his care alone at least once briefly but did not elaborate.

[18] For his part, E. did not address these assertions in his affidavit evidence.

[19] Linda Jensen was tasked with vetting the residence of M.' grandparents for placement as this was an early option under consideration. For a variety of reasons recounted by Jensen in her second affidavit, it was determined that the physical premises were unsuitable at this time.

[20] Jensen spoke with M.' family doctor on August 11th. He offered no specific evidence that either child was or is at risk of harm but he volunteered he had general concerns about the parents' social or personal circumstances. There was little elaboration on those concerns and no evidence about when one or both children were seen by the physician. There was no written report from that physician.

[21] By August 24th, the agency had word from a local police officer that an Opthamologist who examined A. appeared to have linked retinal hemorrhaging to the child's birth and by implication apparently ruled out non-accidental causes. (A written report from that specialist is not in evidence.) Follow-up medical reports from the IWK regarding other testing outcomes are discussed next.

[22] Dr. Kim Blake is a pediatrician with the IWK Health Centre Child Protection Team.

[23] Regarding A., Dr. Blake's August 31st consultation report is the principal one upon which the agency has placed reliance. I will not labour the background remarks in that report except to note that there is mention, rightly or wrongly, that

the weekend before A.' admission she had been in her grandmother's care. I took from that to mean M.' grandmother's care. Neither M. or E. mentioned this in their affidavits. Neither did Mr. W., as will appear when I canvass his evidence momentarily, and the grandmother, assuming this means M.' grandmother, not her biological mother, did not submit an affidavit about this recent parenting assertion. There was mention of a cat in Dr. Blake's report but it was disclosed that the cat did not go near A. or her sister.

[24] I might also note that M. reportedly identified her sister, as well as her grandmother, as a support but the sister's full role is not mentioned in M.' evidence. Dr. Blake wrote that the grandmother had been looking after T. each day but the evidence elsewhere is that it was only the grandfather. In the result, I'm simply unable to resolve the discrepancies at this early stage.

[25] When she conducted her examinations, and perhaps more importantly, Dr. Blake was alert to a disclosure by E. that his mother bruised easily, to use his reported words, and that a brother or half-brother of M.' allegedly had bruising as a baby that may have prompted a child welfare investigation many years ago about which unnamed sources reportedly said resulted in no substantiation of abuse and some confirmation of so-called easy bruising. All of this comes from disclosures and has not been independently checked or verified thus far. I need not recapitulate Dr. Blake's entire report but a few excerpts should be highlighted including the following:

> Bruising was noticed on the back of both legs below the knees. This had a patterned appearance, with a linear/zig-zag appearance on the left leg. On the right side the bruising had a rounded appearance. Blistering/crusting was also noticed bilaterally in between the toes. On the sole of the left foot a mark was identified. This mark was unusual in appearances. Photographs of all of these were taken by myself, Dr. Blake. Measurements were also taken and are documented below.

[26] There followed a detailed elaboration of the findings.

[27] Supplemental tests were completed because of lingering concerns about possible fractures of the lower right arm and lower left leg. Fractures were not ruled out absolutely as a result of further testing but were described as "less likely".

[28] Fortunately, opthamology tests seemed to rule out recent eye trauma and other tests appear to have ruled out infectious diseases and brain injury. Bloodwork disclosed some abnormalities. This is still under medical investigation.

[29] However, the bruising and blisters remained problematic as of the end of August.

[30] Dr. Blake concluded:

> The possibility of inflicted injury must be considered, but cannot be ascertained on medical evidence alone. The patterned bruising is very concerning. Further investigation by the Child Protection Agency is suggested to correlate with social circumstances surrounding these findings.

[31] It's hard to argue with those statements. Medical evidence is not admitted and acted upon in civil or criminal cases in a vacuum. Such evidence must be considered in the context of all the prevailing circumstances which, as this case has clearly already demonstrated, may continue to evolve as time goes on.

[32] Regarding T., Dr. Blake's separate report included these passages:

> On skin exam, she had some lesions on the back of her lower left leg which measured 3 mm x 3 mm. There were three of these lesions, all quite symmetrical. They were raised. There was no excoriation (scratches) around the lesions. There were <u>no lesion</u>, with this appearance, <u>present elsewhere</u> on her body. On the top of her foot there was a smaller lesion which was fainter, not raised, and did not resemble those on the back of her leg.
>
> These lesions on the back of the leg were non-descript and non-specific. However, they <u>may have been caused by non-accidental means, such as a burn which could produce a blister resulting in a raised area. A differential could be bed bugs or insect bites; however, there were no other lesions of this character over the rest of her skin</u>.

[33] In the final analysis, Dr. Blake seemed primarily concerned about some mild delays in T.'s development. These concerns led to several suggestions for follow-up and for supports and services which I won't restate.

[34] Absent from the IWK reports regarding A. is any definitive opinion on what several lay witnesses have described as "easy bruising" of some family members and the implication that such a propensity may be inherited. This is significant as it has been offered up as a possible explanation for A.' presenting symptoms - leaving aside Dr. Blake's careful articulation of possible causing of patterned bruising in non-ambulatory children.

[35] The subject could, of course, be approached in general terms and in terms specific to the individuals and the families who were cited. As later mentioned, there are now more questions than answers on this front - especially since T. who is the sibling and has the same parents has no reported history of similar problems of so-called easy bruising.

[36] Returning to Ms. Jensen, she summarized by saying that the accumulated medical information regarding A.' presenting issues were admittedly inconclusive regarding cause. However, on behalf of the agency, she alleged that the parents had offered no explanation, or certainly no plausible explanation for so-called patterned bruising of A. in particular. She asserted that the unexplained condition or conditions inferentially had to be attributed to one or more of A.' caregivers, that is the parents or the grandparents of M..

D. M.

[37] M.' evidence was that she and E. currently live together in a four bedroom apartment in a local town. She did not elaborate regarding the accommodations. Nothing was said by her about the couple's financial situation.

[38] M. characterized herself as the primary care parent for both children. She suggested E.'s role in A.' care is limited. She wrote that he had been left alone with the children but she said this was seldom and even then, just for brief periods of time. She said that E. does not take the children anywhere without her.

[39] M. acknowledged that her grandparents have spent a great deal of time with both children. Indeed, in September 2009 when Ms. M. returned to school she said it was her grandfather who cared for T. daily. I previously mentioned that the Blake report suggests that it was the grandmother. In any event, Ms. M. said that the grandfather has spent unspecified time with A. since her birth. She also stated that both children have had overnight visits with the grandparents on at least 3 occasions since A.' birth. M. said the couple got a cat in early August. She said it had fleas but she didn't say what, if anything, she did as a result of that knowledge.

[40] M. described T.'s growth and development and her activities, etcetera. From her perspective, it seems that there is nothing abnormal, unusual, or concerning regarding T.'s growth and development. M. described A.' bruises, when brought to her attention, as being faint and light in colour. Otherwise, she said her daughter was generally happy and content. She has expressed some concern about the quality of care being provided in A.' foster placement.

[41] M. asserted that she had never noticed any tenderness in A.' arms or legs before the public health nurse's observations and referral.

[42] Regarding T., M. submitted that the marks observed on one of her legs were "bug bites" which she got several days before. She said when T. is bitten by an insect, any spots tend to get red and swollen.

[43] More broadly, M. claimed that some members of her family and E.'s family "bruise easily". She cited his mother as an example and the person she described as her brother when he was young. As I have alluded to already, no medical reports have been provided so far on this subject.

[44] M. firmly denied she has done anything to cause injury or harm to either of her daughters as alleged or implied by the agency witnesses; and she stated she has not seen anybody else cause injury or harm.

[45] I have already noted elsewhere some discrepancies between the reported disclosures to Dr. Blake about the great grandmother's role and activities at material times, both recent and historical, as well as the complete absence of evidence surrounding M.' own mother, and that individual's role within the extended family and her contact with the children.

F. W.

[46] F. W.'s (W.) affidavit evidence confirmed that he cared for T. when she was about four months old and M. was returning to school. He said that his wife was present "some times".

[47] M. at some stage stopped attending school but W. continued to spend a lot of time with T.. He did not say anything about his wife's involvement at that juncture. W. said he spent a lot of time with A. also following her birth. Again, W. said nothing about his spouse.

[48] The frequency of his contact with T. was said to have been most mornings and with both children 1 ½ to 2 hours in the evenings, sometimes 3 to 4 times per week.

[49] W. also wrote that he and his wife had one or both children for overnight visits occasionally. He added that A. stayed with them on three occasions after her birth. He did not say whether M. and/or E. stayed overnight on those occasions. W. characterized both children as happy and content. He said he has two dogs who spend time inside his residence and which have fleas from time to time.

[50] W. downplayed concerns that he may have expressed about the condition of A.' eyes to a social worker on one occasion.

[51] W. also devoted attention to T.'s development by exemplifying her activities, routines, involvements and the like.

[52] W. denied harming either child; and asserted that he has never seen anyone else do so.

[53] If W.'s recounting of his involvements is accurate, the corollary must be that Dr. Blake at the IWK was largely mistaken about his spouse's role.

M. E.

[54] E.'s evidence was that he and M. were not cohabiting when A. was born in July. However, he said he visited M. five to six hours daily thereafter, giving most of his attention to T.. He confirmed that he and M. recently started to live together. He confirmed the couple's cat had fleas when acquired but like M., he said nothing about what was done, if anything, to alleviate the condition.

[55] E.'s evidence regarding A.' outward normalcy echoed that of M.. He firmly denied harming A. and T. or seeing anyone else doing so. His characterization of T.'s development for her age and stage also mirrors that of M.. E. broadly asserted his mother bruises easily and said he told social worker, Ms. Jensen so. E.'s mother was apparently contacted and confirmed this but his mother apparently conceded she had not been diagnosed with any disorder.

[56] E. cited the access facilitator's reports in support of his assertion that access to the children since the apprehension has gone well and without incident or any concerns by the observers. In the result, the agency did not take issue with the quality of access currently being exercised by the parents.

[57] E. did not counter the various assertions by others regarding marijuana use by him and his episodic aggressive behaviours including an alleged assault of M. when she was pregnant.

Discussion/Decision

[58] For the purposes of this oral decision, my consideration of the **Children and Family Services's Act** (**CFSA**) has included the preamble and a number of sections which I will not read into the record. They include section 2, 3(2), 9, 13, 22(2)(a), (b) and (g), 24 and 39.

[59] Suffice it to say the best interests of the child or children are paramount when weighing the two other legislative objectives, namely, the protection of children from harm and promotion of family integrity. I previously decided at the five day hearing, based on the then available evidence, that there were reasonable and probable grounds to believe that both children were in need of protective services and I placed them in the agency's temporary care and custody.

[60] The so-called 30 day hearing saw the introduction of more affidavit evidence and I also had the benefit of submissions from counsel.

[61] Once again, I have the responsibility to consider whether or not the accumulative evidence establishes the grounds for continued agency involvement and court processes. If the answer is yes, I have to direct myself to the additional and more demanding test under section 39(7) in circumstances such as this where the agency opposes return of one or more children to the parents at the conclusion of the interim hearing. That section, that is section 39(7), requires the court to decide if there are also reasonable and probable grounds to believe that there is a substantial risk to a child's health or safety and that the child cannot be protected adequately by a less intrusive placement order under one of the scenarios contemplated by section 39(4)(a), (b), or (c). The references to health, safety, and protection found in section 39(7) are broad and non-specific.

[62] In my opinion, they should be interpreted broadly. In some cases, health and safety risk will be obvious or clearly evident. In some cases the risks may be more subtle. To that end, agencies often lead some evidence in the early stages of past parental conduct and past agency involvement, if applicable, from which it may be inferred that (coupled with current events) there is a probability of inappropriate conduct repeating itself.

[63] It falls to the court to determine whether a child is actually in need of protective services, not at the interim stage but at the protection stage, and a hearing which must be held, as counsel know, not later than 90 days after the date of the original application of the taking into care. At that juncture, **unless** there is agreement to the contrary, the rules of evidence are more stringent and the court may not receive and act upon all the evidence previously admitted under section 39(11) of the **CFSA**. That said, all hearsay evidence is <u>not</u> necessarily inadmissible even at the protection and disposition stages if the case goes that far. Rather, resort will necessarily be made to the conventional rules of evidence, the relevant sections of the **CFSA**, and the agreements (if any) among the parties themselves.

[64] All parties have taken advantage, if I can put it that way, of section 39(11) of the **CFSA** which gives the court discretion to admit and act on evidence it considers credible and trustworthy in the circumstances. In this regard, I have taken guidance from the case of *Family and Children's Services of Kings County*

vs. Y.B., reported as 2000 NSJ 263, especially at para 7. The same decision is also cited regarding the concept of reasonable and probable grounds. [See paras 4, 8, and 13]. I will not recite those excerpts for today's purposes. Other helpful references at this stage include *Minister of Community Services vs. J.R. and G.N.*, 2010 NSSC 222; and *Minister of Community Services vs. A.M. and E.D.*, 2010 NSSC 227.

[65] I have not heard any testimony. I am, therefore, in no position to assess with any confidence the credibility of the respective affidavit or professional report authors, or the credibility of many individuals who were sourced but have filed nothing with the court so far. My own quick list of the latter includes among others the public health nurse; social worker Amanda Cail; social worker, Yves Bouchard; police officers; an emergency duty worker; pediatrician, Dr. Blake, of course; and a colleague, Dr. Ens; M.' mother; M.' grandmother; M.' friend; an unnamed sister; agency supervisor, Terri Chaytor; general practitioner, Dr. Ernest; and Mr. E.'s mother.

[66] To declare that the evidence from the respective parties is incomplete would be an understatement. That the evidence is such, and also contradictory, untested, may be unreliable on some points and may be self-serving on others is frankly not unique to this case and is explained, at least in part, by the speed by which a complex case must be advanced and defended in an arbitrarily short time span.

[67] The challenges in the present case are heightened by the fact that the two children involved - one an infant, one a toddler - are especially vulnerable and without any ability whatsoever to tell us what did or did not happen. More to the point, they have no ability to protect themselves from harm or risk of harm.

[68] Counsel for the respondents submitted that the complexion of the case has changed significantly since the outset , and that by comparison to some other reported cases of alleged abuse or neglect of very young children, the present case is far less serious. While that may be so, with respect, the present case cannot and should not be decided on appearances or by reference to the misfortune experienced by other children.

[69] On the evidence so far, it cannot be said with certainty that non-accidental injury of A. in particular has been ruled out. The reported multiple patterned bruises of the lower legs in a non-ambulatory child are very concerning and invite

not only further medical investigation, but on the recommendation of the IWK Protection Team, further agency investigation into the circumstances of the family. A.' blisters are also described as extremely rare in the very young. Although insect bites may offer an explanation, the evidence is that other traumas such as abrasions and burns may also cause them. That the blisters found on the bottom of the infant's foot and are unexplained, so far , raises more questions. That both parents and M.' grandparents insist they noticed none of the physical signs of these difficulties arguably points to other protection issues under section 22(2)(j) and (ja), for example, even though not stipulated in the original application.

[70] There are at least four adults who have cared for A., albeit in different capacities and at different times and places. On the respondent's evidence, there have been occasions when A. has been alone with one or more of them. If any one or more of the conditions or symptoms ultimately prove to have been non-accidental, determining the perpetrator or perpetrators will be a daunting task but this will have to be done. In the same vein, if causation by accident or neglect is established, assignment of responsibility and accountability will still remain to be dealt with.

[71] All of this underlines the crucial role that the medical and other professional evidence has in the current case. Until such time as there is an opportunity for that evidence to be heard and tested in court, I am disinclined to summarily dismiss the proceedings at this time. As should be obvious from some of my observations as I canvassed the evidence, many questions have been answered but others remain unanswered, and others have arisen during the course of the hearing. Should the matter advance, the parents may (or may not) seek their own expert opinions regarding the IWK medical evidence and related issues. Clearly, they have not had much time to consider, let alone arrange for this.

[72] I am mindful that A. has been the prime focus of much of the agency's case. Leaving aside some identified developmental concerns regarding T., the agency's position is essentially that until there is some resolution by court decision or agreement regarding the risk of harm to A. and how to alleviate it, that T. is also at risk because she has the same caregivers and extended family members, she is equally vulnerable, and equally unable to protect herself. Keeping in mind we are still at the interim stage, I conclude this is not an unreasonable position for the agency to take.

[73] I reaffirm my finding that there are reasonable and probable grounds to believe that each child is in need of protective services.

[74] Under section 39(7) of the **CFSA**, I find there are also reasonable and probable grounds to believe that there is a substantial risk to each child's health or safety which cannot, at least at this time, be protected by an alternate placement order under section 39(4) (a) (b) or (c) and I conclude that it is in the best interests of each child that they remain in the agency's temporary care and custody.

[75] I order that clauses 2, 3, and 4 of the first interim order be incorporated into a new order.

[76] Additionally, or perhaps better expressed, more specifically, the parents shall participate in the agency's family support program and they shall also cooperate and participate in a so-called Parenting Capacity Assessment, including psychological components.

[77] Regarding T., in particular, the parents shall use their best efforts to follow the recommendations directed to them in the August 31st consultation report of Dr. Kim Blake. I've deliberately chosen that language because it is unclear from the evidence so far what the associated costs, for example, may be and how long it may take and who will take the initiative to put those recommended or suggested services and supports in place. So for today's purposes I order that they, the parents, shall use their best efforts to follow the recommendations.

[78] Regarding the concerns expressed by the parents about the foster placements, courts generally do not interfere with the agency's discretion at the interim stage of **CFSA** proceedings. The lead worker for the agency and agency counsel are now certainly alert to the concerns which were voiced and undoubtedly already have them under advisement. The agency will be well aware of the general consideration set out in section 3(2) of the legislation and more to the point, section 39(8) which directs the agency to take into account, where practicable, among other things the desirability of keeping siblings in the same family unit and maintaining contact with relatives.

[79] I invite Mr. Gruchy to prepare an appropriate order which captures the outcome. It is my intention to immediately go into a pre-hearing mode to address

what I think are going to be some very practical issues with timing of a potential protection hearing.

Dyer, J.F.C.