SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: ***Nova Scotia (Community Services) v. H.M.***, 2015 NSSC 35

Date: 2015 - 02 - 02
Docket: SFH-CFSA 088154
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

H.M and J.L.

Respondents

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	January 27 and 29, 2015
Decision:	Orally, February 2, 2015 Written, February 17, 2015
Counsel:	Megan M. Roberts for the Minister of Community Services Louis Matorin for H.M. Lola Gilmer for J.L.

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

Restriction on publication:

Publishers of this case please take note that subsection 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

Subsection 94(1) provides:

> 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 relative of the child.

Publishers of this case further take note that in accordance with subsection 94(2) no person shall publish information relating to the custody, health and welfare of the children.

By the Court (orally):

Introduction

[1] On January 20, 2015, the Minister of Community Services took three year old IM into care. The Minister did so pursuant to terms of a Supervision Order granted by Associate Chief Justice O'Neil on November 4, 2014. As required by subsection 43(3) of the *Children and Family Services Act*, S.N.S. 1990, c. 5, the Minister brought the matter before me for my review and possible variation pursuant to section 46. This requirement is repeated by subsection 46(1) which states that where a child is taken into care while under a Supervision Order, the Minister shall apply to the court for review.

[2] In support of its action, the Minister filed two affidavits from its worker, Kimberley Hankin. Ms. Hankin had previously filed seven affidavits in this proceeding.

The child, IM, and her parents

[3] IM is three years old. Her mother is seventeen and her father is twenty. Like her father, she has a hearing impairment. Ms. M is hearing. Mr. L communicates using American Sign Language. Before IM reached her second birthday, she had surgery to implant electronic devices ("cochlear implants") to improve her hearing. To function, the implants must be complemented by wearing external devices, which are sometimes called hearing aids or processors. The external devices aren't typical hearing aids, and they perform an array of functions beyond processing. For my purposes, I'll call them hearing aids. This surgery was done with her parents' consent and understanding that they would need to support IM in wearing her hearing aids, and developing hearing and speech skills. Because of his hearing impairment, Mr. L would be secondary to Ms. M in this, but he would play a part, if only in ensuring that IM wore her hearing aids.

[4] Over the course of the proceeding which originally began in October 2013, the Minister's concerns have focussed on Ms. M's transience and mental health and a lack of follow through relating to IM's medical care, specifically her hearing. To develop speech and hearing, IM must wear her hearings aids regularly. She does not do so when in either of her parents' care. If IM's parents decide IM isn't to develop verbal communication skills, IM must be taught to sign. IM isn't being taught this by her parents either.

[5] Ms. M participated in a psychological assessment by David Cox. His report reveals a history of "extreme neglect and abuse by her father and others." She had problems with substance abuse before reaching adolescence and was pregnant at thirteen. She has had problems with her mental health, particularly right after IM was born. According to Mr. Cox, "Results from clinical measures were indicative of clinically significant anxiety and depression, and related personality characteristics including low self-esteem and submissiveness."

[6] In the final affidavit filed before the deadline for final disposition pursuant to subsection 43(1), Ms. Hankin relayed concerns from Laura Getson of the Atlantic Provinces Special Education Authority that IM "is losing precious time to develop speech and hearing skills", and,

in the absence of quick action by Ms. M, "[IM] will lose the ability to speak and hear." Because IM is not being taught to sign, she has virtually no ability to communicate.

Context for this review

January 19, 2015

[7] The parties appeared before me on January 19, 2015, the day before the deadline for final disposition. As is common, this was scheduled for a brief appearance, and the parties were in court for ten minutes. The Minister was not consenting to terminate the proceeding, but said that it would, reluctantly, allow the proceeding to expire. The Minister hoped to enter into a Memorandum of Understanding with IM's mother. The Minister was unhappy with Ms. M's progress and her commitment to IM's needs. The Minister was clear that there had been "several times" earlier in the proceeding when IM "was close to being taken into care", but said that there isn't "enough at this point to take [IM] into care or request a permanent care and custody order".

[8] The Minister's plan was to have Ms. M sign a Memorandum of Understanding which would replicate a provision contained in each and every order that has been granted since this application began, requiring that Ms. M schedule and attend all medical and specialist appointments recommended for IM, and follow and ensure IM's "participation in the reasonable treatment programs recommended by the child's medical service providers". The Minister said that there would be a "very strict warning" that Ms. M was expected to comply with the terms of the Memorandum, as they related to her and her daughter.

[9] I asked what options existed if I did not agree with the Minister's position and was told that my option was to place the child in the Minister's permanent care and custody. The Minister was not seeking the child's permanent care, and the parents were not consenting to it. All the parties were content to let the application expire. I adjourned the motion to the next day so I could decide what I would do. I told Ms. M that I "was absolutely disturbed by the irreparable harm" that was being done to IM's potential to live a hearing and speaking life. Ms. M was upset and cried as I spoke.

January 20, 2015

[10] On January 20, 2015 I advised the parties that, on my own motion, I was beginning a final disposition hearing. Regardless of the Minister's willingness to allow the supervision order and the proceeding to expire, and the parents' hope that circumstances would improve, I was not satisfied this was in IM's best interests. Ms. M was not complying with court orders that compelled her to schedule and attend all IM's recommended medical and specialist appointments, and to follow and ensure IM's participation in reasonable treatment programs that were recommended by IM's medical care providers for her. I had no confidence that Ms. M would be more compliant without a court order in place, and I had evidence from Ms. Hankin that IM would lose the ability to speak and hear if there wasn't quick action by Ms. M.

[11] I caused Ms. Hankin's affidavits to be entered as evidence to begin the hearing. Because no hearing had been scheduled, there was no time available to continue with the hearing, and I

adjourned the matter to return for later discussion about how the remainder of the hearing would continue. Ms. Hankin's affidavits entered into evidence were those of October 7, 2013; November 20, 2013; December 30, 2013; March 24, 2014; July 21, 2014; October 20, 2014; and January 6, 2015.

[12] After court on January 20, Ms. Hankin returned to her office where she received a voicemail message from Laura Getson about IM's condition during her recent attendance at daycare. Ms. Hankin spoke with staff at the daycare centre and asked for a record of IM's daycare attendance and monitoring, which she received later that day. Ms. Hankin also spoke with staff at SHYM (Supportive Housing for Young Mothers) where Ms. M and IM were living, and with Ms. Getson. A risk management conference was held and, before day's end, Ms. Hankin attended at IM's daycare and took her into the Minister's care. IM has been in a foster placement since then.

[13] Pursuant to subsection 43(3) of the *Children and Family Services Act*, the matter was brought back before me, scheduled for Tuesday, January 27. Ms. Hankin's affidavit in support of taking IM into care was filed on Friday, January 23. Inclement weather was forecast for January 27 and counsel attended court by teleconference. Timing and the weather prevented Mr. L from reviewing Ms. Hankin's affidavit with his counsel: his hearing impairment means that they meet in person with an interpreter. To meet the *Act*'s deadlines, the parents consented to IM's remaining in the agency's temporary care and custody, without prejudice to arguing – as soon as scheduling permit – that IM should be returned to her mother under supervision.

[14] On January 28, I received an additional affidavit from Ms. Hankin further explaining the reasons for taking IM into care. This affidavit was sworn on January 29 when the parties again appeared before me and I heard submissions from all counsel. The parents had no questions for Ms. Hankin and offered no evidence of their own. They asked that I make my decision based on Ms. Hankin's evidence. The Minister asked that I schedule a hearing to address IM's placement, whether in foster care or with her mother under supervision.

[15] In its motion seeking a change in IM's placement, the Minister identified its reason for doing so as "the non-compliance of the Respondents." The Notice also identified the evidence in support of its motion: all seven of Ms. Hankin's earlier filed affidavits and her new January 23, 2015 affidavit. This evidence was supplemented by the additional affidavit sworn on January 29.

[16] The manner of providing evidence in a motion is governed by *Civil Procedure Rule* 23.08. *Rule* 23.08(4) provides that there will be direct examination only if I am satisfied that it is "impossible or undesirable" for a party to present evidence by affidavit. The Minister has not argued that it's impossible or undesirable to present evidence by affidavit. Indeed, there has been some latitude in filing Ms. Hankin's affidavits: due to the nature of the proceeding, there's been no objection (and none would be sustained) to the filing of affidavits outside the deadlines required by *Rule* 23.11(1).

[17] The Minister has had the opportunity to file all the evidence it wishes. Admittedly, the timelines are short, but they are equally so for all the parties. The parents have waived cross-examination of Ms. Hankin, so I will make my decision on the evidence I have.

The review process

[18] From the outset of this application in October 2013, IM has been placed in her mother's care, subject to the Minister's supervision.

[19] Ms. M argues that the Minister should have left IM with her pending a hearing and decision whether IM should be taken, and, as well, investigated less intrusive alternatives, such as placing IM with Mr. L's mother, rather than taking IM into care.

[20] There have been seven orders relating to IM's placement since this proceeding began. Each and every order provided that if Ms. M didn't comply with any of the order's terms, the Minister "shall be entitled to take [IM] into care" and bring the matter to court pursuant to subsection 43(3) of the *Children and Family Services Act*.

[21] Subsection 43(3) affirms that such a provision may be contained in a supervision order and "where the agency takes the child into care" the agency shall bring the matter before the court which may review and vary the order, pursuant to section 46.

[22] With respect, I believe that there was no requirement that IM remain with Ms. M in these circumstances. Subsection 46(3) requires that where a party applies to review a supervision order, "the child shall, prior to the hearing, remain in the care and custody of the person or agency having care and custody of the child". The child's custody is changed only where I am satisfied that the child's best interests require a change in care and custody.

[23] However, this matter is before me not as a motion to review the Supervision Order pursuant to section 46, but because IM was taken into care pursuant to the terms of the current Supervision Order. If this had been a motion to review, I would accept Ms. M's position.

Should IM be in the Minister's care?

[24] Subsection 43(3) of the *Act* says that, when the Minister takes a child into care pursuant to the terms of a Supervision Order, I "may review and vary the order" pursuant to section 46. My options include varying or terminating the Disposition Order, ordering the Disposition Order terminate on a specified date or making an order pursuant to subsection 42(1).

[25] Before making an order, according to subsection 46(4) of the *Act*, I must consider: whether the circumstances have changed since the previous Disposition Order was made; whether the plan for IM's care that was applied in the decision is being carried out; the least intrusive alternative that's in IM's best interests; and whether the requirements of subsection 46(6) have been met.

[26] The requirements of subsection 46(6) apply to the review of temporary care and custody orders. I am not reviewing a Temporary Care and Custody Order, but a circumstance where the child has been taken into care pursuant to the terms of a Supervision Order. So I will consider only the first three factors listed in subsection 46(4).

Clause 46(4)(a): whether the circumstances have changed since the previous disposition order was made

[27] The Minister argues that circumstances have changed. For example, despite being told by me, on January 19, that I might not let the proceeding expire and that Ms. M must demonstrate a concerted commitment to IM living a hearing and speaking life if IM was to remain with her, IM was taken to daycare on January 20 without her hearing aids.

[28] As well, on January 20, after appearing in court, Ms. Hankin received a fourteen page fax from IM's daycare centre. This detailed that on January 20, IM was "eating out of the classroom compost this morning after she arrived". Ms. Hankin said that Laura Getson, from APSEA, told her that daycare staff reported IM arrived that morning in a sodden diaper which seemed to have been her overnight diaper. This is not recorded in the daycare notes. The Minister makes much of this, in light of my comments to the parents the previous day.

[29] Notes from the daycare centre detail injuries IM has had: a black eye, a cut, a large scratch and a bruise. These were noticed between March 5, 2014 and April 8, 2014. The daycare centre identified times when IM was unclean: May 15, 2014; July 29 and 30, 2014 and November 19, 2014. On the first three occasions, she had a bad odor and appeared to be unbathed. On November 19, she had "white sticky stuff in her hair" which the notes identified as food. One day, in August 2014, IM arrived with a bag full of treats (chocolate milk, Pepsi, marshmallows, chips and cupcakes). Ms. M explained that IM needed to be bribed with treats to behave. Lastly, on fourteen separate occasions there are notes about IM's hearing aids, most often they state that she is not wearing them. Less often, they state that she hasn't had them on for a period of time.

[30] Ms. M and Mr. L argue that these notes aren't changes in circumstances since the previous order was made. While newly disclosed, the notes largely pre-date the most recent order.

[31] It is more than regrettable that this information from the daycare centre was not disclosed to Ms. Hankin until January 20, 2015. There has been no explanation why disclosure wasn't made earlier. The daycare centre notes from January 14, 2014 indicated that IM "has no verbal skills. Just moans/noises. She points a lot. She does sign quite a bit." Ms. Hankin was in contact with the daycare centre in December 2013, so staff would know of the agency's involvement. I cannot understand why, when dealing with a non-verbal child and agency involvement, daycare staff would not call Ms. Hankin to report matters such as IM's black eye, for example.

[32] According to Ms. Hankin's affidavit of January 23, 2015, staff at SHYM reported that Ms. M returned from court on January 19 and told them that IM would be taken by the agency the following day. Ms. M "appeared emotionally flat" while saying this. She packed up all of IM's belongings and took IM to spend the night at Mr. L's home.

[33] I am not satisfied that the circumstances have changed since the previous Disposition Order was made. I have reviewed the daycare notes. If the injuries were indicative of physical

abuse, neglect or a failure to supervise IM (and this has not been shown to be the case), there have been no injuries since April 2014. IM's personal hygiene was problematic in May and July of last year and only once since then, in mid-November was there any note of her cleanliness. The food in IM's hair could have occurred on her way to the daycare. The notes from early 2014 record that IM wasn't wearing one or both of her hearing aids for weeks or months at a time. By September, October and November 2014, the notes indicate that she was without her hearing aids for two to three days each month. In January 2015, she was without them for three days. There are certainly still grave problems with constant and regular use, but the daycare records show some improvement.

[34] Concerns about time running out for IM to learn to speak and hear were identified to Ms. Hankin in advance of January 19 when the Minister appeared and stated a willingness to leave IM in her mother's care under a voluntary Memorandum of Understanding.

[35] I don't interpret IM's condition at daycare on January 20 in the same way the Minister does. The Minister suggests that Ms. M simply did not heed my sharp warning on January 19 that she might lose IM and that is why IM appeared at daycare hungry, wet and without her hearing aids. I see things differently. The parties were before me briefly on January 19. Without warning, they were scheduled to re-attend first thing the following day. Given the number of proceedings which occur at the Family Division each morning between 9 a.m. and 10 a.m., it's entirely possible that Ms. M had no opportunity to speak with her counsel about what had happened. Her comments and conduct at SHYM indicate that she understood IM would be taken the next day and there was nothing she could do about it.

Clause 46(4)(b) whether the plan for IM's care that was applied in the decision is being carried out

[36] The plan included family skills intervention, individual and couple's counselling and reference to mental health services at the IWK Health Centre for Ms. M, with reference to services at the Nova Scotia Hearing and Speech Centre, Atlantic Provinces Special Education Authority and a daycare for IM. The agency was to contract services with the Society of Deaf and Hard of Hearing Nova Scotians for Mr. L.

[37] Services remained in place and were functioning at a level acceptable to the Minister when the Minister asked to have the application expire on January 19. There were conversations between Ms. Hankin and staff at APSEA, the family skills worker, SHYM staff, and daycare staff subsequent to Ms. Hankin swearing her affidavit on January 6 and before attending court on January 19. The reports were sufficient that the Minister did not alter its position that it wanted to "continue to work with [Ms. M] on a voluntary basis after the legislative timelines expire."

Clause 46(4)(c): the least intrusive alternative that's in IM's best interests

[38] Clearly, the least intrusive alternative is for IM to remain in her mother's care. Another alternative, which the Minister had not been able to canvass, was involving Mr. L's mother in IM's care arrangements. This had been tried unsuccessfully in the past, but the reasons for its past failure might be overcome.

[39] When making a decision that engages determination of a child's best interests, I am to consider all relevant factors contained in subsection 3(2) of the *Children and Family Services Act*. These factors include her family relations (clauses 3(2)(a), (b), and (d)), the importance of continuity in her care (clause 3(2)(c)), her needs (clause 3(2)(e)), her level of development (clause 3(2)(f)), the risk of each course of action (clause 3(2)(l)) and the degree of risk that justified the finding that IM was in need of protective services (clause 3(2)(m)).

[40] Throughout this proceeding IM has been placed with her mother, through whom she has a relationship with her father, grandmother and aunt. IM's medical needs have never been sufficient to remove her from her mother's care. The recent discovery that IM's daycare has not been disclosing pertinent information to Ms. Hankin reduces the risk that IM will suffer harm if returned to Ms. M as both Ms. Hankin and daycare staff now, no doubt, better understand what steps must be taken to ensure disclosure is prompt and complete.

Conclusion

[41] I am satisfied that it is in IM's best interests that she immediately be returned to the care and custody of Ms. M, subject to the agency's supervision until the conclusion of the currently-adjourned final disposition hearing. The terms of paragraphs 1 through 6 of the current supervision order granted on November 4, 2014 shall apply.

[42] I specifically note that if Ms. M isn't compliant with the requirement that she schedule and attend all medical and specialist appointments recommended for IM, and follow and ensure IM's "participation in the reasonable treatment programs recommended by the child's medical service providers", IM may be taken into care again. If that occurs, it will be a very different situation than the one I have faced here.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia