SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. T.S.*, 2015 NSSC 65

Date: 20150211
Docket: *Halifax* No. SFHCFSA-094728
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

T.S. & W.M.

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:

"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."

Judge:	The Honourable Justice Mona M. Lynch
Heard:	February 11, 2015, in Halifax, Nova Scotia
Written Release:	March 2, 2015
Counsel:	Megan Roberts for the Applicant Eugene Tan for the Respondent, T.S. W.M. – self-represented

By the Court:

Background:

[1] This is an application under section 32 of the *Children and Family Services Act, S.N.S. 1990, c. 5 (CFSA)*. At the interim hearing, commonly called the five day hearing, the Minister of Community Services (MCS) requested a finding of reasonable and probable grounds that the child, a four year old girl, is a child in need of protective services pursuant to s. 39(3) and an order placing the child in the care of her parents subject to the supervision of the MCS pursuant to s. 39(4) (b) of the *CFSA*. The MCS requested conditions which would allow the MCS to enter the parents' home to ascertain that the child is being properly cared for. The MCS also requested provisions requiring the parents to refrain from the use of non-medically prescribed drugs and use of alcohol, submission to hair follicle testing and orders of production for records from the Abbie Lane Hospital, the Halifax Regional Police (HRP) and seven separate organizations under the umbrella of Capital Health.

[2] The affidavit which was filed with the child protection application indicates that the MCS received referrals on this family from 2011 and 2014 in relation to

verbal arguing, drug use and breach of probation charges against the mother. The MCS investigated the referrals. The allegations could not be substantiated.

[3] In January 2015 the MCS started receiving anonymous referrals about the mother using crack cocaine. The MCS investigated two such calls from January 19 and 20, 2015 and the allegations of drug use were denied by the parents. The MCS arranged for the child to remain with a relative until the matter could be investigated. The relative did not have any current concerns about the child's safety in the care of her parents and her past concerns were due to the mother's past relationship with a violent individual. When the mother was reached, she denied the allegations and stated that someone was making malicious referrals. When the social worker, accompanied by a police officer, met with the mother to discuss the allegation, the mother became very emotional and was hard to focus. The mother admitted to past mental health issues and having a mental health counsellor and a drug counsellor whom she saw regularly. The mother became very upset and was cursing and swearing. The social worker met with the child, had no concerns, and determined there was not sufficient grounds to continue to ask that the child reside elsewhere. The mother apologized for her emotional reaction.

[4] Another anonymous referral was received on January 26, 2015 alleging alcohol use by the mother and father and that the mother slapped the child. The social worker for the MCS made an unannounced visit to the parents' home two days later and was allowed entry by the mother. The mother was difficult to focus; was hyper but not aggressive. The mother admitted the father consumed alcohol with a friend on that day. The mother denied cocaine use, drinking alcohol and slapping the child. The social worker expressed concern over the number of referrals about the parents' drug use and asked for a hair follicle test. The mother admitted previous drug use dating back two years. The mother asked for time to consider the request.

[5] Another anonymous referral came in the early hours of January 29, 2015 which alleged that the parents had bought crack cocaine and, again, smacking the child. The source said that the child was upset and that the parents were drunk and high when they left the parents' residence. Emergency duty workers attended the residence with the police and there was no sign of alcohol or drugs. The mother suggested again that these were malicious referrals coming from her former partner who had threatened to make her life miserable. Neither parent appeared intoxicated or under the influence of any substance.

[6] Later in the day on January 29, 2015 the mother indicated that she would not participate in the hair follicle test. She was upset with the social worker and cursed and swore.

[7] Another anonymous referral was received by the MCS on January 30, 2015 alleging drug use and that the mother had offered oral sex in exchange for money to purchase drugs. The father was alleged to have slapped the child in the face. A female voice was heard in the background of the call telling the caller what to say.

[8] On January 30, 2015 the MCS held a risk management conference. The details of the numerous referrals about drug use were reviewed as well as the child being hit. Based on the mother's inability to focus on concerns and remain on topic, her admission of past cocaine use, the numerous referrals about drug use, concerns about the mother's mental health, the father's inability or unwillingness to protect the child and the child's young age and inability to self-protect, a decision was made to seek a supervision order from the court, a hair follicle test and access to the mother's counselling records.

[9] On February 4, 2015 two social workers and two police officers went to the residence of the parents and were allowed entry. The mother did not want to talk to them. There were no concerns about the child's physical presentation and no

injuries were observed. The mother became upset. The father denied the referral information about drugs, the offer of oral sex for money or physical harm to the child. The mother again indicated that the referrals were made by her former partner. The mother did not want to discuss the most recent referral. The mother was told that an application was going to be made to the court to obtain hair follicle tests and to obtain the ability to speak to her mental health and addictions service providers. The mother became very upset, was cursing and swearing and came close to the social worker's face. The father took the child out of the room.

Issues:

[10] Is there credible and trustworthy evidence on which to base a belief of reasonable and probable grounds that the child is in need of protective services?

Legislation:

[11] Sections 39(1) – (4) of the *CFSA* read:

> 39 (1) As soon as practicable, but in any event no later than five working days after an application is made to determine whether a child is in need of protective services or a child has been taken into care, whichever is earlier, the agency shall bring the matter before the court for an interim hearing, on two days' notice to the parties, but the notice may be waived by the parties or by the court.
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> (2) Where at an interim hearing pursuant to subsection (1) the court finds that there are no reasonable and probable grounds to believe that the child is in need of protective services, the court shall dismiss the application and the child, if in the

> care and custody of the agency, shall be returned forthwith to the parent or guardian.
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> (3) Where the parties cannot agree upon, or the court is unable to complete an interim hearing respecting, interim orders pursuant to subsection (4), the court may adjourn the interim hearing and make such interim orders pursuant to subsection (4) as may be necessary pending completion of the hearing and subsection (7) does not apply to the making of an interim order pursuant to this subsection, but the court shall not adjourn the matter until it has determined whether there are reasonable and probable grounds to believe that the child is in need of protective services.
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> (4) Within thirty days after the child has been taken into care or an application is made, whichever is earlier, the court shall complete the interim hearing and make one or more of the following interim orders:
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> (a) the child shall remain in or be returned to the care and custody of a parent or guardian;
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> (b) the child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of the agency and on such reasonable terms and conditions as the court considers appropriate, including the future taking into care of the child by the agency in the event of non-compliance by the parent or guardian with any specific terms or conditions;

Section 39(11) reads:

> (11) For the purpose of this Section, the court may admit and act on evidence that the court considers credible and trustworthy in the circumstances.

Analysis:

[12] The rules of evidence do apply in child protection cases, including the rules regarding hearsay, unless the hearsay evidence falls under an exception or there is a provision in the *CFSA* which allows such evidence. Section 39(11) allows a court to admit and act on evidence that the court considers credible and trustworthy in the circumstances at the interim hearing stage. Section 96 allows the court to

consider evidence from prior child protection proceedings and under certain circumstances to consider out of court statements of children.

[13] The detail of the allegations about these parents is set out above. A summary of the allegations against the parents and the credible and trustworthy information that the MCS asks me to rely on can be summarized as:

(a) Two referrals in 2011 and 2012 which were investigated and not substantiated by the MCS;

(b) Referrals in 2013 that could not be substantiated;

(c) A referral in 2014 about the mother breaching her probation which the MCS determined was not sufficient to open a file;

(d) Five anonymous or confidential referrals within eleven days in January 2015 alleging drug and alcohol use by the parents in a child caring role, physical abuse of the child by the parents and the mother offering to exchange oral sex for money. None of these allegations were substantiated by the MCS when the parents were questioned or when the MCS attended the parents' residence;

(e) The mother's presentation on three occasions when presented with the anonymous allegations which included an inability to focus her on the concerns, anger, cursing, swearing and being hyper;

(f) The father's inability or unwillingness to protect the child.

[14] Up until the referrals in January 2015, the MCS did not find any of the information or referrals they received to be enough to start a proceeding under the *CFSA*. The referrals in 2011, 2012, 2013 and 2014 were not substantiated when

investigated by the MCS. These, along with the five anonymous referrals in January 2015, are of limited or no evidentiary value.

[15] The details of the referrals made to the MCS are out of court statements that the MCS appears to be putting forward for the truth of their contents -- hearsay evidence. Or the MCS is putting the statements forward as proof that the statement was made and their relevance and probative value must be considered.

[16] It may be that in some cases the referrals made by professionals such as teachers, social workers, police officers, doctors, etc., would be considered credible and trustworthy by the court at the interim hearing even though the information is presented in the form of hearsay. The same cannot be said of anonymous referrals. The affidavit presented to the court from the social worker for the MCS indicated that she believed the anonymous referrals to be true, however, no basis for her belief was provided.

[17] With anonymous referrals the court has absolutely no basis to assess whether the information in the referrals is credible or trustworthy. There is nothing known about the person who made the statement. The anonymous referral information cannot be considered by the court for the truth of its contents - it is hearsay and there is no basis to find it credible or trustworthy. This is particularly so when

investigation by the MCS does not substantiate the referral information or where the MCS does not consider the referral information to be worthy of an investigation. It is not a matter of weight as inadmissible hearsay has no weight. Should the anonymous referral information be in the affidavit submitted by the MCS? It should not.

[18] Evidence presented in child protection hearings was considered in **DCP v. C.P. & T.P.** 2014 PECA 18 at paragraphs 3-6:

> [3] The appellants begin their factum with the following admonition:
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> > It is respectfully submitted that Child Protection cases have devolved into trials that pay little attention to the rules of evidence. The cases proceed on the basis that Child Protection workers are presumptively credible and deference is paid to their evidence which includes both hearsay and unqualified opinion. In this situation, the answer to the ultimate question is obfuscated by a morass of evidence which in other cases would be inadmissible.
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> [4] Child Protection cases are unique. The Director must meet statutory timelines and therefore must gather evidence quickly and efficiently. The evidence at interim hearings, and frequently, as well at protection and disposition hearings, is tendered by way of affidavit. In order for the Director to explain why a particular decision was made, the affidavit often contains details of anonymous reports. A practice has developed whereby counsel and the courts do not apply the rigors of the law of evidence to these affidavits, relying instead on the wisdom of the trial judge to ignore the otherwise inadmissible evidence in arriving at a fair and just decision.
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> [5] The difficulty with this approach is three-fold: the danger that highly prejudicial evidence of limited probative value will unconsciously bleed into the trial judge's reasoning; the perception of trial unfairness that may develop from a belief that parents have lost their children due to hearsay without any real ability to cross-examine and challenge the evidence; and the danger that the sheer volume of hearsay evidence can overwhelm the admissible evidence.
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> [6] A trial is a search for the truth. The law of evidence as it has been developed and refined over hundreds of years facilitates the search for the

> truth. It is designed to weed out unreliable evidence so that decisions are based on trustworthy evidence. This, in turn, enhances the faith and trust of litigants, and the public, in the fairness and integrity of the judicial system. A decision to remove a child from the care and custody of its parents, either temporarily or permanently, is a serious one, which should only be made on evidence that is trustworthy. Complying with the laws of evidence in child protection cases is not a burden on the parties; it is an obligation.

These comments are no less true in Nova Scotia. The MCS must comply with the rules of evidence, although at the interim hearing stage they can rely on evidence that is credible and trustworthy. Evidence of limited or no probative value should not be presented to the court in the affidavit of the MCS. Statements from anonymous sources should not be contained in the affidavits for the truth of their contents.

[19] If the anonymous referral information is presented to the court as proof that the statement was made and the reason for the investigation by the MCS, it could be considered for that purpose provided the investigation of the MCS substantiated the information. If the MCS did not consider the information received important or reliable enough to investigate, it should not be in the affidavit as it has no probative value. If the MCS did investigate but did not substantiate the anonymous referral information, it should not be in the affidavit as it has no probative value. Unless the details of the anonymous referral are necessary to explain the subsequent investigation they should not be included in the affidavit.

[20] In **DCP v. C.P. & T.P.,** Mitchell, J.A. considers the narrative exception to the hearsay rule and information from anonymous sources at paragraphs 47-53:

> [47] In **Heron - Perth Children's Aid Society v. H.(C.),** 2007 ONCJ 744, the court at para.27 (dealing with affidavits filed on a motion for summary judgment) set out guidelines that the Director would be well advised to follow if the Director wishes to place hearsay evidence before the court so that the court can assess necessity and reliability. That court stated as follows:
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> > ... First of all, hearsay evidence properly pleaded is designed to facilitate motions, not to deny the normal procedural protection when the merits of a claim are being decided. Therefore, the deponent should do a number of things.
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> > - First, the deponent should identify the source of the information and identify that the source must be the original source of the information, or that that person is the person with the personal knowledge or observation of the fact alleged.
> > - Second, the deponent must explain the reason why the original source of the information has not sworn his or her own affidavit and therefore why would it be necessary for the court to accept hearsay evidence on those facts as opposed to the direct evidence of those facts.
> > - Third, the deponent must explain the circumstances of how the hearsay evidence was obtained, why the source would have knowledge of the information and the full details of the information and the source so that the court can ascertain the soundness of the information and the source and assess some kind of level of reliability to that evidence.
> > - Last, the deponent must explain not only that they believe the evidence from the hearsay source, but they have got to give for every piece of hearsay evidence reasons why they and the court should believe the source and rely on that untested evidence.
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> [48] Hearsay may be admitted not for the proof of its contents but to complete the narrative or to put things in context. This exception to the hearsay rule involves a weighing of the probative value of the evidence versus its prejudicial effect. In my view much of the evidence tendered in this case (and in many other Director cases with which I am familiar), goes far beyond what could

be considered narrative/context and ventures into areas that are highly prejudicial with little probative value. For example, paragraph 10 of Creswell's January 4, 2012 affidavit is typical. It states:

> ..that a report was received on June 26, 2009, regarding concerns related to emotional harm and lack of supervision. C. was reported to yell and swear at S., as well calling her a 'fucking little bitch' and a 'fucking little jerk.' This yelling was reported to be the norm in the house. It was also reported that S. was almost hit by a car and had been outside on her own, and as well as concerns regarding S. being 'smacked' were also reported. The report source expressed concern that S. was two and a half years old and not talking. Social worker Carolyn Peters was assigned to complete the investigation. The report was received on an open investigation on June 29th, 2009, regarding concerns for C.'s ability to parent and neglect. The report stated that C. is 'bad natured' and 'bad tempered'. C. and T. denied any protection concerns. S. was not found to be in need of protection and the investigation was closed on July 24th. Referrals were made to speech therapy and nutrition services. [Emphasis added.]

[49] The affidavits filed by the Director's workers in this case are replete with the details of anonymous reports. (See: **Director of Child Protection for the Province of Prince Edward Island v. J.P., J.L., and L.M.**, 2013 PESC 6, paras.31-35; **DCP v. J.D. and D.B.**, 2014 PESC 17 (CanLII), at para.4.) This problem is not confined to this province. See: **Huron-Perth Children's Aid Society v. H.(C.), supra,** and **C.A.S. v. K.V.**, 2013 ONSC 7480 (CanLII). The fact an anonymous report was made is relevant and admissible only to explain why the Director became involved. When the Director receives a report, the Director is statutorily obliged *"to make an assessment of the circumstances"* (s.11 of the **Child Protection Act**). The identity of the anonymous informant is protected (s.10 of the **Child Protection Act**). Those anonymous and confidential reports may be accurate, based on a misconception of the facts, or completely false. Other than providing the Director with an obligation to act and investigate, the details of the report are, at law, little better than rumor and have no weight.

[50] The probative value of the anonymous report referred to in para.10 of Creswell's affidavit is that it explains why and when the Director became involved. In some cases, a little more detail might be acceptable to explain why the Director acted as she did. For example, if the report related to alcohol abuse it may lay the ground work for a Director's request that the parents be assessed for alcohol addiction. However, the details of the report are unnecessary. The prejudicial effect is that the unproven allegations will inflame the mind of the trier of fact who may come to believe that C. is an unfit parent because of the allegations. There is danger as well, when there is so much hearsay, as in this case, that the hearsay will overwhelm the admissible evidence.

> [51] The contents of para.10 have virtually no probative value other than to show how and when the Director became involved. In my view, they go far beyond providing narrative or context. To add insult to injury, this anonymous report resulted in the child being *"found not to be in need of protection and the investigation was closed."*
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> [52] Yet even with that result, this particular hearsay found its way into Dr. Mallia's report. Dr. Mallia wrote: *"CFS received a report in June 2009 that Ms. C. was yelling and swearing at S. She was reported to be calling S. a 'fucking bitch' and a 'fucking jerk'."* There is absolutely nothing in the evidence, affidavit or viva voce to indicate that the result of the Child and Family Services investigation was that the report was true and accurate. It is simply an anonymous report against which it is impossible to defend as the appellant parents could not cross-examine the maker of the statement. It is essentially little more than a rumor. There is *viva voce* evidence from the appellant father T. that C. swore, but his evidence was that she did not swear at the children.
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> [53] In my view, spelling out the unnecessary details of an anonymous report should cease. If the Director's investigation reveals something, then that may well be admissible. However, it is unfair to the parents, the children, and to the court to file an affidavit with highly prejudicial hearsay of very limited probative value. The Director has legal ways to put forward relevant and admissible evidence. The Director does not have to rely on hearsay nor should the Director taint her case by including such hearsay. When such hearsay is presented, the trial judge should not accept it into evidence.

[21] In the present case, the dangers are the same. There is a danger that the volume of the inadmissible anonymous hearsay may lead a trier of fact to find that "where there is smoke there is fire". As Mitchell, J.A. said in **DCP v. C.P. & T.P.,** the anonymous and confidential reports may be accurate, based on misconception of the facts or completely false. There is no way to assess the credibility or trustworthiness of the information except by the MCS investigating. If the investigation does not substantiate the information, the details of the anonymous referral have no weight, should not be in the affidavit and should not be considered

by the court. They are no better than rumor, are unfair to the parents and are little more than mud-slinging. In most cases the MCS has enough admissible evidence to substantiate their concerns without having to put forward inadmissible and irrelevant information.

[22] The anonymous or confidential referrals are not admissible and should not be considered. They do not provide credible and trustworthy evidence on which the court could find reasonable and probable grounds to believe the child is in need of protective services.

[23] The only remaining evidence that the MCS has provided is the demeanour and behaviour of the mother when the MCS attended at her home to investigate the anonymous allegations and whether there is evidence that the father was unwilling or unable to protect the child.

[24] There is no doubt that the mother was upset and angry about the allegations made about her and the father. There is no doubt that she "got in the face" of the social worker. There is no doubt that she screamed and yelled and was hard to keep on topic. She cursed and swore. There are at least two ways to interpret the mother's behaviour. One is evidence of mental health issues as the MCS alleges. The other is the mother was surprised, shocked, upset and angry that false

allegations were being made about her and the police and social workers were attending at her home and asking her to explain the anonymous allegations. The mother's behaviour was not always angry. She apologized at one point for her behaviour.

[25] The mother was very upset again when the social worker indicated that there was going to be an application made to the court and there would be requests for very intrusive orders of hair follicle tests and counselling records. The mother was trying to provide an explanation for the referrals as coming from her previous partner. It is impossible to defend against anonymous allegations.

[26] I do not find it unusual that a person would get very upset about the invasion into their life as a result of anonymous referrals. Proceedings under the *CFSA* involve a huge intrusion into the lives of families and the end result could be loss of all parental rights. They are not to be used for fishing expeditions when there are numerous anonymous referrals made.

[27] The mother's behaviour does not provide reasonable and probable grounds that the child is in need of protective services.

[28] The father was found to be drinking alcohol with a friend on one of the visits by the police and social workers. That is hardly enough for reasonable and

probable grounds to determine that the child is in need of protective services. The mother was also present and able to care for the child and the evidence presented does not indicate that the father was intoxicated. The other allegation against the father was that he was unable or unwilling to protect the child. However, the evidence provided shows that the father removed the child from the room when the mother became very upset with the social workers on February 4, 2015. He protected the child from exposure to the highly emotional interaction the mother was having with the social workers and police officers. The father's behaviour does not provide reasonable and probable grounds that the child is in need of protective services.

Disposition:

[29] Nothing in this decision would prohibit the MCS from continuing their investigation. However, the credible and trustworthy information and evidence presented to the court does not provide reasonable and probable grounds to determine that the child is in need of protective services. As there are no reasonable and probable grounds to find the child in need of protective services, the application of the MCS is dismissed.

Lynch, J.