SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: Nova Scotia (Community Services) v. MS, 2015 NSSC 307
Date: 2015-10-27
Docket: *SFSND* No. 92568
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

MS, SA and SF

Respondents

Date: 2015-10-30
Docket: SFSNMCA:97384
Registry: Sydney

Between:

SS

Applicant

v.

MS, SA and SF

Respondents

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated November 10, 2015.
Judge:	The Honourable Justice Theresa Forgeron
Heard:	September 23, 2015; October 5 and 27, 2015 , in Sydney, Nova Scotia
Oral Decision:	October 27, 2015
Written Release:	October 30, 2015
Counsel:	Danielle Morrison, for Minister of Community Services Shannon Mason, for MS

Cathy Logan, for SF
SA, Self-Represented

By the Court:

Introduction

[1] D, C, and J are the young children of MS and SA. The children are in the care of the Minister of Community Services. SF was residing with MS at the time the children were apprehended.

[2] The Minister is seeking a permanent care and custody order pursuant to the provisions of the *Children and Family Services Act*. All respondents, except SA, consent to the Minister's plan.

[3] SS is the maternal grandmother of the children. SS seeks party status. She wants to put forth a plan to care for her grandchildren. SS is also seeking leave and custody of her grandchildren pursuant to the provisions of the *Maintenance and Custody Act***.**

[4] The Minister disputes the application of SS to be added as a party in the child protection proceeding. The Minister also objects to the application of SS to seek leave and custody under the provisions of the *Maintenance and Custody Act*. SA's position was not articulated.

Issues

[5] The following issues will be determined in this decision:

- Should SS be granted party status in the child protection proceeding?
- Should leave be granted to SS to apply for custody pursuant to the provisions of the *MCA*?

Background

[6] D, C and J were apprehended by the Minister on August 19, 2014 because of concerns surrounding drug use, unfit living conditions, domestic violence and neglect. The children have remained in the care of the Minister since their apprehension.

[7] Interim orders were granted on August 26 and September 18, 2014. The protection finding was entered by order dated November 17, 2014. The first disposition hearing was held on February 10 and 12, 2015. Subsequent review hearings were held on May 6, June 5, and July 22, 2015.

[8] Although the legislative time lines have not expired, the Minister moved forward with its application for permanent care and custody, given the circumstances and the needs of the children. The application was scheduled to commence on September 23, 2015.

[9] Before the hearing began, MS and SF consented to the Minister's application. They recognized that they are not in a position to care for the children. MS and SF are no longer participating in the proceedings.

[10] Further, prior to the permanent care hearing, SS filed an application to be added as a party. She also applied for leave and custody pursuant to the *MCA*.

[11] The parties agreed that the court should determine the applications of SS before hearing the permanent care and custody application. SS's applications were heard on September 23 and October 5, 2015. The following witnesses testified: SS, MA, and AD. Oral submissions were delivered at the conclusion of the hearing to supplement the written briefs. Before the hearing concluded, SA left the court room and did not provide submissions.

[12] The court's oral decision was rendered on October 27, 2015 in both the *CFSA* and *MCA* matters, although the proceedings were not consolidated, given the consent of the parties, the evidentiary overlap, and concerns surrounding the efficient use of court resources.

Analysis

[13] **Should SS be granted party status in the child protection proceeding**?

Position of SS

[14] SS seeks party status because she wants to gain custody of the children. SS submits that she has a strong and direct interest because of her connection to her grandchildren. SS states that she had a healthy and positive relationship with her

grandsons. She indicates that she was unable to develop a relationship with J because her daughter inappropriately refused contact.

[15] SS states that she is focused on her grandchildren's best interests. She notes that she had regular contact with child protection authorities and has consistently reported child protection concerns, even though the concerns involved her daughter.

[16] SS states that she is able to provide a stable, healthy and loving home to her grandchildren. It is in the best interests of her grandchildren to be placed with family, and in her care.

Position of the Minister

[17] In contrast, the Minister argues that SS did not prove that she should be granted party status. The Minister states that the children's welfare will not be enhanced by granting her application. The Minister points to SS's involvement with child protection authorities which arose when she was parenting her own children. The Minister submits that SS has not resolved ongoing concerns related to addiction, mental health and lifestyle issues. The Minister asks that the application be dismissed.

Position of SA

[18] SA did not provide his position on the motion.

Legislation and Law

[19] Section 36 (1) (f) of the *CFSA* provides the court with the jurisdiction to add "any other person" as a party "at any stage in the proceeding pursuant to the *Family Court Rules*." The burden is on the person making the application.

[20] In **Nova Scotia (Minister of Community Services) v. S. S.**, 2012 NSSC 293, Jollimore, J., after undertaking a case law analysis, reviewed the factors to be considered when faced with a contested standing motion. These factors are as follows:

- Whether the non-party seeking standing has a direct interest in the proceeding's subject matter.

- Whether the non-party seeking standing has a familial, or some other, relationship with the children.

- Whether there is a reasonable possibility, when compared to other alternatives, that the children's welfare may be enhanced by granting the non-party standing and hearing the relevant evidence.

[21] Further, the *CFSA* contemplates family placement in appropriate circumstances, see for example ss. 42(1)(c) and 42(3). These provisions, however, must always be reviewed from the perspective of the best interests of the child as stated in ss. 2(2) and 3(2) of the *Act*, and in **Family and Children's Services of King's County v. B.D.**, [1999] N.S.J. 220 (C.A.).

[22] When responding to a family placement request, the court must be responsive to reasonable alternatives, where such placements are "sound, sensible, workable, well-conceived and have a basis in fact": **Children's Aid Society of Halifax v. S.M.R. and B.** 2001 NSCA 99 at par. 29. In addition, the family member advocating a competing plan must produce cogent evidence of the plan's viability, as noted in paras. 53 and 54, which provide as follows:

> [53] The agency is not required to investigate each and every family placement proposal. The burden of persuasion is upon those advocating a competing plan to advance the most compelling and sensible alternative they can muster.
>
> [54] There is an obligation upon the person advocating a competing plan to present some cogent evidence with respect to it. In that way, the merits and viability of the proposal will have some foundation in fact which might then be adequately assessed by the trial judge. Should time permit and circumstances warrant, it may well be that the plan put forward as a worthwhile family placement option will require further investigation, perhaps in some cases a complete home study report. However, not every possible placement alternative will require such a response.

Decision

[23] I reject the application of SS because she failed to meet the burden which was upon her. Although SS showed the she held a direct interest in the proceeding, and was involved in a familial relationship, she did not prove the third branch of the test. SS failed to prove, that when compared to other alternatives, that there was a reasonable possibility that the children's welfare would be

enhanced by granting her party status and hearing the relevant evidence. To the contrary, concerns surrounding a lack of emotional connection to the children; mental health, addiction and lifestyle issues; and residential instability confirm that there is a reasonable likelihood that the children would be at risk if they were placed in SS's care.

Lack of Emotional Connection

[24] The children lack an emotional connection to SS. SS never met J. From J's perspective, SS is a virtual stranger.

[25] In addition, there is an insignificant attachment between SS and her other grandchildren, D and C. SS's last personal contact with her grandsons was in June 2013 – over two years ago. Further, prior to 2013, the contact between SS and her grandsons was inconsistent and sporadic for various reasons, including:

- The conflict between SS and MS.
- SS's lifestyle choices.
- SS's lengthy absences from the area where her grandchildren were living.

Mental Health, Addiction and Lifestyle Issues

[26] Past parenting evidence plays an integral role in child protection determinations. In **S.A.D. v. Nova Scotia (Community Services)**, 2014 NSCA 77, Fichaud, J.A. held that although "[t]here is no legal principle that history is destiny", a trial judge may "find that past behavior signals the expectation of future risk": para 82. Further, in **Nova Scotia (Community Services) v. G.R.**, 2011 NSSC 88, this court stated at para. 22 as follows:

> 22 Past parenting history is also relevant. Past parenting history may be used in assessing present circumstances. An examination of past circumstances helps the court determine the probability of the event reoccurring. The court is concerned with probabilities, not possibilities. Therefore, where past history aids in the determination of future probabilities, it is admissible, germane, and relevant. In **Nova Scotia (Minister of Community Services) v. Z. (S.) (1999), 181 N.S.R. (2d) 99 (N.S. C.A.),** Chipman, J.A. confirmed the relevance of past history at para 13 wherein he states as follows:

> [13] I am unable to conclude that the trial judge placed undue emphasis on the appellant's past parenting. It was, of course, the primary evidence on which he would be entitled to rely in judging the appellant's ability to parent B.Z. In **Children's Aid Society of Winnipeg (City) v. F.** (1978), 1 R.F.L. (2d) 46 (Man. Prov. Ct.) at p. 51, Carr, Prov. J., (as he then was), said at p. 51:
>
> > ... In deciding whether a child's environment is injurious to himself, whether the parents are competent, whether a child's physical or mental health is endangered, surely evidence of past experience is invaluable to the court in assessing the present situation. But for the admissibility of this type of evidence children still in the custody of chronic child abusers may be beyond the protection of the court ...

[27] SS struggled with mental health and substance abuse issues throughout much of her life. These struggles led to an adoption of an unsafe and chaotic lifestyle. This lifestyle produced child protection risks which resulted in agency involvement for several years. SS has not undertaken sustained and appropriate services to alleviate or moderate the protection concerns associated with her addiction and mental health difficulties. The court therefore finds, on a balance of probabilities, that child protection risks would likely resurface if SS was entrusted with the care of her grandchildren in the future.

[28] Findings of fact in support of this conclusion include the following:

- SS experienced stress and anxiety when her husband committed suicide in 2002. SS had minimal family or professional supports during this period. In fact, SS indicated that her only friend, at that point in her life, was a solvent/glue sniffer.
- SS's personal circumstances became critical after her husband's death. She abused alcohol as a coping mechanism. She did not seek treatment even after child protection authorities intervened and advised her to do so. To the contrary, SS did not create positive changes; the chaos which marked her life, and the lives of her children, continued.
- SS adopted an unhealthy and dangerous lifestyle, at a time when she was solely responsible for the care of her own dependent children. SS regularly left her children alone, while she drank and partied. She associated with

drug addicts and criminals. At one point, SS was afraid for her own life after being severely beaten by family members of a former friend, who was involved in drugs and who died in a house fire. Her own daughter was sexually abused by one of SS's friends.

- SS attempted suicide on two occasions – once in 2007, and the second time in 2009. She minimized the seriousness of these issues.
- Although SS intermittently engaged in mental health services over the years, she did not undertake a consistent approach to treatment. She only saw a psychiatrist and mental health counsellor on a few occasions in 2007, despite her suicide attempt. She did not pursue family counselling with her daughter at a time when their relationship was in crisis. Although being diagnosed with post-traumatic stress disorder in 2013, SS has not received significant mental health treatment. While living in Ontario from September 2014 until June 2015, SS said that she saw a psychiatrist only once. SS states that she is now attempting to wean herself off some medication and is currently on a wait list for a psychiatrist in this area. This fragmented approach to mental health treatment is troubling.
- SS often presents as emotional, upset and in crisis during her frequent interactions with child protection workers. It is unfortunate that SS has not had the mental health therapy and direction that she requires to problem-solve in a healthy and effective fashion. Instead, SS inappropriately reaches out to protection workers who are unable to discuss the confidential details of her daughter's case.
- SS was evasive when describing her alcohol addiction. She stated that she stopped drinking alcohol between 2009 and February 2012. She then discussed drinking alcohol at various times until 2013, although denying any abuse. SS does not appreciate the dangers implicit with any alcohol usage, given her circumstances.
- SS does not appreciate the risks associated with the misuse of medication. SS gave her own medication to her daughter's boyfriend, in an effort to calm him down, during an altercation which occurred at a birthday party for one of the children in December 2012.

- SS does not participate in addiction or relapse prevention programming. In such circumstances, there is a likelihood that SS will revert to abusing alcohol as an unhealthy coping mechanism.
- SS lacks effective problem-solving skills. She was violent in the past. In 2004, she assaulted her son during a disagreement. In 2009, she assaulted her daughter because her daughter was disgusted that SS allowed a drug addict to spend the night. The most recent physical altercation between SS and her daughter occurred in the summer of 2015. SS did not report the assault to the police.
- There is no evidence that SS identified violence as a concern, nor is there evidence that she successfully concluded services to address violence and healthy problem-solving alternatives.

[29] Given SS's past lifestyle choices, her fragmented approach to mental health treatment, and her failure to actively participate in addiction and relapse prevention programming, the court concludes that D, C and J would be at risk should SS be involved in their lives.

Residential Instability

[30] SS does not have appropriate housing. SS is not eligible to apply for regional housing until her outstanding account in the amount of $2,200 is paid in full. She estimates that it will take about six months to make restitution. In the meantime, SS is going to rent a room in a clean house, which she admits is not suitable for the children.

[31] This is not the first time that securing appropriate and affordable housing has been challenging for SS. Her evidence is replete with examples of repeated moves, both within the area, and to and from other provinces. Residential instability is not in the best interests of the children.

Summary

[32] The children's welfare will not be enhanced by having contact with their grandmother. SS's ability to care for the children is marred because of a myriad of unresolved mental health and social welfare challenges. SS did not provide a

reasonable alternative plan. Her proposal is not sound; it is not sensible; it is not workable; it is not well conceived. A biological connection, standing alone, is not a strong basis upon which to grant party standing. The motion is denied.

[33] **Should leave be granted to SS to apply for custody pursuant to the provisions of the *MCA?***

[34] Child protection proceedings commenced under the *CFSA* must be determined before applications are heard under the *MCA*: **Nova Scotia (Community Services) v. BC,** 2012 NSSC 413, para 36 and **New Brunswick (Minister of Social Development) v. P.(T.A.)**, 2015 NBCA 39. In any event, I would deny leave under the *MCA* for the reasons previously stated.

Conclusion

[35] The applications of SS are dismissed. It is not in the best interests of the children for SS to be added as a party, nor to be granted leave to apply for custody. The Minister is directed to prepare the orders.

Forgeron, J.

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Erratum: November 10, 2015

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ERRATUM

Cover page: Change to the date on the cover page from 2015-10-30 to 2015-10-27.