SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *AAG v. Mi'kmaw Family and Children Services,* 2015 NSSC 369

Date: 2015-12-18
Docket: *Sydney* No. 97583
Registry: Sydney

Between:

AAG and CG

Applicants

v.

Mi'kmaw Family and Children Services

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	November 24, 25, and December 7, 2015, in Sydney, Nova Scotia
Oral Decision:	December 18, 2015
Written Decision:	December 22, 2015
Counsel:	Jennifer Nolan for the Applicant, AAG CG, on his own behalf Robert Crosby, Q.C. for the Respondent, MMFCS

By the Court:

Introduction

[1] AA and CG are husband and wife. Their five children, C, I, S whom they call W, K and A, are in the permanent care and custody of Mi'kmaq Family and Children Services. Mrs. G seeks to terminate all permanent care orders, while Mr. G seeks to terminate the permanent care orders for I and S. The Agency strenuously objects to the application.

Issues

[2] The following issue will be addressed in this decision:

- Should any of the permanent care and custody orders be terminated?

Background

[3] Mr. and Mrs. G are in a committed marital relationship, and have been for many years. They want their family reunited. They love and miss their five children.

[4] The five children were placed in the permanent care and custody of Mi'kmaq Family and Children Services on October 1, 2013 following a hearing which was held on June 18, 21 and July 4, 2013 in Port Hawkesbury. Neither party was present for the hearing. The trial judge, Justice Legere-Sers, held that disinterest was not the reason for the parents' failure to attend at the court proceeding. She noted that the parents wanted their children returned to their care.

[5] Justice Legere-Sers found that Mr. and Mrs. G "struggled unsuccessfully to address their children's needs" at para 97 of the decision. The extensive special needs of the three older children were detailed in the decision. C was diagnosed as having an autism spectrum disorder. He required a minimum of two person care, 24 hours a day, seven days a week, as stated at paras 45 and 207 of the decision. C was noted to be non-verbal and a flight risk. Although C's circumstances improved after he was placed in the care of the Agency, Justice Legere-Sers nonetheless

found that even the Agency was not always successful in accessing appropriate services for C, see for example para 183 of the decision.

[6] I and W were each diagnosed with an autistic spectrum disorder. They each experienced language delays and difficulty with reciprocal social interaction. Resources and services were necessary to address their special needs, although their needs were not deemed to be as severe or as debilitating as those presented by C.

[7] In summary, Justice Legere-Sers placed the children in the Agency's permanent care because Mr. and Mrs. G did not have adequate housing and because they had failed to secure the necessary services to meet the special needs of the children, as noted at paras 300 to 305 of the decision, which paragraphs provide as follows:

> [300] The children cannot be returned to the parents without adequate housing and adequate services in place to assist them in the care of their five children, each with significant needs.
>
> [301] The assessors for the children indicate that ongoing significant interventions are necessary to try to keep these children with their grandmother and C. back with his extended family.
>
> [302] Dr. Kawchuk recommends C. not be moved for at least another year to build on his progress. She advised he requires at least two years of stability to "retain and regain" the skills he is being taught. Moving him may cause a setback.
>
> [303] On the totality of the evidence, the agency has satisfied me that the children continue to be in need of protective services and may well be in need for their dependant lives.
>
> [304] The parents have not been able, on their own, to address these significant needs or engage in community services and supports.
>
> [305] The kind of care the children need at this stage has been described to me and it is significant.

[8] Approximately two years later, on September 10, 2015, Mr. and Mrs. G applied to terminate the permanent care and custody orders. Mr. and Mrs. G state that they have satisfactorily addressed all protection concerns. It is now in the children's best interests to be returned to their care.

[9] The hearing was scheduled for November 24 and 25, 2015. On November 24, the court heard the evidence of Mr. and Mrs. G, GF, DM and RP. No evidence was presented on November 25 because counsel for Mrs. G encountered unexpected health difficulties. The hearing resumed on December 7. Dr. Baker and David Gouthro testified. At the conclusion of the hearing, the parties provided oral submissions. The court then adjourned for decision.

[10] Before beginning with the analysis of the issue, I wish to comment on Mr. and Mrs. G's demeanor. Although understandably distressed over the loss of their children, Mr. and Mrs. G were respectful, articulate and focussed when providing their evidence and when addressing the court. Justice Legere-Sers made similar favourable comments throughout her decision, wherein she described Mr. and Mrs. G as co-operative, polite, intelligent and peaceful. These adjectives aptly describe Mr. and Mrs. G when they appeared before this court in December.

Analysis

[11] **Should any of the permanent care and custody orders be terminated?**

Position of Mr. and Mrs. G

[12] Mr. and Mrs. G state that they have successfully addressed the protection concerns which gave rise to the permanent care order, as they relate to housing and the children's special needs.

[13] Mr. and Mrs. G state that they have secured housing in *. The Band Council will provide furniture once the children are returned to their care. Their current home is safe, clean and suitable for the children. Mr. G's sister and her large family have moved out of the home. Prior concerns related to overcrowding and unfit living conditions have resolved.

[14] Mr. and Mrs. G intend to appeal the Band Council's eviction notice, or in the alternative, they will find other appropriate accommodations. Mr. G believes that the Band has no authority to issue an eviction notice. He states that he owns the home and the land upon which the home was built. Mr. G states that the land was given to him by Rabi Yitzhak Kaduri, whom Mr. G states was his relative. Mr. G further indicates that he financed the building of the house with money given to him by Richard Lovitt of Creative Arts Agency in Los Angeles.

[15] Mr. and Mrs. G also confirmed that they made other changes which prove that they are emotionally and physically capable of addressing their children's needs. They are no longer isolated. They have reached out to family members and have their support. Mrs. G referenced the assistance she receives and will continue to receive from her aunts, sisters, and parents. Mrs. G intends to work with the autism society. For his part, Mr. G noted the support which he receives from his parents and his sister Cr, together with Mrs. G's family.

[16] In addition, Mr. and Mrs. G state that they have sought medical assistance so that all mental health issues are professionally monitored. They both are on medication and are thus emotionally equipped to meet the challenges that they will face if the children are returned to their care.

[17] Mr. and Mrs. G state that they are ready and prepared to resume the care of their children. Mr. G expressed distrust of the Agency. He is concerned that the children will experience difficulties similar to those found in residential school survivors. Mrs. G is concerned about the health of the maternal grandparents who have care of the four younger children. Finally, both were worried about C being placed in an institution, off island and away from family and culture.

[18] The only difference in the plan presented by Mr. and Mrs. G concerned the number of children to be returned. Mr. G felt that the two boys, I and W should be returned first, and then C should be transitioned back into their care. Mr. G felt that the girls were happy and adjusted in the home of the maternal grandparents and likely should remain there. In contrast, Mrs. G wants all five returned to their care immediately.

Position of the Agency

[19] The Agency states that the application of Mr. and Mrs. G must be dismissed for two reasons. First, there have been no changes in circumstances. Second, it is not in the best interests of the children to be removed from their current placements and returned to the care of Mr. and Mrs. G.

[20] In support of these conclusions, the Agency states that Mr. and Mrs. G have not addressed the protection concerns which gave rise to the permanent care orders. Suitable housing has not been found. Mental health issues have not been professionally addressed. Mr. and Mrs. G have not secured the services necessary to meet the children's special needs.

[21] The Agency states that the children are happy and thriving in their current placements. The Agency wants to move forward with adoption plans for the four younger children. The children's best interests dictate the denial of the application to terminate the permanent care order.

Law

[22] Section 48 of the *Children and Family Services Act* provides the court with the jurisdiction to terminate a permanent care and custody order. Section 48(10) sets out the test to be applied when the court is faced with a contested termination hearing. Section 48(10) states as follows:

> (10) Before making an order pursuant to subsection (8), the court shall consider
>
> > (a) whether the circumstances have changed since the making of the order for permanent care and custody; and
> > (b) the child's best interests.

[23] The best interests of the child is defined in a non-exhaustive list in s.3(2) of the *Act*. This is a child-focused definition which obliges the court to consider the unique circumstances of each child.

[24] In **Nova Scotia (Community Services) v. NL**, 2010 NSSC 328, this court reviewed the law applicable to termination applications at paras 25 to 27, which confirm the following:

- The onus is no longer on the Agency. The applicant must prove his/her case on a balance of probabilities: **M.D. v. Children's Aid Society of Halifax**, 1994 NSCA 68 (C.A.) at para 71.

- The changes in circumstances must be significant, relevant, and have a positive benefit on the welfare of the children: **M.D. v. Children's Aid Society of Halifax**, ***supra*** at para 61.

- Section 48(10) involves a two stage inquiry. In the first stage, the court must determine whether there is a need of protection in light of the changes in circumstances. In the second stage, the court must determine if it is in the best interests of the children to terminate the order: **Nova Scotia (Minister of Community Services) v. D.L.C.** 157 N.S.R. (2d) 300 (C.A.) at paras 8 and 9.

Decision

[25] I have reviewed the decision of Justice Leger-Sers, the evidence presented at the hearing, and the submissions of the parties. I have assigned the burden of proof to Mr. and Mrs. G. I find that Mr. and Mrs. G did not prove either of the two stages of the s. 48(10) inquiry.

[26] As to the first stage of the inquiry, I find that Mr. and Mrs. G did not prove the existence of significant and relevant changes in circumstances which have successfully addressed the protection concerns and risks identified by Justice Legere-Sers in October 2013. I draw this conclusion for the following reasons:

- Mr. and Mrs. G have not secured suitable and appropriate accommodations. Mr. G did not produce a deed to the property which he alleges he owns, despite being given an opportunity to do so. I find, on a balance of probabilities, that the * Band Council owns the home situate at *. I accept the evidence of GF and DM in this regard. I find that Mr. G is mistaken in his beliefs, although he likely did not intentionally mislead the court. The facts which Mr. G believes to be true are not. Mr. G neither acquired the land from a relative, nor did he personally finance the building the home. The home was financed by the Band Council and built on Band land. Further, Mr. G was not granted a Certificate of Possession to the property.

- Mr. G's sister and children were allocated the use of the property until 2015. They since have moved from the property. The Band Council recently met and voted to reallocate the home to another family. An eviction notice was being given to Mr. and Mrs. G.

- Although Mr. and Mrs. G could, and likely will, ask the Band Council to reconsider its decision, Mr. and Mrs. G did not prove that they secured suitable accommodations for the children at the time of the hearing before me.

- Mr. and Mrs. G did not have the home suitably furnished. A plan to obtain furniture in the future is not sufficient.

- Mr. and Mrs. G continue to own many pets, including six dogs, two cats and two turtles. The parties did not address how the care of this number of pets would impact on their ability to meet the significant needs of the children.

- Mr. and Mrs. G have not proven that they are capable of arranging for professional assistance to meet the special needs of their children. They have not accessed such services. Although planning to meet with the Autism Society, they have yet to do so. Good intentions are insufficient in the face of the many challenges confronting C, I, and W.

- Mr. and Mrs. G provided little evidence as to how they would meet their children's special needs, other than relying upon the assistance of family members. Yet, no family members testified that they would assist Mr. and Mrs. G should the children be returned to their care. The type and level of extended family support and commitment is thus unproven and unknown.

- Mr. and Mrs. G have not proven that they appreciate the need for consistent medical and professional intervention. For example, Mr. G was aware that serious concerns had been expressed about his mental health during the 2013 child protection proceedings. Mr. G therefore made an appointment with his family doctor who prescribed medication and made a referral to a psychiatrist. Mr. G did not attend at, nor did he reschedule, the psychiatric appointment. Mr. G has not seen his family doctor in about a year. Mr. G calls in for prescription renewals. The court is not satisfied that Mr. G will be proactive with the children's medical needs in such circumstances.

[27] As to the second stage of the inquiry, I find that Mr. and Mrs. G did not prove that it would be in the best interests of the children to terminate the permanent care orders for the following reasons:

- Child protection concerns remain outstanding as previously reviewed.

- Mr. G has spent little time with the children since the permanent care orders issued. The children have a limited relationship with their father at this time.

- Although Mrs. G does spend time with the children, such visits are usually restricted to family gatherings held on holidays, birthdays and special occasions.

- The four children are happy, adjusted and doing well in the maternal grandparent's care, where they are provided with much love, structure and

routine. The needs of I, W, K, and A are met in the maternal grandparent's care.

- It is not in C's best interests to be returned to Mr. and Mrs. G's care. Mr. and Mrs. G have little contact with C. They are unable to meet C's substantial needs. Although the house of safety in Truro is less than ideal, socially or culturally, it is nonetheless currently the best option for C given his circumstances.

Conclusion

[28] Given the fact that the protection concerns have not been successfully addressed by Mr. and Mrs. G, and given the lack of meaningful access between the children and their parents, and given the progress, stability, structure, routine and love which the children experience in the home of their maternal grandparents, and given the extensive needs of C, I find that it is not in the best interests of the children to have the permanent care and custody orders terminated.

[29] Mr. and Mrs. G I am sorry that this court was unable to grant your requests. I must however focus on the analysis outlined in the legislation and case law, including ensuring the best interests of the children. Given the evidence, I find that it is in the children's best interests to refuse your application. I encourage each of you to seek medical attention so that any underlying medical issues are addressed.

[30] Mr. Crosby is to draft the order.

Forgeron, J.