SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. J.M.*,,2016 NSSC 22

Date: 2016-01-08
Docket: *Sydney,* No. 092032
98803
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

J.M., T.W.

Respondents

Judge: The Honourable Justice Kenneth C. Haley

Heard: January 4, 5, 6, 7, 8, 2016 in Sydney, Nova Scotia

Counsel: Tara MacSween, for the Applicant
Alan Stanwick, for the Respondent J.M.
Coline Morrow, for A.M. (party seeking standing)

By the Court:

[1] This is the continuation of the matter of the Minister of Community Services, J.M. and T.W., file number 092032. Ms. MacSween represents the Minister, Mr. Stanwick representing the Respondent, J.M. and Ms. Morrow representing the Applicant for Standing, A.M. T.W. has not been participating and is again, not present here today and I see that J.M. is not present here today as well.

MR. STANWICK: Yes, My Lord, J.M. did call me, probably around 9:00 o'clock this morning, regarding attending Court and for her own personal reasons she decided she could not attend, but I did indicate to her that maybe she should, but I can understand, without going into great detail, her reasons behind not attending. So I just want to let the Court know that unlike the other day when nobody heard from J.M., she did contact me today and gave her own reasons why she wasn't comfortable coming to Court here today. Thank You.

THE COURT: Thank you Mr. Stanwick.

[2] Well counsel, it has been a long week and before I go through my decision I want to thank you all for your presentation here this week in terms of your respective positions, particularly Ms. Morrow, I want to give you the Court's

thanks for getting involved at the eleventh hour. I know that wasn't easy for you and you spent a week away from home and I can assure you whatever the result may be that you have certainly done a great service to your client, A.M., and you are to be commended for your conduct in the proceeding this week. Similarly Mr. Stanwick, this was also probably a difficult week for you as well in terms of trying to juggle your schedule and then without an appearance of your client, I want to give you again the Court's personal thanks for making arrangements to be able to participate in this proceeding on such short notice. You are barrister of good standing in this community and I know you have a very busy workload and for you to have managed to take the time out of your busy schedule to accommodate this quick turnaround for this hearing is much appreciated by the Court. Similarly Ms. MacSween, I know this has been not an easy week for you in terms of trying to juggle all witnesses pending, the Standing Application has taken priority over the actual hearing, and here we are a week, or second week, trying to get the hearing started and we haven't advanced much beyond that. But I want to thank you for all your efforts in trying to administer the attendance of witnesses throughout the course of the week. So, my thanks all the way around.

[3] By way of background, this matter has been before the Court since July 16, 2014, at which time the Court issued an Interim Order pursuant to s. 39 of the

Children and Family Services Act of Nova Scotia placing the child, M.W., in the temporary care of the Minister. A Protection Order was issued on October 10, 2014, with a series of review hearings following up to, and including, December 14, 2015. The Minister had made an early determination to seek permanent care at the hearing scheduled for December 14 through the 18th, 2015. At a Pre-trial Conference on November 25, 2015, Mr. Stanwick, counsel for the Respondent, J.M., advised that his client was not putting forth a plan but was supporting her sister, A.M., who was seeking custody, but had yet to file anything with the Court at that time.

[4] A.M. currently resides in British Columbia with her 20 month old daughter. A further Pre-trial was held on December 9, 2015, at which time the Minister advised they were not supportive of A.M.'s plan. The Respondent father, T.W., appeared, for the first time on that date, and indicated his opposition to the Minister's application for permanent care. By December 9, 2015, A.M. had filed a Maintenance and Custody Application with the Court, seeking leave and custody with regard to the child, M.W. It was agreed that the Court would hear evidence regarding A.M.'s request for standing before dealing with the merits of the Minister's application for permanent care. On December 14, 2015, A.M. appeared by telephone and persuaded the Court to permit her an opportunity to give

evidence via video link. On December 15, 2015 A.M. advised the Court that she was successful in finding a place which could accommodate a video conference at the courthouse in Surrey, British Columbia. A.M. was instructed to file an affidavit in the matter and the matter.

[5] Based upon the information provided by A.M. on December 15, 2015, the Court was prepared to commence the Standing Application via video conference on December 17, 2015. On December 17, 2015, A.M. failed to appear. When A.M. was contacted by phone subsequently, she submitted to the Court that she did not know that she had to appear because no one from the Sydney Courthouse had confirmed her attendance. The Court rejected and does reject this explanation as it was clearly stated on the record that A.M. was to make herself available for the video conference at the appointed time and place. In the circumstances, the Court nonetheless granted a further adjournment to January 4, 2016, to allow A.M. the opportunity to travel to Sydney and actually appear for the hearing in person and also importantly, to permit the Respondent father, T.W., more time to secure counsel.

[6] On January 4, 2016, the Standing Application commenced. The Applicant testified followed by the Minister's witnesses who were Cst. Ryan Lawrence, Ms. Marilyn MacNeil, Temporary Care Worker, and Ms. Dawn Manley, Protection

Worker. The Standing Hearing concluded on January 7, 2016 with submissions from counsel and the decision was reserved until today's date namely, January 8, 2016. It should be noted that the Respondent father, T.W., failed to appear for the entirety of the hearing this week and has not put forth a plan. As well, the Respondent mother, J.M. did not attend the hearing on January 6 and 8, 2016.

[7] The statutory deadline in this matter was January 6, 2016, and on that date all parties consented with the concurrence of the Court that the deadline should be exceeded to conclude the Standing Application in the best interests of the child, M.W. I have scrutinized the evidence with care. I have carefully considered the evidence and the thorough submissions of counsel. My decision is as follows.

Decision:

[8] This is a Standing Application pursuant to s. 36 of the *Children and Family Services Act of Nova Scotia*. Section 36 states as follows;

> The parties to a proceeding pursuant to s. 32 through 49 are, and specifically s. 36 (f) says: *Any other person added as a party at any stage of the proceeding pursuant to the Family Court Rules.*

Family members may be granted standing in a proceeding if the order sought by a party to the proceeding make their intervention timely and relevant to the

determinations in issue. The Court is guided by the decision of ***Children's Aid Society of Halifax v. T.B.,*** 2001 NSCA 99. Our Appeal Court states as follows, at paras. 52 through 55;

> [52] The agency has a statutory duty to take reasonable measures to provide services to families and children that promote the integrity of the family (s. 13 CFSA). The court has its own responsibility to take into account such measures and alternatives as are applicable in the circumstances of the case, before removing the child from the care of a parent or guardian (s. 42(2) CFSA). Thus the court and the agency share a responsibility to see that *reasonable* family or community options are considered. But the burden of establishing the merits of the alternative proposed are squarely upon the proponent. It is the proponent who must satisfy what I would term a burden of persuasion. Only when specific arrangements have been conceived and put in place by the proponent can the viability of that proposal be assessed.
>
> [53] Quite apart from the statutory component, there are sound practical and policy reasons for fixing the proponent of a family placement with the burden of persuasion that I have described. The things that motivate alternative proposals for family placement in child custody matters may be as varied as the factors which prompted the family crisis in the first place. In many cases, a relative's offer to provide shelter, love and support to another parent's child will be driven by a genuine affection and willingness to help. But in other cases, offers of assistance may be prompted by harsh, yet subtle catalysts, including threats or other forms of coercion by those whose power or control over the proposed custodian may go well beyond the current judicial proceeding. This reality may be quite difficult to discern; all the more reason to expect that the individual who volunteers to serve as an alternative family placement, be obliged to demonstrate that the proposed plan is workable, well-motivated and worthy of serious consideration.
>
> [54] 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.
>
> [55] 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.

[9] When responding to a family placement request the Court must be responsive to the reasonable alternative. Pursuant to the ***T.B.*** case aforementioned, at para. 31, reasonable has been deemed to mean;

> [31] …those proposals that are sound, sensible, workable, well-conceived and have a basis in fact.

[10] In addressing the issue of standing I rely upon the decision of ***Nova Scotia (Minister of Community Services) v. S.S.***,2012 NSSC 293, a decision of Jollimore, J.. In that decision, Justice Jollimore outlined the factors which the Court must consider when determining a Standing Application:

> (1) Whether the non-party seeking standing has a direct interest in the proceeding subject matter;
>
> (2) Whether the non-party seeking standing has a familial or some other relationship with the children;
>
> (3) Whether there is a reasonable possibility when compared to other alternatives that the children's welfare may be enhanced by the granting of the non-party standing in hearing the relevant evidence.

[11] In ***Nova Scotia (Minister of Community Services) v. B.C.***, 2012 NSSC 413, Forgeron, J., adopted these three factors. She stated at paras. 21, 22 and 23 as follows:

> [21] The burden is on CD and GD to prove their case. I find that they have not done so. Although, I am satisfied that they have a direct interest in the proceedings and that there is a preexisting family relationship, CD and GD have not proven that their involvement has a reasonable possibility of enhancing the children's welfare.

> [22] In reaching this conclusion, I have reviewed the best interests test as articulated in secs. 2(2) and 3(2) of the *Children and Family Services Act*. I have also considered the law as set out in **Nova Scotia Minister of Community Services** v. **S.(S.)**, ***supra***. I draw my conclusion from the following findings of fact:
>
> · The relationship between CD and GD and the children was markedly restricted during the past year and a half. Further, CD and GD have little connection to M, who was born on March *, 2011.
>
> · The relationship between the maternal grandparents and BC and IF is a divisive one. Animosity and conflict continually erupt when they interact. Indeed, CD and BC were involved in a physical altercation that resulted in police being called. This altercation began when the children were present.
>
> · The application was made before the Minister has suggested that the agency will seek a permanent care and custody order. At this stage, the Minister's focus is on the provision of services which will eliminate the risks so that the children can be safely returned to BC and IF.
>
> **[23]** Given these findings, CD and GD will not be granted party status.

[12] Justice Forgeron further found that the grandmother in this case had demonstrated inappropriate reactions to stress in the past by engaging in physical confrontations and driving dangerously. The grandfather watched pornography in the presence of others and refused to stop. The Applicants did not have the skills nor the experience to parent special needs children and there were serious safety concerns regarding the home including storage of guns and ammunition together in an unlocked locker.

[13] At para. 32, Justice Forgeron states;

> [32] The children have significant needs. It is not in their best interests to be removed from their current foster homes to be placed in the care of CD and GD in light of these significant deficits. The plan of CD and GD is not sound, sensible, workable, well-conceived or appropriate.

[14] It should be noted that in this instance the case was not at the permanent care stage.

[15] Justice Forgeron wrote a second decision in ***Nova Scotia (Minister of Community Services) v. M.S.***, 2015 NSSC 307. This case did indeed involve an application for permanent care. The maternal grandmother, S.S., sought standing in the matter. At para. 11 Justice Forgeron stated;

> [11] The parties agree that the Court should determine the application of S.S. before hearing the permanent care and custody application.

And that is what has occurred in this instance as well.

[16] Justice Forgeron denied standing to the applicant. Justice Forgeron found that the grandmother had never met one of the three children. Her last personal contact with the other two children was more than two years previous and her contact before that was inconsistent and sporadic. The Applicant struggled with mental health and substance abuse issues throughout much of her life leading to a chaotic lifestyle that produced child protection risks and concerns. The Applicant had not undertaken services to deal with the protection issues.

[17] Justice Forgeron concluded at para. 32;

> [32] The children's welfare will not be enhanced by having contact with their grandmother. S.S.'s ability to care for the children is marred because of a myriad of unresolved mental health and social welfare challenges. S.S. 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. The biological connection standing alone is not a strong basis upon which to grant party standing. The motion is denied.

[18] Similarly, Justice Forgeron went on to deny the companion application for leave under the *Maintenance and Custody Act*.

[19] A.M. is the biological aunt of M.W. She is 27 and resides in British Columbia with her 20 month old daughter. She testified that she made initial contact with the Minister on May 13, 2015, inquiring about the prospect of adopting M.W. Dawn Manley, worker for the Minister, provided A.M. with a phone number to contact Adoption Services. A.M. did not have a lawyer and relied upon her own resources to navigate her way through the child welfare and legal process. It would appear A.M. got overwhelmed and lost in the process or at a minimum, did not fully understand the process and her responsibilities to same. Although seeking assistance, she was not able to follow up in a timely manner. It was not until December 9, 2015, that contact was again made with the Minister's office. This lapse of time is unfortunate as it propelled A.M. into the Court process at the eleventh hour with a permanent care hearing due to commence on December 14, 2015. The statutory deadlines were to expire on January 6, 2016.

[20] Defence counsel, on behalf of A.M., submits that the Minister's office could have been more helpful during the May 2015 contact. Defence counsel are suspicious of the Minister's motives, especially in view of the decision to seek permanent care in March of 2015. With respect, I do not share that view.

[21] A.M. is responsible to make her intentions known to the Minister. She sought information about adoption and received that information. There was no obligation upon the worker to investigate the matter further, without further action being taken by A.M. Just as she carries the burden of proof in this application, I find she should have been more diligent in her attempts to pursue a placement for M.W. As stated earlier in ***T.B. supra***, 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.

[22] Further in the ***T.B.*** case, the Court states at para. 31;

> [31] Justice Cromwell`s words should not be interpreted as imposing either upon the agency or the court a statutory burden to investigate and exhaust every conceivable alternative, however speculative or fanciful. He spoke of *reasonable* family or community options. Neither the agency nor the court is obliged to consider unreasonable alternatives. Their statutory obligation is nothing more than to assess the reasonableness of any family or community alternatives put forward seriously by their proponents. By reasonable I mean those proposals that are sound, sensible, workable, well-conceived and have a basis in fact.

> The onus of presenting such a reasonable alternative must surely be upon the person or party seeking to have it considered. It is hardly the responsibility of the agency or the court to propose the alternative, provide the resources for its implementation, or shepherd the idea through to completion.

[23] The belated timing of A.M.'s application is thus problematic. She enters the scene on the eve of a statutory deadline lapsing. The question then becomes, is further delay of this proceeding in M.W.'s best interests?

[24] The Court must always be cognizant of the potential and viability of the family placement as per s. 42(3), but as a deadline approaches, the Court has limited options. At para. 25 of the ***T.B.*** case it states as follows;

> [25] Thus it can be seen that the operative placement provision I have just cited, s. 42(1)(c) of the **CFSA**, allows a type of disposition order. But such an order is only available for so long as the court has the jurisdiction to grant it. The extent of the court`s jurisdiction is limited by s. 45(1) of the **CFSA**, which fixes the maximum time limit for such orders. As the proceeding nears a conclusion, the opportunity to grant disposition orders under s. 42(1)(c) diminishes until the maximum time limit is reached, at which point the court is left with only two choices: one or the other of the two terminal orders. That is to say, either a dismissal order pursuant to s. 42(1)(a) or an order for permanent care and custody pursuant to s. 42(1)(f).

[25] At para. 27, our Court of Appeal said as follows;

> [27] One ought not lose sight of the relationship between s. 42(3) and 42(1)(c). Once the maximum time limit is reached, s. 42(3) can no longer be determinative, since temporary placement with a relative, neighbour or other extended family is no longer available. At the end of the time limits, once the agency establishes that the child remains in need of protective services, and subject to the court`s authority to extend time in the rare circumstances I have described in paragraph 56 infra., the determination for the court becomes one of what final or terminal order is in the child`s best interests. At that stage during such a proceeding, consideration of family relationships is required only because it is one of several factors which are to form part of the child`s best interests as

> defined by s. 3(2) of the **Act**, not because s. 42(3) continues to require such consideration.

[26] M.W. has been in the care of the Minister essentially since birth and was not in a stable foster environment until January of 2015 to present, according to the worker for the Minister. The current foster parents are interested in adopting M.W. It is nonetheless acknowledged by the Minister that all applications to adopt are given equal consideration.

[27] M.W. has special needs and currently has many specialized services such as occupational therapy, physiotherapy and speech therapy. He attends the IWK Developmental Clinic and receives psychological services. I may have missed some, but those identified are substantial in any event. All the services that M.W. is receiving are under the observation of a pediatrician.

[28] According to the evidence, M.W. is progressing well and as stated by the temporary care worker, Marilyn MacNeil, "Generally he is the most stable he has been in his short little life. He is coming along."

[29] The evidence is that M.W. struggles with change and that it is a big deal for him if his schedule changes. As an example something as minimal as change to daylight saving time can be a stressful situation for M.W.

[30] The Minister's plan is one of permanent care and adoption. A.M. requests standing so that she can pursue custody of M.W. Her plan is to relocate M.W. with her to her home in British Columbia and live with her 20 month old daughter. A.M. testified that she lives in a two-story townhouse with its own yard, garden plot and a playground for the children. During her last visit with M.W. in September of 2014, she testified that M.W. was very happy and kept hugging her daughter. He also hugged A.M.'s legs. A.M. testified that she has no criminal record, although the evidence showed that she was awarded an absolute discharge for assaulting a peace officer in December of 2012. A.M. acknowledged that she had a troubled past while living in Cape Breton. She testified, "I was lost and confused". Currently, A.M. does not use illicit drugs and testified that she may have an occasional glass of wine. She testified that, "It has been a long journey."

[31] A.M. testified she has a support network in British Columbia through her father and his girlfriend who A.M. treats more like a step-mother. A.M. has a boyfriend who she testified is supportive, but A.M. tries to avoid any contact with her daughter's biological father. A.M.'s plan for M.W. is to enroll him in specialized daycare and have him assessed in a local health centre which she described as equivalent to the IWK. It must be noted that none of these planned services have been confirmed to date.

[32] A.M. testified that she can receive government assistance in terms of providing services for M.W. She also has a social worker available for guidance and support. A.M. remains under psychiatric care and takes medication as prescribed. There is some confusion about her diagnosis, but at a minimum, it appears A.M. suffers from anxiety and/or depression. She testified now she "feels fantastic" and was never really happy until she had her own daughter. She now has a family and a life of her own. A.M. testified, "I see purpose, I am focused, I see what I want and I intend to get it".

[33] A.M. testified that because of her difficult upbringing she would be able to bring a different dimension or assistance to M.W. She would love him and give him fulfillment and purpose. A.M. is aware of M.W.'s special needs and believes she is up to the task to care for him.

[34] The Minister's concerns are mainly historically based upon A.M.'s past mental issues, suicide idealization, impulsive behavior, aggression with the police, hospitalizations and failing to report an incident of domestic violence between M.W.'s parents when she was residing with them for a month back in 2012. The Minister submits these factors should rule out A.M. as a candidate to have custody of M.W.

[35] The Minister acknowledges that they have little or no information regarding A.M.'s present life and circumstance. The Minister acknowledges its concerns about A.M. are primarily historical, but emphasize the lack of meaningful contact that A.M. has had with M.W. since the Fall of 2014. The Minister also questions whether she is up to the task of caring for a child with special needs.

[36] Regarding the three factors this Court must consider regarding standing, I find that A.M. has a direct interest in the proceeding. I also find it is clear that she has a familiar relationship with the child and in any event, these two factors are conceded by the Minister. The issue primarily for the Court to consider is whether or not there is a reasonable possibility when compared to other alternatives, that M.W.'s welfare may be enhanced by the granting of standing to A.M. and hearing the relevant evidence. There is no question that A.M. is well intentioned and motivated in making her application. I applaud her for stepping up and trying to make a difference in M.W.'s life.

[37] When one reviews the circumstances of the applicants in ***MS & B.C. supra***, there is no comparison to A.M. in terms of the genuineness of her application. Simply put, she is a young mother on the road to getting her life back together and on track. What she has achieved in the last three years is remarkable. She should be proud of her accomplishments. That said, I must deny A.M.'s application. She

has not discharged the burden of proof upon her on the balance of probabilities as defined by the Supreme Court of Canada in ***F.H. v. McDougall***, 2008 SCC 53. At para. 46 the Court stated;

> [46] If a responsible judge finds for the Plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge and that the Plaintiff satisfied the balance of probabilities test.

And at paragraph 49;

> [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on the balance of probabilities.

[38] The ***McDougall*** decision supra, is binding upon this Court. Upon reflection and review of the law in this regard, I am satisfied it would be an error to assign a lesser threshold or standard of proof to A.M. in terms of determining her Standing Application. There is only one standard of proof and that is on a balance of probabilities. I therefore retract any comments to the contrary I may have made during the course of these proceedings.

[39] A.M. has thus failed to prove, on the balance of probabilities, that there is a reasonable possibility, when compared to other alternatives, that M.W.'s welfare may be enhanced by the granting of standing to her. A.M.'s application was not timely. She had no contact with M.W. since September of 2014. M.W. has special needs and A.M. has not demonstrated any particular expertise to deal with such

needs. M.W. needs structure and stability and it is not in his best interests to disrupt the progress he has made to date by injecting potential major change. It is also not in M.W.'s best interests to delay these proceedings beyond the statutory deadline. There are too many unknown factors to support A.M.'s plan. Her plan is well-intentioned but speculative and uncertain. Therefore it must be rejected.

[40] A.M's intentions are laudable but not supportable. It would not be in M.W.'s best interests to blindly transition him to a completely new and different environment in British Columbia given his unique challenges and sensitivity to change. It has been sixteen months since A.M. has personally interacted with M.W. This length of time, although understandable given A.M.'s circumstances, is not acceptable in M.W.'s best interests.

[41] I agree with Justice Forgeron that a biological connection, standing alone, is not a strong basis upon which to grant a party standing. I conclude that A.M.' plan is not sound, sensible, workable, well-conceived, nor does it have a basis in fact. Her application is dismissed. For the reasons above stated, I will also deny leave pursuant to A.M.'s application under the *Maintenance and Custody Act.*

[42] Order accordingly.

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J. Kenneth C. Haley