

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: J.M.K. v. Children's Aid Society of Inverness/Richmond,
2010 NSSC 171

Date: 20100427

Docket: SFPACFSA-062149, SFPACFSA-060546

Registry: Port Hawkesbury

Between:

J.M.K.

Applicant (Respondent)

v.

Children's Aid Society of Inverness/Richmond

Respondent (Applicant)

and

C.D.C.

Respondent

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 subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or relative of the child.”

Editorial Notice

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

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

April 20, 2010, in Port Hawkesbury, Nova Scotia

Counsel:

Tracey Sturmy, for the Applicant, J.M.K.
Lindsay McDonald, for the Respondent, The Children's
Aid Society of Inverness/Richmond
Greg MacIsaac, for the Respondent, C.D.C.

By the Court:

- [1] This Child Protection proceeding began in 2008. The initial order was issued on September 15, 2008; the Finding Order on December 8, 2008.
- [2] First disposition occurred on the 23rd of March 2009.
- [3] There are 3 children: D., d.o.b. * August 2006, almost 4;
 C. d.o.b. * January 2008, age 2;
 N, d.o.b. * December 2008, age 1.
- [4] First Disposition: two oldest, 23 March 2009 - end date 23 March 2010
 youngest, 15 June 2009 - end date 15 June 2010.
- [5] The third child was born after the proceedings commenced.
- [6] A Plan of Care was filed November 27, 2009, recommending all three children be placed in the permanent care of the Agency with a view for adoption.
- [7] Section 45 of the *Children and Family Services Act* requires final disposition for the two oldest children by March 23, 2010.
- [8] This child protection proceeding was originally scheduled for all three children with the agreement of all counsel and the Court for a four day hearing on February 9-12, 2010.
- [9] A parental capacity assessment had not been completed due to the parents ongoing drug involvement. On January 18, 2010, the parents asked that the assessment be completed because they had established themselves in a methadone program.
- [10] After hearing the parties and having made the requisite “best interests” finding, the final disposition was set for completion in May 18-21, 2010.
- [11] The assessment was recommenced and completed by report date April 15, 2010.

[12] The results of the report recommend placing all three children in the permanent care of the Agency with the intent to place the children for adoption. Regarding access, the assessment recommends the following:

It is recommended that a goodbye visit be arranged if it is deemed appropriate by the agency and only with careful planning. (The mother and father) must ensure they will behave appropriately in this visit and not create any undue stress for children . They should be encouraged to provide the children with a goodbye gift and perhaps a short letter with the appropriate content explaining why they cannot provide parenting to the children that may be read to them later should their adoptive parents wish to do so. If the agency is not convinced that this visit will be beneficial to the children it should not be conducted.

[13] Interim access has been suspended by the Agency as of a risk management conference which took place March 25, 2010. This was before the report release date. The recommendations of the assessor would not have been common knowledge, at least to the parents. There was some suggestion from the evidence that the Agency had some advance knowledge before the report release date that the recommendations were not favorable for the parents.

[14] This is a devastating blow to the parents. They are struggling with their addictions and the results of this assessment as they continue to fight for the return of their three young children.

[15] At the plea of mother's counsel, an application was made to reinstate her contact immediately.

[16] Holding an interim hearing so close to the final disposition date would seem an unnecessary and untimely duplication of proceedings.

[17] However, the access issue had to be heard immediately for a number of reasons:

1. Due to the short period of time between the suspension and the final disposition;
2. Considering the recommendations of the assessor for permanent care;
3. The recommendation for final visitation; and

4. The comments of counsel for the Agency regarding the possibility that they may not offer final visitation.

[18] At final disposition, the time lines will be exhausted. The Court has no jurisdiction to impose conditions on either the Agency or the parents under the umbrella of a child protection legislation. To place the children in the care of the parents, the Court must be satisfied that the parents are able, without conditions attached, to have the children returned to their care.

[19] If the Agency is successful in proving that the best interests of the children requires a permanent care order, the Court may not be in a position to impose or enforce any visitation that may jeopardize a potential adoption. This means that the suspension of interim access has significant consequences to the parents and the children.

[20] The Agency's counsel has advised the Court that their position remains firm. There will be no access to either parent, together or separate, as a result of what they consider threats to the safety of the Agency workers. They will not commit to a goodbye visit.

[21] Given the abbreviated and urgent nature of this hearing, I recognize the evidentiary constraints on all parties.

[22] The Agency put forward evidence that:

1. The parties have not stopped use of alcohol and non prescription drugs (marijuana and percocet) while on a methadone program.
2. They continue to be involved in domestic abuse issues necessitating police involvement. In addition, although not as compelling, there has been a charge arising out of allegations that the pair were caught stealing food.
3. The evidence of their home life supports the continuation of an unstable lifestyle.

[23] Between January 18, 2010, and March inclusive, access continued three times a week. At one visit the three children were seen together; on another, the two oldest were together; and on one visit, the baby was seen alone. Both parents attended these supervised visits.

[24] The Agency filed affidavits and their plan of care. I heard from the social worker responsible for the carriage of the file. The father's therapist submitted a report. I heard the evidence from a police officer regarding the domestic incident that occurred on March 15, 2010. I have access to the assessment report. The mother provided an affidavit and testified. The father did not testify due largely to the fact he faces criminal charges as a result of the domestic incident.

[25] After the hearing, I asked to be provided with the access facilitator reports from January 20, 2010, to March 24, 2010.

[26] The access facilitator reports provide a contrast to the overall evidence produced. Their private lives teeter as they walk the precipice between sobriety and addiction. In light of the evidence surrounding the parents current lifestyle difficulties (and they are significant), the access reports provide a more compassionate snap shot of the connection between the children and their parents.

[27] The visits are recorded as very positive occasions for the children. The children exhibit glee and affection when their parents arrive. All appear to know their parents well.

[28] The parents create activities that are engaging and fun. They relate to the children playfully. They exhibit insight and attempt to correct and enforce proper manners. They show expectations of respectful conduct.

[29] The oldest child consistently grieves for his parents, enjoying the time with them and consistently expressing sadness when the visits terminate. As hard as it is for the young parents, they redirect their children and assure them they will meet again. They do not engage in behavior that aggravates the children's sadness; something the Court not uncommonly sees in other cases.

[30] The parents illustrate that, **but for** their significant struggle with drug addiction and their personal history, they have something to offer these children. The children are engaged with them, know them as Mom and Dad.

[31] This view into their access world was surprising given the other evidence.

[32] These visits are supervised in a place provided by the Agency that allow for what appears to be very positive moments of connection between the children and

their parents. They are moments in time that will form part of the children's memory according to their capacity to remember and in the context of their age and stage of development.

[33] The positive interaction observed may well be inextricably tied into the fact that the environment for visitation is agency supervised and controlled. The structure mandates sobriety.

[34] These are parents who suffer historically from significant addiction and all the baggage that comes with addiction. The evidence supports that the parents have not emerged from their addictive lifestyle. The involvement of child protection started in *. As a result of the parents leaving the jurisdiction a Canada Wide Alert resulted in their current involvement with a child protection agency here in Nova Scotia.

[35] I reviewed the assessment report a number of times looking for mention of the positive nature of these visits. I found nothing that would speak to this. That raises questions about the testimony of the Agency relying on the assessment as supporting a conclusion that no attachment is exhibited between the parents and the children. I could find no reference to specific information in the assessment that supported this conclusion.

[36] These children are in a position where their connection with their parents has been terminated prematurely and may be terminated completely. This is a potential loss that requires therapeutic preparation and intervention for both the parents and the children.

[37] In looking to the future, how the children and the parents recover and continue to address their issues; how their life together and apart is managed is important. How the Agency manages this may form a critical piece in the lives of these children...forever! How this occurs, how the Agency manages this will be an important statement about government intervention in the lives of families in such a manner that the act of intervention itself causes no justifiable harm.

[38] In support of the termination, the Agency offers evidence to prove that in their belief there is an escalating and unacceptable risk to the children and to other (Agency) persons from the respondents.

1. An incident occurred on February 26, 2010, when both parents were arrested for theft of food. The Agency affidavit suggests that the mother had been particularly uncooperative during the arrest. The police officer testified that while she raised her voice, the situation remained in control. There was no violence associated with the arrest. On March 5th, the Agency was advised of this incident through the police.

2. On March 12th at 11 pm, the mother admits that both she and the father bought and drank some alcohol. She acknowledges this was a bad decision. She advises that neither of them had consumed alcohol in a long time. She admits they became intoxicated and argued. She took the father's chocolate milk and smashed it in the sink. He grabbed the dish rack and threw it in the sink. They engaged and he grabbed her by the throat. She alleges he held a knife to her throat. She called for assistance. She was afraid the father may harm himself. The police responded. The father was located in the basement. The officer called him to come out, he responded cooperatively. He was arrested and held overnight and charged. The mother called the police because she was afraid of the father's state of mind.

[39] The Agency affidavit notes that "*the police had to hold a gun on the Respondent father before he was hand cuffed*". The evidence of why this was done confirmed it was not because of the father's actual behavior rather it was the potential in a domestic incident that dictates this as a precaution.

[40] The police officer noted that he was not concerned about his own safety. The nature of the domestic incident and the possibility that the father might harm himself was a concern. He advised that the officer who responded to back him up drew his revolver out of caution.

[41] The father was required to enter into an undertaking to restrict his contact with the mother except for contact for supervised visits and contact for court purposes.

[42] The Agency was notified of this incident on March 15, 2010, by the police.

[43] During this week, the usual three visits were scheduled. The mother cancelled the March 15, 2010, visit. She wished to go to the detachment in Antigonish to ensure that the father and she would be able to be in contact for visits.

[44] The March 17, 2010, visit was cancelled by the Agency while they met to assess if, how and when to reinstate access. They made arrangements to continue visitation.

[45] When the March 17, 2010, visit was cancelled, the father agreed not to go to the visit in order to facilitate the possibility the Agency would allow the mother's visit to go forward.

[46] The father called the Agency again on March 16, 2010, and asked that the mother's visit go forward, even if his visits were cancelled.

[47] At that point, the Agency was still prepared to conduct access under different circumstances. There would be separate visits - one after the other.

[48] On March 19, 2010, the Agency initiated a phone call with the mother to confirm the continuation of the visits separately, one after the other commencing March 22, 2010. During that conversation, the mother asked the Agency if they could have a joint Easter visit with the three children. She was refused.

[49] She asked for a half hour to be added to the Wednesday visit. This was refused.

[50] The March 22, 2010, visit went forward with the new arrangements. The mother was driven to the access cottage first and the father driven at the end by a separate driver and told to wait in the car until the mother came out.

[51] The children were supervised in a cottage. The location of the visits was very familiar to the parents and they were schedule to essentially overlap such that the children would remain in the access cottage. When one parent arrived the other would leave. They were prohibited from contact with each other in the presence of the children. Contact for the purposes of visitation was not restricted in the criminal undertaking.

[52] Reading through the former access reports illustrates that the cottages were known to the parents. It was not uncommon for the parents to go directly to the cottages together.

[53] The father approached the cottage contrary to the direction of the driver. The child saw him and opened the door. The mother left - got in the car but forgot her keys. She moved quickly out of the car to retrieve the house key from the father. Thus, both father and mother broke one of the rules set down by the Agency.

[54] The transporter apparently reported this trouble and asked that further access take place at the Agency offices and not in the cottages.

[55] This was the first time the parents operated with the new rules. By itself, this would not seem a serious breach unless repeated. In the circumstances of this case, given the parent's traditional behavior at access visits, this was a minor infraction.

[56] The access reports indicate that the case aid /driver went over the rules with the mother as they drove to the cottages. There was to be no contact between the parents in the children's presence. The no contact during visits was agency imposed. At 11:30, the mother (or the worker) was to go out into the parking lot and let the father know what cottage they were in. He was to arrive at 11:30.

[57] On arrival, the children were happy and excited to see their mother. The mother brought cookies to the visit. When the cookies were gone, one of the children asked for more. The mother phoned the father and asked him to bring more when he came for his visit. She advised him they were not to have any contact during the transition in front of the children. She was cooperating. When the father arrived he left the car and came to the door. The mother rushed to leave to comply with the rules. The child saw his father on the step and started to open the door.

[58] The children were very happy to see both their mother and father. It cannot be said the mother breached this Agency condition. The father cooperated at the rest of the visit and played with the children. He then had all the toys and bags packed up before the end of the visit. Overall it was a very positive visit.

[59] The Agency was also (perhaps more) concerned about the father's mental health. The mother advised them that the father said to her: "*If I lose my kids, I am going to kill myself*".

[60] The mother informed the case aid of this at some point during transportation on the visit.

[61] The Agency cancelled the March 24, 2010, visit and advised the couple that future visits would take place at the Agency offices.

[62] The mother was concerned because the drive from the foster parent's place to the Agency offices meant the children would be tired.

[63] The mother also advised the Agency they wanted an Easter visit together as it might be their final visit together.

[64] The mother began to scream into the phone asking the worker to imagine what it must be like to be in their place.

[65] The Agency worker re-confirmed with the mother that Wednesday was cancelled - the mother said: "*get a fucking peace bond you whore*".

[66] The worker then contacted the mother's therapist. She missed her March 17, 2010, appointment and one had been rescheduled for April 1, 2010.

[67] The worker meet with the father's therapist and advised him of the father's comments about killing himself. The therapist confirmed with the worker that he met with the father on March 24, 2010, and that in his opinion the father's suicidality and risk of violence was becoming more fully formed. He suggested he had concerns about a "*risk of harm to persons and places*" and concerns about the safety of the worker.

[68] He noted his concern in particular about the building where the Children's Aid office and parking lot are located. He recommended safety precautions as the final disposition hearing approached.

[69] On March 25, 2010, the father called his therapist and asked for couples counseling.

[70] On the same date, a risk conference confirmed that access would be suspended to protect the children and workers. The parents contact with the Agency personnel was diverted through counsel.

[71] The Agency produced evidence that the father's police file contained an ODARA report which confirmed the police placed a "*high risk of lethality*" notice

on the father's report. This arose after the Agency advised the police of their concerns and conveyed to the police the information about the mothers conversation with the Agency as well as information about the father's state of mind.

[72] The father missed his March 31, 2010, appointment with his therapist.

[73] The Agency cites a number of reasons for their firm position. Regarding these I make the following findings:

a) I find the theft charge is not relevant to interim access; although it is relevant to the final disposition and long term plan;

b) If the parents are not impaired at the visits, their ongoing use of alcohol/drugs is relevant to the final disposition more so than interim access;

c) Without therapeutic involvement, the father's state of mind appears to be of significant concern. He has expressed a certain desperation at the prospect of losing his children. When one reads the access reports we see a very engaged father. Should the final disposition terminate his involvement there is cause for concern about his need for immediate therapeutic intervention;

d) The mother's behavior at the access visits up to and after the domestic incident was controlled and respectful of Agency directions. There is no excuse for the manner in which she displayed her displeasure at the Agency terminating visits, separating their visits and refusing to consider any extension or a joint Easter visit. She lost her temper. She has apologized but the effect of her temper now causes the particular worker to be afraid;

e) In ordinary circumstances, the contact that occurred on the visit would be a minor infraction, not entirely relevant to best interests given there was no actual risk to the children. The visits have gone so well. In particular, the visit that day continued to go well despite the infraction;

f) The risk of abduction was not proven. If this is a risk, it would relate to the concerns expressed well before Agency termination of access when the parent called the foster mother. This means the parents have some method of contacting the foster parents home. Risk of flight during the supervised access visits is not apparent;

g) risk of suicidal ideation was covered in (c).

[74] The Agency has in this case, as in many cases, a cause for concern given this high stakes litigation. They spoke of a concern that they could not manage supervised visits for the parents. This total termination of contact for both parents appears to be a strong response that may only escalate the conflict. It appears that the Agency is attempting to respond to the need to protect the Agency worker from what appears to be the father's deteriorating mental health more so than the mother's comments. The Agency worker has not been involved in the access visits.

[75] It is reasonable to conclude that the Agency would be concerned as they approach final disposition. They are concerned about the parents given they believe they have sufficient evidence to convince a court that the children cannot be returned to the parent's care. Given what the father has said, they wish to take the advice of his therapist and take precautions.

[76] The Agency has not provided convincing evidence that the abrupt termination of visits will not adversely affect the children. Quite the contrary, the abrupt termination may be problematic. I am not convinced that no attachment exists between the parents and the children.

[77] I am also concerned about whether the visits and the final disposition will result in irreversible harm to the parents and the children. While there are certainly cases that justify a suspension of all parent/child visits this abrupt termination of even the mother's visits was not the only option.

[78] I reinstate the mother's contact with the three children for the remaining time in accordance with the schedule. The mother need not be informed of the place until the she is picked up by the case aid or security person. She will have to abide by all reasonable precautions set up to assist during the visits.

[79] Given the father's health, it is wise at this time to refrain from putting him or the children in a position where his health deteriorates further without therapeutic involvement. The Agency ought to re-consider their position on his contact given the children's relationship with him. They ought to take advice on this, have his individual therapy in place and take advice of this therapist to effect an eventual visit with the children. This is conditional on receiving appropriate advice on the

children's interests that a visit would be in their best interests. Obviously, the Agency should consult with someone on behalf of the children. At this point, an objective view of the children's interest would be appropriate.

[80] The Agency has noted there is another worker, a male social worker who could be involved in facilitating the mother's visits on a short term basis. The worker responsible for the file ought not to be present.

[81] The Agency has access to private security and may ask for police assistance if available. Presumably, they could ensure that the children are not placed at risk by the presence of security.

[82] The mother will have to agree to allow the security to be aware of what, if anything, she brings into the visits.

[83] It would be advisable and helpful for the mother to be briefed as early as possible either by the Agency or her therapist to assist her in how to ensure the interests of the children are addressed such that information about their father is conveyed in a manner that does not cause the children distress. Likewise, she may need assistance herself to ensure the visits are positive and helpful for the children.

[84] Due to the approaching final disposition further delay is not warranted. Visits will be reinstated this week. There shall be two visits per week of two hour duration; one with the mother and the two oldest and one with the mother and the baby. I am assuming sibling contact is being maintained outside the parental visits.

[85] The mother will not have her cell phone with her on visitation or communicate in any way with the father that would disclose her location. Should there be any breach such that the mother conveys to the father the whereabouts of the visits, the Agency may terminate further visits if they cannot be safely effected.

M. C. Legere Sers, J.