

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Nova Scotia (Community Services) v. A.M., 2010 NSSC 227

**Date:** 20100604  
**Docket:** 070200  
**Registry:** Sydney

**Between:**

The Minister of Community Services

Applicant

v.

A.M. and E.D.

Respondents

**Judge:** The Honourable Justice Theresa Forgeron

**Heard:** June 2 and 4, 2010, in Sydney, Nova Scotia

**Oral Decision:** June 4, 2010

**Written Decision:** June 11, 2010

**Counsel:** Lee Anne MacLeod-Archer, for the applicant  
Mark Gouthro, for the respondent, A. M.  
Dave Campbell, for the respondent, E.D.

**Restriction on publication:** Publishers of this case please note:

That s. 94(1) of the Children and Family Services Act applies and may require editing of this judgement or its heading before publication. S. 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 a relative of the child. 1990, c.5

**By the Court:**

**I. Introduction**

[1] The child is a new born baby; her mother is A.M., and her father is E.D. The child will be discharged from the Cape Breton Regional Hospital after this decision is rendered.

[2] The Minister became involved in the child's life at the time of her birth because of protection concerns respecting the mother and the father, individually and jointly. These protection concerns relate to substance abuse and domestic violence.

[3] The first appearance was held on May 10, 2010. The second stage of the s.39 hearing was held on June 2, 2010. The hearing was contested. The parties were cross examined on their affidavits. Ms. Campbell testified on behalf of the Agency. The matter was adjourned for oral decision on June 4, 2010.

**II. Issues**

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

- a. Are there reasonable and probable grounds to believe that the child is in need of protective services?
- b. What interim order should be granted pending the completion of the protection hearing?

**III. Analysis**

[5] **Are there reasonable and probable grounds to believe that the child is in need of protective services?**

[6] *Position of the Agency*

[7] The Minister seeks a finding that there are reasonable and probable grounds to believe that the child is in need of protective services based upon past and

present concerns relating to the mother and the father. The Minister relies upon the fact that the mother's other children were placed in the permanent care and custody of the agency on January 15, 2009. Further, the Minister states that the mother was involved in domestic violent relationships in the past, including a violent relationship with the father. The Minister also notes substantial substance abuse issues with both respondents.

[8] The Minister indicates that many of these concerns are ongoing. The Minister concludes that given the age and vulnerability of the child, and their substantial concerns, that their burden has been discharged.

[9] *Position of the Respondents*

[10] The mother admits that there are reasonable and probable grounds to believe that the child is in need of protective services. The father does not agree.

[11] The father states that the parties' past history is not indicative of their current status. The father states that both he and the mother are no longer addicted to substances. The father further argues that domestic violence is not an issue. He states their relationship was not, and is not, fuelled by domestic violence. He characterized the problem as one where "tempers flared."

[12] The father states that the child requires the love, care and nurture of both parents, and that their actions have been those of loving and concerned parents. The father states that he and the mother have made the necessary lifestyle changes; no reasonable and probable grounds exist to believe that the child is in need of protective services.

[13] **Legal Requirements**

[14] There is not an extensive catalogue of written decisions dealing with s. 39 of the *Children's and Family Services Act*. Nonetheless, several judges have articulated legal principles applicable to this stage of the protection proceeding.

[15] *Philosophy of the Act and Burden of Proof*

[16] In **Family and Children's Services of Kings County v. Y.B.** [2000] N.S.J. No. 263 (Fam.Ct.), Levy J. discussed the philosophical debate present in child

protection proceedings at paras 9 and 10. He notes that although the primary role of the court is the protection of children, the integrity of the family unit must also be maintained to the extent possible. All measures taken must be as unintrusive as possible given the factual circumstances of the case. Levy J. also confirmed that an unrealistic standard of proof should not be adopted at this stage, as such could lead to the dismissal of an application respecting a vulnerable child in need of protection.

[17] Therefore, although the burden is upon the Minister to prove its case, the threshold is significantly lower than that found in s. 40 of the *Act*. The test set out in s. 39 of the *Act* requires the Minister to prove its case based upon “reasonable and probable grounds.”

[18] *Reasonable and Probable Grounds Standard*

[19] In **Family & Children’s Services of Digby (County) v. G.(D.)** 2000 CarswellNS 96 (Fam.Ct), Comeau C.J. held that what constitutes reasonable and probable grounds is a question of fact that depends upon the circumstances of each case. He suggested an objective test when he held that the facts must be such as would cause a reasonably careful and prudent person to believe, or have an honest or strong belief, that the child is in need of protective services.

[20] In **Family and Children’s Services of Kings County v. Y.B.**, *supra*, Levy J. compared the standard of proof required at this interim stage, with the standard of proof required at the preliminary inquiry stage of a criminal proceeding at paras 7 and 8. Levy J. noted two different results flowing from this comparison. They are as follows:

- a. Judges must direct their minds to the issue of credible or trustworthy evidence. The court must only act upon evidence that it considers credible and trustworthy in the circumstances.
- b. The court must assess the evidence. The application will only proceed when the court is satisfied that the Minister’s case reveals reasonable and probable grounds.

[21] In **Children’s Aid Society of Halifax v. T.W.** [2004] N.S.J. No. 59 (S.C.), Lynch J. followed the approach taken by Levy J. She further held that the court’s

decision must be based upon the circumstances existing at the time of the interim hearing. In so doing, Lynch J. did not consider the circumstances which had resolved by the time the interim hearing took place.

[22] *Credible and Trustworthy Evidence*

[23] In **Children's Aid Society of Halifax v. L.L.** [1997] N.S.J. No 456 (Fam.Ct.), Daley J. confirmed that speculation, unspecified reports, and concerns do not meet the threshold test set out in s. 39 of the *Act*.

[24] In **Family and Children's Services of Kings County v. Y.B., supra**, Levy J. expanded on this requirement at para 12:

12 In doing so, the very first thing a court has to do is to determine whether the evidence being presented, in whatever form, is in fact credible and reliable. Merely because some person about whom little or nothing is known makes or is purported to have made a statement does not make that statement credible or trustworthy. It is a simple fact that some people and some statements are credible and trustworthy and some aren't. In my opinion there has to be some basis, be it grounds for confidence in the source, be it inherent in the evidence, or be it found in some extraneous corroboration that can enable a court to first decide, ('consider'), that the evidence is credible and trustworthy. If that determination cannot be made by the judge, then the evidence cannot properly be considered by the court.

[25] **Decision**

[26] The Minister has met the burden upon it. There are reasonable and probable grounds to believe that the child is in need of protective services. I make this finding after thoroughly reviewing all of the evidence, the submissions of the parties, the legislation, and the case law for the following reasons:

- a. The mother's substantial deficits resulted in a permanent care and custody order in January 2009, such that three of her children were removed permanently from her care. Evidence of past parenting is an invaluable tool in the assessment of the present circumstances facing the child: **Nova Scotia (Minister of Community Services) v. S.Z.**

[1999] N.S.J. No. 426 (C.A.) para. 13; **Nova Scotia (Minister of Community Services) v. S.E.L.**, [2000] N.S.J. No. 129 (C.A.) para. 27.

- b. The evidence is credible and trustworthy that some of the parenting deficits which existed in January 2009 continue to exist at present.
- c. Neither the mother, nor the father, recognize that domestic violence was present in their past relationship. They are thus unable to comprehend the real and apparent dangers implicit in violent relationships.
- d. Both the father and mother minimize the violent nature of their relationship. The mother reported violence from the father to the agency. However, in giving her evidence on June 2, 2010, the mother was unable to recall details and, indeed, denied domestic violence. The father, for his part, attempted to classify the violence as “an occasional temper outburst” and “frustration, not intentional violence was, unfortunately, the result, ...”. Neither accepted responsibility for their actions and inactions. Denial and minimization provides little support for the contention that this serious problem has been alleviated or reduced so that the risk to the child has likewise been eliminated or reduced.
- e. I do not believe either the mother or the father’s characterization of the nature of their relationship. Bruising and the use of a pipe, are not indicia of a minor temper outburst, rather they are indications of a serious, dangerous, and unhealthy relationship.
- f. The father’s criminal convictions, and the mother’s past reporting of violence, show an abusive relationship where stress, frustration, and anger are improperly channelled. The violent actions by the father, and the repeated victimization of the mother, show poor problem-solving skills and poor communication skills. Such actions further confirm a propensity towards future violence given the failure of the parties to accept responsibility. Hopefully, through therapy and intensive services, the respondents will learn to effect concrete and lasting changes in their lives.

- g. The mother appears to have been free from drugs, other than methadone, for approximately seven months. The father's current status is somewhat checkered given the test results at the beginning of 2010. If the father is clean, then it has only been recent. Given the past history of their addictions, the court is not confident that sufficient time has expired to conclude that the parties, and especially the father, are no longer abusing drugs.

[27] I find that there are reasonable and probable grounds to believe that the child is in need of protective services. Despite the need to promote the integrity of the family unit, given the factual circumstances which exist in this case, a reasonably careful and prudent person would believe, would have an honest and strong belief, that the child is in need of protective services.

**[28] What interim order should be granted pending the completion of the protection hearing?**

[29] *Position of the Agency*

[30] The Minister is seeking an order placing the child in its interim care and custody because there is a substantial risk to her health or safety, and that she cannot be protected adequately in the care or custody of either, or both, respondents. The Minister relies upon the untreated domestic violence, and the failure of the respondents to follow court orders.

[31] *Position of the Respondents*

[32] The respondents want the child to be placed in their interim care under a supervision order. The respondents state they should not be punished for their past behaviour. The focus should be on their present circumstances, and the necessary lifestyle changes which they have made. As such, they argue, there are no reasonable and probable grounds to believe that a substantial risk to the child's health or safety exists.

[33] *Legal Requirements*

[34] Section 39(7) of the *Children and Family Services Act* confirms that a child shall not be removed from the care of parents unless there is a substantial risk to the child's health or safety. Section 39(7) states as follows:

(7) The court shall not make an order pursuant to clause (d) or (e) of subsection (4) unless the court is satisfied that there are reasonable and probable grounds to believe that there is a substantial risk to the child's health or safety and that the child cannot be protected adequately by an order pursuant to clause (a), (b) or (c).

[35] The *Act* defines "substantial risk" to mean a real chance of danger that is apparent on the evidence as noted in section 22(1) and section 39(6). In **B. (M.J.) v. Family and Children's Services of Kings County** 2008 NSCA 64 (C.A.) para 77, the Nova Scotia Court of Appeal stated that "substantial risk" means a real chance of future abuse, and not that the future abuse will actually occur.

[36] In **Family and Children's Services of Lunenburg County v. S. (W.L.)** [1999] N.S.J. No. 326 (Fam. Ct.), para 21, Daley J. stated that speculation, hunches, or possibilities do not meet the statutory definition.

[37] "Danger" in the context of an interim proceeding was held, by Daley J., to mean danger from the physical harm that may occur before the next hearing, or from psychological harm that will, in the short term, effect the child's health or safety: **Children's Aid Society of Halifax v. M. (P.)** (1995), 138 N.S.R. (2d) 186 (Fam.Ct.) para 32.

[38] **Decision**

[39] I find that the Minister has met its burden. I am satisfied that there are reasonable and probable grounds to believe that there is a substantial risk to the child's health or safety, and that the child cannot be protected adequately by placing her in the care of both, or either, respondent under a supervision order for the following reasons:

- a. The respondents lack insight into the risks associated with domestic violence. Both have minimized and rationalized the violence which



occurred in the past. There is a real chance that abuse will occur in the future, on a reasonable and probable basis.

- b. The child is a vulnerable baby, who has absolutely no ability to self-protect. Domestic violence could be lethal if she was caught in the cross fire. The fact that children were not present in the past when there was domestic violence, provides no security. Domestic violence tends to erupt; it is seldom preplanned.
- c. The parties failed to follow court orders in the past. Neither party assumed responsibility for the many breaches of the Provincial Court order prohibiting contact between them. Rather, both parties focussed on the fact that the order was varied to permit contact. Neither party showed any insight as to the problems associated with their failure to follow a court order in the first place.

[40] **IV. Conclusion**

[41] The child will be placed in the interim care and custody of the Minister, with supervised access to the respondents, upon terms and conditions as are arranged by the agency. In addition, the mother will cooperate with the agency and participate in remedial services, including cooperation with the family support worker appointed by the Minister, continuation with addiction services methadone treatment, and transition house counseling. The father will cooperate with the agency recommended remedial services, including cooperation with a family support worker appointed by the Minister, continuation in the addiction services methadone treatment program, and completion of the Second Chance Men's Program.

[42] The matter will be scheduled for a protection hearing.

Dated at Sydney, Nova Scotia, this 11th day of June, 2010.

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Justice Theresa Forgeron