SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. N. L., 2010 NSSC 328

Date: 20100818
Docket: SFSNCFSA- 051417
Registry: Sydney

Between:

Minister of Community Services

Applicant/Respondent

v.

N. L. and W. M.

Respondents/Applicant

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	December 17, 2009; January 18, 2010; April 26, 27, and 29, 2010; and May 17, 2010, in Sydney, Nova Scotia. Last submission received May 31, 2010.
Written Decision:	August 18, 2010
Counsel:	LeeAnne MacLeod-Archer, for the applicant Alan Stanwick, for the respondent, N. L. W. M. not appearing

That s. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment 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:

[1] **INTRODUCTION**

[2] G.M. is soon to be five years old. She is the daughter of N.L. and W.M. G.M. is not in the care of either of her parents; she is in the permanent care and custody of the Minister because of child protection concerns. Under the terms of the permanent care order, G.M., however, has access to her parents.

[3] N.L. now seeks to terminate the permanent care order, and have G.M. returned to her. In addition, N.L. filed an application to enforce access. W.M. did not participate in the hearing. The Agency opposes N.L.'s application, and seeks to have access terminated so that G.M. can be subject to adoption.

[4] **ISSUES**

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

a) Should the order for permanent care and custody be terminated?

b) If not, should the access provisions of the permanent care and custody order be terminated to permit adoption?

[6] **BACKGROUND**

[7] In addition to her parents, G.M. has two other siblings. J. will be 15 in October. She too was placed in the permanent care of the Agency, although J. has recently been returned to N.L.'s care. G., who is 10, resides with her father.

[8] G.M. has spent most of her young life in the care of the Agency, with limited, supervised access exercised by N.L. The Agency became involved with the family because of significant concerns involving substance abuse, violent relationships, and neglect.

[9] In July 2008, the court issued its final disposition order. The court refused to return the children to N.L. because they remained children in need of protective services. In reaching this conclusion, I made the following findings in my oral decision:

1. N.L. has not consistently attended all the services which have been offered. Although highly motivated, she has been unable to translate this motivation into attendance.

2. This lack of consistency was confirmed by Mr. Burke, of Family Services of Eastern Nova Scotia; by Alanna Brown, of Addiction Services; and reviewed extensively by Susan MacMillan, the protection worker assigned to this case.

3. Because of N.L.'s spotty and irregular attendance at the various services and programs offered, she has not successfully completed all the programs.

4. Because she has not successfully completed all the programs, N.L. has not dealt with the many issues confronting her, and she has failed to learn all of the skills necessary to deal with the stresses and anxieties in her life in a healthy and responsible fashion.

5. Dr. Landry gave a relative, positive report. It should be noted, however, that his report was premised on a number of recommendations which were not met by N.L. In his evidence, Dr. Landry noted that individuals who lack attachments generally have greater problems with anxiety and depression. Relationship losses and stressors create a cycle of anxiety and depression, and without treatment, N.L. does not have the necessary coping mechanisms to deal effectively with the serious issues confronting her. This can lead to ongoing addiction problems and ongoing relationship issues.

6. Dr. Landry suggested therapeutic services to facilitate coping with substance abuse, and to prevent any relapse or deterioration. N.L., although successfully concluding the structured program, has not been consistent with addiction counseling despite many attempts. This ongoing counseling is desperately needed given the level of N.L.'s prior addiction to cocaine and to alcohol. Her addiction is ongoing. N.L. has only recently acknowledged an alcohol problem. This, notwithstanding the multiple alcohol related offences in which she was involved. I further find it is likely that N.L. was driving under the influence of alcohol on more than just the occasions when she was caught by the police. In addition, her last drug use was at least August of 2007, although N.L. originally thought it was in April of 2007. The temptation to use alcohol and drugs to alleviate stress and anxiety is a significant and real issue for N.L. N.L. must continue with counseling on a regular and consistent basis if she is to learn the necessary skills to stay clean and sober. In reaching this particular finding, I acknowledge that the Agency has no reason to doubt that N.L. has not used in 2008.

> 7. Dr. Landry recommended therapy to deal with issues stemming from N.L.'s past history in the areas of her relationship with her mother, her relationship with men, and with issues of trust. These issues have not been concluded in counseling. Mr. Burke noted that although N.L. had made significant progress in the counseling for intimate partner violence, she still requires further counseling, especially with boundary setting. Further, the counseling respecting children witnessing domestic violence has not been completed and, also, Mr. Burke noted that more work is required in the area of conflict responses. Mr. Burke said that he had only scratched the surface on the issues flowing from N.L.'s relationship with her mother, and with trust issues. Because these issues have not been successfully addressed in counseling, N.L. remains vulnerable. These unresolved personal issues have lead to dangerous and poor parental judgments in the recent past, and I find will continue to lead to poor parental decision making in the future. Until these issues are successfully resolved, the children will remain at risk, and by this I mean a significant risk that is apparent on the evidence.
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> 8. Dr. Christians only saw N.L. on two occasions. N.L. missed one appointment. Dr. Christians prescribed medication which N.L. is not consistent in taking. Although I have no doubt that N.L.'s mental health would improve by the children being returned to her care, I cannot do so as my decision must be made in the best interests of the children, and not in the best interests of N.L. The children are not medicine to be dispensed to make N.L. feel better. N.L. must be in a healthy enough condition to ensure that she can parent effectively and safely before the children are returned.
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> ...

[10] Despite the permanent care order, the parties nonetheless consented to access continuing. The Agency hoped that family members would come forward to assume care of the children, or that N.L. would make the necessary lifestyle changes so that a future application to terminate could be made. This is noted in the following extract from the oral decision:

> The Agency has stated that it remains open to N.L.'s continued involvement with the children, and open to a future application to have the children returned to her care, if all the statutory requirements are met. The Agency is also seeking an order providing the Respondents with access, and this order is granted pursuant to s. 47(2). ....

> And at this stage I will leave it up to the Agency to make decisions in relation to the timing of access, if access is to be extended, taking into consideration, as well obviously, J.'s wishes, but also balancing those against N.L.'s progress.

[11] After the permanent care order issued, N.L. continued to exercise access to G.M., although there were missed visits, until N.L. was incarcerated on April 15, 2009. N.L. was released from prison on July 14, 2009. No authorized access has occurred since March 27, 2009.

[12] By July 2009, the Agency decided to pursue adoption for G.M. No family members had come forward with a plan, and N.L.'s lifestyle had not changed. Permanency planning was necessary. Therefore, on July 22, 2009, the Agency filed its formal application to terminate the access provisions of the permanent care order.

[13] In response, on September 16, 2009, N.L. applied to terminate the permanent care orders. N.L. also made application to review and enforce access. The Agency eventually agreed to terminate the permanent care order relating to J.; this order was granted by consent.

[14] The other contested applications were heard on the following dates: December 17, 2009; January 18; April 26, 27, 29; and May 17, 2010. The court heard from the following witnesses: Susan MacMillan, C.M., Cst. Price, Cst. Johnson, Barb Estwick, Cst. Barrington, Cst. Nagy, Dave Brown, Ryan Ellis, Dr. William Vitale, Cst. Power, Paul Moore, Nancy Lotherington, Julie Kendall, E. L., Dr. Andrew Lynk, Ed Burke, Judy MacDonald, N.L., Wendy Clarke, and Alanna Brown. Written submissions were received on May 31st, 2010.

[15] **ANALYSIS**

[16] **Should the order for permanent care and custody be terminated?**

[17] *Position of N.L.*

[18] N.L. seeks an order terminating the permanent care order, with G.M.'s return to her pursuant to s.48(8)(e) of the *Act*; or in the alternative, an order

adjourning the application, and the temporary return of G.M. to N.L.'s care, subject to the supervision of the Agency pursuant to s. 48(8)(c) of the *Act.*

[19] N.L. states that she no longer abuses substances, and is no longer in an abusive relationship with W.M. N.L. submits that the evidence discloses, on a balance of probabilities, that she will not use alcohol again. Other significant changes include the following:

a) J.'s return to N.L.'s care;

b) the use of community and family supports such as Transition House, the Elizabeth Fry Society, Family Services of Eastern Nova Scotia, and Addiction Services;

c) obtaining and retaining employment;

d) pursuing counseling; and

e) understanding the impact of family violence on children.

[20] As a result, N.L. argues that the order for permanent care and custody should be terminated in the best interests of G.M. N.L. states that G.M. has a positive attachment to her, and G.M. also needs to be part of her birth family to ensure that her best interests are met. N.L. states that she is an excellent mother who has properly addressed the child protection concerns previously identified. G.M., her mother, and her sister should have the opportunity to form a cohesive and loving, family unit.

[21] *Position of the Minister*

[22] The Agency, on the other hand, argues that the presenting problems, which resulted in the permanent care order, have not changed. N.L. continues to abuse alcohol, and has not made permanent and effective lifestyle changes. The Agency argues that G.M. has special needs, as a fetal alcohol syndrome child, and those needs can not, and will not, be met in the care of N.L. As a result, N.L.'s application to terminate the permanent care and custody order must fail pursuant to s. 48(8)(a) of the *Act*.

[23] *Decision*

[24] Section 48(10) of the *Act* directs the court to examine two factors. First, the court must determine whether the circumstances have changed since the making of the permanent care order. Second, the court must consider the child's best interests. The best interests of the child is defined in a non-exhaustive list in s. 3(2) of the *Act*. This is a child-focussed definition which obliges the court to consider the unique circumstances of each child.

[25] Further, the onus is reversed at this stage of the proceeding: **M.D. v. Children's Aid Society of Halifax**, [1994] N.S.J. No. 191 (C.A.), para. 71. N.L. therefore must prove the s.48(10) factors.

[26] In **M.D. v. Children's Aid Society of Halifax**, ***supra***, the Nova Scotia Court of Appeal affirmed the decision of Daley, J. F.C. when he held that the changed circumstances must be significant, relevant and have a positive benefit on the welfare of the child at para. 61.

[27] In **Nova Scotia (Minister of Community Services) v. D.LC.** [1997] N.S.J. No. 78 (C.A.), Flinn, J.A. confirmed the two stage test at paras. 8 and 9, which state:

> 8 Following a hearing, Judge Williams dismissed the application. After referring to the recent decision of this Court in S.G. v. Children's Aid Society of Cape Breton et al (1996), 151 N.S.R. (2d) 1, Judge Williams correctly set out the test for considering the application of the grandparents to terminate the order for permanent care and custody.
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> 9 He said in his decision:
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> "The test in this proceeding is essentially a twofold test:
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> (1) have the circumstances changed so that there is no longer any need for protection, and that the parent is a proper person to care for the child? .....
>
> (2) when the application is made, is it in the best interests of the child to terminate the order?"

[28] I have reviewed the legislation, case law, and the submissions of the parties, as well as extensively reviewing the evidence and exhibits. I find that N.L. has not met the burden upon her. She has not proven, on a balance of probabilities, either of the two parts of the test.

[29] *Changes in Circumstances*

[30] I find that child protection concerns still exist because there have been few significant changes in circumstances. N.L. continues to struggle with many personal issues from her past, including sobriety, violent relationships, stress, and anxiety. N.L. continues to lack healthy, coping skills which will allow her to effectively and responsibly confront her many challenges. In the past, this lack of skills lead to ongoing addiction problems, violent relationships, and poor parenting decisions. I find, on the balance of probabilities, such will continue in the future. The temptation to use alcohol and drugs to alleviate stress and anxiety continues to be a constant battle for N.L.

[31] N.L. has taken many courses and engaged in much therapy. However, such knowledge has not translated into permanent changes. Even after N.L. filed her application in September 2009, she continued to abuse alcohol and breached the terms of her probation. In January 2010, N.L. chose to enter a local bar, and chose to become so intoxicated that she had no recollection of what had occurred the night before, or why she had been jailed. N.L. characterized the January incident as a "slip." I do not. This, unfortunately, is but an example of the ongoing saga of N.L.'s dysfunctional and unhealthy life.

[32] Since the permanent care order issued in July 2008, many of N.L.'s choices confirm this finding. Examples include the following:

a) In March 2009, N.L. was once again assaulted by W.M. She had previously advised the court that this relationship had ended. Cst. Johnson noted that N.L. was intoxicated at the time. N.L. had previously advised the court that she was no longer drinking. Further, N.L. was arrested that day because there were two outstanding warrants and because she had breached the terms of her release.

b) N.L. was incarcerated between April 15, 2009 and July 14, 2009. In her affidavit, N.L. stated that she had used this time to take courses,

reflect, and set her priorities. Nonetheless, just days after her release, N.L. was intoxicated at a wedding dance and threatened an Agency worker who was also at the dance.

c) In July 2009, N.L. was once again brutally assaulted by W.M. Just a few days earlier, N.L. had advised the Agency that she had ended her relationship with W.M. N.L. told the investigating police officers that W.M. was her boyfriend of eight years. Further, N.L. had once again been drinking alcohol at the time of the assault.

d) N.L. was convicted of various criminal charges after G.M. was placed in the permanent care of the Agency. The charges include theft; two failures to appear; three breaches; mischief (damage to property); operating a vehicle while impaired; and driving while disqualified.

[33] Although N.L. remains motivated, she fails to make consistent and long term progress in the areas which were identified at the permanent care and custody hearing. It is not safe to return G.M. to N.L.'s care, either on a supervised basis or otherwise. G.M. remains a child in need of protective services for essentially the same reasons which existed in July 2008.

[34] *Best Interests of G.M.*

[35] It is not in G.M.'s best interests to terminate the permanent care order given her current circumstances. I find that G.M. will, on a balance of probabilities, have developmental issues which will require special commitment, skill, and knowledge from the primary care parent.

[36] It is probable that G.M. was affected by the cocaine and alcohol consumption which occurred prior to her birth. In making this finding, I am not assigning blame, rather I am articulating G.M.'s reality as it currently exists: **S.G. v. Children's Aid Society of Cape Breton**, [1996] N.S.J. No. 180 (C.A.), para. 37.

[37] Drs. Vitale and Lynk provided expert opinion on whether G.M. is on the FAS spectrum. Both examined the physical and behavioural characteristics of G.M. Dr. Vitale examined G.M. when she was three years, nine months. Dr. Lynk examined G.M. when she was four years, three months. Dr. Vitale concluded that G.M. had FAS disorder with ADHD, impulsivity, and oppositional traits. In contrast, Dr. Lynk stated that G.M. could have a borderline or mild case of FASD, if at all, but that more testing would be appropriate as G.M. grew older, so that a final diagnosis could be made.

[38] Because FAS is a spectrum disorder, and because of G.M.'s young age, I agree that it may be difficult to pin point an exact diagnosis. However, I find that G.M. has some form of FAS. G.M.'s brain development was harmed when N.L. ingested cocaine and alcohol while pregnant. This has caused G.M. to experience behavioural and executive functioning challenges. G.M.'s behaviours have improved because of the consistent, knowledgeable, and skilled parenting of the foster mother. If G.M. is to maximize her potential, she will require such dedication and parenting skills from her primary care parent.

[39] I find that N.L. is not capable of providing the type of parenting that G.M. requires because of N.L.'s ongoing struggles with substance abuse, domestic violence, and criminal activity. Further, N.L. will experience many challenges because of J.'s return. Although intelligent, J. is oppositional, demanding, and troubled. Counseling has just commenced between J. and N.L.

[40] Given G.M.'s unique needs, it is not in her best interests to be returned to the care of N.L. N.L. has failed to prove the second part of the s.48(10) test. N.L.'s application must therefore fail.

[41] **If not, should the access provisions of the permanent care and custody order be terminated to permit adoption?**

[42] *Position of N.L.*

[43] N.L. seeks ongoing access to G.M. There is a provision for access in the permanent care order. N.L. seeks to enforce this access provision, and set an access schedule. N.L. states that it is in G.M.'s best interests to continue access for the following reasons:

a) G.M. has formed a bond with her;
b) G.M. needs to have an ongoing relationship with her sister, whom she knows and with whom she has a positive bond; and
c) All access visits have gone well. There were no concerns expressed over the quality of the access visits.

[44] *Position of the Minister*

[45] The Agency seeks to terminate all access because the Minister wants to have permanency in G.M.'s life. The Agency's initial hope to have G.M. placed with family members, or to have N.L. effect lasting lifestyle changes, has not been realized. The Agency states that it is in G.M.'s best interest to be adopted.

[46] *Decision*

[47] Section 48(7) of the *Act* states that the court may, in the child's best interests confirm, vary, or terminate the access provisions of a permanent care order.

[48] Section 47(1) of the *Act* states that when a permanent care order issues, the Minister is assigned the "status of legal guardian of the child" with "all the rights, powers, and responsibilities of a parent or guardian for the child's care and custody": **The Minister of Community Services v. T.H. and D.B.** , 2010 NSCA 63, para. 37.

[49] Further, in **The Minister of Community Services v. T.H. and D.B.**, ***supra***, Fichaud, J.A., states that after a permanent care order has issued, there is a de-emphasis on family contact and, instead, priority is assigned to long term, stable placement at para. 46, which states:

> 46 The Legislature has, after permanent care and custody, de-emphasized family contact and instead priorized long term stable placement, including adoption, in the criteria governing the child's best interests. There are exceptions, of course, including access in limited circumstances under s. 47(2) and

openness agreements after adoption
under s. 78A.

[50] I find it is in G.M.'s best interests to terminate all access with N.L. and W.M. G.M. needs a permanent home with loving parents who can provide an environment free from child protection concerns. Time limits have expired. N.L. has not effected permanent and lasting lifestyle changes. N.L. lacks the ability to provide for G.M.'s special needs. Adoption is not possible if access continues. G.M., a child with special needs, cannot have her emotional, physical, and psychological needs met by N.L. whose life is filled with chaos, confusion, and poor parenting choices. Access will, therefore, be terminated immediately in G.M.'s best interests. The Minister is, thus, free to pursue adoption as the Agency stated was its plan.

[51] **CONCLUSION**

[52] The application of N.L. to terminate the permanent care order is denied, as is her application for increased access and enforcement of access. The Minister's application to terminate access is granted.

[53] Ms. MacLeod-Archer is to draft and circulate the order.

DATED at Sydney, Nova Scotia, this 17th day of August, 2010.

The Honourable Justice Theresa M. Forgeron