SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. L.H., 2011 NSSC 41

Date: 20110121
Docket: 68217
Registry: Sydney

Between:

The Minister of Community Services

Applicant

v.

LH and BS

Respondents

Judge: The Honourable Justice Theresa M. Forgeron

Heard: August 25 and 26, September 29, October 13, and November 30, 2010, in Sydney, Nova Scotia

Oral Decision: January 21, 2011

Written Decision: January 28, 2011

Counsel: Lee Anne MacLeod-Archer, for the applicant
Dave Campbell, Q.C. for BS, the respondent
Alfred Dinaut, for LH, the respondent

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] BS and LH are the parents of three young children: H, who is four; BJ, who is three; and M, who is one. The Minister is seeking permanent care and custody of the three children because of concerns involving unexplained injuries, neglect, safety, hygiene, and a lack of basic parenting skills.

[2] LH agrees with the Minister's position. After placing her consent on the record, LH ceased to participate in the proceedings. In contrast, BS contests the agency's application; he wants the children returned to his care. BS also remains open to working with the agency under a supervision order.

II. Issues

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

a) Should the children be returned to the care of BS?

b) Should the court entertain a permanent care order at this time?

c) If a permanent care order is granted, should access be ordered?

III. Procedural History

[4] BS and LH became a couple in 2006. H was born in January 2007 and was apprehended at birth. BS was not cooperative with the agency. After BJ was born a year later, BS began to work with the agency. Progress was slow. The agency filed a plan for permanent care and custody of H and BJ.

[5] During the course of the hearing, the trial judge recommended that the children be returned to LH and BS under a supervision order. A three month stay was entered to permit mediation. BS and LH continued to make progress, and the proceedings were eventually dismissed, by consent, on September 14, 2009.

[6] The parties' third child, M, was born a few days before the proceedings were dismissed.

[7] On November 24, 2009, the agency received a referral from Dr. Currie, who is an emergency room physician. Dr. Currie was concerned about BJ because of unexplained injuries and possible malnourishment. The agency investigated the referral. The children were placed with family relatives and eventually were apprehended on January 8, 2010.

[8] The protection hearing was held on April 8, 2010. BS and LH agreed that the children were in need of protective services pursuant to secs. 22 (2) (a), (b), (e), (j), and (ja) of the *Children and Family Services Act*.

[9] The first disposition order was granted on June 2, 2010. The children remained in the care and custody of the agency, with a provision for supervised access. The court ordered an updated parental capacity assessment. After reviewing the updated parental capacity assessment, the agency held a risk conference. The agency determined that it would seek permanent care and custody of the children.

[10] The contested permanent care hearing was held on August 25 and 26, September 29, October 13, and November 30, 2010. BS discharged his first lawyer in September 2010, and new counsel was secured by October 13. The trial was completed on November 30.

IV. Analysis

[11] **Should the children be returned to the care of BS?**

[12] *Position of the Parties*

[13] The agency seeks a permanent care and custody order pursuant to sec. 42(1)(f) of the *Act*. In so doing, the agency states that despite years of services, BS has been unable to successfully parent the children. As a result, BJ suffered physical injuries, and the children have been neglected. Services designed to promote the integrity of the family have been attempted and failed; such services also have, on occasion, been refused; and such services would be inadequate to protect the children. Specifically, the agency notes the following concerns:

a) BS neglected his own, and the children's personal hygiene and safety, as well as the cleanliness and safety of the interior and exterior of their home.

b) BJ had significant unexplained injuries and BS failed to seek medical attention for BJ.

c) BS experiences cognitive challenges and mental health problems which have hindered his ability to make lasting and permanent changes to his parenting.

d) BS is not always compliant with his medication and has not consistently engaged in mental health counselling which is required.

e) BS does not have a support network.

f) BS cannot meet the physical and emotional needs of the children.

[14] BS contests the agency's application. He seeks the return of the children to his care for the following reasons:

a) He is the biological father of the children and loves them dearly. The children miss and love him.

b) He will provide nutritious meals to the children.

c) He is willing to accept help, and will change his ways, including giving up his work on cars.

d) He will stop living with LH and will get his own house, hopefully through Regional Housing.

e) He will take parenting courses.

f) He will provide the children with the care they need, including going for walks, spending quality time with them, and engaging in social and recreational activities.

g) He will take his medication and be compliant with his mental health treatment.

[15] *Discussion of the Law*

[16] In this application, the Minister is assigned the burden of proof. It is the civil burden of proof. The agency must prove its case on a balance of probabilities by providing the court with "clear, cogent, and convincing evidence": **C.(R.) v. McDougall** 2008 S.C.C. 53. In this case the agency must prove why it is in the best interests of H, BJ, and M to be placed in the permanent care and custody of the agency according to the legislative requirements.

[17] Further, in making my decision, I must be mindful of the legislative purpose. The purpose of the *Act* is to promote the integrity of the family, protect children from harm, and ensure the best interests of children. However, the paramount consideration is always the best interests of the children as stated in sec. 2(2) of the *Act*.

[18] The *Act* must always be interpreted according to a child centred approach in keeping with the best interests principle as defined in sec. 3(2) of the *Act*. This definition is multifaceted. It directs the court to consider various factors unique to each child, including those associated with the child's emotional, physical, cultural, and social development needs, and those associated with risk of harm.

[19] In addition, sec. 42(2) of the *Act* states that the court is not to remove children from the care of parents unless less intrusive alternatives, including services to promote the integrity of the family, have been attempted and have failed, or have been refused by the parent, or would be inadequate to protect the children.

[20] When a court conducts a disposition review, the court assumes that the orders previously made were correct based upon the circumstances existing at the time. At a review hearing, the court must determine whether the circumstances, which resulted in the original order, still exist, or whether there have been changes such that the children are no longer children in need of protective services: sec. 46 of the *Act*; **Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)**, [1994] 2 S.C.R. 165 at para 37.

[21] *Decision*

[22] I am satisfied that the Minister has met the burden upon her. The Minister has proven that the circumstances have not changed. The Minister has proven that it is not in the best interests of the children to be returned to BS's care. His plan is not viable because of risk factors. Further, the Minister has proven that it is in the best interests of H, BJ, and M to be placed in the care and custody of the agency. In so finding, I conclude that less intrusive alternatives, including services to promote the integrity of the family have been attempted and have failed; in some cases, have been refused; and in all cases, would be inadequate to protect the three children. I reach this conclusion for a number of reasons which I will now discuss.

[23] First, BS fails to appreciate the significant and underlying factors which gave rise to these proceedings. Because of this failure, BS is not motivated to make and sustain permanent changes to his lifestyle. As a result, the children are, and will continue to remain at risk.

[24] Second, some of BS's difficulties have arisen because of his limited cognitive abilities and because of untreated mental health issues. Dr. Julie MacDonald, whose expert opinion I accept, states that individuals who have serious mental illnesses may experience relationship difficulties, or problematic behaviours, which can have a profound impact on their parenting. BS has been diagnosed with numerous mental health problems over the years. Dr. Shullaih testified that BS requires treatment for ADHD, an associated learning disorder, oppositional defiant disorder, and concerns relating to depression, stress, and some antisocial traits. BS has not been compliant with either his medication or with psychotherapy, even when under a court order to do so. I find that BS's cognitive limitations and his mental health illnesses have negatively impacted on his ability to parent safely. This is not likely to change.

[25] Third, BS has not made his home safe for the children. Dangerous tools and equipment have been consistently left out in the home and yard. This ongoing issue was addressed with BS since approximately 2007. Despite being repeatedly told, and shown how to create a safe home, and how to avoid safety hazards, BS has been unable to grasp and apply this knowledge. The children remain at risk of harm as a result.

[26] Fourth, BS did not credibly explain the injuries and condition of BJ. In November 2009, Dr. Currie examined BJ, who had been brought to the hospital by a family relative. BJ was severely bruised and malnourished. Dr. Currie indicated that the bruises were not of a pattern that would ordinarily result from a child falling on stairs. In her evidence, Dr. MacDonald reported discrepancies in the time lines which were recounted by BS and LH. I do not accept BS's excuses and explanations. I do not know if the injuries resulted from intentional or unintentional causes. However, the evidence proves on a balance of probabilities that, at a minimum, BS was unable to recognize the seriousness of BJ's condition. BS did not recognize bruising. BS did not recognize that BJ was malnourished. BJ's condition would have worsened but for the intervention of the family relative. BS fails to accept any responsibility for his son's unhealthy state. This is most troubling.

[27] Fifth, BS is unable to meet the physical and emotional needs of the children. The evidence disclosed many examples of this, including the following:

a) BS did not take BJ to the hospital because he was afraid that the agency would once again become involved in his life.

b) Despite repeated educational services, BS is unable to maintain even a basic threshold for personal hygiene for himself or the children. BS presented with hygiene issues on the day he testified in court, even though this was previously identified as a concern.

c) BS was unable to dress M in Ms. Gibson's presence because he could not figure out how to manipulate the snaps on her outfit.

d) BS did not know how to secure M in her car seat.

e) BS did not recognize the need to interact with BJ. I accept Dr. MacDonald's assessment and observations on this point. BS is oblivious to his son's needs. In contrast, once in care, and with the love and attention of his foster parents, who are family relatives, BJ began to flourish. He is eating, gaining weight, beginning to talk and use sentences, laughing, playing, and socializing as is typical for children his age.

f) BS did not recognize that H and BJ require social interaction with children their own ages, and social stimulation.

g) BS did not attend access sessions when LH was not present. Even when LH was present, BS was unable to care for the needs of the three children and often concentrated on M to the exclusion of H and BJ. BS is not able to manage all three children on his own. During access, BS frequently played with toys or books without engaging the children, and for his own personal enjoyment.

[28] Sixth, BS is mistrustful and projects blame on other people. This was noted as an entrenched trait by Dr. MacDonald. As a result, BS is less accepting of services. He is rigid. This personality trait creates a significant impediment to change.

[29] Seventh, BS has no family or friends to create a viable support system. Dr. MacDonald noted the importance of a support system. LH is BS's partner. She correctly recognizes that the children are at risk of harm in her care. LH is, therefore, not a viable support person. BS's father is not a viable support person. He and BS have an "on and off again" relationship. No one testified on behalf of BS. I find that there is no support system available for BS and this is not likely to change.

[30] For these reasons, I find that the agency has met the burden of proof. An order placing the three children in the care and custody of the agency is the only order in the best interests of the children. BS's plan fails for the reasons stated above.

[31] **Should the court entertain a permanent care and custody application at this time?**

[32] *Position of the Parties*

[33] The Minister seeks a permanent care and custody order despite substantial time remaining under the legislative framework. The agency states that the circumstances which resulted in the protection finding are unlikely to change within a reasonably foreseeable time.

[34] BS, on the other hand, contests the granting of a permanent care order at this early stage. He notes that he is willing to work with the agency. He states that he can effect the necessary changes in his life so that the children can be safely returned to his care. BS wants more time to work with the agency.

[35] *Discussion of the Law*

[36] Sec. 42(4) provides the court with the authority to make a permanent care order even when the legislative time lines have not been exhausted, if circumstances are unlikely to change within a reasonably foreseeable time.

[37] This issue was addressed by Williams J. in **Nova Scotia (Minister of Community Services) v. Z.(S.) et al.** (1999) 179 N.S.R., (2d) 240 at paras 24 to 26 which state as follows:

> 24 The question of whether a matter should be adjourned, a parent given more time to address personal deficiencies or problems, that must be resolved by a balancing of the child's needs, best interest and protection including the need to be as a matter of first choice with family and parents and the issues enunciated by s. 42(4). The maximum time limit here, as stated, is one year from the first disposition order made July 16, 1999.
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> 25 Should the Agency seek a permanent order where there is what seems like so much time left on the statutory clock? The Agency has a right, if not a duty, to do so where it believes it can satisfy the burden of proof put on it by the operation of the relevant statutory provisions which include, as stated in sections 2(1), (2) and 3 (2) of the Children and Family Services Act.
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> 26 The time limits set out in s. 45(1) are just that - limits. They are not goals. They are not waiting periods. Each case is different. Each case must be decided on its particular facts and circumstances. The question here is: has the Agency satisfied the court with the evidence that has been presented on the basis of all the evidence before the court, based on the burden of proof being on the Agency and that burden of proof being what has been referred to as "a heavy civil burden", has the Agency satisfied the court that a permanent care and custody order should be made having regard to the considerations set out in the legislation

generally and particularly having regard to s. 42(2) and 42(4) of the Children and Family Services Act?

[38] The comments of Williams J. were affirmed on appeal at **Nova Scotia (Minister of Community Services) v. Z.(S.) et al.** (1999) **181 N.S.R. (2d) 99**.

[39] *Decision*

[40] Despite the time remaining on the "statutory clock", I nonetheless find that the agency's decision to seek a permanent care and custody order at this time is appropriate and in the best interests of the children. BS had ample time to change. He did not. The issues confronting BS have been outstanding since 2007. The improvement noted in June to September 2009, was not maintained after the agency's involvement terminated.

[41] The agency provided BS with many services, yet BS cannot learn and apply the skills which were taught. The skills are not complicated. They involve basic hygiene, how to maintain a safe home, and how to meet the physical and emotional needs of children. Despite many services, BS does not know how to provide nutritious meals, how to bathe and clean children, when to seek medical treatment, when to seek professional help, or how to interact with his children. BS does not know how to keep and maintain a safe, clean home.

[42] On a balance of probabilities, these deficits will not change in a reasonably foreseeable time. BS's cognitive limitations, entrenched personality traits, and unresolved mental health issues confirm that these deficits will not change, especially when coupled with his failure to consistently take medication and participate in psychotherapy. A permanent care order is granted pursuant to sec. 42 (1) (f).

[43] **If a permanent care order is granted, should access be ordered?**

[44] The agency is proposing adoption for the children. An order for access would impede permanency planning. BS is requesting access.

[45] Section 47(1) of the *Act* states that once an order for permanent care and custody issues, the agency becomes the legal guardian of the child and has all the rights, powers, and responsibilities of a parent for the child's care and custody.

Section 47(2) of the *Act* provides the court with the authority to make an order for access in limited circumstances: **Children and Family Services of Colchester (County) v. T.(K.)** 2010 NSCA 72 at paras 40 - 42.

[46] In **Nova Scotia (Minister of Community Services) v. H.(T.)** 2010 N.S.C.A. 63 (C.A.) 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: para 46.

[47] I find that it is in the best interests of the children to be adopted. Access between BS will therefore be terminated, subject to a final visit. H, BJ, and M need a permanent home with loving parents who can provide an environment free from child protection concerns. Adoption is not possible if access is ordered. The Minister is free to pursue adoption as the agency has stated in its plan.

V. <u>Conclusion</u>

[48] The order for permanent care and custody of the children is granted in their best interests and according to the legislative requirements. Because it is in the best interests of the children to be adopted, an order permitting access cannot be granted.

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Forgeron, J (NSSCFD)