

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

**Citation:** Nova Scotia (Community Services) v. N. L. , 2011 NSSC 35

**Date:**2011/01/21

**Docket:** CFSA-072248

**Registry:** Sydney

**Between:**

Minister of Community Services

Applicant

v.

N.L. and W.M.

Respondents

**Judge:** The Honourable Justice Theresa M. Forgeron

**Heard:** December 20 and 23, 2010, in Sydney, Nova Scotia

**Oral Decision:** January 21, 2011

**Written Decision:** January 27, 2011

**Counsel:** LeeAnne MacLeod-Archer, for the applicant  
Alan Stanwick, for the respondent, N.L.  
W.M., on his own behalf

**Restriction on publication:** **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.

**By the Court:**

**I. Introduction**

[1] NL and WM live together. They have been in a relationship for about eight years. Ms. L. and Mr. M. are the biological parents of two children, Jo and A. Jo is in the permanent care of the agency. A is an infant who was apprehended at birth.

[2] In addition, Ms. L has three other children. J, who is 15 years old, resides with Ms. L and Mr. M. The other two children live with their fathers.

[3] The agency's most recent involvement with the parties began at the time of A's birth because of protection concerns relating to substance abuse and domestic violence. A is currently being cared for by foster parents.

[4] The protection hearing was contested. Evidence was heard on December 20 and 23, 2010. Cst. Myler, Cst. MacKenzie, Cst. Campbell, Cst. Oliver, Ms. Nearing, Mrs. M., Ms. L., and Mr. M. testified at the hearing. The matter was adjourned for oral decision on January 21, 2011.

**II. Issues**

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

- a) Are A and J children in need of protective services?
- b) If so, should A be placed in the temporary care and custody of the agency, or in the supervised care of the respondents?
- c) What are the appropriate terms for the supervision order involving J?

**III. Analysis**

[6] **Are A and J children in need of protective services?**

[7] *Position of the Parties*

[8] The Minister states that J and A are children in need of protective services. The agency relies upon the parties' past history of violence and substance abuse. The agency states that neither Ms. L, nor Mr. M have made permanent or lasting lifestyle changes, and as a result the children remain at risk. The agency also relies upon the findings in the August, 2010 decision of this court involving the parties and their child Jo, as reported at **Minister of Community Services v. N.L. and W.M.**, 2010 NSSC 328, as well as the earlier findings made in this court's oral decision involving the parties in July, 2008.

[9] Ms. L and Mr. M state that there are no current protection concerns facing the children because the following has occurred:

- a) Ms. L and Mr. M have made a pact that they will not fight or consume alcohol in front of the children.
- b) Ms. L and Mr. M have better insight into the negative effects that violence has on children.
- c) Ms. L has taken anger management courses and counselling. As a result, she is better equipped to handle her anger. Ms. L no longer physically assaults Mr. M. In return, Mr. M does not assault Ms. L. Ms. L acknowledges that she was the aggressor in all previous domestic conflicts.
- d) Ms. L and Mr. M have taken courses, and Ms. L has once again resumed counselling with Dr. Christians. Dr. Christians is willing to work with both parties.
- e) Ms. L is able to handle the stress in her life and, further, if A was returned to her care, Ms. L would not consume alcohol because she would not experience guilt.
- f) There have been no reported acts of violence between Mr. M and Ms. L since August of 2009.
- g) J continues to do well academically and socially in school and while in the care of Ms. L and Mr. M.

- h) Ms. L and Mr. M have family supports, as well as the support of a minister who provides spiritual guidance and personal advice.
- i) Mr. M's mother has noticed a significant change in the their household environment, and is supportive of A's return.

[10] *Law*

[11] Section 40 of the *Children and Family Services Act* provides the court with the authority to make a determination as to whether children are in need of protective services. Section 40(4) of the *Act* states that the operative date for the finding is the date of the protection hearing itself. Thus, I must determine if J and A are children in need of protective services at the present time.

[12] This directive, however, does not mean that past history is not relevant to my determination. To the contrary, past history may be used in assessing present circumstances. An examination of past circumstances helps the court determine the probability of the event reoccurring. The court is concerned with probabilities, not possibilities. Therefore, where past history aids in the determination of future probabilities it is admissible, germane, and relevant. In **Nova Scotia (Minister of Community Service) v. Z.(S.)** 181 N.S.R. (2d) 99 (C.A.), Chipman, J.A. confirmed the relevance of past history at para 13 wherein he states as follows:

[13] I am unable to conclude that the trial judge placed undue emphasis on the appellant's past parenting. It was, of course, the primary evidence on which he would be entitled to rely in judging the appellant's ability to parent B.Z. In *Children's Aid Society of Winnipeg (City) v. F.* (1978), 1 R.F.L. (2d) 46 (Man. Prov. Ct.) at p. 51, Carr, Prov. J., (as he then was), said at p. 51:

... In deciding whether a child's environment is injurious to himself, whether the parents are competent, whether a child's physical or mental health is endangered, surely evidence of past experience is invaluable to the court in assessing the present situation. But for the admissibility of this type of evidence children still in the custody of chronic child abusers may be beyond the protection of the court ...

[13] 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 that J and A are children in need of protective services.

[14] 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 children as stated in s. 2(2) of the *Act*.

[15] The *Act* is interpreted according to a child centred approach in keeping with the best interests principles as defined in section 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.

[16] The Agency relies upon s. 22(2) (b) and (i) in support of the protection finding. Section 22(2) (b)(a) and (i) state as follows:

22 (2) A child is in need of protective services where

(a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;

(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);

(i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child's parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence;

[17] Substantial risk is defined in s. 22 (1) as follows:

22 (1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.

[18] In **B.(M.J.) v. Family & Children's Services of Kings County** 2008 NSCA 64, 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 at para. 77.

[19] *Decision*

[20] I find that the agency has met its burden in respect of s. 22(2)(b) of the *Act*. The evidence establishes, on a balance of probabilities, that there is a real chance of danger that the children will suffer physical harm from Mr. M or Ms. L, or both, as a result of domestic violence, or substance abuse, or both. There is, however, insufficient evidence to support a finding under s.22(2)(i).

[21] The following findings confirm my conclusion that the children are in need of protective services:

- a) NL continues to grapple with substance abuse, a significant problem which has yet to be addressed despite the court's consistent identification of that problem in past proceedings. Ms. L abuses alcohol to alleviate stress and anxiety and to cope with her past. This is an unhealthy and destructive coping mechanism. Since the last hearing, Ms. L has been convicted of three additional alcohol offenses. Two occurred in May 2010, and one in October 2010.
- b) Neither Ms. L, nor Mr. M, recognize that substance abuse continues to be a problem. Ms. L minimizes her alcohol abuse by saying that she does not consume alcohol in the home, or in the presence of the children. She says that the May 2010 incidents occurred while J was away on a basketball trip, and that the October 2010 incident was not known to J. For his part, Mr. M states that alcohol will not be consumed in the house, or in front of the children, because he said so. Both display a lack of insight into the problems of addiction and the impact such addictions have on children. Because the substance abuse issue has not been addressed, and because of the lack of insight, both J and A remain at risk.

- c) Ms. L and Mr. M lack insight into the issues of domestic violence, despite the therapy undertaken. Contrary to this court's previous findings, and Ms. L's previous evidence, Ms. L now states that she was the aggressor. Mr. M concurs. Ms. L said that Mr. M only assaulted her because she assaulted him first. Both parties have minimized the abuse. Because the violence has not been adequately addressed, and because of the lack of insight, both J and A remain at risk.
- d) Both parties fail to understand the nature of violence. Ms. L and Mr. M appear to be under the mistaken impression that because they have taken a pact not to be violent in the presence of the children, that violence will not occur. Unfortunately violence tends to erupt without preplanning, in many instances, and without reflection or thought of consequences. In the past, the domestic violence was dramatic and brutal. The parties' minimization of this issue is troubling and places both children at a real chance of physical harm.
- e) Ms. L and Mr. M have not taken couples' counselling to resolve their communication problems. Although it appears that their minister's guidance is beneficial, such does not take the place of professional therapy to change entrenched habits. These parents, with longstanding violence and substance abuse issues, must learn new skills to resolve differences and to communicate in a healthy fashion.
- f) Ms. L and Mr. M fail to appreciate their role as parents. Both parties believe that A should be returned so that Ms. L will not experience guilt, and thus will have no reason to turn to alcohol. Children are not medicine. A is not a tool to make Ms. L better. A is a vulnerable baby who requires a home which is safe, loving, and nurturing. Mr. M and Ms. L must change their lifestyles so that the risk of harm is sufficiently reduced to enable A's return.
- g) I reject the evidence of Ms. L and Mr. M when there is a conflict in the evidence. In the past, Ms. L misled the court as to the nature of her relationship with Mr. M. She indicated under oath that her last contact had been the summer of 2009. This is false given that Ms. L became pregnant with A in December 2009. Further, the parties

continued to have contact despite a court order prohibiting the same, and despite Ms. L testifying that she and Mr. M were permanently separated.

- h) Mrs. M's evidence was not overly helpful. Mrs. M avoided the domestic violence between the parties in the past. She did not become involved because she did not feel that it was any of her business. Mrs. M is now dealing with personal issues because of her husband's health and thus is of limited support to the parties.
- i) Although J has expressed a firm and consistent desire not to be found in need of protection, her wishes are not determinative of the issue. The supervision order was terminated in April 2010 on the assumption that Ms. L was not in a relationship with Mr. M. This assumption is not true.

[22] I find that J and A are in need of protective services, despite the fact that no domestic violence has been reported to police since J's return to Ms. L's care in January, 2010 for the reasons which I have identified.

**[23] Should A. be placed in the temporary care and custody of the agency, or should she be placed in the supervised care of the Ms. L and Mr. M?**

[24] The agency seeks to keep A in its care and custody, subject to supervised access. Ms. L and Mr. M, in the alternative, seek a supervision order.

[25] Section 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.

[26] The agency has proven that it is in the best interests of A to be in the temporary care and custody of the agency pursuant to s. 42(2) of the *Act*. A is a vulnerable four month old child. She has absolutely no ability to self-protect. The probability that Ms. L and Mr. M will engage in violence is high. The probability that at least Ms. L will abuse alcohol is likewise high. This combination is dangerous. Given their lack of permanent life style changes, their lack of insight



respecting violence and substance abuse, and their lack of credibility, A cannot be returned to the care of Ms. L and Mr. M at this time.

[27] The situation may be different in the future if meaningful participation in therapy occurs and the skills learned are translated into permanent lifestyle changes. Ms. L and Mr. M are motivated to have A returned to their care. Ms. L has no difficulty meeting the physical and emotional needs of A, provided she is not in a violent or intoxicated state. The home, from all accounts, is clean, safe, and appropriate. Further, the evidence establishes that there are no financial issues. A support system is also in place. These factors are promising. However, intensive therapy, which is consistently undertaken, is required in the areas of domestic violence, anger management, acceptance of responsibility, communication, stress management, and coping skills. Ms. L must also undergo mental health services, and therapy to deal with her past, as consistently noted in previous decisions.

[28] Until this occurs, and the risk is substantially reduced, A must remain in the care and custody of the agency, with supervised access. Because of the violence, Ms. L and Mr. M cannot exercise joint access.

[29] Mr. M is advised to be consistent with access, and to remain for the duration of all visits, even if A is asleep. Increased access between Ms. L and A should be considered, as should increased visits between A and J.

[30] **What are the appropriate terms for the supervision order involving J?**

[31] The supervision order is appropriate for J. She is older and has some ability to self-protect. J is adamant that she wants to remain with Ms. L and Mr. M. However, because Mr. M is now living with Ms. L, a supervision order is a must.

[32] In addition to the usual provisions, the supervision order will include the following terms and conditions:

- a) Ms. L and Mr. M are to submit to drug and alcohol testing, which will include hair sample tests or urine testing, or both, at the discretion of the agency.

- b) Both parties will participate in anger management counselling and therapy.
- c) Both parties will attend couples' counselling to learn healthy and effective communication skills.
- d) Both parties will attend counselling on domestic violence to gain better insight.
- e) Ms. L will participate in individual therapy to resolve self-esteem and personal problems relating to her past, including relationship issues.
- f) Ms. L will attend addictions counselling and relapse therapy.
- g) Ms. L will participate in mental health services.
- h) The parties will not have alcohol or illegal substances in their home. Neither party will consume alcohol or other illegal substances.
- i) The parties will maintain a clean and safe home, free from any violence.
- j) Releases will be signed so that the agency has access to all service providers.

#### **IV. Conclusion**

[33] A and J are children in need of protective services pursuant to s. 22(2)(b) of the *Act*. A will remain in the care and custody of the agency, with supervised access to Ms. L and Mr. M. J will remain in the supervised care of Ms. L, subject to the provisions stated. A date will be obtained for the disposition hearing and pretrial.

[34] Ms. MacLeod-Archer is to draft the order.

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Forgeron, J.

(NSSCFD)