SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. G R., 2011 NSSC 88

Date: 2011/02/24
Docket: SFSNCFSA - 70469
Registry: Sydney

Between:

The Minister of Community Services

Applicant

v.

G R and L C

Respondents

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	February 2, and February 24, 2011, in Sydney, Nova Scotia
Written Decision:	February 28, 2011
Counsel:	Robert Crosby, Q.C., counsel for the applicant Alan Stanwick, counsel for the respondent, G R L C, not represented and not present

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:

[1] **Introduction**

[2] Ms. R experienced a most difficult life. Not surprisingly, Ms. R now faces many personal and relationship challenges. As a result of these challenges, the agency had extensive involvement with Ms. R and her five children. Three of her children, K, H, and M, are in the custody of K's paternal grandparents. One child, L, is in the permanent care of the Minister. The youngest child, M E, is in the temporary care of the Minister.

[3] Mr. C is the biological father of H, M, L, and M E. He too presents as a troubled individual.

[4] The agency began its most recent involvement with Ms. R and Mr. C following the birth of M E. The Minister is seeking permanent care of M E because of concerns involving domestic violence and neglect. Ms. R disagrees with the Minister; she is seeking the return of M E to her care. Mr. C's position is not known as he did not participate in the review hearing.

[5] **Issues**

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

a) Should M E be returned to the care of Ms. R?
b) Should the court entertain a permanent care order at this time?
c) If a permanent care order is granted, should access be terminated?

[7] **Procedural History**

[8] Extensive agency involvement with this family began when Ms. R and Mr. C became a couple. Domestic violence was identified as a chronic issue.

[9] In 2007, the agency apprehended the three, young children of Ms. R. The agency sought a permanent care order. The order was refused when K's grandparents put forth a plan for all three children. After a contested hearing, the children were placed in the custody of K's paternal grandparents in September 2008, subject to supervised access to Ms. R.

[10] In February 2009, Ms. R and Mr. C gave birth to another child, L. An ex parte order was required to locate and apprehend the child. The police had to physically remove the infant from Ms. R's arms. L was eventually placed in the permanent care of the Minister in January 2010. There was no provision for access. L is in the process of being adopted by his foster parents.

[11] In May 2010, M E was born to Ms. R and Mr. C. She was apprehended at birth. The protection order was granted on August 16, 2010, and the first disposition order on October 13, 2010. The Minister seeks a permanent care order, notwithstanding the time which remains available pursuant to the legislative frame work.

[12] **Analysis**

[13] **Should M E be returned to the care of Ms. R?**

[14] *Position of the Parties*

[15] The Minister seeks a permanent care and custody order pursuant to s. 42(1)(f) of the *Children and Family Services Act*. In so doing, the agency states that despite years of services, domestic violence remains a live issue with devastating consequences for a vulnerable child. This, coupled with Ms. R's lack of contact with M E, confirms that a permanent care order should issue.

[16] Ms. R seeks the return of M E to her care. Ms. R states that her relationship with Mr. C ended on December 16, 2010. Further, she states that she has taken courses, and is in therapy to deal with the loss of her children. Ms. R feels that she is best able to provide for M E because she is her mother. Ms. R denies any child protection concerns.

[17] *Discussion of the Law*

[18] In this case, 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 SCC 53. The agency must prove why it is in the best interests of M E to be placed in the care and custody of the agency, according to the legislative requirements.

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

[20] The *Act* must be interpreted according to a child centred approach in keeping with the best interests principle as defined in s. 3(2). 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, and those associated with risk of harm.

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

[22] Past parenting history is also relevant. Past parenting 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.)** (1999), 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:
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> > ... 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 ...

[23] 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: s. 46 of the *Act*; **Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)** 1994 2 S.C.R 165 at para. 37.

[24] *Decision*

[25] 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 M E to be returned to Ms. R's care. Her plan is not viable because of the substantial risk factors.

[26] I further find that less intrusive alternatives, including services to promote the integrity of the family have, in some respects, been attempted and failed, and in other respects, would be inadequate to protect M E.

[27] I draw these conclusions based upon the following findings which I make:

a. Ms. R lacks meaningful insight into the serious problems associated with violent relationships. Ms. R, despite past services, continues to minimize the abusive nature of the relationship which she had, and likely will have, with Mr. C. At one point, Ms. R attempted to justify the violence by stating that she assaulted Mr. C too. Ms. R was also guarded and protective of Mr. C at various times during her testimony. In addition, in the past, Ms. R repeatedly returned to live with Mr. C after the various assaults. Given this lack of insight, M E remains at a substantial risk of physical harm while in the care of her mother.

b. Ms. R's assertion that she and Mr. C are no longer a couple after parting company in December 2010 is not credible, given Ms. R's past history, her lack of insight into domestic violence, her attempts to minimize the past violence, and protect Mr. C while giving evidence. Ms.

R continues to be heavily invested in her relationship with Mr. C, and will in all likelihood, resume the relationship in the future, in the event there was actually a separation in December 2010.

c. Ms. R lacks meaningful insight into the nature of the protection concerns. Ms. R was unable to identify the changes that she had to make in her lifestyle to ensure a safe environment for M E. Ms. R cannot make lasting life style changes when she does not even recognize her problems. This is underscored by Ms. R's testimony that she didn't need the anger management course, and is only taking the course to "show I did it."

d. Ms. R did not recognize that her failure to cooperate with the agency during L's apprehension was inappropriate and dangerous. She was oblivious to the potential risks arising from the police having to force their way into the home and physically removing L from her arms. Ms. R thought that her actions were justified.

e. In the past, Ms. R failed to place her children's health and safety in priority to the "needs" of Mr. C. This has been a chronic problem. Examples include, Ms. R and Mr. C consistently breaching no contact orders in the past; Ms. R facilitating contact between Mr. C and the children notwithstanding a court order to the contrary; and, Ms. R fleeing with the children to live with Mr. C in 2007 contrary to a court order. Ms. R was, and is, oblivious to the harm which occurred, and will likely occur in the future, because of her failure.

f. Ms. R lacks commitment to M E. She only exercised access on five occasions since M E was taken into care. Mr. C had only two visits. For the most part, Ms. R had no reasonable excuse for her consistent failure to visit with M E. I reject the vague reasons proffered by Ms R as explanations for most of the missed visits.

g. Ms. R has not learned healthy and effective coping skills. Ms. R appears socially isolated and vulnerable, despite the services offered since 2007. I find that Ms. R will continue, on a balance of probabilities, to engage in poor parental decision making in the future, as she has in the past. As a result, there is a substantial risk, which is apparent on the evidence, that M E will suffer physical harm if returned to her care.

[28] Given the above findings, M E cannot be returned to the care of Ms. R because of the ongoing protection concerns which have not been alleviated or reduced. M E would be at a significant risk of physical harm if she was to be placed with Ms. R.

[29] **Should the court entertain a permanent care order at this time?**

[30] *Position of the Parties*

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

[32] Ms. R, on the other hand, contests the granting of a permanent care order at this early stage. She states that she has made changes in her life, is engaging in services, and has resumed access.

[33] *Discussion of the Law*

[34] Section 42(4) of the *Act* 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. 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 (S.C.), at paras. 24 to 26:

> 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 C 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?

[35] 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 (C.A.).

[36] *Decision*

[37] 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 is in the best interests of M E. The agency has been involved with Ms. R's life for many years. Many services were offered. Ms. R has had ample time to change. She did not.

[38] The agency provided Ms. R with many services, yet Ms. R cannot learn and apply the skills which were taught. Ms. R continues to place her needs, and those of Mr. C, in priority to the needs of M E. She likely continues to be in an abusive relationship with Mr. C. This finding is appropriate, even without the evidence of Ms. Gibson finding Mr. C at the residence on February 22, 2011 because of the reasons stated in para. 27 of this decision.

[39] On a balance of probabilities, these deficits will not change in a reasonably foreseeable time. Ms. R has no insight into the problem, and has no desire to move forward and change. A permanent care order is, therefore, granted pursuant to s. 42(1)(f) of the *Act.*

[40] **If a permanent care order is granted, should access be terminated?**

[41] The Minister is proposing adoption for M E. An order for access would impede permanency planning.

[42] 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 & Family Services of Colchester (County) v. T. (K.)** 2010 NSCA 72, at paras 40 to 42.

[43] In **Nova Scotia (Minister of Community Services) v. H. (T.)** 2010 NSCA 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 at para. 46.

[44] I find that it is in the best interests of M E to be adopted. Access between M E and Ms. R will be terminated subject to a final visit. M E needs 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, in a culturally suitable environment.

[45] **Conclusion**

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

Forgeron, J.
(NSSCFD)