

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. N.L., 2011 NSSC 369

Date: 20110929
Docket: 72248
Registry: Sydney

Between:

The Minister of Community Services

Applicant

v.

NL and WM

Respondents

Judge: The Honourable Justice Theresa M. Forgeron

Heard: June 29, 30, July 5, August 30, September 1,
7, and 16, in Sydney, Nova Scotia

Oral Decision: September 29, 2011

Oral Decision Released: October 13, 2011

Counsel: David MacIsaac, for the applicant
Alan Stanwick, for the respondent, NL
WM, on his own behalf

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] **Facts**

[2] NL and WM are involved in a number of child protection proceedings. This current review hearing involves two of their children, A and J. A, who is one years old, was apprehended at birth, and has remained in the care and custody of the Agency ever since. J, who is 15 years old, resides with NL and WM, under a supervision order.

[3] The Agency states that there have been no significant changes in circumstances since the issuance of the last court order. They therefore seek the continuation of the temporary care order for A, and the supervision order for J.

[4] NL and WM oppose the Agency's plan. They confirm that they have participated in services. They argue that the protection concerns have been sufficiently reduced to enable A to be returned to their supervised care. In the alternative, the parties seek joint access to A. The Agency opposes the joint access request.

[5] Although J vehemently opposes the supervision order, NL and WM consent to the continuation of it for the time being.

[6] The contested hearing was held on June 29, 30, July 5, August 30, September 1, 7, and 16. The court heard from several witnesses: Helen McNeil; Mary MacMullin; Marilyn Hillier; Dr. Neil Christians; Kerri Fernandez; Joey Gareri; Nicole Sheppard; Andre Campbell; Ed Burke; Dr. Ali; Donna Beaton; Cathy Cross; NL; and WM. After a careful review of the evidence, submissions, the legislation, and the case law, the court will provide its decision on the outstanding issues today.

[7] **Issues**

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

- a. Should the supervision order continue in respect of J?
- b. Should A be returned to the supervised care of NL and WM?
- c. If not, should joint access be granted?

[9] **Background information**

[10] NL and WM have been involved in a relationship for about nine years. Until recently, the relationship was dysfunctional, defined by violence, anger, and substance abuse. Because of these ongoing issues, the parties' daughter, JO was placed in the permanent care and custody of the Agency with no provision for access.

[11] In addition, there are two other child protection applications outstanding involving the parties and their other children, M and MK. Both of these children are 15 years old and they reside in the supervised care of the parties.

[12] The protection order involving A and J issued on January 21, 2011, pursuant to s. 22(2)(b) of the legislation which provides:

(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);

[13] Substantial risk is defined in paragraph 22 (1) as follows:

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

[14] The protection order issued for two main reasons. The first related to violence and anger management. The second concerned substance abuse. Because of A's vulnerability, given her age, and inability to self protect, a temporary care order was granted. Given J's stated wishes, and her age, a supervision order was put into place for her.

[15] The first disposition order is dated March 28, 2011. J continued in the supervised care of NL and WM, while A remained in the temporary care of the Agency, but subject to supervised access to the respondents.

[16] The next review hearing was held on June 6. The terms of the first disposition order were continued, until the contested hearing could be held and a decision rendered. The lengthy trial was completed on September 16. The matter was adjourned for decision on today's date.

[17] In an effort to keep the parties' attention in a very difficult case, I will now provide the outcome, then I will explain my reasons. I have determined that J will continue in the supervised care of the parties; A will continue in temporary care; and that the request for joint access is granted.

[18] **Analysis**

[19] **Should the supervision order continue in respect of J?**

[20] J continues to be a child in need of protective services. It is in the best interests of J that she remain in the supervised care of NL and WM upon the following terms and conditions given the stated risks and current circumstances:

NL:

- a) That NL will continue to be consistently on time and prepared for access visits with her daughter, A.
- b) That NL will continue to attend all scheduled appointments with the protection social worker.
- c) That NL will continue to sign all consents for releases of information, as requested of her by the Department.
- d) That NL will continue to maintain an appropriate and stable residence.
- e) That NL will continue to maintain a clean, safe, and secure home environment free from domestic violence.
- f) That NL will continue to allow a representative of the Agency into the residence of the children, at any time, to provide guidance and assistance and to ascertain that the child, J, is being properly cared for.
- g) That NL will continue to attend individual counselling with an approved service provider.
- h) That NL will continue to attend couples counselling with an approved service provider.
- i) That NL will continue to participate in, and cooperate with, individual counselling and therapy with an approved service provider to continue to address self-esteem and personal history issues.
- j) That NL will continue to participate in, and cooperate with, individual counselling with Addiction Services.
- k) That NL will continue to participate in, and cooperate with, Mental Health Services.
- l) That NL will refrain from the use of alcohol or illegal substances, or both, including prescribing medications in a dose other than as prescribed for her, or medication prescribed for another individual, and NL will not permit the use of,

or presence of, such substances in the family home, nor will she access alcohol or illegal substances in another environment.

- m) That NL will continue to cooperate with drug and alcohol testing, including hair or urine testing, or both, at the request of the Agency.

WM

- a) That WM will continue to be consistently on time and prepared for access visits with his daughter A.
- b) That WM will attend all scheduled appointments with the protection social worker.
- c) That WM will continue to sign all consents for releases of information, as requested of him by the Department.
- d) That WM will continue to maintain an appropriate and stable residence.
- e) That WM will continue to maintain a clean, safe, and secure home environment free from domestic violence.
- f) That WM will continue to allow a representative of the Agency into the residence at any time to provide guidance and assistance and to determine that the child, J, is being properly cared for.
- g) That WM will continue to attend individual counselling addressing anger management and personal issues with an approved service provider.
- h) That WM will continue to attend couples counselling with an approved service provider.
- i) That WM is to cooperate with drug and alcohol testing including hair or urine testing, or both, at the request of the Agency.
- j) That WM will refrain from the use of alcohol or illegal substances, or both, including prescription medications in a dose other than as prescribed for him, or medication prescribed for another individual, and WM will not permit the use or presence of such substances in the family home, nor will he access alcohol or illegal substances in another environment.

[21] **Should A be returned to the supervised care of NL and WM?**

[22] Position of the Parties

[23] The Agency argues that there have been no significant changes in circumstances such that the original protection concerns have been addressed to the extent required to return A. Specifically, the Agency notes that substance abuse issues remain outstanding, and that WM's attitude, in particular, creates difficulties and prevents or limits NL's ability to participate meaningfully in the case plan.

[24] NL and WM argue that they have been faithful to the case plan. They deny any substance abuse. They admit to an issue arising in May 2011, however, they state this anomaly was caused by NL's attempt to stop smoking by using Champix. Specifically, the Champix caused NL to attempt suicide, which resulted in her admission to the Cape Breton Regional Hospital. NL notes that she does not have suicidal ideation. NL further admitted to drinking alcohol in February, but stopped before things spiralled out of control. WM denied any drug usage.

[25] It is also of note that in the March 28 order, there was no specific prohibition against WM consuming alcohol or, indeed, nonprescribed medication. The prohibition was only ordered against NL. I have since made a change in the order to reflect that this prohibition applies to both parties.

[26] Legislative Provisions

[27] Section 46 of the *Children and Family Services Act* provides the court with the jurisdiction to vary or terminate prior disposition orders, or to make further or other orders. In making such orders, I am directed to consider the following factors:

- (a) whether the circumstances have changed since the previous disposition order was made;
- (b) whether the plan for the child's care that the court applied in its decision is being carried out; and
- (c) what is the least intrusive alternative that is in the child's best interests.

[28] In making my decision, I am also mindful of the legislative purpose. The purpose of the *Act* is to promote the integrity of the family, protect children from harm, and to ensure the best interests of children. However, the paramount consideration is the best interests of children as stated in s. 2(2) of the *Act*.

[29] In addition, the *Act* must be interpreted according to a child centered approach in keeping with the best interests principles as defined in s. 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 developmental needs, and those associated with risk of harm.

[30] A review hearing also requires the court to determine whether the children continue to be in need of protective services within the meaning of the legislation. The court must consider whether the circumstances which resulted in the protection finding still exist, or whether there has been a change in circumstances: **Children's Aid Society of Halifax v. V.(C.)** [2005] N.S.J. No. 217 (C.A.) at para. 8.

[31] 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.

[32] *My Decision*

[33] I will now apply the facts to the legislative factors. First, many positive changes in circumstances have occurred between NL and WM in the last number of months. Both parties have made substantial inroads in following the Plan set out by the court. Both parties have been participating in, and cooperating with many of the services. They have gained knowledge and insight. They are attempting to make positive and lasting changes to much of their former lifestyle.

[34] The most notable inroads have been made in the area of domestic violence, anger management, and healthy communication. This is confirmed in the evidence of the access supervisor, Ms. MacNeil, who noted that the communication which she observed between WM and NL, although limited, was appropriate and fine.

[35] Further, Mr. Ed Burke, a clinical therapist employed with Family Services of Eastern Nova Scotia provided unbiased, professional, and balanced evidence. He was credible. Mr. Burke facilitates couples' counselling, and also individual counselling for WM. Mr. Burke indicated that both parties participated well, and that progress is being made. Skills were taught, adopted, and implemented by the parties. Mr. Burke also spoke highly of WM's participation in the anger management and domestic violence sessions. Mr. Burke confirmed that WM has a good level of insight and is applying the skills which were taught.

[36] I find that the issues of domestic violence, anger management, and healthy couples' communication have been addressed. The parties have made such progress, that these issues are no longer a protection concern.

[37] I do agree, however, that WM could work on other issues identified by Mr. Burke, including his use of sarcasm and other social presentation issues. These issues, however, are not child protection issues. One does not lose a child because of sarcasm, nor due to a profound distrust of the Agency. However, WM would likely find that his interactions would be less confrontational and more beneficial if he adopted other presentation styles.

[38] Further, I also hope that the protection workers will relax and be less defensive when dealing with WM and NL. The Agency does appear to have blinders on in respect of the parties and, in particular, have been unable to recognize the significant progress made in many areas of the Plan. Hopefully, this decision will give all of the parties time to breathe, and get on with the process.

[39] There are many other positives in the commitment of NL and WM to the Plan, including the following:

- They have consistently been on time and prepared for access;
- They have consistently attended appointments with the protection social worker;
- They have signed releases;
- They have consistently maintained an appropriate and stable residence, that is clean, safe, and secure;
- They have allowed the Agency to enter the home;
- They are loving, nurturing, kind, and consistent in their parenting of A; and
- They have participated and cooperated in many services as directed.

[40] Notwithstanding these many favourable findings, I remain unable to return A to NL and WM at this time. The substance abuse issue continues to loom and threaten the security and peace of the household. The substance abuse issue produces a real chance of danger for vulnerable A. It is not yet safe to return A to her parents. I hope it soon will be otherwise, but, A cannot, and will not be returned, until the substance abuse issue is dealt with. I make this finding for six reasons.

[41] First, the parties lack sufficient insight into the nature of the substance abuse protection concern. Both minimize usage. WM did not see any difficulty in offering NL sleeping pills which were prescribed for him, and not for her. NL had no problem taking medication that was prescribed for WM. Neither party sees problems with the occasional use of alcohol. This lack of insight inhibits true and lasting progress.

[42] Second, NL continued to use alcohol notwithstanding the court order to the contrary. In February, she drank a minimum of four beer.

[43] Third, WM and NL have had regular contact with cocaine, something that should be avoided if they are properly addressing the child protection concerns. Hair sample testing for both parties showed positive for trace amounts of cocaine. However, in the absence of the metabolite, the hair sample evidence alone could not conclusively show that cocaine had been ingested. The other available option was that NL and WM had frequent passive exposure to cocaine. Even this scenario shows that the substance abuse issue continues to be problematic. The passive exposure that is required to obtain a trace reading is quite high. NL and WM would have had to have been handling cocaine regularly, or would have been regularly in the presence of someone smoking cocaine, or having frequent contact with a heavy cocaine user. Any of these activities are dangerous and shows a lack of insight into the substance abuse issue. Passive

exposure also shows an inability to appreciate the risk of harm to children and can, quite candidly, very quickly lead to active use of cocaine. Similarly with alcohol, if you're near it and you're in an environment where it's being used, it is very easy to slip and start using again.

[44] Fourth, it is also likely, on a balance of probabilities, that NL ingested low levels of cocaine in May, 2011. I accept the evidence of Mr. Gareri, who provided expert opinion in a well balanced and thoughtful fashion. I accept that the positive urine test for cocaine, together with the positive trace hair follicle test prove, on a balance of probabilities, that cocaine was taken by NL. Routine immunoassay testing is relatively stable for cocaine, as opposed to other medications such as amphetamines. Further, the other negative urine tests are not inconsistent with Mr. Gareri's findings.

[45] Fifth, it is also likely that NL did not consume the amount of medication that she alleged in May 2011. Dr. Christians indicates that NL said that she took an overdose of 30 paxil, and 50 wellbutrin. I accept Dr. Ali's opinion that such an overdose is potentially lethal and would create physical symptoms that were absent in NL, including hallucinations, intense anxiety and agitation, and restlessness. NL did present with dilated pupils which is a symptom of cocaine usage. It is probable that NL staged the overdose in an attempt to deflect the cocaine usage.

[46] Sixth, it is likely that WM shaved his head to avoid detection for drugs. I do not accept his excuse that he wanted a hair cut. The June 29, 2011 report of Mr. Gareri also states that WM made repeated use of codeine during the tested period. That result may have been the result of excessive use of Tylenol 1, but such excessive use would still exceed the amounts stipulated on the bottle. This too can be a form of substance abuse.

[47] The parties have made many inroads. If they continue with therapy, including maintaining regular services with Ed Burke, Addictions Counselling, and in the case of NL, therapy with Dr. Christians, chances of succeeding are high. Dr. Christians noted that fundamental changes are more likely to occur if regular sessions are maintained and both parties stay involved. Ms. Campbell also stated that an addiction is a life long issue. NL is indeed making progress, as is WM. The longer the period of abstinence, the greater the likelihood that the abstinence will be permanent. NL and WM have not yet reached the level that is required to confirm that the abstinence is permanent, or that the risk has been sufficiently reduced.

[48] Therefore, it remains in A's best interests to be in the temporary care and custody of the Agency. I am satisfied that less intrusive alternatives would be, at this stage, inadequate to protect A because of the substance abuse issue. Substance abuse was, and continues to be, a significant problem which creates a substantial risk of harm for A. It must cease. No more using drugs, no more handling drugs, no more being present when others are smoking drugs. Avoid those who are drug users. Avoid environments where there is drug use or alcohol use. Don't drink. The tests must come back clean. A will be returned when the substance abuse issue has been adequately addressed and the risks reduced.

[49] **Should joint access be awarded?**

[50] Section 44(1)(a) of the *Children and Family Services Act* provides the court with the jurisdiction to impose reasonable terms and conditions on a temporary care and custody order, including provisions for access, unless I am satisfied that continued contact would not be in the best interests of the child. I find that it is in the best interests of A to have joint access, where possible, with her parents.

[51] Individual access was originally required because of the domestic violence and anger management issues. As previously indicated, these issues have been addressed and resolved. The access facilitator spoke highly of both WM and NL. WM and NL are presenting a joint plan. Therefore, access should be joint when WM is in the area. This will allow A to interact with both parents, at the same time, as well as her siblings, and as a family unit.

[52] Further, joint access will also provide the access facilitators with an opportunity to observe the ability of the parents to communicate with each other in the presence of children in an appropriate, healthy, and adult fashion. If problems emerge, access, of course, can be terminated and the matter brought back to court.

[53] Access times should not be reduced because of the joint visits. A requires as much time as possible with her parents and siblings. The access should be in the parties' home setting, unless there is something unsafe about the new home, which I do not anticipate. Access can also include walks, or outings, provided access remains supervised at all times because of the substance abuse issue.

[54] **Conclusion**

[55] In conclusion, I find that both children, J and A, remain children in need of protective services. It is in J's best interests to be placed in the care and custody of NL and WM subject to the supervision of the Agency, upon the terms and conditions which I have read into the record. Further, it remains in the best interests of A to remain in the temporary care and custody of the Agency with joint access to both parents, as well as to her siblings.

[56] Thank you and we will schedule another review hearing.

Forgeron, J.