SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. J.M.,2012 NSSC 19

Date: 20120111
Docket: 70478
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

JM and DS

Respondent

Judge:	The Honourable Justice Theresa Forgeron
Heard:	November 14, 15, 21, 29, and 30, 2011, and December 7, 2011, in Sydney, Nova Scotia
Oral Decision:	January 11, 2012
Written Decision:	January 18, 2012
Counsel:	Robert M. Crosby, Q.C., for the applicant JM on her own behalf DS did not participate

Editorial Notice

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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.
> 1990, c. 5

By the Court:

[1] **Introduction**

[2] Ms. M was born and raised in a family where violence, instability, substance abuse, and dysfunction were commonplace. Although possessing academic capabilities, Ms. M dropped out of school because of the ongoing family dynamics. Not surprisingly, she became involved with alcohol, drugs, and crime. She began to live on the streets of * as a teenager. Ms. M was further victimized when she was savagely raped by a violent gang. Mr. Parenteau, a youth worker from *, aptly stated that Ms. M was exploited and marginalized all of her life. Somehow, Ms. M survived. It is a testament to her spirit that she was able to do so.

[3] Ms. M became pregnant in 2007. Ms. M wanted to give her child a different life than she had endured. Because of this insight, and out of love for her child, Ms. M contacted child protection authorities before her daughter, J1, was born in March 2008. She reached out for help. Services were initially implemented on a voluntary basis, and then by way of court order. The * agency continued their involvement with Ms. M after the birth of her second daughter, J2, who was born in May 2009. At the time, child protection concerns related to substance abuse and family violence.

[4] Ms. M arrived in Nova Scotia in March 2010, with the permission of the * agency, under a supervision order, which was to be monitored by the local protection office. By that time, it appeared that the risks to the children had resolved to a great extent. Ms. M was no longer using drugs or alcohol. Ms. M was no longer involved in an abusive relationship with her former partner, Mr. S.

[5] Things did not evolve as expected after Ms. M moved to Nova Scotia. As a result, in May 2010, protection workers apprehended the children after receiving a referral from the police. The children have remained in the care of the Minister since that time.

[6] At this stage, the Minister is seeking a permanent care and custody order, with no provision for access. The Minister states that the children remain in need of protective services, and that the legislative time line has expired. Ms. M, on the other hand, states that the children are no longer in need of protective services.

The proceedings should therefore be dismissed, and the children returned to her care. In the alternative, Ms. M seeks access.

[7] **Issues**

[8] The court will determine the following two issues in this decision:

a. Should a permanent care order issue?
b. If yes, should access be granted to Ms. M?

[9] **Background**

[10] The protection finding was made on August 19, 2010. This finding, made pursuant to sec.22 (2)(b) of the *Act*, was entered by consent.

[11] The first disposition hearing was contested. It was held on November 8; the oral decision was rendered on November 25, 2010. The written version issued on December 1, 2010, and is reported as the **Minister of Community Service v. J.M.** 2010 NSSC 441. The children were placed in the temporary care and custody of the Minister. The factual findings in support of this decision are set out in paras. 12 to 17, which provide as follows:

> 12 First, Ms. M. lacks meaningful insight as to the nature of the problems confronting her. She fails to grasp the severity of these problems which resulted in child protection intervention. Because Ms. M. lacks insight, she has no appreciation of the dangers, and has no motivation to effect permanent and lasting changes to her unhealthy lifestyle which is negatively interfering with safe parenting. Ms. M.'s minimization of the problems and her failure to accept responsibility by assigning blame to others are but two examples of her lack of insight.
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> 13 Second, Ms. M. has a serious alcohol problem; she is a binge drinker. The incidents of May 21 and August 26, 2010 are examples of this fact. Further, despite Ms. M. linking her violence and anger to alcohol use, she has not stopped drinking alcohol. Rather, Ms. M. extends the time periods between drinking binges. In addition, she continued to consume alcohol even though the * supervision order forbade its use.
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> 14 Third, Ms. M. requires meaningful therapy to deal with the significant personal issues confronting her. It is highly improbable that Ms. M. will heal herself given the nature and extent of the violent physical, sexual, and emotional abuse which she endured throughout most of her life. Unless Ms. M. undertakes extensive and meaningful therapy, she will continue to engage in high risk activities in an attempt to mask the pain and

> memories. Ms. M. must come to terms with her past. To date, there is little evidence of successful therapeutic intervention.
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> 15 Fourth, Ms. M. also requires basic parenting skills to ensure that her home is physically safe for her children. I accept that the trailer where she and her children were residing was filthy and had been in that condition for some time. The dead kitten, and the conditions of the floors and furniture were not caused by a night of partying by teenage babysitters. The conditions were unsafe for the children. I reject Ms. M.'s explanation. Ms. M. must acquire and implement basic housekeeping skills to ensure a safe, physical environment for her children.
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> 16 Fifth, Ms. M. requires anger management and healthy conflict resolution skills. Her treatment of the police, hospital workers, and child protection workers consistently shows her inability to manage frustration and anger in a safe fashion. Until Ms. M. learns to channel her anger and frustration in a healthy way, her children remain at risk of physical harm. Ms. M. has very little control of her temper, and has high impulsivity. She is highly confrontational. This poses significant protection concerns for children, especially for children who are so vulnerable and young.
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> 17 Finally, Ms. M. has not exercised access on a consistent basis. Her excuses are less than satisfactory. This failure shows the impact of Ms. M.'s ongoing challenges and inability to focus on the best interests of the children.

[12] Despite these findings, the court nonetheless noted that Ms. M and the children had a strong bond, and displayed love for each other. This court also noted, however, that "love and bonding do not necessarily create a safe haven for children" para. 18. Therefore, a number of services were ordered to correct the circumstances that gave rise to the protection finding. These are set out in para. 24 of the decision as follows:

> a. Ms. M. will attend therapeutic counseling to assist with the healthy resolution of issues arising from her past, including issues surrounding physical, sexual, emotional, and domestic violence;
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> b. Ms. M. will engage in anger management therapy to acquire healthy problem-solving skills and skills to properly manage her anger and frustration in a safe fashion;
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> c. Ms. M. will complete Transition House outreach services by completing Phase I and II;

d. Ms. M. will refrain from the use of alcohol and all drugs unless prescribed by a physician, and then only in the doses so prescribed. Ms. M. will not permit any alcohol or non-prescribed medication in her home or on her person.

e. Ms. M. will engage with a Family Support Worker to learn basic homemaking and child care skills;

f. Ms. M. will maintain a stable, clean home which is free from hazards;

g. Ms. M. will participate in random drug testing, which can include hair samples or urinalysis;

h. Ms. M. will attend the access visits as scheduled;

i. Ms. M. will attend scheduled appointments with her caseworker and other involved professionals, providing information in a timely fashion, and follow through with all reasonable directions of the involved professionals;

j. Ms. M. will complete the parental capacity assessment being prepared by Dr. Landry; and

k. Ms. M. will sign all necessary releases of information as it relates to her service providers.

[13] December proved to be a difficult month for Ms. M. She was attempting to come to terms with the temporary loss of J1 and J2. She was attempting to understand the implications of the disposition order. She was attempting to come up with a plan that would result in the early return of the children to her care. Ms. M was also concerned about the quality of foster care, the quantity of access, and the quality of the therapeutic services available in Nova Scotia. Because Ms. M was not emotionally equipped to address these issues in a mature and responsible fashion, she began to make poor decisions.

[14] These decisions involved disjointed and ever changing plans. At one point, Ms. M only intended to stay in * for the Christmas holidays. Then, she proposed that she would remain in * and reconnect with services there. Under this plan, Ms. M intended to file a motion to transfer the file back to *. A third option involved Ms. M living and taking services in *, while having telephone access and returning to Nova Scotia once a month to visit with her children. Another plan proposed that the children be placed with her mother, or her former pastor in *. The final plan involved Ms. M's reunification with Mr. S, and their joint move to Nova Scotia to

eventually parent as a family unit. Ms. M and Mr. S would engage in services in the Sydney area.

[15] Ms. M and Mr. S moved to CBRM in March 2011. Upon her return, Ms. M connected with various service providers. The relationship between Ms. M and Mr. S soon turned violent. As a result, Ms. M ended the relationship; Mr. S returned to * in mid-June 2011. Ms. M continued to engage in services, and exercise supervised access. Access was temporarily cancelled due to trauma the children experienced because of Ms. M's belief that one of them had been sexually abused by the foster father. Access was eventually reinstated.

[16] The contested permanent care hearing took place on November 14, 15, 21, 29, and 30, 2011. The following witnesses testified during the trial: Wendy Clarke, Dr. Reg Landry, Donna Mikkelson, Joyce Aylward, Natasha Wall, Sandi Virick, Derek Parenteau, Edward Burke, Lillian Chadwick, Johena Kennedy, Paul Wukitsch, and Ms. M. Submissions were provided on December 7, 2011. The oral decision was rendered on January 11, 2012.

[17] **Analysis**

[18] **Should a permanent care order issue?**

[19] *Position of the Agency*

[20] The Minister seeks a permanent care order because she believes that J1 and J2 continue to be in need of protective services. The Minister notes that services have not been completed, and that circumstances have not significantly changed. From the agency's perspective, issues related to residential instability, neglect, substance abuse, and violence are outstanding. Legislative time lines have expired. The only safe and viable option is a permanent care order.

[21] *Position of Ms. M*

[22] Ms. M strongly opposes the Minister's submissions. She states that she has complied with the disposition order. In particular, she has accomplished the following:

a. She is attending trauma counseling with Mr. Burke of Family Services of Eastern Nova Scotia. She has established a therapeutic and trusting relationship with him. As such, much has been accomplished. Ms. M will continue with this therapy, on a voluntary basis, once the proceedings are dismissed.

b. She has completed anger management therapy with Mr. Burke. She has learned, and is using healthy problem-solving skills, and skills to properly manage her anger and frustration in a safe fashion.

c. She has participated in Transition House outreach services by completing Phase I, and by meeting individually with workers. She is enrolled in Phase II and will participate in the course once it is offered.

d. She has stopped abusing alcohol and all drugs, and has not permitted alcohol and non-prescribed medication in her home, or on her person. She had only one slip about a year ago in February/March 2011. Ms. M consistently requested drug and alcohol screens, but the agency refused to order them.

e. She was accepting of services from a Family Support Worker to learn basic homemaking and child care skills, but the agency refused to put this service in place, despite the explicit provision in the court order.

f. She has maintained a stable, clean home which is free from hazards.

g. She has attended all access visits as scheduled. There were reasonable excuses for the few missed visits.

h. She attended scheduled appointments with her caseworker, and other involved professionals, providing information in a timely fashion, and follow through with all reasonable directions of the involved professionals.

i. She signed all releases of information as it related to her service providers.

j. She has assumed an adult role and is making plans for her future financial independence.

[23] In summary, Ms. M states that she has accepted responsibility for the apprehension and for the child protection concerns. She has learned and applied new skills. Her life is on track. As a result, J1 and J2 are no longer in need of protective services. They must be returned to her care.

[24] *Discussion of the Law*

[25] 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 child is no longer in need of protective services: s. 46 of the *Children and Family Services Act***; Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)**, [1994] S.C.J. No. 37 (SCC), at para. 37; and **Children's Aid Society of Halifax v. C.V.** [2005] N.S.J. No. 217 (CA), at paras. 8 and 9.

[26] 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 SCC 53. The agency must prove why it is in the best interests of J1 and J2 to be placed in the permanent care and custody of the agency according to the legislative requirements.

[27] 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 child as stated in sec. 2(2) of the *Act*.

[28] The *Act* must 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.

[29] 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 child.

[30] *Decision on Permanent Care and Custody*

[31] In reaching my decision, I am cognizant of the many positive changes that Ms. M has made in her life. These include the following:

a. Ms. M has been drug and alcohol free for almost a year. She consistently attends counseling with Ms. Kennedy of Addictions Services. Ms. Kennedy states that Ms. M has a good level of insight in connecting many of the difficulties in her life with addiction. In addition, the Agency did not conduct drug and alcohol screens despite the court order. I therefore conclude, on a balance of probabilities, that Ms. M has not been abusing substances for about a year.

b. Ms. M has begun to use healthy conflict resolution techniques and anger management skills to deal with conflicts in a more mature and healthy fashion. Although Ms. M completed many anger management courses in the past, she is only now beginning to apply the lessons learned in her daily life. Ms. M has been able to grow in these areas because of the strong, trusting, therapeutic relationship that she has established with Mr. Burke of Family Services of Eastern Nova Scotia.

c. I conclude, on a balance of probabilities, that Ms. M has a clean, stable home in CBRM. I also conclude that she is able to maintain the current state of her home. If Ms. M was not able to do so, the Agency would have provided the family support worker to teach basic homemaking and child care skills as stated in the court order. They did not. Based on the evidence before me, I find that Ms. M's home is clean, stable, and safe.

d. Ms. M is looking to the future and is beginning to assume an adult role. She is an intelligent, capable, and caring woman who has made commendable gains in her life, despite an unthinkable background. Ms. M was able to represent herself in this trial in an exemplary fashion. She remained focused and on task for the most part. Organizational issues that arose may be related to undiagnosed ADHD, as noted by Dr. Landry. Ms. M is capable of doing well if she returns to school and to vocational training, as planned. Mr. Burke states that he is working with Ms. M on this plan, and is hopeful that it will materialize.

e. Ms. M followed the court order in respect of access attendance, meeting with protection and agency workers, signing releases, and providing information to the agency.

f. Access visits were usually positive and healthy. The children have a positive attachment to their mother.

[32] Despite these gains, and my respect for Ms. M, I have no other choice than to grant the permanent care order as requested by the Minister. As noted previously, time lines have expired. I must determine if the children remain in need of protective services today. There is no middle ground available.

[33] The Minister has met its burden. I find, on a balance of probabilities, that J1 and J2 remain children in need of protective services pursuant to sec. 22 (2) (b) of the *Act*. There remains a substantial risk, a real chance of danger, that is apparent on the evidence, that J1 and J2 may suffer physical harm caused by Ms. M's inability to supervise and protect them adequately. Further, less intrusive alternatives, including services to promote the integrity of the family, would be inadequate to protect J1 and J2. I draw this conclusion, based upon the following factual findings:

a. Although Ms. M is getting better at regulating her emotions and applying safe conflict resolution skills, she continues to react inappropriately on occasion to the detriment of J1 and J2. This finding is exemplified in Ms. M's handling of the sexual abuse allegation. Ms. M's reaction caused significant harm to the children. Further work is needed in this area.

b. Ms. M has not concluded the therapeutic counseling that was ordered to deal with the substantial trauma that she suffered throughout her life, including past physical, sexual, emotional, and domestic violence. Mr. Burke noted that this will be a long process. Mr. Burke also expressed his frustration with the legislation that provides only one time line, despite the progress and sincere efforts of Ms. M. Mr. Burke and Ms. M are only in the initial stages of the trauma counseling. Once Ms. M has a better insight into her past trauma, she will be better equipped to make healthy choices in the future.

c. Ms. M has a limited ability to problem solve and make choices that do not place her children at risk at present. Three examples in support of this finding include the following:

    i. Ms. M's decision to leave J1 and J2 to return to * for about three months commencing in December 2010 was not a healthy choice. Ms. Virick, the protection supervisor, explained the difficulty that the children were experiencing because of her absence. This did not deter Ms. M. Further, Ms. M also lost precious time by failing to implement the court's plan in a timely fashion.

    ii. Ms. M met Mr. S in February 2011, and decided to reunite with the hope of creating a family unit for her children. She did so despite the unanimous caution from professional supports. These professionals questioned the wisdom of the decision, and discussed potential consequences associated with the decision to reunite with Mr. S. The professionals included Mr. Parenteau, agency workers in Nova Scotia, and Mr. Burke. Although aware of the likely negative consequences, Ms. M persisted with her plan. Not surprisingly, reunification did not end well.

    iii. Ms. M continues to make poor choices in respect of companions. Ms. M's step father was violent with her when she was young. He also abused substances. He has not changed. Yet, Ms. M continued to seek him out as

late as the fall of 2011. She stayed with him after he had an operation, and also met with him at other times. The relationship is conflictual. There was police involvement. The stepfather should be avoided, as should all people like him. Ms. M does not fully appreciate why this type of relationship is dangerous.

d. Although Ms. M has consistently participated in courses and services since the children were born, she has been unable to sustain permanent lifestyle changes. Child protection agencies have been involved with Ms. M since 2007, before J1 was born. Many programs and services were concluded. Ms. M does well for a period of time and then relapses. This circular pattern will continue until the trauma counseling has been successfully concluded. Until this occurs, Ms. M remains at a high risk of associating with people who have abused her in the past or who will abuse her in the future. She remains at a high risk to abuse alcohol and drugs as a means of coping with the anxiety and stress of her past. The successful completion of the trauma counseling is key. Because the trauma counseling has not been completed, J1 and J2 remain at a substantial risk of harm.

[34] Given these findings, neither J1 nor J2 can be returned to the care of Ms. M, at this time, because of the ongoing protection concerns which have not been alleviated or reduced. There is no time left for further services under the legislative frame work. Therefore, I must issue the permanent care and custody order.

[35] **Should access be granted to Ms. M?**

[36] *Position of the Agency*

[37] The Minister is seeking a permanent care order without a provision for access. The agency wants to make permanent plans for the children and access would impede adoption.

[38] *Position of Ms. M*

[39] Ms. M is seeking access to her children. She notes that the children have formed a strong and healthy bond with her. Ms. M states that she is a positive force in her children's lives, and that it is in their best interests to have this relationship continue.

[40] *Discussion of the Law*

[41] 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 39 to 42.

[42] In **Nova Scotia (Minister of Community Services) v. H. (T.),** 2010 NSCA 63 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.

[43] In the most recent case on this point, **Mi'kmaw Family & Children's Services v. L. (B.),** 2011 NSCA 104, Oland J.A. held that a trial judge erred when she did not fully address access issues upon a permanent care order issuing. Oland J.A. notes that there is no blanket prohibition against access in paras 42 and 43, as follows:

> 42 Section 2 of the Act states that its purpose is to "protect children from harm, promote the integrity of the family and assure the best interests of the children". There is no analysis in the judge's decision on the issue of access. According to the evidence at the final disposition hearing, the children and their mother share a warm attachment and a strong bond which, if disrupted, may present a risk of harm to the children. Section 47(2) does not impose a blanket prohibition against access. Rather, a judge must consider factors such as the likelihood of impairment of opportunities for permanent placement and whether there are special circumstances which would justify making an access order.
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> 43 In KT at ¶ 39-40, Chief Justice MacDonald suggested that a 'special circumstance' under s. 47(2)(d) may include a permanent placement with a family member, with a view to adoption by that family member, but involving some ongoing contact with the natural parent that was satisfactory to the adopting parents and which would not deter the adoption. Here, no notice of adoption has been filed. The judge in this case did not consider whether or not access by these children to their mother, the appellant, would

> jeopardize their placement, whether the potential adoption by the kinship caregivers might qualify as a special circumstances, or other special circumstances exist, or access would be in these children's best interests. In my view, those matters should be addressed.

[44] *Decision on Access*

[45] Ms. M has a warm and loving relationship with her children. Access, for the most part, was positive and healthy. The attachment between the children and Ms. M is strong and positive.

[46] Although I believe it beneficial to J2 and J1 to have an ongoing relationship with their mother, I am unable to grant access based upon my understanding of the legislation and the case law. No family member, nor other support person, has filed a plan to care for the children. The children have been involved with protection agencies for many years; they need love, finality, and a home free from protection concerns. Access would impede adoption planning involving a stranger. Access between Ms. M and the children will therefore be terminated subject to the usual transition visits.

[47] **Conclusion**

[48] I grant the relief sought by the Minister. A permanent care order is the only viable option, at present, given the legislative frame work. Access cannot be ordered in the circumstances.

[49] However, as Ms. M is self represented, it is appropriate for me to advise that she has the right to appeal this decision to the Nova Scotia Court of Appeal. I urge Ms. M to immediately contact Nova Scotia Legal Aid for advice. I am providing Ms. M with a copy of **L. (N.) v. Nova Scotia (Minister of Community Services)** 2010 NSCA 84, which discusses appeals and time lines.

[50] In closing, Ms. M, I hope that you will continue with services, especially the trauma counseling with Mr. Burke and the addictions counseling with Ms. Kennedy. You have the respect and support of these professionals. They will continue to help you deal with your past and help you achieve the future that you deserve.

[51] I also want to thank Mr. Crosby for his professionalism in conducting this case and assisting Ms. M with exhibits and making arrangements for Mr. Parenteau's evidence.

Forgeron, J.