SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. F. L.,
2011 NSSC 512

Date: 20110902
Docket: SFPHCFSA 076511
Registry: Halifax

Between:

Nova Scotia (Community Services)

Applicant

and

F. L. and K. W.

Respondents

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Publishers of this case please take note that s.94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

> Section 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 relative of the child."

Judge: Associate Chief Justice Lawrence I. O'Neil

Date of Hearing: August 19 and September 1, 2011

Date of Oral Decision: September 2, 2011

Edited for Release: April 4, 2012

Counsel: Lindsay McDonald, Counsel for the Applicant
Tracey Sturmy, Counsel for F. L.
Rejean Aucoin, Counsel for K. W.

By the Court: **(orally)**

Introduction

[1] This is a decision concluding an interim hearing in a child protection application by the Minister of Community Services against the Respondents, F. L. and K. W.

[2] My decision was rendered orally on September 2, 2011. At that time, I noted that my comments, expressed thoughts and the organization of my reasons were not as I would have liked, given the pressing nature of the matter before me and the limited opportunity to organize. I reserved the right to add additional references to the evidence and to the law, if necessary, in a written decision. I do so now.

[3] I have considered all of the evidence, and will make reference to various aspects of the evidence. The fact I do not make reference to some of the evidence should not be interpreted as an indication that I have not considered it.

[4] The initial order in this matter was issued July 28, 2011after the five day hearing. I do not have the order in front of me, but the basis of the initial finding of reasonable and probable grounds to believe the child was in need of protective services was section 22(2)(b) of the *Children and Family Services Act*, S.N.S. 1990, c.5. The running file indicates that the finding was not contested, or there was not a contested hearing. However, the running file indicates that the Respondents were contesting the Minister's case and matters about which the Court must make conclusions at the interim hearing. That is why we had the thirty day hearing.

[5] I asked counsel yesterday whether the initial finding made at the five day hearing was in dispute: that is, whether the Court was being asked to revisit the finding that there were reasonable and probable grounds to believe the child was in need of protective services. When I began the thirty day hearing, I believed the hearing was solely about the child's placement. Ms. McDonald, on behalf of the Minister, said that she did not view the "reasonable and probable grounds" finding at the five day hearing to be at issue at the thirty day hearing. Mr. Aucoin, on behalf of K.W., was clear that he did believe this finding to be at issue at this

hearing and Ms. Sturmy, on behalf of F.L. was less clear. I think what is clear, is that there was some difference of opinion about the issues before me.

[6] There is case law that supports the conclusion that a finding of reasonable and probable grounds that the child is in need of protection can be revisited at the thirty day hearing: *The Children's Aid Society of Halifax v. B (S.L.),* (1993), 120 N.S.R. (2d) 72 (NSFC) ; *Family and Children's Services of Annapolis County v. J.M.M.,* [1997] N.S.J. No. 269 (NSCA); *Nova Scotia (Minister of Community Services) v. J.A.* [1998] N.S.J. No 544 (NSFC); and *Nova Scotia (Minister of Community Services) v. C. & H.* 2006 NSSC 372.

[7] I observe that the practice and the reality is that in many of these proceedings, the five day hearing does not offer an opportunity for cross-examination of affiants and that typically the Court's decision on whether a child is in need of protective services is based solely on affidavit evidence. The former Rule 69.07 provided that the court "shall decide the question solely upon any affidavits filed by any party unless leave of the court is granted to hear oral evidence" at the five day hearing.

[8] The current Rule 60A.10(4) is not as restrictive. It provides that the Court "may act on affidavit evidence or, if permitted by the Judge, oral evidence to determine whether there are reasonable and probable grounds to believe that a child is in need of protective services". These Rules reflect current practice and I observe that the opportunity for parents or Respondents to cross-examine and to lead evidence is an important part of the due process that is accorded to parties and is required by the *Children's and Family Services Act*. These practices also reflect important Charter rights that Respondents have in these matters.

[9] The limitation on due process at the stage of the five day hearing might very well be a reasonable limitation on the Respondents' Charter rights. I need not decide that issue today. I am simply observing and supporting the conclusion that the thirty day hearing should be an opportunity to revisit the reasonable and probable grounds finding. In those cases where the right to do so is explicitly reserved at the five day hearing, counsel are on notice that the issue will be revisited at the thirty day hearing.

[10] I am satisfied that this is not a clear situation. The Minister was not present prepared to deal with a contest about the reasonable and probable grounds finding

that was made at the five day hearing. Counsel and the parties often do not turn their minds to this issue as a practical matter, given that five day hearing is frequently only scheduled for fifteen minutes on the docket. Parties are trying to get the files organized and to find solutions, in the interest of the parties and the child or children involved.

[11] There are some significant practical realities that govern the conduct of counsel in proceedings of this nature at this initial stage. I make that observation to put any decisions that are made by all counsel in context.

[12] I am satisfied that the Minister should be given a full opportunity to deal with such a contest. In these circumstances if I try to revisit the five day finding, there would be prejudice to the Minister's position. I do not make that observation to suggest anyone failed to do something they should have done. That finding is open by way of a review of the interim order, and at the protection stage, and there can be appropriate notice to all sides of all issues and an opportunity to prepare arguments, based on the law and consistent with the evidence, if the parties wish to do so. My conclusion that the five day finding should not be re-opened is also influenced by the fact that, for all reasons that follow, today's outcome would not be affected.

[13] The first exhibit filed by the Minister is the protection application and the accompanying affidavit of Ms. Warren. Ms. Warren filed two affidavits. We are concerned with the well-being of a child, M., born in July 2011. The child was taken into care the day after its birth at the hospital. As stated, the statutory basis for that decision was section 22(2)(b) of the *Act*: the existence of reasonable and probable grounds to believe the child was at substantial risk of physical harm. Section 22(1) of the *Children and Family Services Act* defines substantial risk to be: "a real chance of danger that is apparent on the evidence".

[14] At paragraph 5 of the affidavit appearing at Tab 1, the Minister's representative states that she has reasonable and probable grounds to believe that, by reason of F.L.'s cognitive limitations and K.W.'s emotional/mental health problems, the child is at substantial risk of physical harm such that the child must be taken into the Minister's care and custody for the child's own health and safety. Paragraph 9 of the same affidavit states:

> . . . [the Minister] is aware that [F.L. and K.W.] may be presenting family supported or extended family based planning with respect to care for the newborn, in the short term and the application seeks opportunity to confirm and assess the particulars and sufficiency of such planning to protect the child and the child's interests.

[15] At paragraph 10, sub (20) and page 4 of the same affidavit, the following is stated:

> . . . following conclusion of the prior to protection proceeding, the [Minister] remained involved with the L. family, under voluntary service agreements, to continue support through family support services and monitoring with respect to the child [born in 2006].

[16] Further at paragraph 10, Ms. Warren goes on to describe the circumstances involving another child who was born to F. L. in January 2006. I am satisfied that the existence of that file and the circumstances that that child were significant factors influencing the Minister in this matter. The Minister had a protection proceeding relating to the child born in 2006, who is also a child of F.L.

[17] Other evidence confirms that social workers were involved with the L. family until December 2010: they visited F.L.'s home (which is also the home of B. L. and R. L.), were in contact with the family and were aware of F.L.'s pregnancy.

[18] The Minister was aware of the pregnancy leading up to the birth of the child who is the subject to this proceeding. The social workers had communication, contact and involvement with the family of B. L. and R. L. on a voluntary basis. They cared for F. L.'s first child. This is reflected at Exhibit E, a case recording from April 6, 2011, created following a visit to F. L.'s home. By this time, F. L. was in her own apartment. What is interesting about this recording is that it records F. L.'s diligence in attending appointments, her knowledge of pre-natal care and the need to attend those appointments. F. L. was cooperative with the Agency and agreeable to their ongoing involvement. She signed a number of consents to permit the Agency's contact with her service providers.

[19] At Exhibit O, page 110 of the case recordings, there's note of F.L.'s confirmation of her continued agreement to the voluntary involvement of the

Agency. Under the heading “observations”, near the bottom of page 110, the recording states:

> F. L. and K. W. did really well when asked specific step-by-step questions about how to care for a baby. B. L. and R. L. mentioned several times that they will be there to support them with anything they do not know how to do and to make sure they are doing everything properly.

[20] The Minister also filed very extensive reports by assessors Dr. Gerald Hann, Laura Banks and Pamela Wambolt. These reports appear at tab 2 of Exhibit 1. They are approximately one hundred pages long. At page 4, the assessors explain the circumstances that led to their involvement with F. L.’s first child. At paragraph 2 it states:

> . . . as a result of decisions made by F. L. and her parents to put [the child born in 2006] in such a situation, to begin with, reflecting apparent poor judgment, as well as variations in F. L.’s account of events at different times of reporting, a number of concerns were raised with respect to the L.’s ability to protect [the child born in 2006] in the future. Over the course of the investigation, agency staff also being cognizant of apparent limitations (suspected cognitive delays) with the care givers . . . .

[21] As indicated, the Agency affidavits also make reference to the circumstances of this older child, who was injured by F.L.’s former boyfriend. Upon discovering the injury or becoming concerned about it, F.L. sought assistance. The child received medical care. The Agency became involved. Through a series of events and the passage of time, the child came to live with F. L.’s parents, R.L. and B.L. A *Maintenance and Custody Act* order gives these grandparents custody of the older child. The *Maintenance and Custody Act* order is at Exhibit 8.

[22] I also want to draw attention to the recommendations of the assessors which are at page 90 through to page 95:

> Recommendation Number 1: B. L. and R. L. locate housing that is deemed appropriate by DCS Antigonish District Office for four family members. The assistance of income support in this regard may be beneficial.

[23] At the time the family was living in the * area. They are now located in *, and five people are living in the home: F. L., her parents, R.L. and B.L., the child who is in the grandparents’s custody, and K. W., who is a named Respondent in this proceeding.

> Recommendation Number 2: Consideration should be made to return [the older child] to the care of his maternal grandparents, B. L. and R. L. immediately, with continued supervision by the agencies.

Then the report goes on to talk about the role that F. L. should have in this child's life.

[24] Other recommendations address the need for counselling for F. L. and her parents:

> Recommendation Number 9: Given F. L.'s cognitive delays and learning difficulties along with identified deficits with respect to life skills, she should participate in programming designed to foster life and apply ability skills. This could be found through community-based programming or schooling.

[25] The reports of experts of this nature are simply part of the evidentiary mix presented in these hearings. The Court is not bound by these recommendations. These reports relate to another proceeding. They are part of the record pursuant to an order under Section 96 of the *Children and Family Services Act*. The fact of the prior proceeding, in and of itself, does not create a presumption that F. L. should not be entrusted with the care of a child. Past parenting is relevant; is part of the evidentiary mix, but certainly, the assessors did not see the situation unsolvable, from a parenting viewpoint, in F.L.'s case.

[26] At page 18 and page 25 of Ms. Warren's affidavit, are summaries of discussions from the Risk Management Conference, the first one on July 14 and there was a second one on July 21. The affidavits are based on the running reports which are attached as exhibits.

[27] Dr. Hann, in the report that he co-authored, recommended a re-evaluation within twelve months of the older child's options. That was recommendation Number 14 of his report. As stated, the report was prepared as part of the proceeding involving the older child.

[28] It is important that in cases of this nature, a distinction be made between a subjective concern that one person may have about a person's ability to parent and the legal test or the legal burden that must be met to establish reasonable and probable grounds that a child is in need of protective services. Sometimes the line between suspicion and concern is blurred. Sometimes the concern is more

suspicion or the concern is very low, although real, but is not enough to justify a conclusion that there is a risk.

[29] At paragraph 26 of her decision in *Minster of Community Services v. J.P.G.*, 2010 NSSC 378, Justice Jollimore dismissed a proceeding at the five day stage. We have the benefit of her written reasons. I recommend the decision to counsel and social workers to assist in making the distinction between suspicion and evidence-based concerns. At paragraph 26 Justice Jollimore says:

> At page 74 of his helpful commentary on the Children and Family Services Act, "The Children and Family Services Act: A New Annotation for Practitioners", Peter C. McVey describes "reasonable and probable grounds" as "a burden met 'at the point where credibly-based probability replaces suspicion'." This language originates in the Supreme Court of Canada's decision in Hunter et al. v. Southam Inc., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, where the Supreme Court identified the requirements for issuing a search and seizure warrant. The language has found its way into child protection jurisprudence by way of the decision of the Prince Edward Island Supreme Court in M.(H.) v. Prince Edward Island (Director of Child Welfare) 1989, 79 Nfld. & P.E.I.R 274, 22 R.F.L. (3d) 399. I accept this as a useful description of the determination I must make.

[30] At paragraph 30, she makes reference to Section 22(2)(g) of the *Children and Family Services Act* and the definition of substantial risk, which I have already referenced.

[31] At paragraph 34 of her decision Justice Jollimore states the following:

> With regard to section 22(2)(b), there is not a credibly-based probability that K. will suffer physical harm inflicted by Ms. G or that K. will suffer physical harm caused by Ms. G's failure to supervise and protect K. adequately. Ms. G dealt appropriately with her abusive partner. That she did so with her mother's assistance does not discredit her action. Similarly, she and her mother have appropriately engaged in services to address the conflict in their relationship and, as demonstrated on August 25, the skills learned have been applied.

[32] And at paragraph 42 Justice Jollimore says:

> I am not prepare to treat Ms G.'s historic decision that her mother be K.'s primary residential and sole custodial parent as evidence of a refusal or unwillingness to resume K.'s care. To do so would compel the perverse result that a parents who reasonably concedes custody and residence to a capable care-giver might see their child taken into care.

[33] I have struggled with this decision because, notwithstanding the concern we all have about children and the need to eliminate all possible risk for children, there is a legal requirement that there be a minimum evidentiary basis for the concern. It's not enough that one be concerned. We can all have concerns but there is a evidentiary threshold that must be met to justify a finding that a child is at risk. In the case of the five day hearing this is a minimum threshold.

[34] I am not revisiting the finding at the "five day" stage, as I've already said, by putting my observations and reactions to the evidence on record. It is really important that all involved be cognizant of not falling into the trap of over-reacting to the existence of a prior proceeding. As I questioned the social worker, and counsel may recall, the questions I had were about the basis of her concern. How can one have a rationally based concern if one doesn't know what the evidentiary basis of the concern is? It's not evidence-based, it is not rationally based if you cannot refer to evidence. The mere fact of the prior proceeding and an earlier finding of a risk of physical harm covers a wide range of possible circumstances. It may be, in the right circumstances, the mere fact of a prior proceeding will be enough. If, for example, evidence were to establish that, in the context of alcohol or drug abuse, the person failed to exercise care to protect a child or, in fact, deliberately or accidentally hurt a child, due to that state; and that person is now abusing alcohol or drugs or themselves in other ways, then one can argue that the pattern is being repeated. There has to be something more than suspicion or fear. Past parenting is relevant but, in some cases, it is not enough.

[35] I am not revisiting the five day finding, because today's decision would not be impacted. I believe that, were I at the initial stage, I would be more inclined to rely on section 22(2)(g); I say that because of concerns I have about the ability, at this point, of F. L., alone or K. W., to parent. F. L.'s cognitive limitations are identified in Dr. Hann's report. Dr. Hann did not eliminate her as a prospective parent and certainly did not see her as being unable to ever parent. He made reference to her needing support.

[36] In the case of K. W., it is no comfort to the court that the Minster takes the view that we need "to find out" whether he can parent. This is not a reverse onus situation. If you don't have the evidence, then you haven't met the burden to establish the risk. You don't take a child and go away to get the evidence and then come back to justify why you took the child. Having said that, I had the benefit of K. W.'s evidence on the stand and observed his limitations. They will affect his

parenting. There are reasonable and probable grounds to conclude that there would be a risk, under 22(2)(g); recognizing the low threshold, low as it is, there is one.

[37] I was impressed with both F. L. and K. W. After reading the report of Dr. Hann, I had very low expectations as to their ability to communicate, their ability to manage and their ability to function. The vulnerability of a lay person when reading the reports of psychologists, who in one of their measurements, place both of these individuals in the .5 percentile of the 1 percentile in certain intellectual or cognitive functions. That statistic is misleading to me.

[38] I am satisfied that K. W. is honest. There is no evidence that he currently has an anger management problem. I am not at all distracted by suggestions that he could pose a risk by virtue of Obsessive Compulsive Disorder. The event at * Hospital, which apparently, led to a phone call to the social worker, is explained, as K. W. said himself, by excitability. The child was apprehended at the hospital. There was no event involving K. W. There was no violence. There was no aggression. Given K. W.'s presentation I can understand why people might become uncomfortable, not knowing who he is or much about him. They may have sensed his cognitive limitations. It is not uncommon today for people to react based on stereotypes of persons with such limitations. I am not saying that is what happened. The objective evidence, the report is that it was K. W.'s mother got upset at the hospital, I believe her name is Ms. M. I do not believe K. W. has an alcohol problem. He manages his OCD, as he indicated.

[39] K.W. does have apparent cognitive limitations or at least learning disabilities. He is not ready to assume the role of parenting.

[40] The references to his wanting to be with F. L. while he was working at the * store and leaving work 20 minutes early, was not that he had to be with her all the time. It is not uncommon for people in the early period of a relationship to meet for lunch; look for opportunities to get together. I do not conclude from the evidence that I heard, that he was obsessed about being with her. His own ability to communicate does affect his ability to explain what he is experiencing.

[41] In the case of F. L., I found to her to be genuine. The fact that she did change relationships, whether frequently or not, is not uncommon in today's world. Young men and women frequently change relationships. Perhaps she made some poor choices. A lot of young people are doing that. A lot of people are

doing that. She has cognitive limitations. She has accepted past services. As she indicated, she is not the same person she was when her older child was apprehended. I am satisfied that she will respect court orders, as I am satisfied K. W. will.

[42] With respect to F. L.'s mother, B. L., there is no question that she will respect court orders. She has her limitations, as referenced by Dr. Hann. She is honest. She is diligent. She is meeting the task of raising the older child who has been placed with her, and I am satisfied that she's protective of that child. She is doing so with her husband R. L. There is no evidence that the level of care being accorded to that child or the circumstances in which he is being raised are not appropriate. In fact, when you read the case summaries or the running reports of the case conferences there are no concerns recorded in reference to R. L. and B. L.'s home with that child. There was contact with this family after the order for that child expired, under the terms of a voluntary agreement. When F. L. lived there, social workers were in contact with B. L. and R. L.

[43] Ms. Long, at the Risk Conference on July 21, 2011 expressed concerns about B.L. and R.L.'s ability to manage another young child, F.L.'s new baby. There is no evidence upon which I could conclude that they cannot do so, particularly given that they are successfully raising the older child. B. L.'s description of her preparation of the older child for school is admirable. It showed interest, understanding and diligence in terms of meeting the child's needs. There are many persons with higher levels of cognitive and intellectual functioning who, for whatever reason, do no do so; are unwilling or unable to do so whatever the case.

[44] At the interim hearing, the Court may consider hearsay evidence, pursuant to section 39(3) of the *Children and Family Services Act*. The Court may adjourn the interim hearing for completion. That is what happened here. The Court was required to make a finding at the five day hearing. That did happen and the Court may make interim orders, as may be necessary, "within 30 days after the child has been taken into care if an application is made, whichever is earlier," Section 39(4) provides: "the court shall complete the interim hearing and make one or more of the following orders ".

[45] One of the options for the Court at the conclusion of the interim hearing is to order that:

> "The child shall remain in or be returned to the care and custody of a parent or guardian" (s.39(4)(a) CFSA).

The section doesn't say that there need be conditions associated with that order. Further to paragraph 39(4)(b), the Court has the following option:

> "The child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of the Agency".

[46] The court may order the parent or guardian or other person not reside with or contact or associate in any way with the child (s.39(4)(c) CFSA).

[47] Paragraph (d) and (e) of section 39(4) provide for additional orders:

> (d) the child shall be placed in the care an custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the Agency and on such reasonable terms and conditions the court considers appropriate.
>
> (e) the child shall remain or be placed in the care and custody of the agency.

The Minister is seeking to have the child continue in its care. Sub-Section 39(4)(d) and s.39(4)(e) are subject to the limitation of section 39(7); that the court must be "satisfied that there are reasonable and probable ground to believe that there is a substantial risk to the child's health or safety and that the child cannot be protected adequately by an order under clause (a), (b) or (c)".

[48] As indicated, I am not revisiting the five day finding based on section 22(2)(b). I have made my comments from which you may conclude what I might do if I did revisit that finding. I would, nevertheless, find a risk existed under section 22(2)(g). In either case, I must determine the appropriate disposition or placement.

[49] I am satisfied that the appropriate disposition in this case, based on an assessment of the child's best interest, is that the child, M., should be placed in the care and custody of B. L. as provided by s. 39(4)(d).

[50] B.L. has consented to accept this responsibility and the child shall be placed with her under the supervision of the agency. One of the conditions is that she or R. L. be at home when M. is there. I am not requiring that one or the other always

be in the same room as M. I am simply requiring that M. be in her care or R. L.'s care, if B. L. deems that appropriate.

[51] The child is not to be in the care of F. L. or K. W. solely. The plan put forward as an alternative, by B. L., is that the child would share her bedroom, initially. I am directing that this be the case. This is subject to reassessment. If B.L. wishes to make a change in that arrangement, she should notify the Minister, so that the change can be made by agreement or, if need be, you may return to Court. The child should be placed in the care of B. L. forthwith; by the close of business today.

_____

Lawrence I. O'Neil, A.C.J.

Halifax, Nova Scotia