

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

**Citation:** Nova Scotia (Community Services) v. H.B., 2012 NSSC 314

**Date:** 20120809

**Docket:** SFHCFSA-082163

**Registry:** Halifax

**Between:**

Minister of Community Services

Applicant

v.

H. B. and J.T.

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:** The Honourable Justice Elizabeth Jollimore

**Heard:** August 9, 2012

**Counsel:** Cindy G. Cormier for the Minister of Community Services  
Tammy Wohler for Ms. B.  
Mr. T. on his own

## **By the Court:**

### **Introduction**

[1] Ms. B and Mr. T are the adoptive parents of a four year old girl, M. Following M's disclosure that she was sexually abused by her father, M was taken into the care of the Minister of Community Services. The Minister has brought a child protection application and seeks temporary care and custody of M.

[2] The parties came to court for a hearing pursuant to subsection 39(5) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 (commonly called the "five day hearing") on August 9, 2012. Ms. B opposes the Minister's application, as does Mr. T.

[3] Prior to the hearing, Ms. Wohler filed an affidavit from Ms. B and an affidavit from Ms. B's adult daughter, Ms. M. With the co-operation of Ms. Cormier, Ms. Wohler and Mr. T (who is unrepresented), the application was heard immediately. The witnesses who had filed affidavits were cross-examined, and Mr. T testified and was cross-examined. I made my decision at the conclusion of the hearing and let the parties know that I might release written reasons for the benefit of Justice Legere-Sers who will assume carriage of this application.

[4] In its application, the Minister made requests for other relief, such as random urine testing and a production order. Ms. Wohler asked that these matters be deferred and I agreed that their consideration should be deferred until this application comes before Justice Legere-Sers.

### **Family history**

[5] Ms. B and Mr. T each have children from previous relationships. These children are all now adults. Four year old M is the only child they share in common.

[6] Ms. B's adult daughter, Ms. M, became pregnant when she was a teen-ager. M is the child of that pregnancy. M was adopted by Ms. B and Mr. T when she was an infant.

[7] Around the time that M was born and being adopted, one of Mr. T's children disclosed that she had been violently sexually abused by Mr. T when she was a pre-schooler. Her claims were reported to the police and investigated. Mr. T took a polygraph test. The test results were inconclusive. Mr. T was never charged. Ms. B and Ms. M gave no credence to these allegations of sexual abuse. There were ongoing conflicts between Mr. T and his previous wife about financial matters and the allegations of sexual abuse were minimized or dismissed as a malicious incident of acrimonious litigation.

[8] The Department of Community Services became involved. It was not equally dismissive of the allegations. Ms. B was required to take part in the STOP (Safety Through the Offender's

Partner) Program so she could learn to protect M from sexual abuse. One aspect of the program required Ms. B to prepare a safety plan. Such a plan would result in an understanding, shared by both parents and by others involved in the M's care, of acceptable parameters for Mr. T's interaction with M. For example, the plan identifies the physical contact M may not have with Mr. T and the conversations they may not have. It states what will happen if M reported sexual abuse or if sexual abuse was suspected.

[9] Ms. B prepared a second safety plan, quite similar to the initial plan. Ms. B's safety plan identified both of her adult daughters and Mr. T as individuals who were aware of it. In explaining this plan, Ms. B said that the second plan would remain in place until M got older and was able to speak and, as M grew up, Ms. B would explain the "rules" to M and M would be able to tell her mother if something was wrong. Ms. B testified that the rules were "second hand" to M: by this I understand Ms. B to be saying that the rules were well-known or "second nature" to the little girl. Ms. B felt she could use her own discretion in abiding by the safety plan.

[10] Mr. T has steadfastly denied sexually abusing his older daughter. He did not agree with either safety plan, saying that he wasn't guilty.

[11] On the basis of Ms. B's participation in the STOP program and her counseling with regard to children's sexual abuse, M's adoption by Ms. B and Mr. T was concluded.

### **Recent events**

[12] One element of each safety plan was that Mr. T was not to be alone with M. Another was that he was not to be present when M was naked.

[13] As time passed, Ms. B came to relax the rules. According to Ms. B, she had no reason not to trust Mr. T, he "never showed any red flags" or "signs". Similarly, Ms. M was unconcerned: she said she had been around Mr. T since she was ten years old and hadn't seen anything to be worried about. Ms. M believed the earlier complaints were motivated by ill-will between Mr. T and his first family. Neither woman was particularly attuned to the fact that Mr. T had been accused of sexually abusing a girl who was similar in age to M.

[14] Initially, when M travelled to daycare, both Mr. T and Ms. B would take her. This ended six months ago when Ms. B was ill with pneumonia. Then, Mr. T began to take M to her daycare on his own. Ms. B says that she would make phone calls to ensure that the trip was not taking longer than it should and that nothing untoward was happening.

[15] On other occasions, Mr. T was left alone with M. There was no mention of phone calls or other efforts to ensure that M was safe during these times.

[16] On Friday, July 27, 2012, Ms. B and Ms. M went out together. M was left alone with her father.

[17] Over the next two days, M wasn't interested in playing in the family's pool even though she was a "daily swimmer" according to Ms. B. One day, M had a friend visiting and M was

disinterested in swimming with her friend. None of this caused Ms. B to become concerned.

[18] On Monday, July 30, Ms. B attempted to put M into the pool. M refused and screamed. M said she had been naked in the swimming pool with her father and that her father put his penis “between her bum cheeks and vagina clam”. Mr. T was present and called M a liar. M told him he was a liar. Ms. B testified that she believes M.

[19] It isn’t necessary for me to detail what followed between Mr. T and Ms. B that evening. However, Ms. B’s actions are important to this application. She remained at home with M. Mr. T remained on the premises, but not in the family’s home. That evening, Ms. B let Ms. M know what M had said.

[20] On Tuesday, Ms. B took M to the doctor. The doctor told Ms. B to go to the police, which she did. On Wednesday Ms. M became involved. Ms. M, too, believes M.

[21] M was interviewed jointly by a social worker and police officer. The investigation, both by the Department of Community Services and law enforcement personnel, continues.

### **This application**

[22] This is not a criminal proceeding. In criminal proceeding, a person is charged with an offence and it is presumed that they are innocent until they are proven guilty beyond a reasonable doubt.

[23] In this proceeding, no one is charged with anything. The issue for me is whether there are reasonable and probable grounds to find that M is in need of protective services based on clauses 22(2)(c) and 22(2)(d) of the *Children and Family Services Act*.

[24] “Reasonable and probable grounds” has been described as a “a burden met ‘at the point where credibly-based probability replaces suspicion’.”, according to the Supreme Court of Canada’s decision in *Hunter et al. v. Southam Inc.*, 1984 CanLII 33 (S.C.C.).

[25] Subsection 22(2) of the *Children and Family Services Act* defines the circumstances where a child is in need of protective services. Here, the Minister argues that I should make an order determining that M is a child in need of protective services based on clauses 22(2)(c) and 22(2)(c) of the *Act*.

[26] By virtue of section 39(11), I am able to admit and act on evidence which I consider “credible and trustworthy in the circumstances”.

[27] Clause 22(2)(c) provides that a child who has been sexually abused by its parent or guardian, or by another person where the child’s parent or guardian knows or should know of the possibility of sexual abuse and fails to protect the child, is a child in need of protective services.

[28] In these circumstances, I have evidence from Ms. B of M’s report and, as well, evidence from Alison Stone, a worker employed by the Department of Community Services, regarding the

investigation into M's disclosure. This evidence describes spontaneous actions by M and an unprompted and unassisted disclosure by M that she was sexually abused by her father. I consider this to be credible and trustworthy evidence. This evidence exceeds suspicion and rises to the point of credibly-based probability that M has been sexually abused by a parent.

[29] In light of the historic allegations against Mr. T and Ms. B's required participation in the STOP Program, Ms. B should have known of the possibility of sexual abuse. By her own evidence and Ms. M's, it's clear that Ms. B failed to protect M from the real chance that she would be sexually abused. Indeed, Ms. B failed to follow her own safety plan. She relied on four year old M to protect herself without assistance from any adult.

[30] Clause 22(2)(d) makes reference to "substantial risk". (This phrase means "a real chance of danger that is apparent on the evidence" according to subsection 22(1).) The clause states that a child is in need of protective services where there's substantial risk that a child will be sexually abused by the child's parent or guardian, or by another person where the child's parent or guardian knows or should know of the possibility of sexual abuse and fails to protect the child.

[31] Ms. B felt that in her own discretion she could deviate from the safety plan and that this could happen when M was old enough to understand the risks the safety plan was intended to address and to communicate relevant information to her mother. From the fact that M didn't immediately disclose the sexual abuse to her mother (or comment on being alone with her father as she went to and from daycare), it's clear that M did not understand the critical role Ms. B had given M in protecting herself.

[32] The safety plan form contains a section with the language "If concerned about safety or if your children report sexual abuse by your partner". It's followed by a number of blank lines where the plan's author is to identify the steps to be taken in these circumstances. On those lines on the form that she completed Ms. B wrote "leave immediately, call police". Regardless of her plan, when M reported sexual abuse, Ms. B didn't leave immediately even though Mr. T didn't leave the premises. She didn't call the police until she took M to the doctor the following day and the doctor told her to contact the police.

[33] I conclude that M is a child in need of protective services, pursuant to both clauses 22(2)(c) and 22(2)(d) of the *Children and Family Services Act*.

[34] Ms. B urges me to return M to her and Ms. M (Ms. M is moving into her mother's home), arguing that this is the least intrusive response that will sufficiently protect M.

[35] Bringing Ms. M into the household doesn't alleviate the problem. Ms. M, too, refused to recognize the risk facing M. She left the home with Ms. B, leaving M alone with Mr. T. While Ms. M learned of M's report on Monday evening, it seems Ms. M didn't arrive to assist until Wednesday. While Ms. M was said to be aware of the safety plan, Ms. M took no steps to have her mother and M leave the home and she didn't contact the police when M reported that her father had sexually abused her.

[36] The Minister argues that less intrusive measures have already been tried (providing

counseling and participation in the STOP Program to Ms. B) and these measures have failed.

[37] I agree with the Minister. Less intrusive means have been tried and they have been unsuccessful in protecting M. I order M remain in the Minister's temporary care and custody.

[38] Investigations are ongoing. The Minister's concerns are incompletely formed at this point. The protection concerns relating to M may be greater than they appear.

[39] In the brief time since M was taken into care, Ms. B has taken steps to involve herself with Alcoholics Anonymous to address one concern identified by the Minister. This prompt action is positive. I encourage Ms. B to continue this constructive effort.

---

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia