SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. J.S., 2012 NSSC 396

Date: 20121109
Docket: SFH-CFSA 076248
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

J.S. and J.W.

Respondents

Judge: The Honourable Justice Elizabeth Jollimore

Heard: November 9, 2012

Counsel: Cindy G. Cormier for the Minister of Community Services
J.S. unrepresented and not appearing
J.W. unrepresented and not appearing

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."

By the Court

Introduction

[1] The Minister of Community Services seeks an order for the permanent care and custody of J, a seventeen month old, who is the son of J.S. and J.W. The Minister also asks that the order provide that there be no access between J and his parents.

[2] The Minister's application for a permanent care and custody order is pursuant to section 47 of the *Children and Family Services Act*, S.N.S. 1990, c. 5. The request for an order for no access is governed by subsection 47(2).

[3] The statutory deadline for the completion of this proceeding is December 15, 2012 pursuant to clause 45(1)(a) of the *Children and Family Services Act*.

[4] The final disposition hearing was held on November 9, 2012. As I'll detail further in my reasons, each parent received notice of this hearing. Neither appeared. They did not communicate with the Minister or with the court seeking an adjournment or expressing an intention to take part. The Minister introduced a number exhibits in support of its application. I gave a brief oral decision and said that I would release a written decision. These reasons, along with the order arising from my decision, will be served on the parents.

History of this proceeding

[5] Ms. W has a history of involvement with child welfare authorities which focused on concerns relating to inadequate supervision of her older children, illegal drug use, misuse of prescribed drugs (including "double doctoring"), intimate partner violence and involvement with the criminal justice system. There have also been concerns relating to her neglect of the personal hygiene of her older children, their failure to attend school and one child's lack of immunizations. Ms. W had been diagnosed with bi-polar depression.

[6] When J was born, both his parents appeared to be under the influence of some substance. Ms. W had attended only three pre-natal medical appointments, though twelve to fourteen visits would be the norm. Following his birth, J was lethargic, he had poor muscle tone and he displayed symptoms that were consistent with drug withdrawal. Ultimately, tests detected no drugs in J's system at birth. J's discharge from the hospital was delayed because he had difficulty feeding.

[7] In light of Ms. W's history, the condition of both parents when J was born and J's own condition, the Minister began this child protection proceeding.

[8] When the parties were first before me on July 12, 2011, I determined that there were reasonable and probable grounds to find that J was in need of protective services and I ordered that J remain in the Minister's temporary care and custody. Neither parent consented to this. Consideration of the additional relief requested by the Minister in its Notice of Child Protection Application was deferred. The additional relief was an order pursuant to subsection 96(1) of the *Children and Family Services Act*, admitting evidence from other child protection proceedings as evidence in this proceeding, and orders for the production of Ms. W's files and records from her doctors and the IWK Health Centre, and for the production of J's files and records from the IWK Health Centre.

[9] The interim hearing was completed on July 22, 2011. Both parents were represented by counsel by this date and each had suggestions of possible family placements for the Minister's consideration.

[10] Josephine Burchill is J's long term child protection social worker. Ms. Burchill had discussed hair follicle testing with both parents prior to July 22, 2011. The request for hair follicle testing and other requests were deferred to allow Ms. W and Mr. S an opportunity to obtain advice from their lawyers and to give instructions. I ordered that J remain in the Minister's temporary care and custody.

[11] A conference was held on September 9, 2011 in advance of the deadline for making a protection finding. At the conference, both parents agreed to participate in random urinalysis testing. Mr. S wanted more time to consider the request for hair follicle testing. Each parent consented to orders for production of their Halifax Regional Police records and their N.S. Medical Services Insurance records. Ms. W consented to orders for the production of her file from Dr. Somers and both her file and the baby's file from the IWK Health Centre. Mr. S consented to production of the baby's IWK Health Centre file. Additionally, Ms. W consented to the Minister's application pursuant to subsection 96(1) of the *Act*.

[12] By this point, concern was being expressed that the parents had missed access visits with J, who was just two months old. Ms. Burchill's affidavit of August 25, 2011 explained that Ms. W may have missed visits with J while he was still at the IWK Health Centre because she was advised not to visit while she was still recovering from a seizure. Ms. W reports that she has seizures when she is stressed and she doesn't always know when these will happen.

[13] At the protection hearing on September 23, 2011, the parents both agreed to the finding that J was in need of protective services and each consented to participate in hair follicle testing.

[14] A pre-trial conference was held on November 23, 2011, prior to the disposition hearing. In the absence of instructions by Mr. S, the matter returned to court in early December for a further conference. Ms. Burchill's affidavit detailed that Ms. W's hair follicle test was positive for codeine. Ms. W explained that she takes codeine for migraine headaches and an extract of her medical file from Dr. Somers contains a note he wrote confirming that she does, indeed, take codeine for migraine headaches. Mr. S, I was told, "shaved" his entire body so that he could not be tested.

[15] On December 15, 2011 the disposition order was granted with both parents' consent.

[16] A review hearing was held on March 6, 2012. At this hearing, the Minister raised the prospect of scheduling dates for a final disposition hearing at which an order for J's permanent care and custody would be sought. No dates were scheduled in March: the Minister wanted to be clear to the parents, at that early stage, they were not on a path which would lead to their son's return to them. As Ms. Cormier said, the Minister was "sounding the alarm" for Ms. W and Mr. S.

Preparation for the final disposition hearing

[17] Dates for the final disposition hearing were scheduled on May 9, 2012. Both parents were represented and were present in court when these dates were fixed.

[18] Neither Ms. W nor Mr. S was in court for a review hearing on August 7, 2012 or for a settlement conference on August 30, 2012. Their access with J was sporadic. Observations suggested that Ms. W was attending access visits while under the influence. Ms. W and Mr. S weren't regularly attending family support sessions with Gil McMullin, who reported that they were making no progress. The parents weren't actively engaged in addressing the Agency's concerns.

[19] On September 14, 2012 I heard a motion on behalf of Mr. S's counsel (and Nova Scotia Legal Aid) to be removed from the record. His lawyer was no longer employed there. Mr. S had been provided with a certificate in June, 2012 for outside counsel. I granted the motion. Both parents were in court, albeit arriving late. Ms. Moore, who filed the motion, ensured the parents had details of all upcoming court dates. Mr. S was again given a list of lawyers who would accept a certificate. I appreciate Ms. Moore's assistance to the parents.

[20] On September 19, 2012 the Minister filed a Notice of Trial Commencement, providing notice to the parents that the final disposition hearing would begin on October 4, 2012. If the parents attended, the hearing would continue on the dates originally scheduled for it in November. The parents were served with this Notice on September 19, 2012. If the parents attended, we would also use the time to discuss the trial's organization, witness attendance and scheduling.

[21] Ms. W and Mr. S did come to court on October 4, 2012 and they voiced their intention "to fight" for J. Knowing this and aware that Mr. S was unrepresented and searching for a lawyer, I scheduled conferences to ensure that both parents were meeting the upcoming deadlines and preparing for the trial.

[22] On October 4, 2012, Ms. W was present with an associate from her lawyer's office who warned Ms. W that her lawyer would file a motion to withdraw if Ms. W failed to communicate with her. I impressed upon Ms. W the need to communicate with her lawyer and urged Mr. S to make concerted efforts to retain counsel. Mr. S said he intended to find a lawyer and had appointments scheduled, though he did not know exactly when these appointments were, where

the lawyers' offices were located or the names of the lawyers with whom he had the appointments.

[23] To ensure the parents were on track with trial preparation, a conference was scheduled on October 11. Neither parent attended. They did attend a conference on October 17, but not those scheduled for October 30 or November 6.

[24] At the conference on October 17, when Ms. W, her lawyer and Mr. S were in court, we discussed the Minister's proposed witnesses. The Minister had provided a list of witnesses to each parent's lawyer in May, seeking a response by June, identifying the witnesses required to appear. The Minister had yet to receive a response. Discussions that day did little to limit the Minister's witness list.

[25] Over the course of this proceeding there have been twenty-two production orders resulting in hundreds of pages of records from the police, physicians, community-based health service providers, J's daycare, the IWK Health Centre, East Coast Mobile Medical Inc. and Nova Scotia Medical Services Insurance. Following the conference on October 17, Ms. Cormier provided pinpoint references to the specific pages of the records which the Minister would be introducing into evidence, to focus the parents' thoughts in deciding if they wished to cross-examine the author and to prepare to do so. I appreciate Ms. Cormier's assistance to the parents.

[26] The Minister filed the materials in support of its case on October 29. Neither parent attended court on October 30. The parents' deadline for filing their affidavits was November 5. They filed nothing. They didn't attend court on November 6.

[27] On November 1, 2012, the parents were served with a Notice of Trial Commencement stating that the final disposition hearing would begin on November 9, 2012. The parents were personally served with this Notice. If the parents attended, the hearing would continue on the dates originally scheduled for it later in November.

Motions to be removed as solicitor of record

[28] On August 14, 2012, a motion was filed seeking to have Mr. S's solicitor removed from the record. The supporting affidavit reveals that no instructions had been received from Mr. S for "a number of months [since early May 2012], despite attempts" to communicate with him. Mr. S was given a certificate for private representation on June 4, 2012. Reminders were sent to Mr. S in June, July and August. I heard and granted this motion on September 14, 2012. Mr. S was present and we discussed the need for him to act immediately to secure counsel for the final disposition hearing.

[29] On October 11, Ms. Schofield's associate advised me and Ms. W that Ms. Schofield had prepared the motion seeking to be removed from the record as Ms. W's solicitor. At that point, the motion had not been filed. Ms. W and I were told that if Ms. W maintained contact with Ms. Schofield and ensured that Ms. Schofield always had Ms. W's current contact information, the

motion would not be filed. I spoke to Ms. W about the importance of maintaining her relationship with her lawyer so she would not be alone in her fight for J.

[30] On October 17, 2012, counsel representing Ms. W filed her motion to be removed from the record as Ms. W's solicitor. The supporting affidavit details a breakdown in the solicitor/ client relationship with Ms. W. Ms. Schofield, who represented Ms. W, said she'd had no contact with Ms. W since October 4, 2012. There were subsequent court appearances on October 11, October 17, October 30 and November 6. Ms. W did not attend the last three and, while Ms. W was present on October 11, Ms. Schofield was not (one of her associates appeared on her behalf). Other than the court attendance on October 11, there was no communication between Ms. W and her lawyer.

[31] Ms. Schofield's motion to be removed as solicitor of record for Ms. W was heard on November 9. I granted the motion.

Final disposition hearing

[32] Neither parent appeared at court on November 9, 2012. Each was personally served. Both parents have spoken of fighting for their son. However, they have not taken part in any court appearances in the past weeks. They have not filed their affidavits or their plan for J. They have not communicated with the Minister, as directed, about the witnesses they do or do not require to attend the trial. They have not communicated with the Minister or Ms. Burchill in any regard. Outside of this proceeding, they did not regularly attended access with J and they have stopped attending those visits. They have not actively engaged in family support counselling. To the extent they have engaged in services, they have not progressed.

[33] The Minister's application is unopposed. I must determine whether I should grant its application: whether it is appropriate, under the *Children and Family Services Act* and in J's best interests to grant the Minister's application. I do this, considering the affidavits and reports of the Minister's witnesses and other exhibits that the Minister has entered into evidence.

The child, J

[34] I have information about J from various sources.

[35] J remained at the IWK Health Centre until he was sixteen days old. J's foster mother reported that, during J's first few months, J was feeding frequently, though eating small amounts, and sleeping only for brief intervals. He had successful hernia repair surgery at the age of approximately four and one-half months of age.

[36] I have a pediatrician's report to J's family physician from November 2011, when J was approximately four and one-half months old. It noted that J's maintenance of visual attention and tracking weren't what would be expected of a child his age. The pediatrician's impression was that J had "some mild developmental delay". He was receiving all recommended therapy.

J's facial features and his sharp cry were consistent with Fetal Alcohol Spectrum Disorder, though such a diagnosis was premature.

[37] In February 2012, J made an emergency visit to the IWK Health Centre: he had viral pneumonia. J was given a cardiogram and a referral was made to follow up on an observed cardiac abnormality.

[38] A brief referral request from physiotherapist Linda Longmire to J's pediatrician states that J has "shown some 'regression' in gross motor skills". Ms. Longmire explained that this might "possibly be that [J] is simply not feeling well at all." She further commented that J "has some developmental delays" and "has been making some progress" at the development daycare he attended. This information is nine months old.

[39] One month later, J made a second visit to the emergency department: he was very pale, lethargic and was having difficulty breathing. J was admitted to the Intensive Care Unit. The situation was sufficiently serious that J's parents were called to the hospital. Over the following days, J was tested to see if he had cystic fibrosis. He does not. J was also tested for HIV. This test was negative. J remained in the hospital for almost two weeks. Various follow up appointments were scheduled with the genetics and neurology departments. J was fitted with a helmet to mold the shape of his skull. This was done for non-medical (cosmetic) reasons.

[40] Through April and May 2012, Ms. W and Mr. S missed six visits with J.

[41] In August of this year, J's pediatrician reported that J was developmentally delayed by approximately four or five months. His parents' access visits were still inconsistent. Through this fall, J continued to attend appointments with specialists to address his ongoing chest congestion. Most recently, J's been making advancements in his development, though he remains delayed. I'm told he has a good disposition and is likable. The nature of his medical concerns hasn't been diagnosed. He is thought to be a good candidate for an adoption.

Analysis

[42] The purposes of the *Children and Family Services Act* are to protect children from harm, to promote the family's integrity and to assure children's best interests. These purposes are expressed in the *Act*'s preamble and are repeated in the definition of "best interests" in subsection 3(2).

[43] In proceedings under the *Children and Family Services Act*, the child's best interests are paramount. At different points in a child protection application, the *Act* directs me to consider "the best interests of a child" when making an order or a determination. When that happens, I am to refer to the definition of best interests contained in subsection 3(2).

[44] This is an application to review a temporary care and custody order. Section 46 of the *Children and Family Services Act* outlines my process. Before I make an order in a review, I must consider:

a. whether the circumstances have changed since the previous disposition order was made;

b. whether the plan for J's care applied in that order is being executed;

c. the least intrusive alternative that's in J's best interests; and

d. whether the requirements of subsection 46(6) have been met. (Subsection 46(6) says that I may make a further temporary care and custody order unless I am satisfied that the circumstances which justified the earlier order are unlikely to change within a reasonably foreseeable time that doesn't exceed the statutory deadline.)

[45] Circumstances have not changed since the previous disposition order was made. In fact, the circumstances really haven't changed since this proceeding began.

[46] The plan for J's care that I applied in my earlier decision is being executed. J is still in his foster placement and his needs are being met through his attendance at a developmental daycare centre. His health needs are being met in his foster home: medical appointments are made and attended. Prompt action has been taken when he has needed emergency care. At times, his medical needs have been serious. He is fortunate to have the foster placement he has.

[47] Since J was born, the Agency has offered services to the family. The services included supervised access and the assistance of a family support worker. Ms. W and Mr. S have made limited and irregular use of the services and, according to their family support worker, they have made no progress in their skills training. These services, if effective, would promote a less intrusive course by the Agency. The services have not been effective, so there is no less intrusive option available for J.

[48] I am unable to make a further temporary care and custody order pursuant to subsection 46(6): the circumstances which justified the earlier disposition order have not changed.

[49] There are less than six weeks remaining before a final disposition order must be made. There is nothing in the material provided to me by the Minister and there is no evidence from the parents that could support the conclusion that it is in J's best interests to do anything other than order his placement in the permanent care and custody of the agency.

[50] Because of his age, the timelines for Ms. W and Mr. S to respond to the Minister's concerns are the briefest contained in the *Children and Family Services Act*. I am aware that J's parents have faced real difficulties in the past year: Mr. S's father has died and Mr. S has been involved in a car accident. Even just one of these events would diminish the attention and energy Ms. W or Mr. S could dedicate to the work required for their son's return. Together, these events could pose a significant impediment. I understand, as well, that having a child taken into the Agency's care and the potential loss of that child can create despair and paralyse a parent. However, my task isn't to determine whether parents have a good reason for their failure to meet their child's needs, but to determine whether they can meet the child's needs now and in the future.

[51] The evidence before me is that J's parents are unable to meet his needs and will not become able to do so before December 15, 2012.

[52] There is no less intrusive alternative that is in J's best interests. No plan is being offered. The December 15, 2012 deadline effectively limits the options listed in subsection 42(1) of the *Act* to returning J to his parents or placing him in the Minister's permanent care. I am satisfied that the circumstances which justified the earlier order are unlikely to change prior to that deadline. In the past seventeen months, there have been no meaningful changes in this family's circumstances.

[53] I am also satisfied that J's best interest favours making a final disposition order, placing him in the Minister's permanent care and custody, now.

[54] The Minister asks that I order J be placed in its permanent care and custody pursuant to clause 42(1)(f). Before I may do this, I must consider subsections 42(2) and 42(4) of the *Act*. The former section mandates that I do not make an order that removes a child from its parents unless I am satisfied that less intrusive alternatives have been tried and have failed, have been refused, or would be inadequate to protect the child. The latter section instructs that I shall not make a permanent care and custody order unless I am satisfied that the circumstances which justify the order are unlikely to change within a reasonably foreseeable time, not exceeding the maximum time limits. I have already addressed the latter point, above.

[55] Considering subsection 42(2), I am satisfied that the concerns identified in this subsection of the *Act* have been addressed. Less intrusive alternatives would be inadequate to protect J.

[56] Subsection 42(2) refers me to section 13 of the *Act* and services promoting the family's integrity. Some of these services are relevant: for example, family skills training and addiction assessment. This family has received supervised access services and the services of a family support worker. These have had no appreciable effect as a result of the parents' failure to engage fully in the services.

[57] During the past year and one-half Ms. W and Mr. S have been unable to change any aspect of their lives. They haven't progressed in addressing concerns about intimate partner violence, substance abuse and parenting J.

[58] My decision is to be based on J's best interests. "Best interests" are defined in subsection 3(2) of the *Act*. Some aspects of the definition aren't pertinent here: for example, J is far too young to have any views or wishes. Other aspects are relevant and critical to my decision: J's physical, mental and emotional needs and development and the care or treatment needed to meet those needs. J's development is delayed, but he is progressing as a result of attending a developmental daycare. He has been hospitalized as a result of serious health concerns which have not yet been diagnosed. J continues under the watchful eye of pediatric specialists. J must be cared for by someone who is mindful of his health, attentive to the detailed

and changing instructions relating to his medications and willing to dedicate time to his different medical appointments. J is a likable toddler, but his care isn't easy or convenient.

[59] I contrast the heavy demands of J's care with his parents' efforts in those areas most directly related to J: their access with him and their work with Gil McMullin, their family support worker. Throughout this proceeding, Ms. W and Mr. S have not managed the demands of access. They have been inconsistent and undependable in exercising access with J. They've attended visits appearing sleepy or under the influence.

[60] Mr. McMullin's responsibility was to provide the parents with information about a whole range of topics (such as attachment, development, hygiene, safety and violence) and then to have a period of observing them in their roles as parents and partners during which he would offer feedback on their integration of the information they'd learned into their actions. Thirty-one appointments were arranged with Ms. W and Mr. S. One was cancelled following Mr. S's father's death. Of the remaining thirty appointments, Ms. W attended less than half and Mr. S attended eleven. Mr. McMullin says that during "most" sessions Ms. W and Mr. S were "lacking alertness", with "heavy eyes and nodding heads". The parents didn't canvass all the topics they were scheduled to discuss with Mr. McMullin and they never advanced to the point where they could be observed in parenting roles. Mr. McMullin was left questioning how much material they retained from their instructional sessions.

[61] According to subsection 42(3) of the *Children and Family Services Act*, I am not to place J in the Minister's permanent care and custody without considering whether there is a possible placement with a relative, neighbour or other member of his community or with extended family. Here, no such placement has been identified for J.

[62] Where the Minister's application is unopposed, I still bear the burden of considering the evidence and the requirements of the *Children and Family Services Act* and determining whether to grant the Minister's application for permanent care and custody. I've read the Minister's materials and considered the requirements of the *Act*. I conclude that it is appropriate and in J's best interests that I grant the Minister's application for J's permanent care and custody.

Order for no access

[63] The Minister asks that I order there be no access between J and his parents. This request is pursuant to subsection 47(2) of the *Act*.

[64] According to subsection 47(2), I may not make an order for access unless I'm satisfied that one of certain circumstances enumerated in that subsection exists. None of the listed circumstances exists in this case, so I order that there be no access between J and his parents.

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

Halifax, Nova Scotia