SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Mi'Kmaw Family and Children's Services v. KDo*, 2012 NSSC 379

Date: 20121102
Docket: CFSA-077093
Registry: Sydney

Between:

Mi'Kmaw Family and Children's Services

Applicant

v.

KDo, GJe, and PJo

Respondents

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	October 11, 2012, in Sydney, Nova Scotia
Written Decision:	November 2, 2012
Counsel:	LeeAnne MacLeod-Archer, for the applicant Alfred Dinaut, for the respondent, KDo Kymberly Franklin, for the respondent, GJe Alan Stanwick, for the respondent, PJo,

Restriction on publication:

Section 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication. S. 94(1) provides:

> No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

By the Court:

[1] **Introduction**

[2] This decision involves three children, nine year old Ka, six year old Ke, and three year old Me. The respondents, KDo and PJo, are the parents of Ka and Ke. Me is the child of KDo and GJe. All three children have been placed in the temporary care and custody of Mi'kmaw Family and Children's Services of Nova Scotia.

[3] At this review hearing, the agency seeks a permanent care and custody order, despite the fact that the legislative time lines have not been exhausted. Mr. Jo supports the agency. Ms. Do and Mr. Je contest the agency's application; they seek a further temporary care and custody order. Given their positions, all respondents acknowledge that the protection risks have not been alleviated or reduced to enable the children to return to any of them at this time.

[4] **Issues**

[5] The sole issue which I must determine is whether the circumstances giving rise to the temporary care order, are unlikely to change within a reasonably foreseeable time.

[6] **Background**

[7] The agency has a history of involvement with Ms. Do dating back to Ka's birth in 2003. Over the years, this involvement included prior court proceedings and voluntary case plans. Despite the agency's involvement, none of Ms. Do's children were placed in the permanent care of the agency, nor in the permanent custody of other adults.

[8] The present proceeding began when the agency sought an interim supervision order in September 2011. The agency's plan changed after the RCMP located drugs in the home of Ms. Do and Mr. Je. As a result, the children were placed in the care and custody of the agency. The respondents were granted supervised access to the children. Interim proceedings were completed on November 7, 2011.

[9] The protection finding was entered, by consent, on December 1, 2011, pursuant to sec. 22 (2)(b) of the *Act*. Substance abuse and domestic violence were the most significant of the identified concerns.

[10] Disposition reviews also proceeded by consent and resulted in orders dated March 1, 2012, May 23, 2012, and July 13, 2012. These orders continued to place the children in the temporary care and custody of the agency, with supervised access to the respondents. The disposition orders also required the respondents to accomplish the following:

- to refrain from the use of alcohol and nonprescribed drugs;
- to participate in screens for alcohol and drugs;
- to cooperate and take remedial services including AA/NA counselling and programs;
- to complete the SASSI screen with addiction counsellors;
- to attend at relapse prevention addiction treatment programs;
- to attend couple's counselling if Ms. Do and Mr. Je were intending to maintain their relationship;
- to participate in domestic violence and anger management education; and
- to attend all appointments with therapists, agency workers, and service providers.

[11] A contested disposition review was held on October 11, 2012 because the agency sought a permanent care finding. The following witnesses provided evidence: Marilyn Hillier, Tom Sylliboy, Julia Gale, Wendy Aboud, and Jean Stewart. None of the respondents attended at the proceedings. Ms. Do had entered a detox program prior to the scheduled hearing. The parties provided oral submissions, and then case law summaries on October 12, 2012.

[12] **Analysis**

[13] Are the circumstances giving rise to the temporary care order unlikely to change within a reasonably foreseeable time?

[14] *Position of the Parties*

[15] The agency states that Ms. Do had over a year to access services and to demonstrate that she can parent the children without risk. The agency notes that less than five months remain before the outside time lines are exhausted. The agency states that it is not reasonably foreseeable that Ms. Do can effect the necessary life style changes, in about five months, to enable the children to be returned to her care without agency involvement. As a result, a permanent care order must issue. Mr. Jo supports the agency.

[16] Mr. Je and Ms. Do argue to the contrary. Ms. Do submits that she can make lasting lifestyle changes, within the next few months, so that her children can be returned to her care because there will be no protection concerns. In particular, it was noted that Ms. Do has good parenting skills, and maintains a clean and appropriate home. Further, Ms. Do engaged in some of the case plan in that she exercised access; participated in domestic violence education; and attended two of the three meetings to complete the parental capacity assessment. Finally, it was noted that Ms. Do enrolled in a detox program and has undertaken some counselling. In these circumstances, it is reasonably foreseeable, that Ms. Do is capable of changing before the legislative time lines are maximized.

[17] **Decision**

[18] In this case, the agency is assigned the burden of proof. It is the civil burden of the proof. The agency must prove its case on a balance of probabilities by providing the court with "clear, convincing, and cogent evidence"**: C.(R.) v. McDougall**, 2008 SCC 53. The agency must prove why it is in the best interests of the children to be placed in the permanent care and custody of the agency, according to the legislative requirements, at this time.

[19] In making my decision, I must be mindful of the legislative purpose. The threefold purpose is to promote the integrity of the family, protect children from harm, and ensure the best interests of children. The overriding consideration is, however, the best interests of children as stated in sec. 2(2) of the *Act*.

[20] The *Act* must be interpreted according to a child centred approach, in keeping with the best interests principle as defined in sec. 3(2). 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.

[21] In addition, sec. 42(2) of the *Act* states that the court is not to remove children from the care of their parents, unless less intrusive alternatives have been attempted and have failed, or have been refused by the parent, or would be inadequate to protect the children.

[22] 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 children are no longer children in need of protective services: sec. 46 of the *Act*; and **Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)** [1994] 2 S.C.R. 165.

[23] Past parenting history is also relevant as it may be used in assessing present circumstances. An examination of past circumstances helps the court determine the probability of the event reoccurring. The court is concerned with probabilities, not possibilities. Therefore, where past history aids in the determination of future probabilities, it is admissible, germane, and relevant: **Nova Scotia (Minister of Community Services) v. Z.S.** 1999 NSCA 155 at para. 13; **Nova Scotia (Minister of Community Services) v. G.R.** 2011 NSSC 88, para. 22, as affirmed at **Nova Scotia (Minister of Community Services) v. G.R.** 2011 NSCA 61.

[24] Section 42(4) of the *Act* provides the court with the authority to make a permanent care order, even when the legislative time lines have not been exhausted, if circumstances are unlikely to change within a reasonably foreseeable time. Section 42(4) states as follows:

> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 42.

[25] Section 46(6) of the *Act*, notes a similar provision. Section 46(6) states as follows:

> Where the court reviews an order for temporary care and custody, the court may make a further order for temporary care and custody unless the court is satisfied that the circumstances justifying the earlier order for temporary care and custody are unlikely to change within a reasonably foreseeable time not exceeding the remainder of the applicable maximum time period pursuant to subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 46.

[26] Although discretionary, secs. 42(4) and 46(6) of the *Act* do not provide the court with unlimited jurisdiction. All discretionary authority must be exercised judicially, and in accordance with rules of reason and justice, not arbitrarily and based upon a rational and solid evidentiary foundation: **MacIsaac v. MacIsaac** (1996) 150 NSR (2d) 321 (C.A.). This requirement is heightened when the meaning of "reasonably" and "foreseeable" are examined.

[27] "Reasonably foreseeable" is not defined in the legislation. In *Words & Phrases: Judicially Defined in Canadian Courts and Tribunal* vol, 7. (Toronto: Carswell, 1993) (June 2012 supplement) at p. 7-36, s.v., "reasonably" is defined as follows:

> ...the definition of "reasonably" in Webster's Third International Dictionary [is as follows:]:
> 1. in a reasonable manner (acted quite...)
> 2. to a fairly sufficient extent (a book that is good).
>
> What is "reasonable" is not the subjective view of either the respondent or appellant but the view of an objective observer with a knowledge of all the pertinent facts.
> The Shorter Oxford English Dictionary on Historical Principles refers to "reasonably" as an adverb meaning "in a reasonable manner; sufficiently; fairly". (Income Tax)
> Bailey v. Minister of National Revenue, [1989] 2 C.T.C 2177 at 2182, 2183, 89 D.T.C. 416 (T.C.C.) Rip T.C.J.

[28] "Foreseeable" is defined in the Judy Pearsall, ed, *The New Oxford Dictionary of English*, 9th ed (New York: Oxford University Press, 1999) at p. 718, s. v., as follows:

> **Foreseeable - adjective** able to be foreseen or predicted ...

[29] In this context, it is helpful to review the cases submitted to the court by counsel. Circumstances which have been identified as important in determining if a change can be made in a reasonably foreseeable time are as follows:

(a) *Whether other children have been placed in the permanent care and custody of the agency, or in the permanent custody of other adults*. In **Nova Scotia (Minister of Community Services) v. G.R. *supra***, three of the respondent's children were in the custody of paternal grandparents; another child was in the permanent care of the Minister; and a fifth child was apprehended at birth and remained in the temporary care of the Minister.

(b) *Whether the children have a lengthy history of being in the temporary care of the agency*. In **Children's Aid Society of Halifax v. D.H.** 2006 NSSC 1, three separate court proceedings had been initiated. As a result, the four and five year old children had only been in the unsupervised care of her parents for five months; and the youngest child had not been in the unsupervised care of her parents at any time.

(c) *Whether the parent lacked meaningful insight into the issues that gave rise to the protection finding*. In **Nova Scotia (Minister of Community Services) v. G.R.**, ***supra***, the mother minimized the abusive and dysfunctional nature of her relationship with the father. The mother was unable to identify the changes she had to make in her lifestyle to ensure a safe environment for the child. In **Nova Scotia (Minister of Community Services) v. P.M.D.,** 2002 NSSF 38, the mother lacked insight into her addiction to cocaine, which led to a life of prostitution and crime. The mother failed to become involved in a meaningful drug rehabilitation program. In **Nova Scotia (Minister of Community Services) v. S.W.** 2010 NSSC 472, the court held that maximizing the statutory time limits would not result in the mother effecting necessary changes. The mother severed all relationships with each of the doctors who sought to reduce her addiction to pain medication.

(d) *Whether the parent exercised access*. In **Nova Scotia (Minister of Community Services) v. G.R.**, ***supra***, the mother lacked commitment

to the child, having only exercised access on five occasions. In **Nova Scotia (Minister of Community Services) v. S.W.** , ***supra***, the mother was late for approximately 25% of all scheduled visits, and another 17% were cancelled as a result of her actions or inactions.

(e) *Whether the parent lacked basic parenting and housekeeping skills*. In **Children's Aid Society of Halifax v. D.H.**, ***supra***, the mother's parenting skills were so pervasively and extensively inadequate, that no hope of change was probable. In **Nova Scotia (Minister of Community Services) v. S.W.**, ***supra***, the mother made limited progress in developing even basic parenting skills, such as feeding, diapering, or securing the child correctly in a car seat.

(f) *Whether an expert provided opinion evidence confirming an inability to parent*. In **Children's Aid Society of Halifax v. D.H.**, ***supra***, the assessor recommended permanent care because of filthy living conditions, drug and alcohol abuse, and chronic neglect. In contrast, in **Nova Scotia (Minister of Community Services) v. E.C.** 2007 NSSC 37, the court placed little weight on the expert report because of the erroneous information that it contained.

(g) *Whether the parent was effecting positive changes that resulted in lifestyle improvements*. In **Nova Scotia (Minister of Community Services) v. E.C. supra**, the mother's parenting skills had improved. The mother was focussed and open to learning new skills by participating in services. The request for a permanent care order was denied.

[30] In reaching my decisions, I reviewed the evidence and the submissions of the parties. I placed the burden upon the agency. The agency did not satisfy this burden. As such, I will not grant the permanent care and custody order as requested. I am not satisfied that the circumstances are unlikely to change within a reasonably foreseeable time, and in particular, within the maximum time period allocated within the legislation. I draw this conclusion from the following factual findings:

(a) Although there was extensive agency involvement, none of Ms. Do's children were placed in the permanent care of the agency or in the permanent custody of other adults.

(b) Ms. Do. exhibited some insight into the circumstances which gave rise to the protection proceedings. She is participating in a rehabilitation drug treatment program because of her addictions. She participated in some counselling sessions for a period of time. Ms. Do was not always consistent in her efforts, but she does nonetheless exhibit insight and is moving forward, albeit not as consistently or as quickly as one would hope. No recent concerns about violence have been raised, although Mr. Je is incarcerated.

(c) Ms. Do generally exercised access, although there were gaps. Valid access cancellations did occur, usually because of storms, worker cancellations, or Ms. Do attending a drug treatment program. There were also unexplained cancellations, especially during the months of June and July 2012. Visits resumed in August and were again consistent until Ms. Do entered the drug treatment program after September 29, 2012.

(d) Ms. Do has the ability to parent appropriately and safely. She, when not impaired by drugs or alcohol, is attentive and aware of the children's needs, and is able to meet these needs. Ms. Stewart said that Ms. Do was a cooperative and hands on parent. Ms. Do prepared and served healthy meals to her children. She played age appropriately and provided each child with one on one time. She used positive reinforcements appropriately. She maintained a clean home, and also ensured that the children were clean. The children have a strong attachment to their mother. The court notes that in its plan for permanent care, the agency is seeking access between Ms. Do and the two older children.

e) Ms. Do has effected some positive changes in her life. At times, Ms. Do has not been cooperative with the court ordered services; at other times she has been. Ms. Do attended two of the three appointments with Dr. Landry. She is currently participating in a drug treatment

> program. Ms. Do appears to have the ability to effect necessary positive changes.

[31] Although Ms. Do's commitment to services has not been without blemish, she, nonetheless, is capable of making lifestyle changes so that the children can be returned to her care, provided the case plan is consistently followed. Ms. Do has the capacity to parent appropriately when not impaired by alcohol or drugs. The major presenting problem, at this stage, relates to substance abuse. Ms. Do was unsuccessfully involved with rehabilitation programming in the past. This past failure does not objectively lead to the conclusion that Ms. Do will be unable to resolve the protection concerns within the legislative time frame. Ms. Do is currently engaged in rehabilitation programming. Ms. Do has the parenting ability, and I conclude, the motivation to change, because of her love for her children. An objective observer, with knowledge of the relevant and pertinent facts, would not conclude that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time, not exceeding the maximum time limits. Ms. Do must remain free from substances if this is to occur, and she must participate in all services henceforth.

[32] At this stage, a permanent care and custody order does not satisfy the legislative requirements; nor is such an order in the best interests of Ka, Ke, and Me.

[33] **Conclusion**

[34] All three children will continue in the temporary care and custody of the agency. The provisions for supervised access and services outlined in the previous consent orders will continue. A review hearing will be set during my next chambers. Counsel are to contact scheduling immediately to arrange a 15 minute docket for this purpose.

Forgeron, J.