

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v. K.O.*, 2017 NSSC 76

Date: 2017-03-21

Docket: SFSNCFSA-099040

Registry: Sydney

Between:

The Minister of Community Services

Applicant

v.

KO, WO and GM

Respondents

Date: 2017-03-21

Docket: SFSNMCA-070763

Registry: Sydney

Between:

IM and GM

Applicant

v.

KO and WO

Respondents

Judge: The Honourable Justice Theresa Forgeron

Heard: January 30 and 31, February 1 and 2, and March 21, 2017 in
Sydney, Nova Scotia

Oral Decision: March 21, 2017

Written Decision: March 24, 2017

Counsel: Adam Neal for the Minister of Community Services
Carolyn MacAulay for the Respondent GM
Shannon Mason for the Respondent KO
Alan Stanwick for the Respondent WO

By the Court:

Introduction

[1] In December 2015, a child protection proceeding was initiated against KO and WO who are the parents of three children: J, K and W. The paternal grandmother, GM, was also added as a party because she had regularly assumed care of the children, especially during periods of parental instability.

[2] The Minister's application listed domestic violence, substance abuse and untreated mental health issues as the protection concerns surrounding the parents. The Minister found no protection concerns with the grandmother.

[3] Since they were apprehended, the children have remained in the care of their grandparents. When it became obvious that the parents were not successfully addressing the protection concerns, the grandparents applied for custody of the children, with a provision for supervised access.

[4] The Minister supports the application of the grandparents and will terminate her involvement once a *Maintenance and Custody Act* order issues. The mother also supports the application of the grandparents. The father does not. Although the father agrees that the grandparents should have primary care of the children, he seeks joint custody and unsupervised access.

[5] This matter was heard on the following dates in 2017: January 30 and 31; February 1 and 2; and March 21. The following people testified during the hearing: Constable Edward Newell; Constable Steven Campbell; protection workers Renee Wilson and Paul Mugford; Katelyn McNeil; LD; GM; IM; WO; and KO. I considered all relevant and admissible facts flowing from the testimony of these witnesses, as well as the able submissions of counsel.

Issues

[6] This decision will analyze the unresolved issues between the father and the grandparents, which are listed as follows:

- Are any protection concerns outstanding in respect of the father?
- Should an order of joint or sole custody issue in relation to the father?

- Should access between the father and children be supervised?

Analysis

[7] **Are any protection concerns outstanding in respect of the father?**

Position of the Minister, Grandparents and Mother

[8] The Minister, grandparents and mother state that the father exhibits serious and ongoing protection concerns involving violence, substance abuse and untreated mental health problems. They contend that these problems have not resolved despite the many services that were made available to the father. They state that these protection concerns create a substantial risk that the children will suffer physical harm if placed in the unsupervised care of the father.

Position of the Father

[9] The father denies ongoing protection concerns. He states that there is no evidence that he is violent, uses drugs or abuses alcohol, or that he has ongoing mental health issues which negatively impact upon his parenting ability.

[10] The father notes that most of the past violence was defensive in nature. The father states that if he acted violently, it was because he was trying to protect himself or the children from the violence which the mother initiated. Further, the father states that he has taken the necessary domestic violence courses and training. Violence is no longer a protection concern.

[11] The father also notes that he does not abuse drugs or alcohol. There is no evidence of addiction. Substance abuse is not a protection concern.

[12] Finally, the father states that he is no longer experiencing mental health difficulties. The father states that there was only one suicide attempt – that was in 2015. He further notes that the 2015 attempt was situationally based and was not indicative of long term mental health problems. The father argues that he learned to appreciate life because of his unsuccessful suicide attempt. The father said that he realizes that he has a purpose to fulfill. The father denies trying to commit suicide in 2016. The father reiterates that there are no protection concerns involving his mental health.

Law

[13] The Minister relies on s. 22 (2) (b) of the *Children and Family Services Act* to support a protection finding. This section provides that a child is in need of protective services where there is a substantial risk, that is apparent on the evidence, that a child will suffer physical harm inflicted or caused by a parent failing to supervise and protect a child adequately. The Minister need only prove that there is a real chance that future abuse will occur and not that future abuse will actually occur: **M.J.B. v. Family and Children’s Services of Kings County** 2008 NSCA 64 (C.A.).

[14] The Minister and mother also rely on past parenting history. Although “[t] here is no legal principle that history is destiny”, past parenting is relevant as it may signal “the expectation of risk”: **D.(S.A.) v. Nova Scotia (Minister of Community Services)** 2014 NSCA 77, para. 82. 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. L.M.** 2016 NSSC 80.

Decision

[15] I find that the father’s untreated mental health problems and lifestyle issues create serious protection risks for the three children.

[16] That the father’s mental health problems continue to pose protection risks is confirmed by my findings, which are noted as follows:

- The father attempted suicide in 2015 by jumping off the Seal Island Bridge. Thankfully, he was not successful; the father’s life does indeed have value. Upon impact, the father avoided the deadly currents by swimming to shore while fleeing from rescuers because he didn’t want to be taken “to the nuthouse” or to be declared “unfit”. Eventually, the father was apprehended and taken to the hospital. He stayed there for about six hours and was released. The father’s injuries included two cracked ribs and severe bruising over most of his body. Little to no mental health treatment was received while the father was at the hospital.
- The father wanted to commit suicide in 2016 by again jumping off the Seal Island Bridge. I accept the evidence of Katelyn McNeil where it conflicts with the evidence of the father. Ms. McNeil was one of the two people

present when the father planned to jump off the Seal Island Bridge a second time. Ms. McNeil testified under subpoena. She had no reason to lie as she is not involved with any of the parties. She has no interest in the outcome of this case. She was not evasive or strategic when testifying. Her recollection was clear and was in keeping with the testimony of the responding officer.

- The father's second suicide plan was fortunately thwarted by the quick thinking of Ms. McNeil and her boyfriend who discretely called police and physically restrained the father from jumping off the bridge. The responding officer arrested the father for a DUI offence and restrained him under the *Involuntary Psychiatric Treatment Act*. The father was released the next day. No mental health treatment was provided to the father.
- The father's initial contact with mental health services in 2016 was terminated because the father did not keep two appointments; he did not reschedule. Before this hearing, however, the father said that he met with a psychiatrist at the Crisis Intervention Unit on January 23, 27 and 30, 2017 for a total of 7.5 hours. The father said he was diagnosed with high anxiety and coping difficulties for which he was prescribed medication.
- No independent corroboration of the father's mental health treatment was provided and none could be obtained because the father refused to sign a release of information and refused to supply the worker with the name of his psychiatrist. I draw a negative inference about the father as a result of his failure. However, even if the father's evidence is true, 7.5 hours of treatment is an insufficient amount of time for the father to successfully resolve the many clinical issues confronting him, especially in the face of the father's denial of his 2016 plan to commit suicide.

[17] That the father's lifestyle issues continue to pose a protection concern is confirmed by the following findings of fact:

- The father's personal relationships tend to be dysfunctional and are punctuated with violence and substance abuse. The lengthy relationship between the father and mother was violent and destructive. Frequently, the children were present when their parents fought. The parents often physically assaulted each other. On occasion, the children were also physically harmed. In addition, the oldest child suffered emotional trauma from his exposure to violence.

- Despite the violence, the father wanted to maintain his relationship with the mother and in defiance of the no contact provisions of court orders. The father even followed the mother to the Yukon. The mother had moved to the Yukon to get away from the father. Their reunion was not peaceful; the father is facing charges stemming from his conduct in the Yukon.
- I accept the mother's evidence when it conflicts with the evidence of the father. The mother's evidence is more probable. The mother would not have moved to the Yukon if she wanted reconciliation. The father harassed the mother over several months in an attempt to win her back.
- After he returned to Nova Scotia, the father became friends with AN. The father's friendship with AN was not healthy. Ms. McNeil discussed the heated argument she observed on the night of the father's second suicide attempt. For his part, the father noted that AN was involved with drugs. Why the father entered a friendship with a person who abused drugs was not explained.
- The father's most recent relationship involved LD. Even though the father knew that the agency disapproved of his relationship with LD, the father refused to end the relationship. Not surprisingly, the relationship quickly soured and became physical, with each accusing the other of unsavoury conduct. The relationship ended in December 2016 with more police involvement and WO facing more criminal charges.
- Although the father did not use drugs, it is nevertheless evident that he abused alcohol. For example, the father was intoxicated in 2015 and 2016 when he attempted suicide. The father also drove his car while intoxicated. I do not accept the father's evidence that Ms. MacNeil drove his car on the night of the second suicide attempt. I believe Ms. MacNeil when she said that the father drove. Finally, the father abused alcohol on at least one of the nights when he and LD fought. These examples confirm that the father's abuse of alcohol has serious negative consequences.
- The father lacks insight into the serious protection risks associated with a chaotic and dysfunctional lifestyle involving domestic violence, misuse of alcohol, and on occasion, substance abuse by friends. The fact that the father

concluded a number of courses does not mean that the protection risks have resolved. They have not. If the father truly appreciated the protection risks, he would have effected permanent lifestyle changes. The father would not have pursued the mother, nor would he have been involved with either AN or LD. All of these relationships created serious protection risks.

[18] In summary, the father lacks insight and has not made necessary changes. Serious protection risks continue to arise because of the father's untreated mental health issues and because of the lifestyle adopted by the father. There is thus a substantial risk that the children will suffer physical harm caused by the father's failure to adequately supervise and protect them.

[19] **Should an order of joint or sole custody issue in relation to the father?**

Position of the Father

[20] The father seeks an order of joint custody because he is the father and he loves his children. The father wants to contribute to the children's health, education and welfare. He states that he will disregard his dislike of the grandmother so that the needs of the children can be met.

Position of the Grandmother

[21] The grandmother states that she and the father are unable to communicate in a healthy fashion.

Law

[22] All decisions impacting children must be based on their best interests: s. 18 of the *Maintenance and Custody Act*. Parents are presumed to be joint guardians of their children: s. 18(4) of the *Maintenance and Custody Act*. The joint custodial presumption is appropriately displaced when parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that the situation will change: **Roy v. Roy** [2006] O.J. No. 1872 (Ont. C.A.). This lack of effective communication, however, must be balanced against the realistic expectation that communication will improve once the litigation concludes. If there is a reasonable expectation that communication will improve despite the differences, then joint custody may be ordered: **Godfrey-Smith v. Godfrey-Smith** 1997, 165 N.S.R. (2d) 245 (S.C.).

Decision

[23] I find that a sole custody order, as between the grandparents and father, is in the best interests of the children for the following four reasons:

- The father has no ability to communicate in a healthy and reasonable manner with the grandparents. He currently lacks the necessary skills. The father is impulsive and reactive. The father has yet to learn how to problem solve in a healthy, responsible and mature fashion. The father's impulsivity and reactivity leads to poor impulse control, name calling and violence. This is the antithesis of what is required for joint custody to operate in the best interests of the children.
- Although the father loves his children, he has yet to make the necessary lifestyle changes that will enable him to assign priority to the children's needs. A custodial parent must always be capable of acting in the children's best interests before they can provide valuable contribution to the decision-making process.
- The father harbours much animosity towards the grandmother. He blames the grandmother for many of his problems. He is hurt and angry over some of the grandmother's comments. He called the grandmother derogatory and crude names. He does not respect the grandmother.
- There is little credible evidence to suggest that the father's current circumstances will change in the near future. There is no realistic expectation of positive change on the horizon.

[24] Joint custody is not possible because the father has a reactive and impulsive personality, does not always act in the children's best interests, and does not respect the grandmother. There is no realistic expectation of change.

[25] The grandparents, nonetheless, will be obligated to provide updates to the father as to the health, education and general welfare of the children. The communication will be transferred via email, but subject to the father providing his email address. The grandparents are to provide the updates on a monthly basis, except in the case of an emergency. In the event the father responds to the emails in an inappropriate or disrespectful manner, the obligation to provide information will terminate.

[26] **Should access between the father and children be supervised?**

Position of the Minister, Grandparents and Mother

[27] The Minister, grandparents and mother seek supervised access given the outstanding protection risks associated with the father's untreated mental health problems and lifestyle issues.

Position of the Father

[28] The father seeks unsupervised access. He denies ongoing protection concerns. He also notes that his access has been consistently positive as confirmed by agency access supervisors. The father feels that the constraints associated with supervised access negatively impact on his ability to parent his children.

Law

[29] In **C.M. v. C.S.**, 2013 NSSC 273, this court summarized the legal principles as distilled in **Young v. Young**, [1993] 4 S.C.R. 3 (S.C.C.); **Abdo v. Abdo**, (1993) 126 N.S.R. (2d) 1 (N.S.C.A.); and **Bellefontaine v. Slawter**, 2012 NSCA 48 (N.S.C.A.) as follows:

- The right of a child to know and be exposed to the influence of each parent is subordinate in principle to the child's best interests.
- The burden of proof lies with the party who alleges that access should be denied or restricted, although proof of harm need not be shown.
- The court must be slow to extinguish or restrict access, unless the evidence dictates that it is in the best interests of the child to do so.
- An order for supervised access is seldom seen as an indefinite or long term solution.

[30] Some of the circumstances which might result in supervised access were discussed by this court in **M. T. v. M. G.**, 2010 NSSC 89 at paras 18 and 19 which provide as follows:

[18] Supervised access is not a long term solution to access problems which often arise in high conflict cases. Supervised access is appropriate in specific situations, some of which include the following:

- a) Where there are substance abuse issues;
- b) Where the child requires protection from physical, sexual, or emotional abuse;
- c) Where there are clinical issues involving the access parent; or
- d) Where the child is being introduced or reintroduced into the life of a parent after a significant absence.

[19] Supervised access is inappropriate if its sole purpose is to provide comfort to the primary care parent. Access is for the benefit of the child and each application is to be determined on its own merits: **Miller v. McMaster**, 2005 N.S.S.C. 25 (S.C.).

[31] In **Neill v. Best**, (1995) 147 N.S.R. (2d) 54 (N.S.F.C.), Daley, J. noted that access should not encourage risk taking and experimentation with a child's emotional and physical needs at para 27 which provides as follows:

[27] The welfare of the child rule is paramount. Access is not a reward for parenting or for not having custody. It is an active, productive, positive relationship that requires security, knowledgeable care, communication and understanding. It requires two adults and a child supporting each other with meaningful and healthy growth toward responsible adulthood. It requires the access parent having a clear understanding of what is involved. Access law should not encourage risk taking and experimentation with the emotional and physical growth of an infant child. It should look for benefits to the child, not neutral or potentially negative relationships.

Decision

[32] I find that supervised access is in the best interests of the children because of the father's outstanding mental health issues and lifestyle choices which create protection risks. These protection risks have not been reduced or eliminated to the extent necessary to allow for unsupervised access. Until the father effects permanent lifestyle changes, the children will not be safe in his unsupervised care. The children's security and stability can only be assured if access is supervised in light of the circumstances of this case.

[33] Supervised access will take place through the YMCA supervised access program. Given the current hostilities, this is the only viable option.

Conclusion

[34] The grandparents are granted sole custody of the three children, as between them and the father. They will provide monthly updates to the father about the children.

[35] Further, and although the father dearly loves his children, supervised access is the only order that currently meets their best interests. It is hoped that with the help of mental health professionals, the father will receive the treatment and counseling that he needs to effect permanent and meaningful lifestyle changes. Until that occurs, all access must be supervised.

[36] Mr. Neal is to draft and circulate the order terminating the child protection proceedings. Ms. MacAulay is to draft and circulate the *Maintenance and Custody Act* order.

Forgeron, J.