

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v. H.U.*, 2018 NSSC 99

Date: 2018-04-17

Docket: SFHCFSA 107188

Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

H.U.

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Heard:

Trial and Oral Decision - April 17, 2018

Written Decision:

April 25, 2018

Counsel:

Peter C. McVey, counsel for the Minister of Community Services
Krista Forbes, counsel for H.U.

By the Court:

[1] The Minister of Community Services wants permanent care and custody of an infant boy who is now 6 months old.

[2] If I make this order, then the Minister will in effect become this little boy's parent and his mom will stop being his parent. I'm not required to make an order doing that today. The time limits under the law say that I have until January 29th of next year. Those time limits are not a waiting period though, the Minister has the right and, some say the Minister has the duty, to seek a permanent care order where the Minister thinks it can satisfy the burden on it under the *Children and Family Services Act: Nova Scotia (Minister of Community Services) v. Z. (S.) et al.*, (1999), 179 N.S.R. (2d) 240 (SC), upheld at 1999 NSCA 155.

[3] This little boy was taken into care when he was born.

[4] At the completion of the interim hearing on October 31, 2017, I was told that his mother knew the Minister was involved, and she understood why the Minister was involved. She didn't object, at that time, to what the Minister was asking me to order and she didn't have an alternative plan for the baby.

[5] About 8 weeks after the baby was born, the Minister gave notice that she was looking to have the baby in her permanent care. When we were all next in court on November 18, 2017, Ms. Forbes, who represents the baby's mother, told me that her client was unable to give her instructions. At that point, I granted the protection Order that the Minister of Community Services wanted.

[6] We were in court again on January 17, 2018. At that point, Ms. Forbes said that her client had, in the past, had the ability to understand what was going on, but as of late her client had chosen not to be in communication and on that day when we were in court, the mother was saying that she wasn't in a position to make a decision about things.

[7] A week or so later, on January 29, 2018 when we were here for the disposition hearing, Ms. Forbes said that her client wasn't able to provide instructions or to articulate whether she understood what was going on. Ms. Forbes told me that she was concerned about her client's level of understanding.

[8] Today things seemed to have changed, because what Ms. Forbes tells me is that she's had several conversations with her client and that she doesn't have instructions. Not having instructions means that a lawyer has not been told by their client which of different alternatives the lawyer should pursue, which option the client is interested in. Ms. Forbes tells me that her client has been made aware of what the Minister wants me to order and what she'd need to do if she opposed that order, and Ms. Forbes continues to have no instructions to oppose the application or to cross-examine the Minister's only witness.

[9] We've talked a little bit here this morning about the *Adult Capacity and Decision-making Act*. S.N.S. 2017, c. 4. That's a piece of law which allows the courts to appoint someone to

represent a person who is not competent to make decisions. The *Act* doesn't specifically address a situation like this, where the adult who might have a representative appointed for them is required to make a decision about a child. What the *Act* really talks about is the adult making decisions about themselves: whether to accept medical treatment for example, or how to spend their money.

[10] The *Act* doesn't specifically include decisions about permanent care or child welfare as an area where an incompetent person's representative might make a decision. Quite specifically the *Act* limits a representative in some ways. The representative cannot consent to a child's adoption, or guardianship of a child, or change or consent to a change in the parenting arrangements for a child unless a judge makes an order saying the representative can specifically do that: clauses 34(2)(b) and (c). So, it is possible for a representative to be appointed for this baby's mother, but no application has been made to appoint a representative for her. I repeat what Ms. Forbes has said to me this morning that the child's mother has been made aware of what the Minister is asking me to order and what she'd need to do to oppose it.

[11] Parents can actively participate in these cases, sometimes they tell me "yes, I agree with what the Minister wants". Sometimes they tell me they disagree, and sometimes parents opt to do nothing: they neither agree nor disagree. And when a parent does that, I'm required to make the decision whether to grant what the Minister wants or to dismiss the Minister's claim. That's my job as a judge.

[12] Here, this baby's mother is neither challenging the Minister's request, nor agreeing with it, so I need to make the decision. I must decide whether the Minister has shown that the circumstances that justified the earlier temporary care and custody order are unlikely to change within a reasonably foreseeable period of time, and here there is an actual time limit on that reasonable foreseeable period of time. That time limit is January 29, 2019.

[13] Now when I made the protection finding in December 2017, I found this little baby was in need of protective services under clause 22(2)(kb) of the *Children and Family Services Act*, S.N.S. 1990, c. 5. The baby was in the agency's care and the mother was unable or unwilling to resume his care and custody.

[14] Today the only plan I have for this little boy is the Minister's plan for him. His mother hasn't offered me a plan and that speaks to her ability and willingness to resume the baby's care and custody.

[15] When I consider the option of a child being in the Minister's permanent care and custody, I also need to consider whether there is some prospect that someone else, some other member of the baby's family will have a plan for him.

[16] Here there isn't any prospect of any other plan. The baby's father has been very supportive. He attended court twice and he's attended access visits with the baby's mother. When he was in court he clearly told me he has other children and he has no ability to assume responsibility for this baby.

[17] The child's mother has brought her mother to court with her and there is no possible placement there. The child's grandmother hasn't offered a plan for the baby.

[18] No one is obliged to offer a plan, but the Minister is obliged to consider any plans that come forward. None have come forward. As I say, both the baby's father and the baby's grandmother have attended court and they've attended access as well to support the mother and she's very fortunate to have their support. These proceedings are difficult ones, and it is always helpful to have someone there to be with you and to provide you with some understanding so that you're not going through this alone.

[19] The mother's lack of plan is not the only consideration I have in determining if it's unlikely that circumstances will change before January 29, 2019. I also consider the quality of her contact with the baby.

[20] From this baby's birth until the end of January 2018 when the child was 4 months old, he had one visit with his mother and that was in the hospital. His first visit outside of the hospital was on January 30, 2018. His second visit was on March 9, 2018. I've learned that there are 3 more recent weekly visits between the mother and her baby.

[21] I was given detailed notes about these visits today and what they tell me is that the mother needs continuous direction during the visits. She needs to be reminded to support the baby's head and to keep her hands and her eyes on him so that he's safe, particularly if he makes sudden moves. The baby's mother, at this point, lacks awareness of his development: when he'll get teeth, when he'll stand, when his neck will be able to support the weight of his head, when he'll be able to digest things other than liquids, when he'll learn speech.

[22] The mother is currently unable to assume care of the baby and at this point she needs total support in terms of caring for him during these visits. That need for total support hasn't diminished over the 5 visits that have happened since the end of January.

[23] The mother certainly has become calmer when dealing with the baby when he cries. As the baby's father says, she's "less shy" about dealing with the baby, but she remains unable to manage any parenting task, feeding him or changing him or burping him, without direction and without assistance. So, parenting skills have not advanced far in two and a half months.

[24] If this is an average child, his needs will continue to develop over the next ten months, teething, starting to eat solid foods, developing sounds and speech, and if his mother's learning continues at this pace she will fall farther and farther behind him.

[25] The baby attends a developmental daycare centre two days each week and he's completed intake screening for an early intervention program and he's being assessed for a possible visual abnormality. What these things tell me is that this baby may have greater needs than the average child, and what that means is that the mother may be at greater disadvantage in being able to meet his needs than she would be at if he was an average child with average needs.

[26] I do note that the baby appears to have a genetic disorder, but this seems to have no immediate health risk or identifiable challenge that's expressed at this point.

[27] I don't have evidence that the mother has accessed any services on her own or sought services from the Minister. She hasn't pursued, to my knowledge, mental health services which are the primary need that the Minister has identified. This need was identified before the baby was born and it's been identified by different individuals. The Minister has enabled the mother to attend at one appointment with Dr. Tulipan at the Reproductive Mental Health Clinic at the IWK, but this does not seem to have advanced any treatment for the mother.

[28] This is a difficult decision for me because I've heard only from the Minister. Quite often I hear from the Minister and from the parent, so I can weigh information after hearing both sides.

[29] Like the mother, I wish the access visit recordings could tell me her thoughts during access. That might give me some insight, but I don't know her thoughts and I must make a decision based on what I know from the material that's been given to me, and in the baby's best interests.

[30] I do conclude that the circumstances which formed the basis for the temporary care and custody order are unlikely to change before January 29, 2019 and I do order that the baby be placed in the Minister's permanent care.

[31] I'm going to ask Mr. McVey to prepare an order and to have that reviewed by Ms. Forbes. Once that's reviewed it can be forwarded to me.

[32] I know that in these circumstances the Minister sometimes arranges final visits between parents and children and that may be the case here depending on what the baby's mother wishes to have happen.

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

Halifax, Nova Scotia