SFH No. C009074

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Nova Scotia (Community Services) v. S.E.L.*, 2002 NSSF 16

BETWEEN:

MINISTER OF COMMUNITY SERVICES

APPLICANT

- and -

S.E.L. and L.M.L.

RESPONDENTS

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September 11, 2008.

DECISION
(Cite as M.C.S. v. S.L. & L.L., 2002 NSSF 16)

HEARD: **Before the Honourable Associate Chief Justice Robert F. Ferguson, at Halifax, Nova Scotia on January 15 & 17, 2002**

DECISION: **March 1, 2002 (Orally)**

WRITTEN RELEASE: March 8, 2002

COUNSEL: **James Leiper, counsel for the Applicant**
Colin Campbell, counsel for the Respondent, S.E.L.
Claire McNeil, counsel for the Respondent, L.M.L.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT S. 94(1) OF THE ***CHILDREN AND FAMILY SERVICES ACT***, S.N.S. 1990, CHAPTER 5 APPLIES

AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION. SECTION 94(1) PROVIDES:

> "**94(1)** 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."

FERGUSON, A.C.J. (Orally)

J.S.L., born on [in 2000], the child of S.E.L. and L.M.L. (Respondents) was taken into care by the Minister of Community Services, virtually, at birth. The Minister is seeking an order the child be placed in the permanent care and custody with a view to adoption. Both parents are contesting this application. L.M.L. is requesting the child be returned to his care and S.E.L**.** supports this request.

Court Hearings:

The following is a chronicle of some - not all - of the court appearances in this application prior to the ultimate trial on January 17, 2002:

- ***December 1, 2000: Initial 5-Day Hearing***

S.E.L. appeared with counsel. L.M.L. appeared without counsel but indicated he was in the process of retaining a lawyer. Also present, with counsel, were W.F.G. and K.A.G., a couple with whom the parents wished to place J.S.L. Their counsel notified the court they would be seeking party status in the application. An initial finding was made that the child was in need of protective services;

- ***December 14, 2000: 30-Day Hearing***

The Respondents, now both with their counsel, appeared and informed the court they were supporting the G.'s application for standing which, if successful, would lead to their request the child be placed in their care;

- ***January 19, 2002: Pre-Trial Settlement Conference***

A pre-trial settlement conference was attended by the Applicant and the Respondents and the G.s, all of who were represented by counsel;

- ***February 6, 2001: Pre-Trial Prior to Protection Hearing***

The court declined the application of W.F.G. and K.A.G. to be added as parties to the application, ruling that such a request was premature at that stage of the proceedings;

- ***February 21 and May 2, 2001: Pre-Trial Conferences***
  These were pre-trial conferences in advance of the protection hearing;

- ***May 15, 2001: Protection Hearing***
  At this hearing, L.M.L. and S.E.L. both with counsel, agreed to a finding that J.S.L. was a child in need of protective services. An order was issued which stated, in part:

> **IT IS HEREBY DETERMINED** that the female child, J.S.L., born [in 2000], is in need of protective services pursuant to the **Children and Family Services Act**, **s. 22(2), paragraph (k)**, reserving to the Applicant, the Minister of Community Services, the right to call evidence with respect to the allegations in relation to **s. 22(2), paragraphs (b), (g) and (ja)** of the **Children and Family Services Act**, and reserving to the Respondent, S.E.L., and the Respondent, L.M.L., the right to cross-examine on the affidavit evidence and all other documents on file herein.
>
> **IT IS ORDERED** that pursuant to **s. 39(4)(e)** of the **Children and Family Services Act**, the child, J.S.L., born [in 2000], shall remain in the care and custody of the Applicant, the Minister of Community Services.
>
> **IT IS FURTHER ORDERED** that pursuant to **s. 39(4)(f)** of the **Children and Family Services Act** the Respondent, S.E.L., and the Respondent, L.M.L., shall have supervised access with the child, J.S.L., as is arranged from time to time by an Agent of the Minister of Community Services.
>
> **IT IS FURTHER ORDERED** that pursuant to **s. 39(4)(g)** of the **Children and Family Services Act**, K.A.G. and W.F.G. shall be and are hereby referred to Martin Whitzman for the preparation of a psycho/social history, a parental assessment including an examination and assessment of parenting skills and techniques, and a home study and assessment. K.A.G. and W.F.G. shall attend as and when directed for the purposes of having the examinations and assessments conducted and shall co-operate and comply with all reasonable requests, inquiries, directions and recommendations of Martin Whitzman. Martin Whitzman shall file with this Honourable Court a Report with respect to the examinations and assessment on or before **July 6, 2001**. The costs of the examinations and assessments and the Report shall form part of and be paid out of the costs of maintenance of a child in care.
>
> **IT IS FURTHER ORDERED** that the Applicant, the Minister of Community Services, may provide such other supportive and rehabilitative services to the child, J.S.L., as are determined to be in the child's best interests by the Applicant, the Minister of Community Services. The costs of such supportive or rehabilitative services shall form part of and be paid out of the costs of maintenance of a child in care.
>
> **IT IS FURTHER ORDERED** that the Applicant, the Minister of Community Services, may provide such other supportive and rehabilitative services to the Respondent, S.E.L.,

as are agreed to by the Respondent, S.E.L., and the Applicant, the Minister of Community Services. The costs of such supportive or rehabilitative services shall form part of and be paid out of the costs of maintenance of a child in care.

IT IS FURTHER ORDERED that the Applicant, the Minister of Community Services, may provide such other supportive or rehabilitative services to the Respondent, L.M.L., as are agreed to by the Respondent, L.M.L., and the Applicant, the Minister of Community Services. The costs of such supportive and rehabilitative services shall form part of and be paid out of the costs of maintenance of a child in care.

- ***July 6, 2001: Pre-Trial Prior to Disposition Hearing***

As stipulated in the previous order, the court reconvened. The assessment pertaining to the G.s had been received by the court and the parties. An adjournment was granted to allow the parties more time to consider the assessment. The report concluded it would not be appropriate to consider the G.s as a prospective placement for J.S.L.;

- ***July 20, 2001***: ***Pre-Trial Prior to Disposition Hearing***

The respective counsel for L.M.L. and S.E.L. appeared, however, the L.s were absent. A request for an adjournment by S.E.L.'s counsel was granted. The court reminded counsel of the time constraints with regard to this application and directed counsel for the Respondents to notify counsel for the Minister of their clients' positions prior to returning to court;

- ***August 10, 2001: 30-Day Interim Hearing***

The Respondents attended with counsel and an order of temporary and custody was issued with the consent of the Respondents and it stated, in part:

AND UPON THE COURT having rendered its decision respecting disposition, including the statement of the plan for the child's care and the reasons for the decision on the 10th day of August, 2001;

NOW UPON MOTION:

IT IS ORDERED that pursuant to **s. 42(1)(d)** of the **Children and Family Services Act**, the child, J.S.L., born [in 2000], shall be placed in the temporary care and custody of the Applicant, the Minister of Community Services.

IT IS FURTHER ORDERED that pursuant to **s. 44(1)(a)** of the **Children and Family Services Act**, the Respondent, S.E.L., and the Respondent, L.M.L., shall have supervised access with the child, J.S.L., as is arranged from time to time by an Agent of the Minister of Community Services.

> **IT IS FURTHER ORDERED** that pursuant to **s. 46** of the **Children and Family Services Act**, a Review Hearing shall be held on the 22nd day of August, 2001, at 11:15 o'clock in the forenoon or sooner upon the Application of any party to this proceeding upon notice to the other parties.

- ***August 22, 2001: Review Hearing***

At this time, the Minister requested dates to be set for trial. Counsel for L.M.L. indicated that she would be making a motion to be removed as counsel. Counsel for S.E.L. requested an adjournment to seek further instructions from his client;

- ***September 6, 2001: Pre-Trial Conference***

L.M.L. and S.E.L. were aware the Minister was seeking an order of placing J.S.L. in their permanent care with a view of adoption which, in effect, would cease any involvement they had with this child. At this hearing, S.E.L., with counsel, indicated her agreement with the plan of the agency. L.M.L.'s counsel was granted her request to withdraw. L.M.L., then representing himself, stated he was not in agreement with the Minister's plan and would be seeking new counsel. The court reminded L.M.L. of the time constraints of this application and encouraged him to secure new counsel without delay;

- ***October 12, 2001: Pre-Trial Conference***

L.M.L. had not secured counsel and S.E.L. informed the court that she was no longer in agreement with the Minister's plan and she would be supporting her husband's position;

- ***November 1, November 6 and November 21, 2001***

The Applicant and Respondents, all now with their counsel - by that I mean L.M.L. had retained new counsel - attended hearings on these dates. During these hearings, the court was made aware of L.M.L.' continuing objection to the agency's plan and S.E.L.' support for him in this regard. At this stage, L.M.L. had not provided the Applicant, nor the court, with the details of any alternative plan. There was an indication that L.M.L. was requesting, if an order of permanent care was made, that it would contain a provision for access by him and S.E.L.;

- ***December 18, 2001: Pre-Trial Conference***

On this occasion, L.M.L. advised the court he was now putting forward a plan of care which would be supported by S.E.L.

- ***January 15 & 17, 2002: Trial***

Andrea Boyce, a social worker employed by the Applicant, K.A.G. and both Respondents testified.

All decisions emanating from the **Children and Family Services Act**, particularly ones made at the disposition stage, require a consideration of the whole of the evidence and the applicability of the provisions of the **Act**.

Without restricting the foregoing, I have considered, in addition to the preamble, the following sections of the *Act:*

> **Purpose**
> 2 (1) The purpose of this **Act** is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> **Paramount consideration**
> (2) In all proceedings and matters pursuant to this **Act**, the paramount consideration is the best interests of the child.
>
> **Best interests of child**
> 3 (2) Where a person is directed pursuant to this **Act**, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
> (b) the child's relationships with relatives;
> (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
> (d) the bonding that exists between the child and the child's parent or guardian;
> (e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
> (f) the child's physical, mental and emotional level of development;
> (g) the child's cultural, racial and linguistic heritage;
> (h) the religious faith, if any, in which the child is being raised;
> (i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;
> (j) the child's views and wishes, if they can be reasonably ascertained;
> (k) the effect on the child of delay in the disposition of the case;
> (l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
> (m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

(n) any other relevant circumstances.

Disposition order

42 (1) At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:

(a) dismiss the matter;

(b) the child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of the agency, for a specified period, in accordance with Section 43;

(c) the child shall remain in or be placed in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency, for a specified period, in accordance with Section 43;

(d) the child shall be placed in the temporary care and custody of the agency for a specified period, in accordance with Sections 44 and 45;

(e) the child shall be placed in the temporary care and custody of the agency pursuant to clause (d) for a specified period and then be returned to a parent or guardian or other person pursuant to clauses (b) or (c) for a specified period, in accordance with Sections 43 to 45;

(f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.

Restriction on removal of child

42 (2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,

(a) have been attempted and have failed;

(b) have been refused by the parent or guardian; or

(c) would be inadequate to protect the child.

Placement considerations

(3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.

Limitation on clause (1)(f)

(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.

The burden of proof in this proceeding is that of the Applicant. It is a civil burden of proof, but also a burden that must have regard for the seriousness of the consequences of the required decision [**Children's Aid Society of Halifax v. Lake**, (1981) 45 N.S.R. (2d), 361 (N.S.C.A.) and **J.L. v. Children's Aid Society of Halifax**, (1985) 44 R.F.L. (2d) 437 (N.S.C.A.)]. It is accepted it would be difficult to render a more serious decision than one in which a child may be separated, temporarily or permanently, from a parent.

L.M.L. and S.E.L. have an extensive history with the Minister of Community Services, going back to the spring of 1996 when the agency became involved with five of S.E.L.'s children. These children and a younger sibling were later found to be in need of protection on July 3,1998. Judge White, in coming to a conclusion, stated at page 13 of his decision:

> It is not clear from the evidence that the respondents have the requisite capabilities to parent. Also, it is apparent that they have not, to this date, responded positively to those attempts to assist them in gaining the consistent basics of parenting, nor have they, of their own initiative, taken all of the positive steps necessary to attain such a grounding. It would appear that unless the respondents are prepared to expend the necessary efforts to acquire the basic parental skills, they may never care for their children. That is their decision and their responsibility. Society must, needs be, and is, prepared to render all of the assistance that resources may be able to provide, but the benefit of such support can only find its genesis in their genuine desire to assume the full responsibility of custodial parents and all of the baggage that comes with it.
>
> The onus is now upon the respondents to take a pro-active and remedial approach to the resolution of their personal and parenting deficits. Therefore, an order for protective services shall issue forthwith. Having arrived at this conclusion, it would, however, be appropriate for the respondents to have access with the children provided that it is supervised and further provided that there are no disruptive or aggressive incidents during such access.

Eight months later, on March 18, 1999, these children were made permanent wards of the Minister. In coming to this conclusion, Judge White stated at page 9 of his decision, in part:

> This is a family which would require high maintenance in terms of services. Willing acceptance of, and compliance with the dictates of, such services is an absolute necessity. On that point, the court must be satisfied on the balance of probabilities that the delivery of, and the acceptance of, the required services would result in the benefits and stability necessary to reasonably provide for the needs and special attentions of each of the children. Anything less would be a disservice to the children who have the right to

> expect that a court will choose the course which will best provide for the healthy growth, development and education of the children >thereby equipping them to face the problems and realities of life as mature adults.
>
> As noted in my decision on the protection hearing, society must provide the respondents with all of the assistance that resources may provide, but the benefit of such support can only find its genesis in their genuine desire to assume the full responsibility of custodial parents and all of the baggage that comes with it.

[In 1999], L.M.L. and S.E.L. became parents once more. This child was taken into care at birth. The child was found to be in need of protective services on November 9, 1999. In coming to this conclusion, Justice Campbell stated at page 6 of his decision:

> The protection application is brought under sections 22(2) and particularly provisions (b), (g), (j)(a) and (k). Each of these sections, as counsel is well aware, deals with risk of harm of various types that the Agency fears would be presented to this child if left in the care of the Respondents. Subsection (k) does not so much deal directly with risk as it deals with the fact that the child is in the care of the Agency and it speaks of a parent's inability or refusal to resume the child's care. So, of course, the question of the need for protective services comes down to the difficult task of predicting whether that inability to care continues to exist as is outlined in subsection (k) or whether the risk of emotional or physical harm is evidence. Because of the fact that the child has not been in the actual unsupervised care at any time of the parties, there could not be any evident of actual harm of the types anticipated but, of course, the statute does not require the existence of such actual harm. The risk of same is sufficient for the Court to make the finding. Risk, in a case like this, will be assessed almost exclusively by reference to past history.
>
> The fact that gives the Court the greatest concerns is the difference between the stress and the weight of the task associated with one child versus a household that, at one point consisted of five children and then six after the birth of a sixth child who was apprehended as well at birth. There could be no doubt that the task is less onerous with one child. That, in itself would have caused the Court to give serious attention to testing the arrangement when that particular new circumstance differentiates the situation from the very past history from which the Court is asked to assess risk. Having considered that seriously and having heard the evidence of the professional witnesses about that point and having heard from counsel, conclude that, in this particular case, the history has simply been so extensive, both in terms of time (eleven years) and so significant in terms of the amount of neglect and considering the extent to which the Respondents are unwilling to agree that the neglect had occurred, that the baby is in need of protective services. In fact, the interim or continued disposition of the matter requires an order for temporary care and custody to the Minister of Community Services because to order something less intrusive would subject the child to the type of substantial risk that is not permissible under the ***Act***.

Approximately one year later, July 7, 2000, an order issued placing this child in the permanent care and custody of the Minister. In coming to this decision, Justice Campbell stated at page 10 of his decision:

> I have reviewed the written plan of care filed in accordance with section 41(3) of the Act. That plan seeks an order for permanent care to the agency after which the agency would intend to place the child for adoption without parental access, except transitional access. My review of the evidence above constitutes a statement of the evidence as required by section 41(5)(b)(i) and outlines my reasons as required by paragraph (b)(ii) of that subsection why the child cannot be adequately protected in the care of the parents. In very summary form, the reasons relate to the uncorrectable lack of parenting capacity and inability to gain from further services.
>
> I have considered my duty under sections 42(2) and (3) of the Act and have concluded that less intrusive alternatives have been attempted and failed and would be inadequate to protect the child. There is no plan before me with respect to the placement with a relative, neighbour or other member of the community or extended family and I have therefore concluded that such a placement would not be impossible (sic). As was stated in the case of *Children's Aid Society of Halifax versus M.A.* (1986) (76 N.S.R.) (2d) (18) (F.C.P.) at page 21:
>
> > Love, devotion and good intentions are not the sole ingredients to sound parenting. They are important elements, probably even essential, and without them very poor results can occur in a child's development into adulthood. What has to be coupled with the emotional connection a parent has for a child is the ability to carry out the difficult job of parenting.
>
> I am completely satisfied that the respondents have that love, devotion and good intentions regarding their child. However, I must regrettably conclude that they are unable to carry out the task.

It is acknowledged that much of the evidence before me for consideration came forward by virtue of section 96 of the **Children and Family Services Act** which states:

> **Admissible evidence**
> **96 (1)** At a proceeding pursuant to this Act other than Sections 68 to 87, the court may, subject to subsection (2) of Section 40, admit as evidence
> (a) evidence from proceedings, pursuant to this Act or any other similar legislation, respecting the child that is the subject of the hearing, or respecting another child that was in the care or custody of a parent or guardian of the child that is the subject of the hearing.

It is further acknowledged that this **Act** and the supporting law requires that I consider this child's (J.S.L.) situation as of the date of the hearing. It is to be noted that I

have come to a decision in this matter on the basis of all the evidence that has been placed before me at this hearing.

Section 42 of this **Act**, as earlier mentioned, provides me with six alternatives at this stage ranging from a dismissal of the application and the return of the child to his/her parent to the placement of the child in the permanent care and control of an agency with no provision as to access.

The Minister submits that the evidence presented demonstrates that J.S.L., since her apprehension or taking into care, and continuing to this day, continues to be a child in need of protective services; that such services can only be provided by requiring the child to remain in their care and control and that these existing circumstances are unlikely to change within a reasonably foreseeable time. They request an order for her care without provision for access as they plan to place this child with a family for adoption, a family in which one of her (J.S.L.) siblings reside.

L.M.L. submits it would be appropriate to return the child to him. In the alternative, if an order for permanent care, it should provide for him and S.E.L**.** to have access to J.S.L. L.M.L. states the evidence that relates to inability to provide for children relates primarily to S.E.L. and not to him; that the evidence presented to previous courts and to me does not provide any information as to his inability to parent. Further, that the agency did not provide him, since the taking of J.S.L. into care, with any help or services that could have assisted him in parenting his child.

While it is true, on past occasions when children have been placed permanently away from the L.s, S.E.L**.** was looked upon as the primary care giver in the L. household. It is also true that those who testified in past hearings and Judges and Justices who rendered decisions spoke of and considered the L.s as a family unit. Further, on a review of L.M.L. and S.E.L.s testimony, it is difficult not to continue to consider L.M.L.s plan as being essentially a family plan. The evidence clearly establishes that he and S.E.L. intend to remain as a couple and to share the same residence. In this regard, one must consider the comments of Dr. Carter in her Assessment Report dated October 5, 1999, where she stated, at page 10:

> L.M.L. is clearly a backup secondary parent. He helps out but does not have the capacity to manage a number of tasks simultaneously. His capacity to provide infant care on a regular basis, over a period of time, it unknown, but what is known, is that he is not the stronger or dominant partner is this relationship, and he will take his lead from S.E.L. in most matters.

L.M.L**.** has been unable to put a realistic plan before this court. What he has done is voice his displeasure, which is understandable, with, once again, having his children removed from his care and, further, on this occasion, having been prevented, in the case of the G.s, from placing his child in what he considered to be an appropriate setting. I acknowledge, as have the other judges who have had to intrude on the L.s and their lives, their love and good intentions towards J.S.L. and, indeed, their other children. However, I conclude J.S.L. is, and remains, a child in need of protective services; that such services can only be provided by her remaining in care of the Minister and, further, that the circumstances justifying this conclusion are unlikely to change within a reasonably foreseeable time.

I order that J.S.L. be placed in the permanent care and custody of the Minister.

L.M.L. has requested access in the event of an order for permanent care. Section 47(2) of the **Act** is the section one must direct oneself to when that request is made. Section 47(2) states:

> **Order for access**
> **47(2)** Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
> (a) permanent placement in a family setting has not been planned or is not possible and the persons access will not impair the child's future opportunities for such placement;
>
> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.

I find I am not in a position to order such access. I believe Justice Campbell's conclusion on a similar request in his decision of July 7, 2000, is equally applicable in this instance, and I quote from page 11 of that decision:

> The children will be placed in the permanent care and custody of the agency. Regarding access, section 47(2) of the Act directs that the court shall not make an order for access except in certain specified situations none of which apply to this case in my opinion. The agency intends to seek an adoptive placement of the child at the earliest possible date. Parental access could impair that plan. Accordingly, access between the respondents and

the child shall be transitional and at the discretion of the agency. Beyond that form of access, there shall be no access to the respondents.

J.