

IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: [MCS v. TLS and TGM, 2004 NSSF 07]

Date: 20040121

Docket: SFH CFSA 014779

Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

T.L.S. and T.G.M.

Respondents

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September 29, 2008.

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."

Judge: The Honourable Justice R. James Williams

Heard: July 3, 4, 7, 9, 11 and September 23, 2003
in Halifax, Nova Scotia

Oral Decision

Rendered: October 23, 2003

Written Decision: January 27, 2004

Counsel: Cindy Cormier, for the Applicant
Brian Newton, for the Respondent, T.L.S.
Linda Tippett-Leary, for the Respondent, T.G.M.

By the Court:

[1] This is a proceeding pursuant to the Children and Family Services Act. It concerns two children: H.M., born [in 2000], and H.A.[M.], born [in 2002], and their parents, T.L.S. and T.G.M..

A. THE LEGAL PROCEEDING

[2] The legal proceeding was commenced by the Department of Community Services with the filing of a Protection Application and Notice of Hearing dated April 9, 2002. At the time H.M. was about 19 2 months old and H.A.M.. was 2 2 months old. Both parents have been ably represented by counsel throughout.

[3] A series of court appearances followed the Application that was initiated by the Department of Community Services. Those appearances included the following:

1. April 11, 2002

By consent the children were placed in the temporary care of the Agency.

2. April 22, 2002

A series of Orders of Production were granted by consent.

3. May 13, 2002

The Temporary Custody Order in favour of the Agency was (by consent) continued. T.G.M. agreed to make a self referral for drug assessment. It was agreed that a Parental Capacity Assessment would be ordered.

4. June 21, 2002

It was agreed and admitted that the children were in need of protection pursuant to Section 22 (2) (g) of the Children and Family Services Act. Section 22 (2) (g) reads and provides that:

"a child is in need of protective services where there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm."

The order was not taken out on June 21, 2002. It was agreed that the Protection Order would be granted formally on July 3, 2002 so as to maximize the time periods available under the Legislation, (the Children and Family Services Act.)

5. July 3, 2002

The Protection Order was filed and granted on the agreed terms. The Order expressly reserved the Agencies right to lead evidence concerning the allegations that the children were in need of protective services pursuant to Sections 22 (2) (a), (b), and (k) (contained in the Protection Application.) Services that were continued or put in place following this appearance included supervised access, and the parental capacity assessment (which was in progress).

6. September 10, 2002

A pre-trial prior to disposition took place. The terms of the Disposition Order were agreed to and the matter adjourned to September 30, 2002 for the first Disposition Order to be granted, an order continuing the temporary care arrangement with the Agency. The adjournment to September 30, 2002 was again taken to maximize the time periods under the Children and Family Services Act. The parental capacity assessment had been completed on September 9th, the day prior to the September 10th appearance.

7. September 30, 2002

The Disposition Order was granted, as had been agreed.

8. October 18, 2002

The Temporary Care Order was renewed by consent. The matter was adjourned to January 10, 2003 for review

9. January 10, 2003

The disposition review was held. T.G.M. had completed a drug dependency assessment. The Temporary Care Order was continued. The Agency was undertaking to review its agency plan.

10. April 1, 2003

The disposition review took place. The Agency had filed the revised agency plan (dated March 7, 2003) prior to this date. It stated that the Agency sought an Order of Permanent and Custody. This was opposed by both parents. All parties consented to a renewal of the Temporary Care and Custody Order. Trial dates of July 3, 4, 7, 9 & 11, 2003 were set. Directions were given with respect to trial preparation and filings. A pre-trial was set for May 13, 2003.

11. May 13, 2003

The Temporary Care Order was renewed at a pre-trial.

12. June 23, 2003

A further pretrial was held. A series of issues pertaining to the trial were dealt with. The Temporary Care Order was renewed.

13. The trial proceeded on July 3, 4, 7, 9 & 11, 2003. Evidence was called from:

Dr. Alvin McCrae
Constable Charles Bruce
Constable Greg Mason
T.A.M.
Deborah Garland
Constable Blair Hickey
Pat Dougan
C.C.
P.M.
S.M.
M.L.O.
N.R.
S.A.D.
Jody Hann
A.G.
Dr. Riding
Dr. Gordon
Dr. Morrison
Dr. Hawkins
Dr. Byrne
A.J.
R.M.
T.M.
E.M.

Some fifty two exhibits were tendered. The trial was not completed. The Temporary Care Order was renewed. The matter was adjourned to September 23, 2003 for completion.

14. September 23, 2003

On this date T.L.S. and T.G.M. testified. Counsel were directed to file written submissions. All counsel did so in a timely fashion. The matter was adjourned to September 30, 2003 for an oral decision. A finding was made (on September 23, 2003) that it was in the best interests of the children to extend the time periods

under the Children and Family Services Act. This was consented to by all counsel. Under the circumstances it was perhaps fortunate that this was done. The September 30, 2003 date was cancelled when Court and indeed the entire city was shut down as a result of Hurricane Juan. The matter was rescheduled to October 23, 2003.

B. ISSUES: APART FROM THE INJURIES

[4] I have reviewed the evidence and the exhibits filed. H.A.M. and H.M. were taken into care by the Department of Community Services on April 4, 2002 when authorities learned that H.A.M. had suffered a number of serious injuries. A number of issues apart from these injuries were addressed at trial. They included:

1. H.M.'s apparent developmental delay. The evidence indicates that H.M. prospered in foster care, making developmental gains (from an apparent delay) quicker than might have been expected. The evidence suggests but is not conclusive that neglect in the M./S. home may have played a role in this delay. The evidence does not raise these concerns to a level, that, in my view, that would justify permanent removal of H.M. from the home. Were this the only concern, it is evident that the children would be returned to the home and family supports placed there.
2. Alcohol or substance abuse by T.L.S.. T.L.S. appears to be a regular user of marijuana.
3. Substance abuse by T.G.M.. T.G.M. also appears to use marijuana regularly. Their marijuana use has not been shown in itself to have negatively impacted upon the children.
4. The instability of the parents' residence. There has been some instability. T.L.S. and T.G.M. have had difficulty maintaining a residence for an extended period. Financial limits have played a role in this.
5. Missed access visits. The parents access to the children has generally gone well. They missed or cancelled access over a period of time in January/ February 2003. Prior to this they had lived with T.G.M.'s mother. They had a falling out with her and in January, 2003, moved to live with one of T.G.M.'s cousins. They say that the residence of the cousin was not suitable for access and in consequence they cancelled a series of access visits. The access exercised subsequent to this does not appear to have been problematic in any way.
6. Stability of the parents' relationship. These parents have been together for the better part of four years. I say the better part as T.L.S. did have a relationship with another man, become pregnant by him and have a baby, that baby being born this past summer (2003). This baby was placed for adoption. The plan of T.L.S. and T.G.M. is, however, a joint plan. They have presented as being together and intending to be together through thick and thin.

7. Anger and violence in their relationship. T.L.S. has had a troubled past. There is limited evidence of any physical altercations between these parents. T.G.M. referred to what appears to be a rather bizarre incident involving a cat and his either stunning or killing the cat. T.L.S. indicated that on another occasion, she was "incidentally pushed" when T.G.M. and another male were having a physical altercation. It is evident that T.G.M. has a temper. T.L.S. is, in relative terms, the more limited intellectually of the two. T.G.M. appears to be the more assertive, dominant one of the couple. All of this said, there is not a significant amount of unambiguous evidence relating to physical domestic violence between the two of them.

[5] There is not, in my view, sufficient evidence arising from any of the above concerns I have outlined to independently find, rationalize or prove that an order of permanent care and custody should be made.

C. H.A.M.'S INJURIES

[6] The fundamental issues here, in my view, arise from H.A.M.'s injuries. While I have reviewed all the medical evidence, I find the evidence of Dr. Michael Riding to be compelling. He was qualified by consent as a pediatric neuroradiologist, qualified as an expert in neurology and radiology related to the brain and spinal cord; with a sub-specialty in children's radiology.

[7] He described H.A.M.'s injuries (from tests done on April 4, 2002) as involving

1. Three or four skull fractures:
 - the newest being five to six days old plus or minus three or four days
 - the oldest being more than two weeks old.
2. Three subdural hematomas or hemorrhages of different ages:
 - one two to three weeks old,
 - one ten days to two weeks old,
 - one more recent less than seven days old.

[8] The fractures and hematomas, he indicated, could either be related to each other or arise from separate injuries. The doctor's opinion was that they were caused (the fractures and subdural hematomas) by "non accidental trauma." His view was there were at least two, probably three, episodes causing the head injuries. A skeletal survey revealed that H.A.M. also suffered from a bucket handle fracture of the tibia near her ankle. This fracture was approximately two weeks old. This type of fracture, the doctor indicated, is caused by a pulling and twisting. The doctor said this type of fracture is "about as individual to child abuse as any fractures are". He stated "H.A.M.'s injuries are consistent with trauma..." and "that because of the different ages of the injuries, radiologically it is suspicious that this is inflicted trauma because it is not one episode, it is more than one."

[9] There is no evidence that I can identify, in the record, of a parent or care giver of H.A.M.'s falling with H.A.M. and causing the head injuries. I say head injuries, plural, because I

have concluded that there was more than one injury, more than one event. The leg fracture I conclude beyond any doubt is the result of abuse.

[10] I conclude H.A.M.'s injuries result from three to four separate episodes or events. I conclude that they are the result of someone applying force or trauma. I conclude that she was physically abused by a person or persons.

[11] H.A.M. was hospitalized for some six weeks. The injuries were and are serious. They have and potentially will impact on her growth, development and health in a negative fashion. Some of the outcomes from these injuries are unknown at this time. Her progress thus far has been positive.

[12] The burden of proof in these proceedings is on the Agency. That burden is a civil burden on the balance of probabilities but is one that is heightened having regard to the serious nature of the issues before the Court, those issues involving the Agency's assertion that these children should be removed permanently from the care of their parents. The Agency has in my view proven that H.A.M. was physically traumatized or abused.

D. PRIOR TO APRIL 4, 2002

[13] H.A.M. was born [in 2002]. She was taken to the family doctor (Dr. McCrae) on February 1, 2002. Dr. McCrae indicated that he was concerned about malnourishment at that time. H.A.M. was expected to return in one month's time. H.A.M. did not return for a visit in the latter part of February or early March as expected. The reason given for this was that the family was moving to a new house. Family members, the evidence indicated, noticed that H.A.M.'s head was enlarged on separate occasions (on March 16th and March 19th). H.A.M. was taken to Doctor McCrae on March 28th. He requested an urgent appointment with a specialist at the IWK.

[14] To their credit, T.G.M. and T.L.S. did not wait for that appointment. They took her to the hospital that day (March 28th) almost immediately (concerned about her enlarged head.) The evidence indicates that H.A.M.'s head was enlarged from the fractures and subdural hematomas that I have referred to. The IWK asked that they return and they did return on April 3rd or 4th, 2002.

[15] There is something perhaps quizzical or curious in the failure of Dr. McCrae or the IWK Hospital to identify the seriousness of H.A.M.'s injuries on March 28th. The evidence did not really address this in any formal way beyond the fact that it was noted. Dr. McCrae did seek an immediate referral to the IWK. The individual or individuals who saw H.A.M. on March 28th at the IWK were not questioned about their referral of H.A.M. to an April 3rd appointment.

[16] There is no evidence of a fall or falls by a care giver that could have caused any of the skull fractures. There is no evidence that anyone saw someone abuse H.A.M.. There is no evidence that H.A.M. was injured or physically abused in any way.

E. THE INVOLVEMENT OF OTHERS

[17] On March 1, 2002, the couple moved into a [...] apartment. They did some work in the apartment. T.L.S. testified (on September 23, 2003)

"...that there were a couple of babysitters in our apartment building that watched H.A.M. and H.M. for just maybe an hour, half hour, not long. M., she lived at 14 [...]. She watched H.A.M.. when we first moved in and a couple of times after that. M.I., she also lives in [...]."

[18] There was also mention of a T. who was present when either M. or M.I. apparently babysat H.A.M..

[19] What I have just outlined is effectively the extent of evidence of an explanation of who, other than the parents, had an opportunity to injure H.A.M.. It is vague, imprecise and seems to focus on the start of the March.

[20] T.G.M.'s testimony on September 3rd was that he was alone with H.A.M. once since her birth. Frankly I find this difficult to believe. It strains credulity.

F. DISPOSITION

[21] There were a series of injuries in the month of March to H.A.M.. I am satisfied that the Agency has demonstrated through the medical evidence that the cause of the injuries is abuse. The parents say they have no idea how this happened. I conclude that their evidence does not place the child with others at times when these injuries occurred. This is not a situation where there is one injury and one time or one window of opportunity for these events to occur. There were / are a series of injuries. The skull fractures are similar (injuries) to each other. The leg fracture is clearly of a different sort.

[22] There is no question that H.A.M. and H.M. have been in the care of the Agency as a result of H.A.M.'s injuries. There was a consent that they were in need of protective services pursuant to Section 22 (2) (g). I have no doubt and conclude that H.A.M. was and remains in need of protective services pursuant to Section 22 (2) (a) of the Legislation being:

"a child who has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately."

[23] I have no doubt and conclude that both children are in need of protective services pursuant to Section 22 (2) (b) being children in need of protective services where

"there is a substantial risk that the child will suffer physical harm inflicted or caused as described by clause (a)"

[24] I note that clause (a) refers to "physical harm suffered by a child either inflicted by a parent or guardian or caused by the failure of a parent or guardian to supervise and protect the

child adequately." Again, I want to emphasize this is not a situation where there is one injury. I conclude from the evidence, considering the burden of proof on the Agency, that the children, and particularly H.A.M., was under the general charge of her parents, T.G.M. and T.L.S., when these injuries occurred. Both parents have been given opportunities to put forward, to explain, to fill in, to identify other caregivers, to identify some alternative or other possibility that might explain these injuries, or even identify who might have had an opportunity other than them to cause these injuries. These opportunities have been repeated with police, doctors, social workers, the assessor, counsellors and finally through testifying in this process. I am not saying that the burden of proof is on the parents to come up with an explanation here. I am saying that the evidence satisfies me that H.A.M.'s injuries occurred while she was in their care. I do not have evidence that would lead me somewhere else. The multiplicity of the injuries is a significant factor in these conclusions. We are left only with a cursory, superficial indication that M. and M.I. had care of H.A.M. for two or three short periods near the start of March. While it is imprecise exactly when the injuries occurred, I conclude from the evidence that they occurred from the start of March through the third and even into the fourth week of March.

[25] Individual counselling for both parents was recommended in the assessment report of September 9, 2002. It was to be followed by couples counselling if the individual counselling was completed or successful. The individual counselling was not followed through with in a committed fashion. The couples counselling was not gotten to. I do not make this observation to blame or find fault with T.G.M. or T.L.S.. Their position throughout this has been they "don't know what happened." That assertion left little place for the counselling to go.

[26] These children are three years, two months and one year, nine months old. They have been in foster care for one year and seven months, the majority of both their lives. They were and are young and vulnerable. T.G.M. and T.L.S. essentially say "give us a chance."

[27] The Legislation provides and I am bound to consider

1. The Preamble. I have reviewed the entirety of the Preamble of the Legislation and particularly have observed the Sections that state

"AND WHEREAS children are entitled to protection from abuse and neglect;

AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;

AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time."

[28] Here we are beyond the time limits mandated by the Act.

2. Section 2 (1) and 2 (2) of the Legislation state that

"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.

2(2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child"

[29] I have considered this direction in coming to this decision.

3. Section 3(2) outlines considerations the Court shall have in considering the best interest test within this Legislation. I have considered the whole of the Section, but in particular had regard to:

(a) Section 3 (2) (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." [emphasis added]

(b) Section 3 (2) (d):

"the bonding that exists between the child and the child's parent or guardian"

I am satisfied that the children are attached to their parents.

(c) Section 3 (2) (e):

"the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs".

The most primary physical need of these children is safety.

(d) Section 3 (2) (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".

I have considered the respective plans.

(e) Section 3 (2) (k):

"the effect on the child of delay in the disposition of the case".

(f) Section 3 (2) (1):

"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".

Here the risk that must be assessed is the risk involved in a return of the children to the parents balanced against those risks that exist in termination of their relationship with the parents.

(g) Section 3 (2) (m):

"the degree of risk, if any, that justified the finding that the child is in need of protective services".

The degree of risk, particularly with respect to H.A.M., and the injuries she suffered is significant.

At simplest, the circumstances are as follows:

- (i) An infant has been severely injured on multiple occasions while in the care of her parents. The injuries are non-accidental. They are abuse.
- (ii) The infant and a young brother, approximately one and one half years older are removed from the parents for nineteen months.
- (iii) No explanation for the multiple injuries is available.
- (iv) I find and conclude that there is no likelihood of an explanation being found at this point.
- (v) Having said that there is no explanation, there is no perpetrator that can be identified. While there is no date, time and place (in extraordinarily specific terms) that can be identified where H.A.M. suffered these injuries, I do conclude from the evidence that the injuries occurred while she was in the care of her parents, not others.

4. Section 46 (6) of the Children and Family Services Act states that

"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 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."

The Nova Scotia Court of Appeal in Minister of Community Services vs. LLP (2003) 211 N.S.R. (2d) 47 stated at paragraph 31:

"Where a child is in the temporary care and custody of the Agency, at each further disposition hearing, the court may not make a further order for temporary care and custody if the court is satisfied that the circumstances justifying the earlier order are unlikely to change within a reasonably foreseeable time, not exceeding the remainder of the applicable maximum time period."

The plan of the parents here essentially involves them asking the Court to ignore the fact that there is no explanation for these injuries. Section 42 of the Legislation outlines the dispositional alternatives open to the Court. Section 45 outlines the time limits in the Legislation.

5. Section 42 (2) states:

"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."

Here there is not a service, there is not an assessment, there is not an exercise that has been identified that has not been attempted. At the heart of this decision I am concluding that in circumstances where I am satisfied that a child was seriously injured, abused while in the care of her parents and there is no explanation for that (and nor to be fair to each of them is there an indication that a specific one or other of them caused the injury), there is not an Order that could be made that could adequately protect the child or children in their care.

The Legislation provides that where the Court determines that it is necessary to remove a child from the care of parents the Court shall consider whether it is possible to place the child with a relative, neighbour or other member of the child's community. No such plan has been put forward.

6. Finally, Section 42 (4) provides:

"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 periods."

Here, the time periods under the Legislation have been exceeded, we have maximized the time periods. We have two children who remain very young, remain very vulnerable, remain very dependent upon caregivers. We have injuries that are, in a word, "grave" and we have risk that, in my view, is exceptionally high. I am satisfied that the Agency has satisfied the burden of proof on it, that it is, regrettably, in the best interests of these children to be placed in the permanent care of the Agency.

[30] As I have stated, I do not feel that I have evidence that would allow me to conclude in any reasonable fashion that there was an opportunity for some other, third parties, to cause these injuries. The only evidence of that are the very vague allusions to that made somewhat late in the process. I am not prepared to speculate that multiple other persons, be it M., M.I. or relatives, abused H.A.M. on repeated occasions. I do conclude that the Agency has demonstrated that the injuries occurred while H.A.M. was in the care of her parents.

[31] The Order of Permanent Care will be made. The Agency plan is that adoption be pursued. That plan is inconsistent with an order of access. There will be no order of access. My expectation, though not ordered however, would be that there would be arrangements made for a final visit for the children for both parents and, further, that in the event that my decision was appealed, that visitation would continue during that process.

J. S. C. (F.D.)

Halifax, Nova Scotia
January 27, 2004