

IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: [CAS of Halifax v. T.W. and A.J.W., 2004 NSSF 08]

Date: February 3, 2004

Docket: SFHC29304

Registry: Halifax

Between:

Children's Aid Society of Halifax

Applicant

v.

T.W. and A.J.W.

Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on July 9, 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 Mona M. Lynch

Heard: December 23, 2003; January 15 & 20, 2004, in Halifax, Nova Scotia

Written Decision: February 3, 2004

Counsel: John Underhill - counsel for the Applicant

By the Court:

BACKGROUND:

1. T.W. and A.J.W. are the mother and father of five children, A.W. aged 16 months, K.W. age 3, R.W. age 6, C.W. age 8, and D.W. age 10 years. In May 2003 the Children's Aid Society of Halifax received a referral from the Halifax Regional Police expressing concern over the unclean, unsafe and cluttered condition of the residence of the Respondents. Two intake workers from the Agency attended at the home of the Respondents on May 9, 2003. One of the workers noted extensive clutter, a filthy carpet and general uncleanliness. He also noted a strong unpleasant smell along with the smell of cat urine and cleaning products. T.W. was advised that the conditions were very bad and had to be cleaned. The worker returned a few weeks later and found the home to be in acceptable condition. Some clutter remained but there were no health or safety concerns. T.W. explained both at the time and during testimony before the Court that during this time four relatives were moving from [name of place changed] and in with T.W.,

A.J.W. and the five children. They were in the process of clearing out the lower level of the home when the police and social workers visited the home at the beginning of May, 2003. She agreed that the state of the home, at the time, was not acceptable.

- [2] In the weeks between the first visit by the Agency and the return visit checks were made with the children's school and medical doctor. The medical doctor indicated no concern about the children's physical presentation, they were healthy, well nourished, had proper hygiene and clean clothing. The only concern expressed was not having seen the child A.W. for well-baby examinations and immunizations. T.W. indicated to the worker that she took the youngest child to a pediatrician. The child, C.W., has a developmental problem. His education program assistant teacher was contacted and had no concerns about hygiene, presentation or lunches but expressed a concern about C.W. smelling of cat spray and four instances of head lice in the past two years for C.W. She described the house on her recent visit as cluttered and untidy but not dirty. The EPA teacher's visit was during the same period as the police visit and the initial visit from the Agency. As a result of an inability to substantiate that the children were in need of protective services, the Agency's file was closed.

[3] The file remained closed until November 12, 2003 when the Principal of the children's school called the Agency to express some concerns. Noted by the Agency from this phone call were: all three children being dirty and reeking of cat urine, the treatment for head lice, including putting glue in C.W.'s hair, one child's excessive scratching in the groin area, the children coming to school with Cheerios or a T.V. dinner for lunch, the filth of the home as reported to her by the police and an educational assistant, the children having no socks or underwear on in school and attendance problems excused by T.W. The concerns were classified by the Agency as "chronic" after this report. Two intake workers again visited the Respondents' home on November 13, 2003, but were denied entry into the home by T.W. as her husband was not at home. One of the worker's noted a strong odour coming from the home and flies on T.W.'s pants despite the windy conditions at the time. The worker had frequent telephone contact with T.W. in the next few days in an attempt to arrange a home visit.

[4] The worker also contacted the Principal of the school and the pediatrician. After speaking with the pediatrician the worker noted concern over missed

appointments, numerous prescriptions, lack of immunization of the youngest child and lack of follow through on referrals to specialists. After speaking with the Principal the worker noted concerns about D.W. having chest pains at school. When called T.W. did not seem alarmed and a second call was required before she came to pick up D.W. from the school. The school had a medical alert about D.W. and a heart condition. The worker attended at the IWK Hospital where T.W. had taken D.W. and noted that D.W. had dirty feet and was not wearing underwear. During this visit to the hospital the worker discussed concerns with T.W. and noted that T.W. was defensive and attempted to give reasons for her actions. The worker noted that T.W. revealed that she suffered from post partum depression after the birth of the youngest child and was taking Paxil to treat the depression.

- [5] A case conference on November 18, 2003 at the Agency noted a number of concerns. The Agency felt that they were now able to substantiate that the children were in need of protective services and the file was opened.

- [6] Agency workers visited the Respondents' home on November 20, 2003 and noted concerns with regard to an old fridge with the door still intact in the

driveway of the home; two vehicles in the driveway which were extremely cluttered with papers, garbage and plastic pop bottles; the smell was still present although it was obvious that an effort had been made to eliminate the odour; clutter in the living room and the carpet was extremely soiled; a window with no screen was open; dirty dishes; open bags of garbage; back door was blocked; flies in the kitchen and kitchen floor was filthy; C.W. had defecated on the floor in his bedroom; general clutter and an unwillingness by T.W. and A.J.W. to allow the worker to observe their bedroom. An overpowering odour in the basement was noted which made the workers choke – this room appeared to be used as a large litter box for the animals. The Respondents indicated that the children were not allowed in this room. The workers told T.W. that the house had to be cleaned right way in order to be safe for the children.

- [7] The worker assigned to the file returned to the Respondents' home later on November 20, 2003 and noted that the refrigerator had been moved so it could not be opened, the carpet had been cleaned in C.W.'s room; the garbage in the kitchen had been moved; the back door was now accessible and the kitchen floor was clean. The worker noted concerns around dirty

dishes, clothes not put away and the carpets still required cleaning. The worker noted that T.W. appeared to be minimizing the seriousness of her depression and also noted that she might benefit from counselling about the roles of she and her husband as she explained that the state of the house was her responsibility. After further discussions with T.W., the worker noted that T.W. was downplaying the concerns of the Agency. T.W. refused to give permission for the worker to speak to the family doctors.

- [8] The Respondents retained a lawyer who tried to contact the Agency on December 2, 2003. A formal Risk Management Conference was held at the Agency on December 5, 2003 and concerns were noted regarding the state of the home although improvements had been made and the Respondents not allowing the worker's entry to the home or contact with the doctors. It was decided to apply to the Court for a Supervision Order. Another Risk Management Conference was held on December 10, 2003 where concerns were noted over household extreme disarray and uncleanliness; mother's post-partum depression; school reports of children smelling of cat urine; lack of medical follow-up for children; parents minimizing problems and resistance to Agency involvement and refusal to allow access to home and

family. The Agency applied to the Supreme Court of Nova Scotia, Family Division, for a Supervision Order based on the children being in need of protective services pursuant to s. 22(2)(b),(e),(g),(h),(j), and (ja) of the *Children and Family Services Act*. At the Five-day Hearing a Supervision Order was granted solely on the basis of the Protection Application and supporting affidavit from the Children's Aid Society of Halifax. No affidavit evidence was submitted by the Respondents. On December 23, 2003, a finding of reasonable and probable grounds that the children were in need of protective services was made, an Order for Supervision was granted and the matter was adjourned for the completion of the Interim Hearing.

[9] On January 7, 2004 a worker attempted to do a home visit at the Respondents' home but was denied access. The worker visited the home on January 8, 2004. She noted that there had been a significant improvement in many areas of the home - there was an absence of the odour of animal urine except the basement room where a slight odour lingered and there was far less general clutter although some was still noted. Both T.W. and A.J.W. refused the worker access to their bedroom. A contested Thirty-day Hearing

was heard on January 15 and with consent of both counsel for the Respondents and the Agency it was further adjourned to January 20, 2004.

ISSUE:

- [10] Are there Reasonable and Probable Grounds to believe that the Respondents' children are in need of protective services?

LAW:

- [11] It was found at the Five-day Hearing that there were reasonable and probable grounds to believe that the children were in need of protective services pursuant to s. 39 of the *CFSA*. That finding was based solely on the Protection Application and supporting affidavit from the Agency. At the completion of the Interim Hearing it must be determined whether there are reasonable and probable grounds to believe that the children are in need of protective services after hearing all of the evidence presented at the Interim Hearing. It is not a heavy burden that the Agency must meet, however, they must prove their case on the balance of probabilities. In making the decision the Court can consider any evidence that it considers to be credible and trustworthy.

[12] The Court must consider as the paramount consideration the best interests of the children. The Court must also respect the integrity of the family and ensure that the proceedings are the least intrusive possible in the circumstances. The Court must conduct an analysis and reach a considered conclusion based upon the evidence before it. The question to be asked and answered in the affirmative is whether it is reasonable to conclude that there probably is and that there likely is a sound basis to believe that an eventual hearing will result in a granting of the Agency's application for a finding that the children are in need of protective services. *Family and Children's Services of Kings County v. Y.B. and J.T.* (2000), 181 N.S.R. 181 (2d) 178 (N.S.F.C.).

ANALYSIS:

- [13] The concerns noted by the Agency in the protection application included:
- (a) The condition of the Respondents' home;
 - (b) Neglect of the children – i.e. lice and hygiene;
 - (c) The Respondents' unwillingness to cooperate with the Agency;
 - (d) Missed medical appointments;

- (e) Immunization for the child, A.W.; and
- (f) Concerns regarding T.W.'s mental health.

(a) The condition of the Respondents' home;

[14] In May 2003 the condition of the house was deplorable. T.W. admitted this when she testified. Police officers investigating a totally unrelated matter felt a duty to report the state of the house to the Children's Aid Society. Both T.W. and A.J.W. explained the state of the house as resulting from moving everything out of the basement to make room for the family of four who would be moving in with the Respondents. While this explained the clutter in the house it did not explain the dirty conditions in the house, which I find did constitute a health and safety concern for the children. On May 29, 2003 a return visit to the home showed that all health and safety concerns had been looked after. On November 20, 2003 another visit to the home revealed further health and safety concerns including a blocked entrance, overpowering stench, dirty conditions and an unsafely stored refrigerator. When I consider the state of the house, I am taking into account that fact that in May 2003 nine people were living in the home. I am also taking into account the fact that all times under consideration, five active

children between the ages of 10 years and 15 months lived in the home and at least one of the children has special needs which includes fecal soiling. I am also considering that the household also included a number of pets - kittens, a dog, birds and gerbils. Clutter, general untidiness, dirty dishes in the sink, clothes not put away and dirty laundry are all to be expected in this home. Clutter and debris in automobiles is a common situation for families with children. I am satisfied that both on May 9, 2003 and the first visit on November 20, 2003 the conditions in the home constituted health and safety concerns and that the children should not be living in those conditions. I am also satisfied that when the workers returned on May 29, late in day on November 20, 2003 and January 8, 2004, the conditions would not constitute a health or safety concern for the children.

(b) Neglect of the Children

[15] F Concerns expressed with regard to the neglect of the children included C.W. having head lice on a number of occasions and the perceived inability of T.W. to rid him of the lice; the children, their clothing and belongings smelling of cat urine and the children being inadequately clothed - no socks or underwear. These concerns come primarily from the school. The school's Personnel described three or four occasions in the last two years

when C.W. had head lice. The Principal of the school understood, incorrectly, that T.W. had put actual glue in C.W.'s hair as a treatment for head lice and she reported this incorrect information to the Agency in her telephone call of November 12, 2003. This telephone call caused the Agency to reopen the file on the Respondents. C.W. was sent home by the school on a number of occasions for apparently having lice or nits. The EPA teacher from the school described the treatment for lice and nits as the shampoo treatment and taking the nits from the hair shafts. She described how difficult this would be with regard to C.W. as he will not sit still. The Principal also indicated an ongoing problem with the lice and discussions with T.W. T.W. described using the shampoo treatment, going through the hair and the difficulty she had with ridding C.W. of the lice. On the advice of personnel at the family doctor's office she used a hair gel as a barrier to prevent further infestation. T.W. also sought advice from the public health nurse and T.W. eventually shaved C.W.'s head to rid him of the lice.

[16] The report from the school was that the children, in particular C.W., smelled of cat urine. The Principal referred to the smell of cat urine and the lice problem being the reason that she contacted the Agency on November 12,

2003. The smell was on his clothing and his school bag. School Personnel reported that this was an ongoing problem with C.W. and to a lesser extent his two brothers in the school. C.W.'s school bag was replaced by the school and the smell was reduced. T.W. testified to having a male cat reach the puberty stage and the cat was constantly spraying in the house. She received reports from the school about the cat spray smell and made attempts to wash out the smell. This proved to be unsuccessful and C.W.'s jacket was eventually replaced, as was his school bag, and the cat was neutered. T.W. indicated that she may not smell the cat spray as strongly as others as she became used to the smell. After the steps noted, there were few, if any, complaints about the cat urine smell from the children's clothes or belongings. A.J.W. testified that although he was at the school daily and spoke with teachers and the Principal, no mention was made to him of the cat urine smell.

[17] Reports from the school also alleged that the children arrived in school with no socks or underwear. The testimony from the Principal and the EPA Teacher was that on one occasion the child, C.W.'s, shorts fell down in gym class and he was not wearing underwear and when being checked for lice he had no socks in his boots. There was also reports of D.W. not wearing

underwear. T.W. explained that C.W. left the house without socks without her knowledge. It can hardly be found to be surprising that a child could put boots on without socks and a mother caring for four other children would not notice. With regard to not having underwear on in gym class, C.W. may have had underwear on when he left the house and did not keep them on when he changed for gym. This does not concern the Court. T.W. explained that because of his husky build D.W. finds that underwear cuts into him and he prefers not to wear underwear. T.W. has tried a couple of solutions and believes she has solved this problem.

[18] Although the notes indicated the Principal reported that all three children were dirty, the Principal disagreed that she had reported that all three children were dirty. The family doctor testified he had never had a problem with the children's appearance or hygiene; he said they were not perfect but in keeping with children their age. The notes from the Agency also noted that the school had reported the children had inappropriate lunches. The testimony from the school officials showed that this was not the case. The children went home for lunch this school year and when they did attend the school lunch program they were always well fed. The notes also seemed to

imply that T.W. ignored a call from the school regarding D.W. having chest pains although the school had a medical alert for D.W. for heart problems. The notes suggested that it took two phone calls to get T.W. to come to the school. However, the testimony of the Principal made it clear that T.W. was appropriate in her response; she told the school what to look for and it was not until the second call the Principal suggested that T.W. come to the school to get D.W. T.W. came to the school and took D.W. to the hospital.

[19] I do not find any of the neglect issues raised provide reasonable and probable grounds to believe that the children are in need of protective services. The Respondents, in particular T.W., took appropriate steps to deal with the concerns expressed by the school.

(c) The Respondents' unwillingness to cooperate with the agency

[20] The Respondents have no obligation to cooperate with the Agency. It was clear in their testimony that T.W. and A.J.W. felt misled by the Agency and threatened by the Agency. During the November 20, 2003 visit from the workers, they indicated to T.W. that there had been recent reports from the police and the school about the condition of the home. This was as a result

of a misunderstanding of the information which came from the Principal. While I do not find that the workers made explicit threats to the Respondents, the Respondents' understanding from the workers was that they must cooperate or risk losing their children. They decided, as is their right, to hire a lawyer to deal with the Agency instead of cooperating. I make no adverse inference against the Respondents for their failure to cooperate.

(d) Missed Medical Appointments

[21] The only missed appointments noted by the family doctor was a follow-up with the neurosurgeon after R.W.'s closed head injury resulting from a fall from one level of the house to another. A.J.W. explained that it was their understanding that the follow-up appointment was only necessary if there were concerns. He called the neurosurgeon's office, discussed the follow-up appointment and the fact that there were no concerns and it was decided that the appointment was not necessary. Counsel for the Agency also made note of an exercise test not being scheduled for the child, D.W. The letter, which suggested this test be conducted, was sent to the family doctor and not the Respondents; therefore it is difficult to blame the Respondents for this

appointment not being scheduled. The notes of the Agency noted numerous missed medical appointments with the pediatrician and other specialists. Some of these missed appointments were explained by the pediatrician as a mix-up in times or the office having received a call to say that the family had car trouble. In one case a referral was made to a clinic but a mix-up in the name of the child resulted in K.W. not attending at the Hearing and Speech Clinic. This mix-up was caused by the doctor's office and not the Respondents. There was a missed appointment with a dermatologist. T.W. acknowledged that she has forgotten appointments. There was nothing brought out in the testimony of the medical doctors to suggest that these missed appointments put the children in any kind of medical danger.

(e) Immunization for the child A.W.

[22] The Agency noted concern after speaking with the family doctor that he has not seen the youngest child for well-baby examinations and she had not received her immunizations. T.W. explained that A.W. was being seen by a pediatrician. A.W. did not receive her first immunization shot until December 22, 2003. Both the pediatrician and T.W. explained that T.W. had concern about the immunizations as one of the older children had

reacted badly to the needle usually given at the 12 month stage and there was suspicion of autism with this child. The pediatrician testified that there is much discussion in the lay press about the link between the immunization for measles, mumps, rubella and autism. T.W. and the pediatrician discussed immunizations for A.W. and T.W. decided to hold off on the immunizations. Immunizations would have begun for A.W. in July 2003 but at the scheduled appointment she had an infection and the start of the immunizations was put off. The immunizations began in December and the pediatrician indicated the next set of immunizations would be in February 2004. The pediatrician expressed no concern over the decision to put off the immunizations for A.W. that would give me reasonable and probable grounds to believe that this decision would cause A.W. to be in need of protective services.

(f) Concerns regarding T.W.'s mental health

[23] T.W. discussed with the Agency that she suffered from depression after the extremely difficult pregnancy and birth of the youngest child. She sought medical attention for this depression and was prescribed both anti-depression medication and anti-anxiety medication. The testimony from the family

doctor was that the depression was under control. This was also the testimony of T.W. The family doctor also testified that there were no medical concerns that prevent the Respondents from taking care of the children.

Other Concerns

[24] The Agency also expressed concern over what they perceived as minimizing their concerns, making excuses for the concerns and denial of problems by T.W. T.W. acknowledged that there were valid concerns over the state of her home in May. She provided explanations as to the efforts she made to rid the children of lice and to get rid of the smell of cat urine. She provided explanations for some of the missed medical appointments and she explained how or why the children may not have had on socks or underwear at the times noted. She explained why A.W. did not receive her immunizations. I do not find it unusual or troubling that T.W. attempted to explain her position when concerns were raised.

[25] It must be kept in mind that some of the concerns expressed to T.W. by the Agency contained what would later be determined to be erroneous

information such as the police and school visiting the home in November 2003. Also erroneous were concerns about the children coming to school with Cheerios for lunch and information that T.W. put glue in one of the children's hair. There were concerns expressed about her inappropriate reaction when called by the school about D.W.'s chest pains but the testimony of the Principal revealed that her reaction was perfectly appropriate. The misinformation presented to T.W. understandably caused her concern and would cause her to explain her position. There was also concern expressed by the Agency with regard to the roles of the Respondents in the home. T.W. expressed her belief that the state of the home was mostly her responsibility as A.J.W. was working three jobs and her responsibilities were in the home. The Agency suggested that the couple should have counselling around the roles and expectations in their relationship. Testimony from A.J.W. and T.W. satisfied me that they do not have rigid or unreasonable roles and expectations in their relationship. It is not for the Agency to decide what are the proper roles and expectations in the Respondents' relationship and it is understandable that the Respondents would view the Agency's suggestions as intrusive.

Section 22(2) of the *Children and Family Services Act*

[26] The Agency alleges in their Protection Application that the children are in need of protective services under s. 22(2)(b), (e), (g), (h), (j) and (ja) of the *CFSA* and have requested a Supervision Order, access to the home, medical examinations of the children, a parental capacity assessment and other supportive and rehabilitative services for the Respondents and the children.

[27] The Agency alleges that there are reasonable and probable grounds for me to believe that the children are in needs of protective services under ss. (b) of 22(2) – that there is a substantial risk that the children will suffer physical harm caused by the failure of the Respondents to supervise and protect the children adequately. Counsel for the Agency pointed to the fall of R.W. in the home which caused the head injury and suggested that I could infer from the fact that he fell that the Respondents were not properly supervising him. This suggestion would invite me to find that there are reasonable and probable grounds to believe that every child brought to an emergency room

with a serious injury from a fall is in need of protective services. Well supervised children sustain injuries.

[28] There may have been a risk of harm to the children from living in unsanitary conditions but these conditions have been eliminated. I do find that at the time the Agency visited the Respondents' home on May 9, 2003 and the first visit on November 20, 2003 that there were reasonable and probable grounds to believe that physical harm would come to the children if they continued to live in those conditions. However, I must base my decision on the circumstances as they existed at the time of the interim hearing. The unsanitary and health concerns in the home have been alleviated. I do not find that this is a chronic situation. It is a home where five children live and it will rarely, if ever, be uncluttered and pristine. I do not find that the condition of the home provides me with reasonable and probable grounds that the children are in need of protective services.

[29] Ss. 22(2)(e) requires a failure or refusal to provide medical treatment - I do not find that the Respondents have failed or refused to provide medical treatment to cure, prevent or alleviate physical harm or suffering in any of

the children. The evidence from the two doctors and the other evidence presented does not support a reasonable and probable ground finding under this section.

[30] Under ss. 22(2)(g) I must find a substantial risk of emotional harm to the children demonstrated by severe anxiety, depression, withdrawal, self-destructive or aggressive behaviour and the Respondents do not provide, refuse to provide, etc. services or treatment to remedy or alleviate the harm. There is nothing in the evidence to show a substantial risk – real chance of danger – of emotional harm under this section. I do not find reasonable and probable grounds to believe the children are in need of protective services under this section.

[31] With regard to s. 22(2)(h) – that the child or children suffer from emotional or developmental conditions that, if not remedied, could seriously impair the child's development and the parents do not provide, refuse, are unavailable or unable to consent to services or treatment to remedy or alleviate the condition. I also find no reasonable and probable grounds on the evidence for this section. The evidence shows that C.W. has a developmental

problem that is not expected to get better. No other emotional or developmental concerns were established on the evidence.

[32] There was nothing in the evidence to show that a child or children suffered physical harm caused by chronic and serious neglect under s. 22(2)(j).

[33] With regard to s. 22(2)(ja) I must find that there is a substantial risk – real chance of danger on the evidence – that a child or children will suffer physical harm caused by chronic and serious neglect by the Respondents and they do not provide, refuse, etc. to services or treatment to remedy or alleviate the harm. I find that the Respondents, in particular T.W., took appropriate steps to rid the children of lice, took appropriate steps to rid the children of the smell of cat urine and took appropriate steps to rid the house of health and safety concerns. These steps may not have been as quick as some would have wanted or as thorough as some would have wanted but I do not find that I have reasonable and probable grounds to believe that there is a substantial risk that a child or children will suffer physical harm.

Conclusion

[34] T.W. and A.J.W. are the parents of five very busy children, two with ADHD and one with a developmental problem. They are doing the best that they can with limited funds and at times they are overwhelmed. Had things developed differently in the relationship between the Agency and the Respondents, voluntary services may have been accessed by the Respondents to assist with their family. The relationship between the Agency and the Respondents in November 2003 started out with the Agency acting on some misinformation and some dated information. The Respondents perceived the Agency to be intrusive and threatening. It is unfortunate but unlikely at this point that the Respondents would consent to voluntary services which may benefit them. I would, however, encourage them to do so.

[35] Based on all of the evidence, I do not find that under any section of s. 22(2) of the *CFSA* that I have reasonable and probable grounds to believe that any of the Respondents' children are in need of protective services. On test set out above, it is not reasonable to conclude that there probably is, or likely is,

a sound basis to believe that an eventual hearing will result in a finding that these children are in need of protective services.

[36] Therefore, pursuant to s. 39(4) of the *CFSA*, I dismiss the application of the Children's Aid Society of Halifax.

Mona M. Lynch, J.