IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Minister of Community Services v. H.L.S. and D.K. v. W.S.*,
2004 NSSF 89

Date: 20040930
Docket: SFHC14561
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

H.L.S. and D.K.

Respondents

v.

W.S.

Third Party

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on May 30, 2008.

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: September 9, 10 & 20, 2004, in Halifax, Nova Scotia

Counsel: James Leiper, for the Minister of Community Services
Jennifer Schofield, for the Respondent, H.L.S.

Tanya Jones, for the Respondent, D.K.
Colin Campbell, for the Third Party, W.S.

By the Court:

BACKGROUND:

[1] The Respondents, D.K. and H.L.S., began their relationship in 1999. The parties lived together for a short period of time, difficulties arose, and H.L.S. moved in with her parents for approximately one year. D.K. and H.L.S. began living together again in May of 2000 following the birth of R.S. [in 2000]. H.L.S. took maternity leave for six months after R.S.'s birth and when she returned to work D.K. stayed home with R.S. until R.S. was approximately one year old. The couple's second child, H.K.K., was born [in 2002]. H.L.S. was on maternity leave and the primary care giver for both children. On March 15, 2002 this family came to the attention of the Minister of Community Services after they were contacted by the IWK Hospital. H.L.S. had noticed bruising on H.K.K.'s left leg on the evening of March 14, 2002 and took the four week old baby to her family physician, Dr. Higgins, on March 15, 2002. Dr. Higgins advised H.L.S. to take H.K.K. to the IWK Hospital.

[2] Dr. Camfield was the on-call physician for the child protection team at the IWK Hospital on March 15, 2002 and he examined H.K.K. on that date. After examination and x-rays, Dr. Camfield found that there were two fractures to the left tibia, a fracture further down the tibia on the left leg and another fracture near the right ankle of the young infant. He also noted two small bruises – round and symmetrical on her forehead in the temple region which were smaller than a dime. He also noted a few petechiae – tiny hemorrhages – on the right side of her abdomen. The left leg was bruised from just below the knee to just above the

ankle. The age of the fractures meant that there were at least two periods of trauma. Dr. Camfield found that the baby, H.K.K., was subject to non-accidental injuries. Both children were taken into the care of the Minister of Community Services on March 15, 2002.

[3] R.S. and H.K.K. were placed in a foster home and the Respondents, D.K. and H.L.S., had supervised access to the children. The Respondents' third child, H.S., was born [in 2003] and was apprehended by the Minister at birth. She was placed in a foster home for a short period of time and then with G.S. and W.S., her maternal grandparents. The maternal grandmother was added as a third party to the proceeding on July 11, 2003. Although H.L.S. moved into the home with her parents and her youngest child, both D.K. and H.L.S continued to have only supervised access to all three children.

[4] With the two older children in foster care and the youngest placed with the maternal grandparents, the Minister applied for an order of permanent care and custody and a trial began on September 22, 23 and 24, 2003. After the evidence of the Minister was completed all parties agreed to terminate the proceeding and start the current proceeding, thereby extending the time frames for all three children for another year. On October 6, 2003 it was agreed that the evidence from the previous proceeding would form part of this proceeding, the proceeding relating to the youngest child would be consolidated with the proceeding for the older two children and there was an agreement to the finding in need of protection in relation to all three children. It was also agreed that the three children would remain in the temporary care and custody of the Minister of Community

Services. On November 10, 2003 it was agreed that the three children would be placed with the third party, maternal grandmother, with supervised access to both D.K. and H.L.S. H.L.S. continued to live in the home of her parents where all three children were placed.

[5] The matter of the final disposition for all three children was heard on September 9, 10 and 20, 2004. The Minister's position at trial was that the three children should be placed in the custody of the maternal grandparents under the *Maintenance and Custody Act* with supervised access to D.K. and H.L.S. The respondents, D.K. and H.L.S., are asking for the custody of their children to them as a couple; in the alternative the custody of the children to H.L.S., and as a last alternative custody of the children to the maternal grandparents. The third party, W.S., is supporting custody to D.K. and H.L.S., or H.L.S on her own. If neither of those orders are made she is requesting custody of the three children.

ISSUE:

[6] What custody arrangement is in the best interests of these three children?

LAW:

[7] It is very clear that the primary and paramount consideration in any custody or child welfare matter is the best interests of the children. The preamble to the *Children and Family Services Act* provides that the basic rights of children and their families include

the right to the least invasion of privacy and interference with freedom as is in the children's best interests and society's interest in protecting children. The purpose of the *Act* as set out in section 2 is to protect children from harm, promote the integrity of the family and assure the best interests of children. Section 3(2) of the *Act* requires me to consider such things as: the importance of continuity; the bonding between parent and child; the child's physical, mental and emotional needs; the merits of the plans presented and the risk that the child may suffer harm. The Minister of Community Services bears the burden of proof that the plan of the Minister is in the best interests of the children.

ANALYSIS:

[8] The major points to consider in deciding what is in the best interests of the three children are:

1. The injuries to H.K.K;
2. Considerations in granting custody to D.K. and H.L.S.;
3. Considerations in granting custody to H.L.S.;
4. Considerations in granting custody to G.S. and W.S. – the maternal grandpa

The injuries to H.K.K.:

[9] I accept the medical evidence from Dr. Camfield that when he examined H.K.K. on March 15, 2002 that she had four fractures in her legs – three in the left leg and one in the right. She also had the bruising and petechiae noted above. Dr. Camfield offered the opinion that H.K.K.'s injuries were non-accidental. The parents were the primary caregivers for four-week old H.K.K. up to the time of her apprehension. The parents indicate that they do not know the origin of the injuries to H.K.K. but offer injury at birth and injury by her two year old brother, R.S., as possible explanations. Both have indicated that they accept responsibility for the injuries to H.K.K. as they occurred while she was in their care. Both deny causing the injuries. The mother took a polygraph test which she passed; the father declined to take a polygraph test. No charges have been laid in relation to H.K.K.'s injuries.

[10] Both parents and other family members provided evidence that H.K.K. favoured one leg from shortly after birth. They also indicate that there were times that R.S. grabbed H.K.K. by the feet or legs, on one occasion he pulled H.K.K. off the coach onto the floor and on another occasion he was caught twisting H.K.K.'s foot while she was in her baby swing.

[11] With regard to the suggestion by the parents that the injuries to H.K.K. were caused at birth, I find that the evidence cannot support that theory. I accept the medical evidence that the oldest injury to H.K.K. was approximately 10 - 20 days old which would mean that she was at least a week old when the first fracture occurred. Dr. Camfield based his estimate on the callus that had formed on the fracture. There were also documents from

the IWK Hospital at the time of H.K.K.'s birth showing that her hips and feet were normal. Her hips were also noted to be normal on a visit to Dr. Higgins, the family doctor, on February 27, 2002, when she was two weeks old. The medical evidence does not support the theory that some or all of H.K.K.'s injuries occurred at birth.

[12] With regard to the injuries being caused by R.S., again the evidence before me does not support that all of the injuries to H.K.K. were caused by R.S. Dr. Camfield testified that the injuries to the ankles on both legs were caused by twisting of the feet of the baby. The twisting must be sufficiently hard to cause the fracture of the tibia in both legs. The force required for this type of injury is great but Dr. Camfield did not rule out that these injuries could be caused by a two-year old. He testified that it was not impossible for a two-year old to cause the injuries but it would be difficult. The other two fractures to the leg of H.K.K. were caused at different times as one of the injuries had started to heal and then the leg was injured again in the same place. There was some confusion between the testimony of Dr. Camfield and the other medical reports as to whether the injuries were traverse or spiral in nature. I accept the evidence of Dr. Camfield that the fractures higher up on the left leg were traverse in nature as a spiral injury in this location would always cause the fibula to fracture which did not occur with H.K.K. I accept that the fractures were traverse in nature and were caused by a direct blow to the bone and it would be extremely unlikely that a two-year old would have the force required to cause this injury. The second injury to the same area would not require the same amount of force as the bone was not completely healed when it was re-injured. As the Minister has

pointed out, there were also no further injuries to H.K.K. after the children were apprehended although R.S and H.K.K. were placed together. I also accept Dr. Camfield's evidence that it is very unlikely that the injury was cause by a plastic tray on a baby swing being brought down on the leg. Brittle bone disease was ruled out as a contributing factor in these injuries.

[13] Based on all of the evidence before me I accept that H.K.K. was injured by a perpetrator on as few as two and as many as four occasions. The two most likely persons to have caused these injuries are the parents. Based on history, it would appear much more likely that these injuries were caused by D.K. than H.L.S. H.L.S. has no history of violence; she sought immediate medical attention for H.K.K., and she passed the polygraph test. D.K., in contrast, has a lengthy history of violent and out of control behaviour, including violence to a child; he has a history of substance abuse and a history of failing to take responsibility for his actions.

[14] I find that the most likely cause of H.K.K.'s injuries were as a result of the direct actions of her father, D.K.

Considerations in granting custody to D.K. and H.L.S.

[15] D.K. and H.L.S. are the parents of the three children. The two older children were taken into care in March 2002 and the youngest child in March 2003. Since March 2002 both parents have had supervised access with their children. In recent months this access has been taking place at the home of and supervised by the maternal grandparents. The

major concern that the Minister has with regard to this custody arrangement is D.K. D.K. has a lengthy criminal history which includes very violent offences, including violence to a child. The majority of D.K.'s violent offences occurred in relation to intimate partners. To accept D.K.'s explanation for these offences and his convictions for these offences would require the court to believe that he was possibly the unluckiest man who ever lived – at least two prior intimate partners set him up for offences he did not commit, the police were out to get him and although he plead guilty to the offences he was innocent. The explanations that D.K. provided to Dr. Blood who prepared the parental capacity assessment are inconsistent with the police reports and the court records for the offences. D.K. presented on the witness stand as a man who, although violent and with a history of substance use and abuse, took no responsibility for anything. His explanations always required one to believe that it was someone else's fault and he was the victim of circumstances. D.K. lacked credibility at every turn. I accept that he has a history of very violent behaviour, including violence to intimate partners and violence to a child, and a complete disregard to court orders.

[16] D.K.'s violence is not in the distant past. In 2001 he was involved in a high speed chase with police that could have easily caused injury to many innocent people on the street as he drove through a residential area at speeds in excess of 120/km, ignoring traffic signs and intoxicated. H.L.S., who was pregnant, was a passenger in the car. In 2002 he was involved in another high speed chase

with police - again traffic signs were ignored and speeds exceeded 100 km an hour. He was passing vehicles on the wrong side of the road and he was intoxicated. The public was clearly put at risk by D.K.'s violent and out of control behaviour.

[17] D.K.'s contact with his children since March 2002 has improved greatly. As indicated in Dr. Blood's report, D.K. had a hard time putting his own feelings aside for the benefit of the children and sulked during the visit observed by Dr. Blood. Access facilitators' reports on the visits between D.K. and his children became increasingly and consistently positive. For a number of months D.K.'s access has been supervised by the maternal grandparents at their home and these reports are also very positive.

[18] While the reports have been increasingly positive in relation to D.K., I am not prepared to return the children to the care or custody of D.K. As I have found that he is the most likely perpetrator of the injuries to the child, H.K.K., and as fits his pattern, he has not accepted responsibility for those injuries. The risk to the children is too high to return them to his care or custody in an unsupervised setting. I, therefore, reject the plan of the respondents to return the children to the custody of D.K. and H.L.S. as a couple.

Considerations in granting custody to H.L.S.

[19] The Minister's biggest concern in relation to H.L.S. is her relationship with D.K. and as a result concern over her judgment and ability to protect her children from D.K. The Minister also has concerns about H.L.S.'s trustworthiness and truthfulness.

[20] There is no doubt that H.L.S. is a good and concerned mother when it comes to looking after her children's physical needs. She has consistently provided appropriate snacks, activities and affection for her children during access visits. She has shown that she has the ability to put her own needs aside for her children. She has moved in with her parents in order to be close to her children after they were placed with her parents. This was not an easy decision for H.L.S. and it has been a difficult situation. H.L.S. is 30 years old and was estranged from her parents for a year prior to the children being taken into care. This estrangement with her parents was as a result of her relationship with D.K. The home of her parents is very small and it has been a very cramped living situation for all in the home. While living with her parents H.L.S. took on the role as the primary caregiver to her children when she was at home. This was also a very difficult situation as H.L.S. testified, she couldn't even take her children to the store with her as her access with them is supervised. H.L.S. testified that no matter what the outcome of the trial, she will be moving out of her parents' home.

[21] Prior to her relationship with D.K., H.L.S. had no criminal record. Since she began her relationship with D.K. she has been convicted of misleading the police and shoplifting. The misleading charge arose from a situation where D.K. borrowed her car, got in an

accident and left the scene. H.L.S. led the police to believe that the car was stolen. The shoplifting charge arose from stealing groceries when R.S. was very small and money was scarce. H.L.S. does not accept that H.K.K.'s injuries were caused by D.K. nor does she accept that he committed the violent offences that he was charged with, plead guilty to and convicted of in relation to former partners and violence to a child. This raises great concern for the court.

[22] The Minister's concern about H.L.S.'s trustworthiness and honesty arise from H.L.S.'s failure to tell the Minister of her third pregnancy until she was approximately seven months pregnant. Also, the Minister indicates that H.L.S. led both the Minister and Martin Whitzman to believe that she had ended her relationship with D.K. in late 2002/early 2003. H.L.S. did not admit that she continued to see D.K. until confronted with credible evidence by the Minister. H.L.S. describes these incidents as simply withholding information and not lying to the Minister. Whatever label is put on these two incidents, H.L.S. was deceptive and dishonest with the Minister and Mr. Whitzman. H.L.S.'s conduct can be partially explained by her fear over the new baby being taken into care and her fear that her children would not be returned to her.

[23] H.L.S. has put a large part of her life and independence aside in the last two years in order to spend as much time as she can with her children. There appears from the access reports and other accounts to be a real bond between H.L.S. and her children. Early in the proceeding concerns were raised over H.L.S.'s ability to control the behaviour of R.S. H.L.S. participated in parenting courses and this is no longer a concern.

[24] The major concern with H.L.S. is whether she would allow unsupervised contact between the children and D.K. The Minister has grave concerns that she will not be able to stand up to D.K. Dr. Blood and Martin Whitzman have expressed the same concerns. It was the Minister's hope that H.L.S. would end her relationship with D.K. and the children would be returned to her care. As it became apparent that H.L.S.'s plan was a joint plan with D.K., the Minister's plan since December 2003 has been for G.S. and W.S. to have custody of the children pursuant to the *Maintenance and Custody Act.*

Considerations in granting custody to the maternal grandparents:

[25] W.S. and G.S have had the children in their home and in their care for approximately one year. The youngest child has been in their home and care almost since birth. W.S. and G.S. have sacrificed much over the 1½ years to protect their grandchildren and to assist their daughter. There is no doubt that the children would be safe and well cared for if they were to get custody of the children. After a few initial misunderstandings as to H.L.S.'s supervision, there have been no concerns expressed by the Minister over the care the children have received in the home of G.S. and W.S.

Conclusion

[26] It is clear that any plan for these children will involve supervised access to D.K. The choice between granting custody to H.L.S or G.S. and W.S. is not an easy one. It is clear the safest place for the children is to remain in the care of G.S. and W.S. with supervised access to both parents. However, that is not the end of the matter as I must not only consider the safest plan but the one in the children's overall best interest. I must consider the bond that they have with their mother and the effect of losing daily contact with her. I must consider that while G.S. and W.S. are putting forward a plan to have custody of their grandchildren that is really not what they want. For over a year their lives have been disrupted and as W.S. indicates in her affidavit – it has been difficult. Alternate care givers were difficult to arrange because of the Minister's requirements. W.S. had trouble arranging for the smallest outing for herself – she has been virtually house bound. A situation that the grandparents felt would be short term is now being considered as a long-term and perhaps a permanent arrangement. G.S. and W.S. have made many sacrifices for their daughter and grandchildren, including renovating their home to allow for sleeping space and putting life on hold. While they are offering to be long term care givers for the children, it is clear that they do not want to be in that position. Is it fair to the children and the grandparents to put them in that position?

[27] Placing the children in the custody of their mother with supervised access to the father has certain risks. The concerns raised by Dr. Blood and Martin Whitzman have to be considered seriously despite the fact that they have had little, if any, contact with the

parties for an extended period of time. It is clear to all that if H.L.S was not in a relationship with D.K. she would have had her children returned to her a long time ago. I have concern that H.L.S. does not believe that D.K. caused the injuries to H.K.K., although I have found that to be the most likely scenario. I have concern that H.L.S. believes that D.K. plead guilty and was convicted of some very serious offences although he was not responsible – again clearly contrary to the evidence.

[28] Balanced against these concerns is the history over the last year and a half. Although H.L.S. had limited unsupervised access there is no evidence that she allowed unsupervised contact between the children and D.K. H.L.S.'s actions in moving in with her parents in very difficult circumstances show that she is able to put her children first. I believe that coupled with the last 2½ years of this proceeding would make it clear to H.L.S that it would not be worth the risk to allow unsupervised access by D.K. If that were to happen the Minister would likely apprehend the children again and the process that H.L.S. has waited so long to end would start all over again. It is my belief that H.L.S. would not be so foolish as to risk her children and the return of the Minister in their daily lives. I believe that the children can be adequately protected in the care and custody of their mother with supervised access to their father.

[29] The oldest two children were apprehended in March of 2002 and this family has been in a holding pattern since that time. It is time to normalize the situation for the children and I find that to be in their best interest. The living situation with the maternal grandparents was not a long term solution.

[30] The matter involving the Minister of Community Services, H.L.S., D.K. and W.S. is dismissed and I grant sole custody of the three children to H.L.S. and supervised access to D.K. This access will be directly supervised by W.S. or G.S. If there is an application made to vary the custody or access provisions of this order, the Minister of Community Services must be provided 30 days' notice of that application.

Mona M. Lynch, J.