

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v. RK*, 2021 NSSC 45

Date: 20210210

Docket: 119085

Registry: Sydney, NS

Between:

The Minister of Community Services

Applicant

v.

RK and DW

Respondents

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Judge: The Honourable Justice Pamela A. Marche

Heard: December 14, 2020 in Sydney, Nova Scotia

Oral Submissions: December 14, 2020

Oral Decision: December 18, 2020

Written Decision: February 10, 2021

Subject: Protection Hearing, *Children and Family Services Act*

Summary: The Court found that the children LK and IK were children in need of protective services, pursuant to ss22.(2).(b) and (g) as of the date of the Protection Hearing.

Issue: Are the children LK and IK in need of protective services pursuant to ss.22.(2)(b) and (g)?

Result: The Court found:
(1) That the children LK and IK were at substantial risk of physical and emotional harm due to the circumstances in which they have been placed by both parents as a result of their parents lengthy and polarizing high conflict dispute.
(2) That the allegations of physical abuse in relation to RK in particular could not be substantiated by child hearsay evidence.

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Written Release: February 10, 2021
Counsel: Briana Renou for the Minister of Community Services
Alan Stanwick for the Respondent DW
RK – Self-Represented Respondent
Lisa Fraser-Hill for the Litigation Guardian

By the Court

[1] On December 14, 2020 a Protection Hearing was held past statutory deadlines.

An oral decision was delivered on December 18, 2020. This is the written decision that was delivered on December 18, 2020 modified only to correct

grammar, to provide case law citations and to make other minor edits that do not substantially alter the decision.

Background and Procedural Facts

[2] This is a decision about whether LK, 13 and IK, 10 are in need of protection because of concerns for their physical and emotional safety. The son and daughter are the children of parents who have been embroiled in an exceptionally high conflict parenting dispute for just about as long as they have been parents.

[3] Most recently their private dispute had been centered around issues of residency and interpretation and compliance with their parenting orders issued under the *Parenting and Support Act*, RSNS 1989, c 160.

[4] The current bout of turmoil began with the outbreak of Covid-19 when the week about parallel parenting order that had been put in place under the *Parenting and Support Act* was abandoned and the long festering dispute between these parents escalated to the point where the Minister of Community Services became formally involved.

[5] For reasons that he attributed to Covid-19, RK kept the children in his care from March 11, 2020 until June 13, 2020. At approximately 4:00 am on June 13, 2020,

TW, the father of DW, removed the children from the residence of RK. RK was lobster fishing at the time and the children were home alone. RK's partner discovered the children as missing when she returned to the home in the early morning from a nursing shift.

[6]RK has video camera surveillance on his property that captured images of this event. He reported the incident to the police and wanted TW charged with break and entry and kidnapping in relation to this incident. RK also wanted the police to return the children to him. The police declined to do either of these things.

[7]In her response to the police about the incident, DW indicated that on June 12, 2020 the children had reported to her that they were being left alone and could only speak to her when they were alone because RK was recording them. DW told the children that they should contact her again if they were left alone and she would come and get them.

[8]DW told the police that the children were terrified of RK. She reported that the children had made a previous disclosure of physical abuse and that nothing had happened as a result, and now the children felt there was nothing they could do. DW indicated an intention to keep the children in her care in PEI to make up for the time when the children were with RK.

[9] On July 10, 2020, the children, while in their mother's care, reported physical abuse from their father, RK to a PEI Social Worker. These allegations were investigated and substantiated by the Minister of Community Services. These allegations were also investigated by the police and RK has been charged with one count of assault in relation to the reported abuse.

[10] A Notice of Child Protection was filed on August 18, 2020. The 5-day Order was granted August 20, 2020 and a Litigation Guardian was appointed for LK on September 18, 2020.

[11] The interim hearing was not completed until September 28, 2020, past the 30 day deadline. There were multiple court appearances, several of which were adjourned to allow RK the opportunity to get legal counsel, as RK was initially disputing the interim finding. RK eventually consented to the interim finding on September 28, 2020, after receiving the benefit of legal advice.

[12] At a pretrial for the Protection Docket, counsel for RK indicated that he would be consenting to a protection finding but, on the date of the uncontested protection docket, RK indicated that he would be representing himself and that he no longer agreed to a protection finding. A Protection Hearing was held at the next earliest opportunity, December 11, 2020.

[13] Given the pressing time frames embodied within child protection legislation, it was determined that the Protection Hearing would proceed in accordance with Covid-19 Notice to the Bar #9, allowing for direct evidence by Affidavit.

[14] RK filed eight affidavits. The Minister objected to the majority of the content contained in these Affidavits on the basis that they contained inadmissible evidence such as opinion, argument, hearsay and child hearsay.

[15] In the interest of time, the Minister did not seek to have the affidavits struck or edited but rather asked the Court to ignore inadmissible, irrelevant, hearsay and opinion evidence. Justice Forgeron adopted such an approach in **White v. Stevens-White**, 2013 NSSC 368, noting at paragraph 16:

Given the significant time constraints under which the court was operating, and the voluminous amounts of materials, it was not productive for the court to individually identify and strike each offending portion. Rather the court globally rejected all inadmissible material contained in the affidavits. Neither party were served by the glaring infringement of affidavit evidence rules.

[16] I have done the same in my assessment of the evidence on this matter.

[17] In addition to the three affidavits from two child protection workers, the Minister filed as evidence the complete ICM record as well as complete police records for both RK and DW.

[18] The ICM and police records comprised of four large volumes of materials, each approximately three to four inches thick, and covering over a decade of involvement. The records were tendered in bulk and filed with the Court on Friday afternoon before the Monday hearing.

[19] RK did not object to these records being entered into evidence or to the Court considering the out of court statements attributed to his children. The records were, therefore, admitted in their entirety with the Court to determine the appropriate weight to be assigned to the various aspects of the evidence.

[20] DW did not participate in the Protection Hearing having previously indicating her consent to the position of the Minister.

Issues

- Has the Minister of Community Services proved that the children are in need of protective services because they are at substantial risk of physical harm or emotional abuse?

Position of the Parties

[21] The Minister's position is that the children are at risk of emotional abuse and of physical abuse. Their latter concerns relate to RK only.

[22] DW agrees with the Minister and the children remain in her care in PEI.

[23] The Litigation Guardian also agrees with the position of the Minister.

[24] The allegations of physical abuse made by the children against their father is are as follows:

- LK said his father was violent and that he made an escape plan with his mother to leave his father's house. LK reported that he learned about escape plans from watching action movies.
- LK reported that his father would pull his hair, squeeze and twist his arm, bend his fingers back and grab his throat, if LK did not do well in school or did not do exactly as his father said.
- LK reported that his father had gotten LK's fingerprints on a pocket knife and had taken a picture of LK holding this knife. LK reported that his father threatened to use this finger-printed pocket knife to send LK to jail.

- LK reported that he would lie to his father so that his father would not hurt him and that he taught IK to do the same thing too (lie) to protect IK.
- When asked about what sort of lies he would tell, LK said he would lie and say that he wants to live with his father and likes his father more than his mother.
- LK said he was afraid social workers would tell his father about how he is feeling and that his father would be angry.
- LK reported wanting to get a hand air gun so that he could scare his father.
- IK reported that her father twists her arm, pulls her fingers back and slaps her bum.
- IK reported being sad because her father said bad things about her mother.
- IK reported her father being mad at her for talking to her mother and she reported that her father told her that he was taking her mother to court and that IK would only see her mother for a few hours on holidays.
- IK said she would lie to her father about where she wants to live because she is scared of how he would react.

[25] RK vehemently disagrees with the Minister and feels that DW is using the involvement of the Minister to further her position in their ongoing private parenting dispute litigation. He argues that this proceeding is just another stepping stone by DW to have the children placed in her care in PEI.

[26] RK feels the police are biased against him, are in a conflict of interest and have mishandled this investigation. He has filed a formal complaint against the Police.

[27] Similarly, RK feels the Minister of Community Services have conducted a one-sided investigation and that they have unfairly taken DW's side and are believing her lies. RK pointed to inconsistencies within the ICM notes as confirmation of untruths and that the Minister of Community Services is stacking the file against him.

[28] RK claims DW has a history of making false allegations against him citing past charges of sexual assault against him that were ultimately dismissed.

[29] RK points out that the children made similar allegations against him in 2016 which were ultimately unsubstantiated and that this should be an indicator that the current allegations are also untrue.

[30] RK says the children were not physically abused. He argues that he had been fishing for several weeks prior to the children being removed from his home and during this period of time the children had access to cell phones to call their mother or anyone else to assist, if they were really being abused.

[31] RK points to inconsistencies within the children's statements as an indication of untruth. RK argues that the children are being manipulated by DW to make allegations of abuse as justification, after the fact, of her wrongful and illegal removal of the children from his home.

[32] RK denies any protection concerns that relate to him.

[33] On cross-examination, RK acknowledged that his children were at risk of harm. RK was insistent, however, that such risk emanates solely from DW.

[34] On several occasions RK acknowledged that his children were suffering and in need of counselling.

[35] RK agreed that the risks his children were facing could be alleviated through services and counselling that could be provided through the Minister but argued that the risk of harm could be addressed by removing the children from their mother's care and returning them to him.

[36] RK has not engaged with any of the services currently being requested of him by the Minister. He referred to the recent completion of past counselling, as well as health concerns and time constraints, as reasons why he has not.

Applicable Law

[37] The burden of proof is the civil burden of proof and “that is proof upon the balance of probabilities” as stated in **FH v. McDougall**, 2008 SCC 53.

[38] Protection decisions must be made keeping in mind the legislative purpose as stated in s. 2(1) of the *Children and Family Services Act*. S.N.S. 1990, c. 5 (“*CFSA*”):

- To promote the integrity of the family
- To protect children from harm
- To ensure the best interests of the children

[39] The paramount consideration, however, is the best interests of the children as stated in s. 2(2) of the *Act*.

[40] The *CFSA* must be interpreted according to a child-centered approach, in keeping with the best interests principle as defined in s. 3(2) of the *Act*. This

definition is multifaceted. It directs the Court to consider various factors unique to each child, including those associated with the child’s emotional, physical, cultural, and social developmental needs, and those associated with risk of harm.

Nova Scotia (Community Services) v. RMN, 2017 NSSC 270.

[41] The Minster is relying on two provisions of the *Children and Family Services Act* to establish a protection finding, both of which are based on substantial risk s. 22(2)(b) and (g). Section 22(2) indicates a child is in need of protective services where:

(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in case (a) [Clause a states: a child 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]

(g) there is a substantial risk that the child will suffer emotional abuse and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, or fails to cooperate with the provision of services or treatment to remedy or alleviate the harm.

[42] S. 3(1) in this *Act*:

(1a) “emotional abuse” means acts that seriously interfere with a child’s health, development, emotional functioning, and attachment to others such as:

- (i) rejection
- (ii) isolation, including depriving the child from normal social interactions
- (iii) inappropriate criticism, humiliation or expectation of or threat or accusations towards the child, or
- (iv) any similar acts

[43] Substantial risk is defined in s.22(1) of the *CFSA*. It means a real chance of danger that is apparent on the evidence.

[44] When deciding whether there is a “substantial risk” a judge must only be satisfied that the “chance of danger” is real, rather than speculative or illusory, “substantial” in that there is a “risk of serious harm or serious risk of harm” (**Winnipeg Child and Family Service v. KLW**, 2000 SCC 48 paragraphs 104, 106, and 117) and it is more likely than not (a balance of probabilities) that this “risk” or “chance of danger” exists on the evidence presented. **CR v. Nova Scotia (Community Services)**, 2019 NSCA 89

[45] As noted in **MJB v. Family and Children’s Services of Kings County**, 2008 NSCA 64, in relying upon “substantial risk” the Minister need only prove that there is a real chance that the future abuse will occur and not that future abuse will actually occur.

Decision on Substantial Risk of Physical Harm

[46] I find that the Minister did prove that the children are in need of protection pursuant to s. 22(b) of the *Act*, which is a finding based on a substantial risk of physical harm.

[47] Except for findings under s. 22(2) (a) and (c), which have the result of placing a parent or guardian on the Child Abuse Register, a protection finding is not made against a parent or guardian. Rather it is the circumstances of the child which places them at risk. **Nova Scotia (Community Services) v. CKZ & GLP**, 2016 NSCA 61, at paragraph 47 states:

Nowhere in s. 22(2) is the protection status of a child linked to the specific **attributes** of his or her parent or guardian. It is, however, clearly linked to the actions, failure to act, or inability to act of the adults responsible for the child's care. Whether a child is in need of protective services is based upon the real life, lived experiences of the child. Nowhere in that definition, or elsewhere in the *Act*, is the status of a child as being in need of protective services informed by the reason **why** their parents acted, failed to act, or have the inability to act in a particular manner.

[48] I do not find that the risk of physical harm is limited to concerns related to RK. Furthermore, I am making this finding not based on the allegations of physical abuse as disclosed by the children but based on the behaviours of both parents.

[49] I am unable to afford very little weight to the evidence of LK and IK, and I am unable to do so because of the unfortunate fact that both of their parents have placed them in the middle of a polarizing and lengthy parental dispute. Even within the children's statements upon which I am being asked to rely, the children themselves admit that they have lied to please a parent. The high conflict context

of this situation makes the child hearsay offered to prove the children to be at risk of harm at the hands of RK to be highly suspect and unreliable.

[50] I am satisfied that the conflict between the parents has escalated to the point where the children are at substantial risk of physical harm caused by the failure of both parents to supervise and protect the children adequately.

[51] The father and mother are engaged in a high conflict, polarizing and lengthy parenting dispute. The father is convinced that the mother is alienating the children from him. The father is consumed by this conflict to the point where he is unable to parent in an objective and healthy fashion. He has adopted a war-like approach where he is the victim and DW, and any other who takes umbrage with his behaviour, is the enemy. His war-like approach includes the recording of his children and of others and the hiring of a private eye to monitor DW. RK feels this is necessary to protect his innocence and to vindicate his legal position. These types of recordings violate a sense of privacy and security for his children and demonstrate the father's inability to put the needs of his children above his own.

[52] DW has also demonstrated poor judgement in the face of her escalating conflict with RK over the children. Engaging with the children directly in a dead

of night escape plan from their father was not necessary. Any concern that she had about the children could, and should, have been handled more appropriately. It is abundantly clear that both parents understand thoroughly how to interface with the courts to intercede in their private parenting disputes.

[53] I find, given these circumstances, that the children are at substantial risk of physical harm by their parents' failure to supervise and protect them adequately. Unless these parents change their parenting and their attitudes by acquiring new skills and a better appreciation of the children's needs, it will only be a matter of time before the children suffer significant harm.

Decision of Substantial Risk of Emotional Abuse

[54] In **Nova Scotia (Community Services) v. KM**, 2019 NSSC 312, Forgeron J. stated at paragraphs 27 and 28 the following with respect to a finding of substantial risk of emotional abuse:

[27] A finding of a substantial risk of emotional abuse, like any other protection finding, is not one that will be entered lightly. Evidence must support such a finding in keeping with the civil burden of proof. Such a finding involves both objective and subjective elements. The parental conduct must be viewed objectively to prove actions that seriously interfere with a child. The parental conduct must also be viewed subjectively based on the impact that the conduct has or will likely have on the specific child.

[28] In the end, the Minister must prove that there is a substantial risk that the father will seriously interfere with three aspects of the children's lives – that

involving their healthy development, emotional functioning and attachment to others. In addition, for a finding of substantial risk, the Minister must also prove that the father does not participate in services to remedy or alleviate the abuse

[55] A finding of substantial risk of emotional abuse, like any other protection finding, is not one that will be entered lightly. Evidence must support such a finding in keeping with the civil burden of proof. Such a finding involves both objective and subjective elements. The parental conduct must be viewed objectively to prove actions that seriously interfere with a child. The parental conduct must also be viewed subjectively based on the impact that the conduct has or will likely have on the specific child.

[56] As stated by Justice Forgeron, in the end, the Minister must prove that there is a substantial risk that will seriously interfere with three aspects of the children's lives – that involving healthy development, emotional functioning and attachment to others. In addition, for a finding of substantial risk, the Minister must also prove that there is a lack of participation in services sufficient to remedy or alleviate the abuse.

[57] I find that the Minister did prove a substantial risk of emotional abuse for the same reasons previously identified under the issue of risk of physical abuse. Also, there has been significant damage such that LK is refusing contact with his father.

[58] Furthermore, DW consented to this finding and RK admitted that his children are suffering emotionally and are in need of counselling.

Conclusion

[59] JK, paternal grandmother, gave evidence and spoke about the chaos experienced by LK and IK, saying something had to be done or someone is going to be held responsible.

[60] The children have experienced chaos and upheaval at the hands of both parents. The Minister has proved that the daughter and son are both in need of protective services in that they are at substantial risk of physical harm and emotional abuse.

[61] Both parents have contributed to this truly unfortunate situation and the Court holds both of these parents responsible for putting their children in the middle of their polarizing parenting dispute which has negatively consumed this family for far too long.

Marche, J. Pamela A.