SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v. LE*, 2021 NSSC 47

Date: 20210211
Docket: 113485
Registry: Sydney

Between:

The Minister of Community Services

Applicant

v.

LE and CH

Respondents

LIBRARY HEADING

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Judge:	The Honourable Justice Pamela A. Marche
Heard:	November 16, 19, 20, 2020 December 18, 21, 2020 in Sydney, Nova Scotia
Final Written Submissions:	Adam Neal – January 11, 2021 Rosemary Osasere, January 25, 2021 Alison Aho, December 22, 2020
Written Decision:	February 12, 2021
Subject:	Permanent Care and Custody Hearing, *Children and Family Services Act*
Summary:	The Court found that the children remain in need of protective services and it was in their best interest that a Permanent Care and Custody order be granted.
Issues:	(1) Do the children remain in need of protective services?

(2) If so, should a Permanent Care and Custody Order be granted?

Result: Permanent Care and Custody Order granted.

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Counsel:	Adam Neal for the Applicant Rosemary Osasere for the Respondent, LE Alison Aho for the Respondent, CH, present but not actively participating

By the Court:

Overview

[1] The Minister is seeking a permanent care and custody order in relation to LYM, born November *, 2010, LZM, born April *, 2014 and WH born May *, 2017. LE is the mother of all three children. CH is the father of WH.

[2] The Minister claims the children remain in need of protective services due to concerns of substance abuse, domestic violence and inadequate parenting skills and that it is in the best interests of these children to be placed in the permanent care and custody of the Minister.

[3] The mother, LE, seeks to have the children returned to her primary care. She proposes a joint custody arrangement with CH who would have reasonable access to the children. She claims that any risk of harm to the children has been sufficiently addressed. She argues that she is no longer in a relationship with CH and concerns about domestic violence are therefore no longer relevant. LE says that drugs are no longer an issue for her as evidenced by her participation in the New Horizons Program and a number of clean drug tests. Finally, LE asserts that she has participated in services and programs sufficiently to ameliorate any concerns the Minister may have in relation to her parenting skills.

[4] The father, CH, did not actively participate in the permanent care hearing and did not put forward a position.

Issues

- Do the children remain in need of protective services?
- If so, should a Permanent Care and Custody Order be issued?

Background and Procedural Facts

[5] The Minister has historical involvement with LE dating back to 2011. The most recent involvement with this family began in the summer of 2018 with the Minister seeking to engage LE voluntarily in services. The Minister found LE to be resistant to voluntarily engagement and in February 2019 the Minister obtained an Order placing the children in the care of LE under the supervision of the Minister.

[6] From the Minister's perspective, LE remained uncooperative and continued to avoid engagement with the Minister's plan to address protection concerns. As a result, the Minister felt more intrusive measures were necessary to protect the children and the children were taken into the care of the Minister in April 2019.

[7] A protection finding on this matter was initially contested and hearing dates were adjourned several times to accommodate LE, who often did not attend for Court. A protection finding was ultimately made on August 28, 2019, pursuant to Section. 22(2)(b) of the *Children and Family Services Act*, SNS 1990, c 5, (The *Act)* with the first Disposition Order being issued on November 25, 2019.

[8] The two older children have remained in the care of the Minister since April 2019. The youngest child, WH, was initially placed in the supervised care of her paternal grandparents, where her father, CH was also living. This placement broke down in September 2019 when it was discovered that CH was not maintaining his sobriety and was allowing LE unsupervised access to WH contrary to court order.

[9] In April 2020 WH was placed in the supervised care of CH but in September 2020 WH was once more returned to the care of the Minister because CH had again permitted LE unsupervised access to WH.

[10] The statutory time limit of this proceeding expired on October 8, 2020. All parties agreed to extending the deadline to schedule a five-day hearing in November 16-20, 2020. The matter could not proceed on November 17 and 18 as scheduled due to a Covid 19 related issue. All parties agreed to adding two additional docket dates to make up the lost hearing time. The matter was heard again on December 18 and 21, 2020.

[11] The Court heard from fourteen witnesses: Cst. Miller, Cst. Clark, Cst. Fraser, Case Aide Bobby Newman, Case Aide Leeann Grande, Case Aide Ashley Wilson, Case Aide Tracy Pentecost, Case Aide Amanda Burke-MacKeigan, Ryan Ellis (Child Care Worker), Josey Lovett (Long Term Social Worker), Cheryl MacQuarrie (foster parent), Keltie Jones (Safer Communities Investigator), Steve Fraser (CBR Housing Manager), and DH (father of CH).

[12] The Respondents were late in appearing for Court each day by at least half an hour. The Respondents did not attend Court at all on the day LE was scheduled to give evidence. Unexpectedly, no evidence was put forward on behalf of LE with the exception of a Joint Statement of Facts, prepared to the credit of counsel and included in closing submissions, in relation to LE's participation in the New Horizon

Program. Closing submissions were received by Counsel for CH on December 22, 2020 and by Counsel for the Minister on January 11, 2021 and by Counsel for LE on January 24, 2021.

Applicable Law

[13] The Minister is assigned the burden of proof and it is the civil burden of proof. The Minister must prove its case on a balance of probabilities by providing the Court with "clear, convincing and cogent evidence." **Nova Scotia (Community Services) v. C.K.Z.,** 2016 NSCA 61. The burden of proof is not heightened or raised because of the nature of the proceeding. **F.H. v. McDougall**, 2008 SCC 53. The agency must prove, on a balance of probabilities that it is in the best interests of the children to be placed in the permanent care and custody of the Minister.

[14] The Minister seeks a permanent care and custody order pursuant to Section 42 of the Act

Decisions about permanent care must be made keeping in mind the Legislative purpose stated in s. 2(1) of the *Act.*

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

[15] The *Act* must be interpreted according to a child-centered approach. Factors to be considered when making a decision in a child's best interest are listed in s. 3(2) of the *Act* and are non-exhaustive. The definition of best interest is multi-faceted. The Court must consider various factors unique to each child including those needs associated with the child's emotional, physical, cultural, social, and developmental needs and those needs associated with risk of harm. **Nova Scotia (Community Services) v. R.M.N. and M.C.,** 2017 NSSC 270.

[16] In making a decision about the future care of a child, the best interests of the child must be the Court's paramount consideration as per ss. 2(2) and 42(1) of the *Act*. In consideration of the best interests of the children in this particular case, the Minister relies primarily on the following section of s. 3(2) of the *Act* in support of a Permanent Care and Custody Order being issued:

> 3(2) Where a person is directed pursuant to this *Act*, except in respect to a proposed adoption, to make an order or determination in the best interests of a

> child, the person shall consider those of the following circumstances that are relevant:
>
> > 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;
> >
> > (l) The risk that the child may suffer harm through being removed from, kept away from, returned to allowed to remain in the care of a parent or guardian;
> >
> > (m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

[17] Prior to the Court granting an Order for permanent care and custody, the requirements of s. 42(2), (3) and (4) must be met. Section 42(2) of the *Act* states that the Court must not remove children from the care of their parents, unless less intrusive alternatives, including services to promote the integrity of the family, have been attempted and have failed, or have been refused by the parent, or would be inadequate to protect the children. The obligation to provide services is not without limit; the *Act* obligates the Minister to take "reasonable measures" in this regard: **Children's Aid Society of Shelbourne County v. S.L.S.,** [2001] N.S.J. No. 138 (NSCA).

[18] Section 42(3) of the *Act* states when the Court determines that it is necessary to remove the child from the care of a parent, the Court shall, before making an order or temporary or permanent care, consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family. The onus is on a potential family placement to put before the Court a reasonable plan for the care of the child. The Nova Scotia Court of Appeal stated that "reasonable" meant proposals that are sound, sensible, workable, well-conceived and have a basis in fact: **Children's Aid Society of Halifax v. T.B.,** [2001] N.S.J. No. 225 (NSCA).

[19] Section 42(4) of the *Act* provides that the Court shall not make an order for permanent care and custody unless the Court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the statutory time limits outlined in the *Act* based on the age of the child.

[20] The permanent care hearing is the last of the disposition reviews. In conducting a disposition review, the Court assumes that the orders previously made were correct, based upon the circumstances existing at the time. At a review hearing, it is not the Court's function to retry the original protection finding, but rather, the Court must determine whether the child continues to be in need of protective services. The Court must determine whether the circumstances which resulted in the original order, still exist, or whether there have been positive or negative changes, or whether new factual circumstances have arisen, such that the children are no longer children in need of protective services: **Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.), [**1994] 2 S.C.R 165.

The Children

[21] LYM is described as a sweet and loving girl. When she was in the care of her mother, LYM had trouble with attending school regularly and was bothered with issues of head lice, warts, and worms. LYM had difficulty sleeping when first coming into care and the setting of boundaries was necessary to help her settle into her placement. LYM is described as assuming a motherly role in relation to her two siblings, particularly her younger sister.

[22] LZM, also described as sweet, has several health issues in addition to those experienced by his sister. LZM has been diagnosed with ADHD. He has serious behavioural issues that have included violent and aggressive outbursts. He has difficulty sleeping and has suffered night terrors. He has acted out sexually in inappropriate ways. He has cognitive issues that create challenges for him, particularly in relation to articulating his feelings and focusing while in school. His medical issues are controlled through medication and behavioural management strategies. He requires special adaptations to help him manage in school and socially. Consistency is key to his treatment and he does not do well with change.

[23] WH, during her short life, has already experienced much upheaval having been twice removed from the care of her father and his family. She is described as a bright child with well-developed speech, who could be mistaken for being older than her actual age. She is also described as being persistent and headstrong, and while these are not negative character traits, consistency and boundaries have also been reported to be helpful to WH.

[24] The evidence indicates that the children have all settled and are doing well in foster care. LYM and WH are in foster care together and both are sleeping better. The two older children are doing well in school, with adaptions and medication in

place for LZM, and both LYM and LZM are enjoying and benefitting from extra-curricular activities.

Decision

[25] In making my decision I have considered the burden of proof as well as the provisions of the *Children' and Family Services Act*. I have considered the applicable case law, including that relating to credibility (**Baker-Warren v. Denault,** 2009 NSSC 59) and drawing inferences (**Jacques Hometown Dry Cleaner's v. NS (Attorney General),** 2013 NSCA 4). I have analyzed the evidence, in consideration of the law, and I have reflected upon the submissions of counsel.

Issue One: Do the children remain in need of protective services?

[26] I am satisfied that the Minister did prove that the children remain in need of protective services. LE continues to present with issues that place her children at risk of harm.

Inadequate Parenting Skills

[27] In closing submission, the Minister acknowledged that LE had engaged with a Family Support Worker and had participated in the Healthy Relationships Program through Transition House as well as individual counselling and Anger Management through the Cape Breton Elizabeth Fry Society. The Minister asserts, however, that LE continues to demonstrate inadequate parenting skills notwithstanding her participation in these services and programs.

[28] LE argues that the Minister has not afforded her sufficient opportunity to demonstrate the knowledge she has gained though her participation in these services and programs because she was not given the chance to parent the children under a Supervision Order.

[29] Given that LE did not put forward any evidence to support her position, I have limited information about LE's level of participation in these services or the impact of these services and programs upon her. I must make findings based upon the evidence before me.

[30] I did hear evidence from several Case Aides, who either transported the children for access visits or supervised the visits between the children and LE. or did both. All of the Case Aides who testified described the access visits between LE and

her children as chaotic, hurtful and, at times, dangerous for the children because of a number of issues:

- LE had serial issues with not showing up for access or cancelling at the last minute. When LE did attend at access, she was consistently late for access, often by as much as 15 minutes for a one-hour visit. This created ongoing uncertainty and anxiety for the children about the access visits.

- The behaviour of the children being transported to the visits and while waiting for LE to arrive was described as calm, respectful, and appropriate. In contrast, the behaviour of the children while visiting with LE was described as aggressive, loud, out-of-control and upsetting for all involved. The children were described as screaming at each other, running around, and pushing and shoving each other. The access visits were so problematic that efforts were made to modify the structure of the visits to so that access could be more manageable for LE. This did not change the dynamic and access visits remained chaotic.

- LE was observed at access visits as not having the capacity to address the behavioural issues of the children. The children's behaviours during access visits were described as devolving to a point where their conduct created a dangerous situation for themselves and for each other. LE frequently had to call on the assistance of Case Aides to help in moderating her children's behaviour to address safety concerns. LE was unable to effectively respond to the behavioural issues when told by Case Aides that it was her role to intervene with the children.

- The negative behaviours that emerged during access visits with LE were reported to last well after the visits in some cases, particularly in relation to LZM who began to refuse visitation with LE. LZM was reported to experience setbacks in his progress in dealing with his behavioural challenges after visitations with LE.

- LE engaged her children in her active defiance of access rules and policies. For example, she brought outside food and objects

> to the visit for the children, contrary to Covid policy, and attempted to conspire with the children to hide these objects from the Case Aides.
>
> • LE engaged in adult conversations with LYM about ongoing child protection issues such as details about the court proceeding and possible family placements. LYM was deeply upset by these conversations and her connection with her Child Care Worker was negatively impacted as a result.
>
> • LE advised a Case Aide, in the presence of LZM, that she did not want LZM to be taking medication for his ADHD. After this, LZM began to actively refuse to take his medication and progress he had made in school and socially was lost, and his behavioural issues regressed.

[31] The Minister had multiple conversations with LE about how her conduct during access visits was having a negative impact upon her children. Nothing changed. I am satisfied that this demonstrates either a lack of insight about the protection concerns or an inability on the part of LE to address those concerns. Either way I find that LE continues to be unable to utilize parenting skills to the degree necessary to meet the needs of her children, thereby placing those children at risk of harm. It is not incumbent upon the Minister to allow LE a period of time with the children in her supervised care to prove that the children remain at risk of harm.

Drug Use and Drug Culture

[32] The Minister claims that LE continues to use drugs and immerse herself in the drug culture by associating with drug users. LE argues that she is clean and free from the drug world culture.

[33] LE initially denied drug use and her evasiveness around this issue at least in part prompted the Minister to undertake the more invasive intervention of taking the children into care.

[34] LE did admit to drug use post-apprehension. In October 2019, LE told her caseworker that she had gone downhill after the children were taken into care (April 2019) and that she had been taking hydros and had almost overdosed. When she

made this admission to her caseworker, she reported to have been in the methadone program for six weeks and was now clean.

[35] As a result of public complaints of illegal activity, LE's home was the subject of a week-long surveillance by NS Public Safety - Safer Communities and Neighborhoods (SCAN) during the week of February 27 to March 3, 2020. A SCAN investigator testified that he identified sixteen separate instances where he believed illegal drug activity was taking place out of the residence of LE during the week of surveillance. Because of Covid 19 shut down, action stemming from this investigation was put on hold. Due to the passage of time during which there was inactivity associated with the SCAN investigation of LE's residence, SCAN undertook a second surveillance during the week of July 15, 2020. The same SCAN investigator testified that there was no conclusive evidence of illegal drug activity at LE's residence during the week of July 15, 2020.

[36] Additional evidence offered in relation to drug use by LE is found in the Joint Statement of Fact which provides the following:

> - LE began participating in the New Horizon Program on September 25, 2019
> - LE tested positive for drug use on four occasions from September to December 2019
> - In December 2019 LE's participation in the program was a concern because she was missing appointments and not rescheduling appointments
> - Testing was interrupted in March 2020 and did not resume until June 2020.
> - From June to August 2020, LE tested negative for non-prescription drug use on seven occasions.
> - LE was tested two other times: October 16, 2020 and November 26, 2020 and was found negative for non-prescription drug use each time.

[37] On September 14, 2020, the Minster received an anonymous referral that CH was allowing LE unsupervised access with WH in the home of the referral source's neighbor - "the neighbor". The anonymous source also reported a concern that the neighbour was trafficking drugs.

[38] The Minister asserts they were not able to investigate risk associated with the neighbor because LE refused to provide the Minister with information about where she was staying and whom she was spending time with. The Minister asks the Court to draw an inference from this, and absent any evidence to the contrary, that LE was associating with someone involved in the drug culture when she was spending time with the neighbor.

[39] The Minister claims that CH had also reported concerns that the neighbor in question was a drug dealer and this should support this inference. However, the evidence of Case Worker Lovett in her affidavit of September 21, 2020 was that CH's response was "I don't know" to her assertion to CH that he had reported concerns to the Minister about the neighbour's drug use.

[40] While the anonymous referral was correct that WH was spending unsupervised time with LE in the home of the neighbor, I am hesitant to rely on an anonymous referral as the basis of making an inference. I am satisfied that the evidence shows that there was a period of time when LE was using drugs heavily and likely involved in drug trafficking. I am further satisfied that the evidence shows there was a subsequent period of time, when testing showed that LE was no longer using drugs (June – November, 2020) and surveillance of her home no longer generated evidence of drug trafficking (July, 2020). To draw an inference that LE remains involved in the drug culture because of her association with an individual whom an anonymous referral suspected of being a drug dealer would be nothing more than a hunch, particularly in light of evidence that does exist to the contrary, specifically LE's drug test results, which do not support a logical conclusion that LE was using drugs in September, 2020.

[41] The Minister further asserts that LE has been spending time with CH and that LE, herself, has raised concerns about CH's drug use. The Minister claims this is indicative of LE's continued association with drug users.

[42] The Minister allowed WH to remain in the supervised care of CH up until September 2020. I heard no evidence about drug use on the part of CH subsequent to September 2020 other than an illusion to drug use by CH made by the neighbor referenced earlier who also admitted to the case worker that he did not have direct knowledge of the matter. Cleary the Minister must not have shared LE's concerns about drug use on the part of CH if they supported WH being in CH's supervised care. To hold up LE's association with CH now as indicative of drug use or association with drug culture is problematic.

[43] Based on the evidence before me, I am not satisfied that the Minister has met her burden in proving ongoing concerns with LE using drugs or being immersed in the drug culture.

Domestic Violence

[44] The Minister asserts that LE and CH have had a volatile and violent relationship with each other that has caused protection concerns for the children. I find this to be true.

[45] The Minister claims that the continuation of this relationship, whether platonic or romantic, presents a continued protection risk for the children. The Minister points to the evidence of CH's father as proof that LE and CH are in a relationship. While CH's father did testify that he felt LE and CH were in a relationship, he also admitted that he did not have direct knowledge of this fact.

[46] While the Minister did not prove on a balance of probabilities that LE and CH are involved in an ongoing romantic relationship, I am satisfied based on the evidence provided by the Minister that the potential for ongoing conflict between LE and CH is high, regardless of the nature of their relationship. LE's plan is to involve CH in the parenting of these children. The evidence before the Court is that the relationship between LE and CH has been toxic and tumultuous giving rise to a risk of violence that creates an ongoing protection concern for the children.

Issues Two: Should a permanent care order issue?

[47] Having been satisfied that the children remain in need of protective services, s. 42(2), (3) and (4) of the *Act* must be addressed prior an order for Permanent Care and Custody being granted.

> Section 42(2) - Have less intrusive measures, including services to promote the integrity of the family, been attempted, and have failed, or been refused by the parent, or would be inadequate to protect the children?

The Minister attempted to provide support to LE on a voluntary basis and then by court order since 2018. There have been significant periods of time when LE has been resistant or refused services to address protection concerns. LE took efforts to hide or minimize the issues she was struggling with that lead to risk of harm.

[48] Once the Minister had taken the children into care and it became clear that the Minister was planning for permanent care, I find that LE did become more actively

engaged in services and programming. Her participation in the New Horizons Program, while rocky to begin with, did ultimately prove successful, as demonstrated by a series of clean drug tests. There is some indication that LE participated in other services such as individual counselling, Anger Management and Healthy Relationships. However, I have no evidence that LE's participation in services has created a positive change in her behaviour thereby reducing the risk or harm. Ultimately the evidence before me, as discussed in detail previously, leads me to conclude that less intrusive measures, to the degree they have been attempted by LE in terms of services and programs, have been inadequate to protect the children.

Section 42(3) - Are there any family members available to care for the children?

No family placements were put forward by the parents pursuant to s. 42(3).

Section 42(4) – Are circumstances likely to change in a reasonably foreseeable time?

[49] At this stage, given the expiration of the statutory deadline, I have only two options. I must either dismiss the proceeding or grant a permanent care order. Because I have found that the children remain in need of protective services, it is in their best interests to be placed in the permanent care and custody of the Minister.

Conclusion

[50] I find that LE's plan to have the children returned to her care, with joint custody and reasonable access to CH, is not in the best interests of the children. The children have experienced a great deal of chaos and turmoil in their young lives and need stability and structure to ensure their safety and well-being. LE has demonstrated an ongoing inability to meet her children's needs in her role as a parent. The involvement of CH in the proposed parenting plan only serves to augment concerns about conflict and violence. Even if CH were not involved, the risk has not been sufficiently reduced such that the children should be returned to LE's care.

[51] The Minister's application for Permanent Care and Custody of the three children is granted.

Marche, J. Pamela A.