

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. CN and KF*, 2021 NSSC 125

Date: 20210413

Docket: *Halifax* No. SFHCFSA-114817

Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

CN and KF

Respondents

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: November 16, 17, 18 & 19, 2020, in Halifax, Nova Scotia

Counsel: Elizabeth Whelton for the Applicant
Catherine Torraville for CN
Raymond Kuszelewski for KF

Restriction on Publication: Restriction on Publication

Pursuant to subsection 94(1) of the *Children and Family Services Act*, S.N.S. 1990, c. 5, there is a ban on disclosing 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 a relative of the child.

By the Court:

[1] The Minister of Community Services is seeking a permanent care and custody order for the children, Ka (8) and Kn (5). The parents are seeking the return of the children to their care and the dismissal of these proceedings. The parents, CN and KF, have put forward a joint plan. They testified that they have addressed the protection concerns sufficiently such that their children should be returned to their care.

ISSUE

[2] Have the protection concerns been sufficiently addressed such that Ka and Kn should be returned to the care of their parents?

BACKGROUND

[3] CN is the biological mother of Ka and Kn. She was involved with the agency from her childhood, having been taken into care herself at a very young age. Her mother passed away before the child protection proceeding was concluded and she was raised by a family member. The difficulties and trauma experienced by CN throughout her life are clear. Given her history, it is understandable that it was difficult for CN to trust and engage in the child protection proceeding at the outset.

[4] KF is the biological father of Ka and Kn. He is considerably older than CN. He has been involved with CN in a relationship off and on since CN was a teenager. KF has been involved with the Agency dating back to 2003, relating to his children from a previous relationship. Past allegations related to KF included domestic violence, and risk of emotional and physical harm to the children.

[5] The Agency became involved with CN and KF at the time of Ka's birth in 2012. Concerns at that time related to CN's ability to parent (without support) as well as allegations related to drug use. CN acknowledged drug use while pregnant with Ka prior to knowing she was pregnant. For the first five months of the pregnancy, CN consumed drugs (including dilaudid and marijuana) and drank alcohol.

[6] Following Ka's birth, there were referrals from police related to domestic violence (which were subsequently denied by CN). KF also reported to the

Agency that CN was using drugs and prostituting herself in 2013. Subsequently CN, KF and Ka left Nova Scotia for various periods of time (to BC and to Ontario). After the parents returned to Nova Scotia, KF signed a Memorandum of Understanding confirming that CN was only to have supervised parenting time with Ka given the various concerns.

[7] In 2015 the Agency was again involved with CN and KF. There were allegations of CN's drug use and KF permitting CN to have unsupervised parenting time with Ka. During the time of the Agency's involvement, CN gave birth to Kn. There continued to be concerns about CN's drug use including her alleged drug use while still in hospital after giving birth to Kn.

[8] Despite the involvement of the Agency, there continued to be issues related to: the care of Ka and Kn, domestic violence, and drugs. Services were put in place to assist the parents, but the concerns escalated to the point where the children were taken into care in November 2015. The parents participated in services to the extent that the children were returned to their care in July 2016.

[9] In November, 2016, the proceeding was terminated. CN had addressed the concerns related to substance abuse, had engaged in Family Support Work and had attended couples counselling with KF. KF also participated in Family Support Work and couples counselling.

[10] Evidence shows that referrals continued to be received in relation to the family within months of the previous proceeding terminating. Referral sources included the IWK, the children's school and the parties' themselves. CN had been incarcerated for a period of time after the children were returned to the parents care in 2016.

[11] Concerns from the school continued to be raised in relation to Ka including: her behaviour, developmental delays, hygiene, and marks on the child. Numerous services had been put in place for Ka from the school including a psychological assessment, school psychologist, guidance counsellor, education support worker and a behavioural specialist. The parents did not agree with the diagnosis of ADHD for Ka and would not agree to any medication. The IWK had previously raised issues related to Ka's aggression and hyperactivity, and attempted to connect the parents with appropriate services although they did not follow through.

[12] In the spring of 2019 Ka attended school with a bag of marijuana in her backpack. At the time she was 7 years of age. The parents did not know how Ka

got the bag of marijuana but agreed to safely store the marijuana where the children would not have access. Despite the mounting concerns, the children remained in their parents' care.

[13] Both parents acknowledged that there were behavioural issues particularly with Ka. CN indicated that Ka's behaviour was out of control- she was not sleeping at night and they had difficulty getting her to school. She would sometimes run from home or school to the point where the parties had to put a lock on the door so the children could not get outside on their own.

[14] The incident which brought the children into care in this proceeding occurred on June 13, 2019. On that occasion, the police contacted the Agency to advise that the children were seen at a playground without an adult. Kn had no shoes. A person saw them at the park and returned them to the home where there did not appear to be a care giver for the children. CN testified that she was not in the home that morning and that the children had a child care provider (KF's niece). She indicated that she did not know about the problem with the children unsupervised at the playground until she returned home. KF also testified that he was not home when the children left for the park.

CURRENT PROCEEDING

[15] The current proceeding commenced in June 2019 when the children were again taken into the care of the Agency. The Notice of Application for the current proceeding cited the following protection grounds: 22(2)(b), (g), (k) and (kb). The most recent Plan of Care was filed September 9, 2020. The concerns noted in that Plan were: inadequate parenting skills, substance abuse, inadequate supervision and domestic violence.

CIRCUMSTANCES SINCE CHILDREN TAKEN INTO CARE

[16] The parties were provided services to address the child protection concerns.

Drug/ Alcohol Use:

[17] One of the concerns related to drug use. KF confirmed that he had purchased and supplied drugs to CN previously. Random urinalysis was put in place for both parties. Both parties missed testing at various times.

[18] CN tested positive for various substances (including marijuana, codeine, morphine). As late as October 2020 there was a positive test result for codeine, morphine, and hydrocodone. The positive test results were attributed by CN to pain medication taken as a result of dental problems. No corroborating evidence was offered in relation to any prescribed medications. Further, the Agency had offered to pay for the dental work of CN, which offer was refused.

[19] CN submitted to a Substance Use Assessment which was completed in November 2019. The report indicates:

“Significant concerns pertaining to anxiety, distress, self-esteem and stress management skills were evident... Sine (sic) emotional distress and other mental health/ emotional difficulties are related to ongoing substance use as well as risk of relapse pertaining to addictions, it is essential, in the undersigned’s opinion, that [CN] receive treatment for trauma related symptoms (potentially undiagnosed Complex PTSD) and that she engage in intensive outpatient treatment for ongoing substance use with the understanding that residential treatment may be needed if she is unable to refrain from using or should she experience relapse...”

[20] CN continued to indicate that she did not have issues with drug use. She admitted to using marijuana for anxiety and pain medications to address dental health issues. She did not acknowledge any further issues with drug use and did not follow through on the recommended course of treatment.

[21] KF also tested positive for drugs. In December 2019, the test results were positive for cocaine on four occasions. He continued to deny any drug use. He (and CN) missed some urinalysis testing and it was suspended for a period of time given the number of missed tests.

Domestic Violence

[22] Another concern of the Agency was domestic violence. Couples counselling was put in place for CN and KF. Marilee Burwash-Brennan indicated that her opinion was based on the self reported information provided by the parties. CN and KF reported to Ms. Burwash-Brennan that there was no conflict between them and that they were supportive of one another.

[23] The difficulty with this assertion is that CN and KF were less than candid with Ms. Burwash- Brennan. In the fall of 2019, CN and KF presented as separated. The report of Ms. Burwash-Brennan of October 15, 2019, indicated that KF needed to set and implement “boundaries with [CN] while healing from the

loss of his relationship with her.” The report confirmed that, as of late September, KF indicated he “had no intention of reconciling with her”. At the time, however, the parties had reconciled and did not advise their counsellor.

[24] The report of Ms. Burwash-Brennan dated September 28, 2016, was also before the court in the first CFSA proceeding. In that report Ms. Burwash-Brennan indicated:

“In summary, [KF] and [CN] appear to have focused on building a stronger connection with each other and to be working more effectively as a team in raising their children.... Both [CN] and [KF] will also need to continue to practice their anger management strategies to avoid any further verbal violence. It is imperative that they remain committed to their goal of having a peaceful nurturing home. [CN] has reported that she no longer has cravings and appears committed to taking care of her health issues...”

[25] KF and CN received counselling to address issues in 2015 and 2016 which persisted to this proceeding. The conflict between the parties was clear. At times KF reported that CN was prostituting herself and using drugs. CN advised the Agency that KF was verbally abusive to her, calling her various derogatory and racist names. CN indicated that her children would be devastated by hearing their father call their mother by the most horrifying and objectionable racist slur. She denies, however, that the children ever heard that. During an argument, KF threw out CN’s phone case. It contained all of CN’s identification cards and made it difficult for CN to access financial assistance or other services. Despite this, the parties stated that they had learned a lot through counselling and they are committed to working together as a team.

[26] There are issues of credibility to be addressed by the court. Credibility findings are made by the court where they may be internal and external inconsistencies in the evidence provided. The case of *Baker-Warren v Denault*, 2009 NSSC 59 (N.S.S.C.) reviewed the principles to be considered in determining the credibility of the parties.

[27] On occasion, the evidence of CN was forthright but there were also a number of times when she could not recall what had transpired. On the contrary, KF’s evidence was often inconsistent. When presented with his own affidavit evidence, he refuted his own sworn testimony. If the evidence benefitted him, his recollection was clear. If presented with negative evidence, he denied the evidence or indicated he could not recall. KF’s credibility was found to be lacking at times throughout the proceeding.

Inadequate Parenting- Needs of the Children

[28] Both children also received counselling from Ms. Burwash-Brennan. Ka continued to express her desire to return to the care of her parents. Initially, Ka had difficulty focusing, was very active and expressed anger. Ms. Burwash-Brennan focused her sessions on improving Ka's ability to focus and regulate her emotions and to assist Ka in processing past trauma. Ka's school also expressed concerns related to her aggression with other children and her EPA.

[29] Kn also participated in therapy with Ms. Burwash-Brennan. She indicated that he initially showed themes in play therapy which were "very aggressive with a lot of conflict, unpredictability and chaos exhibited." He presented as very dysregulated. He was also exhibiting signs of attachment issues, past trauma and ADHD. Despite having a full time assistant at the school, his behaviour has been unmanageable at times. At his former daycare, there were concerns expressed about his social interactions (aggression), as well as his inability to respect boundaries.

[30] Given the needs of Ka and Kn, three access supervisors were required. Concerns regarding the children included: safety concerns and the high needs of the children. There were safety concerns noted with the children unbuckling themselves in the vehicle, hanging out the window, being aggressive with each other to the point that the children were separated.

[31] A Neuropsychological Assessment was conducted by Dr. Robert McInerney in relation to both children. Kn was noted to be "happy and exuberant" but also extremely dysregulated. He had difficulties with speech which were noted by Dr. McInerney. He indicated that "there were clear deficits in his attention and behaviour, along with mild to moderate deficits in other areas of higher-order cognition." Dr. McInerney concluded that Kn has "Neurodevelopmental Disorder Associated with Prenatal Drug and/or Alcohol Exposure" as well as ADHD.

[32] The Neuropsychological Assessment in relation to Ka. She was noted to be a little girl who "appeared happy and full of energy." During the assessment, she was in almost constant motion. The diagnosis for Ka was the same as that for Kn. Dr. McInerney noted in his report:

"[Ka's] general intelligence was low enough that she is likely intellectually disabled, but because of her young age and chaotic past, it would be best to re-evaluate this diagnosis when she is a little older. Either way, we can expect that

[Ka] will often have difficulty reasoning, problem-solving, and generally understanding and making sense of the world in a manner we would expect for her age.”

[33] Ka was noted to have tremendous difficulty “controlling her impulses. At school, she frequently runs away or pushes other children. Her behaviour is wild and dysregulated. Other children are afraid of her...”

[34] The parents did not accept the conclusions of Dr. McInerney. KF indicated that Ka’s functioning was higher than was noted in Dr. McInerney’s report. He indicated that Ka could count to 20 but the report noted she could not. On cross examination, he did not confirm that she could count without prompting or count sequentially. He indicated that she could spell her name, although this was not found to be the case in the assessment. He dismissed the findings and the recommendations in the report and placed the blame for Ka’s behaviour on the removal of the children from the parent’s care.

[35] The needs of the children were noted in the report of Dr. McInerney. The parents refused to acknowledge the extent of their children’s needs. As a result, there was little follow through with recommendations related to the children’s care. For example, Ka was referred to the Schools Plus program and the parents were asked to set it up. KF did not follow through and continued to indicate that the program would not benefit Ka.

Inadequate Parenting- Services for the Parents

[36] The parents also participated in Family Support Work although their attendance was not consistent at the outset of this proceeding. The Family Support Worker noted improvements with the parents and that their engagement had increased over time. She indicated that the improvements were not enough to rectify the child protection concerns as the parents still had difficulty managing the children’s behaviour for lengthier periods of time. She discussed the children’s high needs with the parents in that the children were still fighting/ acting out, and the parents were not able to calm the children. She indicated that there were a number of topics that they were unable to cover. Often the immediate concerns related to the children’s behaviours (including issues of safety) were the paramount issues to be addressed.

[37] The parents acknowledge that there were some challenges in attending access. Their attendance was more consistent closer to the trial of these

proceedings. What became clear through the evidence is that both parents dearly love their children. They sometimes brought gifts/ activities to their visits. They minimized their children's difficulties by times and highlighted their accomplishments.

THE LAW

[38] There are only two options available to the court at the conclusion of the legislated time frame: the children are returned to the care of their parents or the children are placed in the permanent care of the Agency (ref. *Nova Scotia (Minister of Community Services) v. H. (N.)*, 2006 NSCA 20 (N.S. C.A.)).

[39] Section 2 of the *Children and Family Services Act*, RSNS 1990, c.5, as amended ("CFSA") describes the purpose and paramount consideration of the Act:

2(1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of the children.

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

[40] The Agency has the duty to provide services to the families to promote the integrity of the family. The Agency has fulfilled their duty in providing services to CN and KF. Services have been provided to this family throughout the two child protection proceedings.

[41] As noted by our Court of Appeal in *Nova Scotia (Minister of Community Services v. L.L.P.* [2003] N.S.J. No. 1 at para 25:

"The goal of "services" is not to address the parents' deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfill their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the Act. ... Ultimately, parents must assume responsibility for parenting their children. The Act does not contemplate that the Agency shore up the family indefinitely..."

[42] The parents were provided with services over a significant period of time over the course of two proceedings. As noted, there were times when the parents did not agree that the services were necessary and their compliance was not consistent. In particular, KF argued that the family was not receiving enough support and services but did not fully engage in the Family Support Work. He

missed urinalysis. He did not believe the children's needs were as significant as noted by third party care providers.

[43] The burden of proof is on a balance of probabilities (*N.S. (Minister of Community Services) v. D.C.* (1995), 138 N.S.R. (2d) 243 (NSFC); *Nova Scotia (Minister of Community Services) v. Z. (C.K.)*, 2016 NSCA 61 (N.S. C.A.)). The Agency must prove that the children remain in need of protective services pursuant to s. 22(2) of the CFSA.

[44] Section 22(2) of the CFSA deals with whether there is a substantial risk to the children. "Substantial risk" was defined in *C.R. v. Nova Scotia (Community Services)*, 2019 NSCA 89 (N.S. C.A.), at paragraph 13:

"13 Rather, the test is as set out previously by this Court in *B. (M.J.) v. Family & Children's Services of Kings County*, 2008 NSCA 64 (N.S. C.A.):

When deciding whether there is "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 Services v. K.L.W.*, 2000 SCC 48, paras. 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."

[45] Past parenting may be relevant in assessing future risk (ref. *G.E.M. v. Nova Scotia (Community Services)* 2020 NSCA 37 (NSCA)). Many of the current risks to the children were risks at the time of the prior proceeding. The risks have not been addressed to the extent that the children can be returned to the care of their parents.

[46] Section 22(2)(b) of the CFSA deals with substantial risk of physical harm; (g) deals with substantial risk of emotional abuse, and (k) deals with substantial risk of neglect. I find that there is a substantial risk to Ka and Kn should they be returned to their parents' care. I make this finding based on the finding of facts made in relation to drug/ alcohol use, domestic violence and inadequate parenting skills as noted above.

[47] Prior to ordering permanent care, I must consider s. 42 (2), (3) and (4) of the CFSA. The factors to be considered by the court are:

- Have less intrusive measures been attempted, and have failed, or been refused by the parents, or would be inadequate to protect the children?

- Is there a potential placement with a relative, neighbour, or member of the child's community?
- Are the circumstances likely to change within the time frame prescribed?

[48] Less intrusive measures to permanent care are not viable.

[49] There is no other potential placement. At the time the children were taken into care they were placed with a family member. That placement broke down and the children came into the care of the Minister shortly thereafter. There were no other placement alternatives to the agency.

[50] The circumstances are not likely to change within the time frame prescribed.

CONCLUSION

[51] There have been eight years of referrals to the Department of Community Services. These children have been taken into care three times over the course of two separate child protection proceedings. Although services have been provided to the parents to address the concerns, the concerns remain. Ka and Kn shall be placed in the permanent care of the Minister of Community Services.

Chiasson, J.