SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. SM*, 2022 NSSC 28

Date: 20220128
Docket: 117093
Registry: Sydney

Between:

Nova Scotia (Community Services)

Applicant

v.

SM, AH, and AI

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	November 29, December 3, 2021, and January 17, 2022
Written Release:	January 28, 2022
Counsel:	Danielle Morrison for the Applicant SM, Self-Represented AH, Self-Represented Elaine Gibney for the Respondent, AI
Summary:	Minister seeking permanent care and custody of the two younger children and supporting application for sole custody of the oldest child by his father. Risks associated with domestic violence, mental health, and unfit living conditions continue. Children remain in need of protection. PCC & *PSA* orders granted. No parenting time or contact for SM & AH with oldest child.
Legislation:	*Children and Family Services Act*, S.N.S. 1990, c. 5 *Parenting and Support Act*, R.S.N.S. 1989, c. 160.

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Restriction on Publication

Section 94(1) of the *Children and Family Services Act* applies to this decision and provides as follows:

94(1) 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 a relative of the child.

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By the Court:

FACTS:

[1] This is the final disposition review hearing in a child protection proceeding involving the parents of three children, namely DM (age 7), EH (age 5), and JM (age 2).

[2] SM is the mother of all three children. AI is the biological father of the oldest child. AH is the biological father of the younger two children.

[3] The Minister seeks an order for permanent care of the younger children and supports a request for sole custody of the oldest child by his father, under the *Parenting and Support Act*, R.S.N.S. 1989, c. 160.

[4] SM and AH do not agree with the Minister's plan, nor with IA's custody application.

ISSUES:

1. Are the children still in need of protective services?

2. If so, what orders are in the best interest of the children?

LEGISLATION:

[5] In any decision involving children, and in particular a review under the *Children and Family Services Act*, S.N.S. 1990, c. 5, the court must give priority to the children's best interests (s. 2(2) and 42(1) of the ***CFSA)***. The circumstances relevant to a consideration of a child's best interests are set out in s. 3(2).

[6] The court must also have regard to the legislative time limits set out in s.45 of the ***CFSA*** for the ages of the children involved**.** A first disposition order in this proceeding was granted on July 21, 2020, so the final deadline fell on July 21, 2021. However, the court doesn't lose jurisdiction if that deadline isn't met, as long as it's determined to be in the children's best interests (**TZ v Minister of Community Services**, 2020 NSCA 40).

[7] Section 42 of the ***CFSA*** provides the court with only two options at this stage of the proceedings, namely dismiss the proceeding, or place the children in the permanent care of the Minister.

[8] In addition, the ***CFSA*** requires that, before the court grants an order removing a child from the care of a parent, the circumstances enumerated in s. 42(2) – (4) must be met.

THE ONUS:

[9] The onus is on the Minister to prove its case on a balance of probabilities. I have applied that onus in considering the evidence. SM's evidence was untested because she failed to appear and submit to cross-examination, so I have weighed her evidence accordingly.

PROCEDURAL BACKGROUND:

[10] In its protection application, the Minister sought an order leaving the children in the supervised care of SM and AH while they undertook services. However, with little cooperation from SM and AH, and concerns surrounding their ability to care for JM upon his discharge from the NICU, the children were taken into care on January 22, 2021.

[11] The Minister filed its plan for permanent care and custody on March 18, 2021. SM filed an affidavit outlining her plan for the children on May 31, 2021. That plan involved placing the two younger children with AH's mother under the ***PSA***. SM's plan later fell through when AH's mother backed out, but in the meantime, the Minister undertook an investigation into the viability of her plan.

[12] On consent, and in the best interests of the children to ensure that all plans being advanced for their care were explored, the final deadline was extended. The final hearing commenced on November 29, 2021.

[13] I rendered a decision on January 17, 2022 in the absence of SM and AH. I was satisfied that they had every opportunity to participate in the proceeding. They chose to delay matters by failing to retain and/or instruct counsel, by failing to file an updated plan of care for the children, and by failing to appear for scheduled hearings, including a settlement conference and portions of the final review hearing.

[14] Throughout this proceeding, SM and AH's participation has been irregular. At times they were represented by counsel, but they failed to instruct their counsel.

They each had two different lawyers during this proceeding, but those lawyers were removed. They were both self-represented by the time I gave my decision.

[15] When the final review hearing started on November 29, 2021, neither SM nor AH were present. After hearing the Minister's evidence, I adjourned to allow SM's (then) counsel to contact her. I agreed to hear SM's evidence if she showed up on the next scheduled date of December 3, 2021.

[16] Both SM and AH attended court on December 3, 2021. SM was permitted to give *viva voce* evidence, at which time she alleged that the child, DM, was conceived when she was raped by IA at 15 years of age. She testified that she'd reported the rape to police.

[17] IA requested, and was granted, an adjournment to obtain the police records relating to the allegations. Before leaving court that day, both SM and AH were provided with a written adjournment slip containing the next court date. SM was still represented by counsel at that point.

[18] However, during the adjourned period, SM's counsel filed a motion to be removed as counsel of record due to a breakdown in the solicitor-client relationship. That motion was scheduled for the morning on January 5, 2022 when the hearing was set to resume. It was served on SM the evening prior.

[19] Neither SM nor AH attended court on January 5, 2022. I granted the motion for removal of SM's counsel, released the hearing dates of January 5 & 6, 2022, and scheduled a telephone conference for January 13, 2022 to discuss the resumption of the hearing.

[20] At that conference, both SM and AH requested an adjournment to seek counsel. I indicated that I would rule on their request to adjourn after hearing from them what efforts had been made to secure counsel on the next scheduled date. Their conduct during that call was inappropriate, and the call had to be ended as a result.

[21] Neither SM or AH was present on the morning of January 17, 2022 when the hearing resumed. I adjourned to allow the Minister to contact SM and AH to determine why they weren't in attendance. When the hearing resumed after lunch, SM and AH were not present. Counsel for the Minister advised that the worker had contacted SM and AH, who advised that they weren't aware of the court date. While this isn't true, they still chose not to attend court the afternoon of January 17, 2022 after being advised that the hearing had resumed.

[22] Given the fact that the hearing was then six months past the statutory deadline, and with the delays and lack of commitment to the process exhibited by SM and AH, I opted to proceeded in their absence. After closing arguments, I rendered an oral decision granting the orders sought by the Minister and IA, with reasons to follow. These are my reasons.

THE CHILDREN:

[23] DM's father, IA, was born in the Democratic Republic of Congo, but immigrated to Canada and has been a Canadian citizen since 2007. He now lives in the Halifax region. DM was placed in his father's supervised care in January, 2021 and is said to be thriving. DM has developmental delays, and exhibits some challenging behaviours that IA is working hard to address. However, DM has adapted well to his new home and school and is doing well in his father's care.

[24] The two younger children are in the Minister's temporary care and custody. EH also has developmental delays, and he's displayed problem behaviours that resulted in the breakdown of a prior foster placement. He is now in a new foster home where he's doing well.

[25] JM was born two months premature, so he has health challenges related to his early birth. However, he is thriving in his foster home.

ISSUES:

Issue #1 - Are the children still in need of protective services?

[26] The children were found in need of protective services under s.22(2) b) of the ***CFSA*** on April 27, 2020. For purposes of the final disposition review, I must determine whether the children remain in need of protective services. The concerns that gave rise to this proceeding were: domestic violence, mental health concerns, and unfit living conditions.

[27] I have reviewed all of the evidence tendered by the Minister. I accept that the major presenting problems present at the outset of this proceeding have not been addressed. The plan filed by the Minister outlining services recommended to remedy the risk, as well as the court orders containing terms for services, have seen little compliance from SM and AH.

[28] I find that the risk to the children from exposure to domestic violence continues. Although SM did complete a group program through the Elizabeth Fry Society and engaged with a mental health counsellor, there is no indication that these services improved her understanding of the risk. The fact that her (unwritten) plan was for the return of all three children to her care, while still living with AH, demonstrates this.

[29] AH has a history of child protection involvement, arising from domestic violence he perpetrated against two former partners. He also has criminal convictions for assault, threats to cause bodily harm, and breaches of undertakings. SM has acknowledged domestic violence in her relationship with AH.

[30] Of particular concern is the degree to which AH exhibits coercive control over SM. I accept the Minister's submission that AH's control tightened after the Minister delved into SM's ability to parent without AH in the picture. Although AH did not play an active role in this proceeding, I find that he played a role behind the scenes in directing and influencing SM's actions. Her lack of cooperation with the Minister is just one example.

[31] SM's involvement with the youngest child presents a more troubling example of AH's control. After JM was born, and during his lengthy stay in the NICU, SM only visited him in hospital a couple of times. She told workers that she stayed away because AH told her not to visit.

[32] On the few occasions that SM did attend the NICU, there was conflict with nursing staff, leading to concerns about discharging the child to SM's care. This ties in with the risk presented by SM and AH's mental health.

[33] SM has a significant history of mental illness, including reports of PTSD, hypervigilance, anxiety, emotional dysregulation, paranoia, auditory and visual hallucinations, and multiple personalities. Her mother had child welfare involvement, thus SM is a "child of the system". She has a history of conflict with family and neighbours, and her relationship with the Minister has been volatile and confrontational.

[34] When the Minister became involved with SM and AH in 2019, they were in a mental health crisis. SM told workers that they both needed help. Despite assurances that they would cooperate with services recommended by the Minister, neither has fully engaged in remedial services to address their mental health issues.

[35] In her affidavit filed on May 31, 2021, SM denies, "any mental health problems that would negatively impact upon my ability to care for my children". She goes on to say that she has completed a healthy relationships and anger management program with E. Fry, and is engaged with a therapist through mental health services. She also says that AH "has completed all required services".

[36] AH did not file an affidavit, nor did he testify. There's no evidence that he "completed all services" as outlined in the Minister's plan or the court orders.

[37] The Minister's evidence documents threats by SM and AH towards social workers, their families, and third parties involved in this file. SM admits telling the protection social worker that she was going to punch him "in the teeth". AH told the same worker that he doesn't mean what he says, he just gets into a "blind rage" at times. It's clear that neither SM or AH accept responsibility for their behaviour. In fact, they don't even accept that telling someone you'll "have his job", or that you know where he lives, constitutes a threat.

[38] I accept the Minister's evidence that both SM and AH have demonstrated threatening, aggressive, and volatile behaviours when dealing with the Minister's workers and third party professionals involved with their file. That's consistent with their behaviour during the conference held on January 13, 2022 with the court.

[39] In an effort to determine the source of these issues, the Minister sought a psychological & parental capacity assessment of SM and AH. However, despite saying that they'd participate and being ordered to do so, SM and AH failed to cooperate with completion of the assessment. That's particularly unfortunate, as it would have shed light on the mental health issues they face, and made recommendations for remedial services to address those issues.

[40] SM claims that they never refused to participate in completion of the assessment, but this is contradicted by the Minister's evidence. I accept that SM and AH did not attend scheduled appointments, and failed to follow up to reschedule those appointments. The assessment could not be completed as a result.

[41] Of further concern has been their inability to consistently maintain positive contact with the children through access, and their inability to behave appropriately during visits. I accept the Minister's evidence that they used abusive language and demonstrated disruptive behaviours during visits.

[42] Additionally, and although not a mental health concern *per se*, the extreme views espoused by SM and AH pose a risk. SM told workers that she and AH met

through a white supremacy group, that they both hold racist views, and that AH identifies as a "white supremacist" and "Aryan". It's not clear whether SM shares those views, or whether she endorses them to appease AH.

[43] This is a significant concern where SM's oldest child is biracial. SM's willingness to paint her child's father as a rapist is particularly troubling. I don't believe her claim that IA raped her for several reasons, including:

- I accept IA's evidence that he and SM had a short-term, consensual relationship, and that after they split up, he and SM shared a cordial relationship until SM and AH became a couple.
- I accept that IA sent money from time to time for DM's support, even though there was no court order requiring it. I also accept that when IA stopped sending money, SM threatened IA with the allegation of rape, and both she and AH started harassing him with repeated calls and texts.
- SM cannot acknowledge a consensual relationship with IA while in a relationship with a white supremacist. A claim of rape serves not only to extort money from IA, but to explain her biracial child.
- SM testified that IA was not "legally allowed to have custody until the "police case" is over." This suggests that SM is also using the allegation of rape to defeat IA's custody claim.
- SM lacks credibility for a number of reasons:
    - She failed to submit to cross-examination;
    - She testified that DM would be 8 years old in December, 2021, which isn't correct. He turned 7 years of age on December 25, 2021. But she also claims that she was 15 years old when DM was conceived (this seems to be an effort to portray statutory rape under the *Criminal Code of Canada* as IA is older than SM), which would make DM 8 years of age. However, SM was born on August 18, 1997, making her 17 ¼ years of age when DM was born. There's no possible way that DM was conceived while SM was 15 years old; and
    - Her testimony that she has nothing against "Africans", but that she "wouldn't have a relationship with one" illustrates

> her efforts to align with AH's racist views and distance herself from IA.

[44] The Minister argues that SM and AH have been so caught up in their conflict with the Minister, they have no energy left for parenting or improving their situation. I accept that argument. Their anger with the Minister and others involved on the file is all-consuming and dangerous. Without meaningful and consistent engagement in mental health treatment, their behaviours are unlikely to change. I find that SM and AH's mental health concerns continue to pose a risk to the children.

[45] The final concern is with unfit living conditions. This is not a new concern, and it's been addressed with SM in the past. Services have been offered but either didn't resolve the problem, or there was non-compliance. I accept the Minister's argument that the state of the home reflects the state of their mental health.

[46] SM denies any problems with the home, beyond the usual clutter associated with young children and pets. However, she and AH would not allow the Minister's workers into the home, so the Minister's ability to monitor the home was limited. I accept the evidence that the condition of the home, on the few occasions it was viewed, continues to pose a risk to young children.

[47] In conclusion, I find on a balance of probabilities that the risks identified at the outset of this child protection proceeding continue to be present today. Based on the totality of the evidence, I find that there is a substantial risk of physical and emotional harm apparent on the evidence. The children cannot be returned to the care of SM or AH.

<u>Issue #2 - If so, what orders are in the best interest of the children?</u>

[48] In determining this next issue as it relates to the younger two children, I must consider the following questions:

- Have the least intrusive measures, including services, been attempted and failed ? Or would they be inadequate to protect the children?
- Are there any family members available to care for the children?
- Are circumstances likely to change in a reasonably foreseeable time?

[49] The Minister offered services to the SM and AH. SM took counselling and participated in a group program, but this was inadequate to alleviate the risk and protect the children. She never gained insight into the risk to the children posed by her and AH's behaviours. I find that services to promote the integrity of the family have been attempted and failed. The limited services undertaken by SM are insufficient to alleviate the risk, and some services were refused.

[50] The younger children cannot be placed with any family members, as none have advanced a plan for the children's care. The family members who contemplated doing so changed their minds. There is a family plan for DM, which I will address below.

[51] I need not consider whether the circumstances justifying a permanent care order for EH and JM are unlikely to change in a reasonably foreseeable period, given that the statutory time limits have long since passed. Even if the time limits hadn't been exhausted, I'm not satisfied that further remedial services would alleviate the risk, as genuine engagement by SM and AH is unlikely.

[52] DM has been in his father's care under a supervision order for the past year. I've considered IA's plan for custody and sole decision-making for DM. I find that his plan for DM meets the best interests of the child. DM is thriving in his father's care, attending school and accessing services. DM's placement with IA will also enhance DM's connection with his culture. With DM in his father's care, I find that the risk to the child is alleviated, thus the child protection proceeding as it relates to DM will be dismissed upon issuance of a ***PSA*** order.

[53] IA asks that SM and AH be granted no parenting time or contact with DM. In particular, he's concerned that any parenting time could harm the child and his relationship with IA. He cites **Nova Scotia Minister of Community Services v LM,** [2016] NSJ No 115 and **Nova Scotia Minister of Community Services v TA**, [2010] NSJ No 345 in support of his position.

[54] DM has not had in-person visits with SM and AH in almost two years. Virtual visits had to be suspended because the Minister had difficulty controlling their behaviour during calls. SM has told workers that she cannot live without her children; it would be a "murder-suicide". Given her untreated mental health, that threat is very concerning.

[55] I have considered whether supervised parenting would be in the best interest of DM. However, under a ***PSA*** order, IA will be parenting DM without the

Minister's support, so no access facilitators or access supervisors will be made available. IA has no family in HRM, so supervision by a family member is not an option. He is the only supervisor available, other than a supervised access program. It's not reasonable to expect IA to supervise, and I'm not satisfied that a third party supervisor would be able to manage these parties any better than the Minister.

[56] IA argues that parenting time and contact would harm the child, rather than benefit him. It's hard to think otherwise when SM and AH hold racist views and DM is a biracial child.

[57] Further, SM has actively tried to damage DM's relationship with IA. She didn't name IA on DM's birth certificate and refused to identify IA as DM's father when the Minister filed this application. This was despite the fact that IA was paying child support and met the definition of a "parent" under the ***CFSA***. The delay in identifying IA as DM's father led to a delay in naming IA as a party and in placing DM with IA.

[58] There's also SM's accusation that IA raped her. I've rejected that claim, but there's a real possibility of SM relaying those allegations to DM. For him to hear that he was conceived of a rape (whether true or not) would be emotionally damaging to him, and would negatively affect his relationship with his father. DM's placement with IA could be jeopardized, which is not in his best interests.

[59] Even virtual contact between SM, AH, and DM is problematic. DM could inadvertently provide information about his home address, school, sports teams, etc. SM and AH are bent on preventing IA from parenting DM, so this type of information could be used to disrupt the child's relationship with his father.

[60] Given all of the above, I find that parenting time and contact between SM and DM, and between AH and DM is not in the child's best interests.

[61] I decline to include a review clause in the order, allowing SM and AH to apply for parenting time or contact should they complete certain services. The likelihood of genuine engagement in remedial services and progress in overcoming their mental health challenges in future is poor. There will therefore be an absolute prohibition on contact between them and DM and IA.

[62] The ancillary orders requested by IA are granted. This includes a change of name to reflect DM's true parentage, and the right to obtain a passport for DM and travel without SM's consent. He may provide a copy of the order prohibiting contact between SM, AH, and DM to any third parties involved with DM, including schools,

physicians, and coaches. For purposes of this order, contact includes access to DM's records from such third parties.

[63] The Minister will draft the orders for EH and JM, and Ms. Gibney will provide the ***PSA*** order for DM.

MacLeod-Archer, J.