SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *K.F. v. Nova Scotia (Community Services)*, 2023 NSSC 52

Date: 20230210
Docket: *Halifax* No. SFHCFSA-127958
Registry: Halifax

Between:

K.F.

Applicant

v.

Minister of Community Services and C.N.

Respondents

LIBRARY HEADING

Publication Ban: 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.

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: February 2 and 3, 2023, in Halifax, Nova Scotia

Summary: The father applied to terminate a permanent care order issued in April 2021. Since the granting of the permanent care order, the father's circumstances had not changed significantly. He participated in three hours of online parent education since the permanent care order. He has accessed no further services.
The children placed in permanent care have special needs and the father has done little in accessing services to assist him in parenting the children. The other concerns leading to the children being placed in permanent care were not addressed since the order was granted.
The father's application was dismissed.

Key words: Child Protection, Family- child custody, Family- change in circumstances, domestic violence

Legislation: Children and Family Services Act, R.S.N.S. 1990, c.5

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Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	February 2 and 2, 2023, in Halifax, Nova Scotia
Written Release:	February 13, 2023
Counsel:	Terrance Sheppard, K.C. for the Applicant Megan Roberts for the Respondent

By the Court:

[1] K.F. made an application to terminate the Permanent Care and Custody (PCC) Order issued April 13, 2021. K.F. is the father of two children, Ka (11) and K(7). The mother of Ka and K, C.N. was served with notice of the application. C.N. did not appear at the hearing nor did she file any materials.

[2] K.F. appealed the Permanent Care Order of April 2021. His appeal was dismissed in December 2021 (*K.F. v. Nova Scotia (Community Services)*, 2021 NSCA 81). On November 16, 2022, K.F. applied to terminate the Permanent Care and Custody Order. An Amended Notice was filed by K.F. on December 15, 2022, confirming notice to both the Minister and C.N..

ISSUE:

[3] Should the Court terminate the Permanent Care and Custody (PCC) Order issued April 13, 2021?

PROCEDURAL BACKGROUND

[4] The hearing of the application to terminate was held on February 2nd and 3rd, 2023. The court heard *viva voce* testimony from K.F. and the current social worker for the children. Additionally, by consent, the parties entered file materials from the Department of Community Services, the Halifax Regional Police and the RCMP. These materials were entered as business records.

[5] The counsellor involved with K.F., C.N. and the children also provided reports and a C.V.. By consent of the parties, her reports were entered. The parties consented to the qualification of the counsellor as an expert. She was qualified by the court as "an expert in counselling including an expertise in individual and family counselling".

[6] Cross examination was waived of the expert witness, of another social worker at the Department of Community Services, and of K.F.'s sister, KaF. The court heard viva voce testimony from K.F. and one social worker. In total, 9 exhibits were tendered.

LAW & ANALYSIS

[7] The statutory framework is set out in s.48 of the *Children and Family Services Act*, R.S.N.S. 1990, c.5 (CFSA). Sections 48(1) and (3) permit the court to terminate a permanent care and custody order on the application of a party. Applications to terminate must be heard no later than ninety days after the

application is made pursuant to s. 48(7A).

[8] K.F. made an application to terminate and that application was heard within 90 days. Subsection 48(8) sets out the options available to the court in considering an application to terminate. The court may:

> " (a) dismiss the application;
>
> (b) adjourn the hearing of the application for a period not to exceed ninety days and refer the child, parent or guardian or other person seeking care and custody of the child for psychiatric, medical or other examination or assessment;
>
> (c) adjourn the hearing of the application for a period not to exceed six months and place the child in the care and custody of a parent or guardian or third party, subject to the supervision of the agency;
>
> (d) adjourn the hearing of the application for a period not to exceed six months and place the child in the care and custody of a person other than a parent or guardian or third party, with the consent of that other person, subject to the supervision of the agency; or
>
> (e) terminate the order for permanent care and custody and order the return of the child to the care and custody of a parent or guardian or other person."

[9] In determining which legal outcome is appropriate, the court must consider the factors in S. 48(10):

> "(a) whether the circumstances have changed since the making of the order for permanent care and custody; and
>
> (b) the child's best interests."

[10] In closing argument, counsel for K.F. urged the court to consider sections 48(8)(c) and (e). K.F. was requesting that the PCC order be terminated and that Ka and K be returned to his care. Alternatively, K.F. requested that the court adjourn the hearing for a period not exceeding six (6) months and to place Ka and K in his care subject to the supervision of the Minister of Community Services. The alternative relief was sought based on providing further opportunity to K.F. to access services to address the child protection concerns.

[11] In order to provide a proper analytic framework one must go back to the

findings made in the permanent care trial. In placing the children in permanent care, the following risks to Ka and K were identified:

1. Drug/ alcohol use
2. Domestic violence
3. Inadequate parenting- needs of the children
4. Inadequate parenting- services for the parents.

[12] The burden of proving a change in circumstances is on K.F.. As noted in *N.S. Minister of Community v. L. (N.)*, 2010 NSSC 328, the onus on applications to terminate shifts from the Minister to the applicant parent. I must first address any change in circumstance, and thereafter address the best interests of Ka and K.

Change of circumstances- Drug Use

[13] At the time of the permanent care trial, evidence was led in relation to four urinalysis tests for K.F. that were positive for cocaine. During the trial in late 2020, K.F. vehemently denied any drug use. This denial was contained both in his affidavit evidence as well as in *viva voce* testimony. K.F.'s evidence at the trial involved concerns related to the drug use of C.N., the children's mother. At no time did he acknowledge any difficulty with substance use.

[14] During this proceeding, however, K.F. admitted that he lied in 2020. He indicated in cross examination that he had tried cocaine on a few occasions in the fall of 2020. He testified that he consumed cocaine to try and relieve his stress but did not find that it alleviated the stress.

[15] The evidence at the time of the current proceeding is problematic from a number of perspectives. If K.F. was prepared to categorically and vehemently deny any allegation of drug use at the previous trial, his credibility may be questioned. Further, given his admitted drug use in this proceeding, there has been no subsequent counselling related to drug use. There has been no further urinalysis testing.

[16] K.F. indicated that C.N. abused drugs. He indicated that because he was no longer in a romantic relationship with C.N. that the concerns related to drug use were addressed. This is not correct.

[17] His admitted drug use in 2020 was tied to his attempt to alleviate stress. He will continue to experience stress. His stress may even be exacerbated on occasion if the children are returned to his care. Without counselling or urinalysis, the court is left with no evidence that this concern has been addressed by K.F.

[18] The evidence does not lead to a finding that the risks posed by drug use have

been addressed by K.F..

Change of circumstances- Domestic Violence

[19] The second concern noted in the permanent care decision related to domestic violence. Counsel for K.F. indicated that K.F. was no longer in a romantic relationship with C.N.. As such, the concern related to domestic violence has been addressed. This is not correct.

[20] This would be defining domestic violence so narrowly that it would only relate to situational violence as between K.F. and C.N.. The issue of domestic violence warrants a far more nuanced approach by the court. As noted in the case of L. (N.D.) v. L. (M.S.), 2010 NSSC 68 at paragraph 23:

> " … The words domestic violence are used to describe a phenomena, a construct, a process that is complex and many faceted. To some extent the words provide a shorthand description for a number of propositions that a court will want to consider in assessing the evidence provided to the court."

[21] Behaviours related to domestic violence may be isolated or may be cyclical. The behaviours may be overt and physical, they may involve coercive control, or it may be any other myriad of behaviours that fit within the definition of domestic violence. Whether the issues related to domestic violence are addressed turns on the level of insight of the parties as well as their subsequent actions demonstrating their level of insight.

[22] There is no evidence that the issues around domestic violence were addressed by K.F. following the permanent care trial. The separation of K.F. and C.N. may address the issue of domestic violence as between the two of them but does nothing to address the issue of domestic violence generally.

[23] The counsellor for the parties during the course of the child protection proceeding testified that the parties had not been forthright in discussing their relationship with her. The counsellor's ability to assist the parties in addressing the issue of domestic violence was completely hampered by the actions of K.F. and C.N. caused by their lack of candour.

[24] The Minister led evidence that K.F. and C.N. still have contact. On the day the termination application was filed, K.F. was photographed in a grocery store with C.N.. When provided the photographic evidence, K.F. admitted that he was with C.N. on that occasion.

[25] In his affidavit, K.F. admitted that he has contact with C.N. two to three times per month. He indicated (in cross examination) that C.N. will contact him if

she needs things such as groceries or cigarettes. K.F. testified that he will assist her with those purchases.

[26] Counsel for K.F. indicated that he does not initiate contact with C.N.. This is not borne out by the evidence. On cross examination K.F. was provided a screenshot of C.N.'s Facebook page. He admitted that he commented on C.N.'s Facebook.

[27] Although the contact noted in the screenshot is minimal, it again points to difficulties in the testimony provided by K.F.. It is clear that K.F. wants to help C.N.. Although that may be understandable given their history, it is clear that C.N. is still in K.F.'s life to some extent. Should the children be placed in his care, it is unknown if the contact between the parties would increase or cause further conflict between the parties.

[28] There is no evidence that K.F. has any insight into the domestic violence issues before the court at the permanent care trial. There is no evidence that he has accessed any service to address the issues of domestic violence including counselling services. The evidence does not lead to a finding that the risks posed by domestic violence have been addressed by K.F..

Change of circumstances- Inadequate parenting (needs of the children)

[29] The needs of the children at the time of the permanent care trial were fully explored. During the child protection proceeding, Ka and K were assessed by Dr. Robert McInerney. Reports from Dr. McInerney were provided to K.F. and those reports were in evidence at the time of the permanent care trial.

[30] Trial transcripts confirm that K.F. was questioned on those reports at the permanent care trial. The reports concluded that both children have a neuro-developmental disorder associated with prenatal drug and/or alcohol exposure and they also have Attention Deficit Hyperactivity Disorder.

[31] K.F. acknowledged the children's ADHD but not the diagnosis the neuro-developmental disorder at the time of the permanent care trial. He denied that the children had the significant issues and difficulties as cited in the reports of Dr. McInerney.

[32] At the permanent care trial, K.F. attributed Ka's difficulties to her trauma and being uncomfortable in her environment in the care of a foster parent. He also disputed the children's needs for medication to address their ADHD issues. K.F. conceded the children did need an Educational Assistant in the classroom but advised he did as well when he was younger. He testified that he and C.N. had

provided the children with sufficient supports to address their issues.

[33] At the time of the permanent care trial both children were struggling in school. Their behavioural issues were noted in the PCC decision. Both children were in counselling and their counsellor noted issues related to aggression, focus and an inability to regulate emotions. K was exhibiting signs of attachment issues. There was conflict, unpredictability and chaos in the children's presentation at times. Three access supervisors were needed to ensure the children's safety when the parents had access with Ka and K.

[34] During the termination proceeding, K.F. indicated that he has taken steps to remediate this concern. Since the permanent care trial, he has participated in three online sessions of one hour in length. K.F. testified that he contacted a service provider in the fall of 2022 and commenced participation in the online program in late 2022. It was later confirmed that the sessions commenced in January 2023.

[35] K.F. indicated that these sessions addressed issues of how to assist a child with ADHD including behaviour management, discipline and boundaries. There is no evidence that K.F. completed this on-line program. There is no evidence of the specifics of the topics reviewed in this program. In the twenty months since the permanent care decision K.F. has only participated in three hours of online programming to address the needs of ADHD children.

[36] There is no evidence that he has received an programming, training, or education in relation to the children's diagnosis of neuro-developmental disorder. Despite confirming that he now accepts this diagnosis, he showed no greater insight into the children's needs related to their diagnosis.

[37] To remediate the concern related to his lack of insight of the needs of the children, K.F. would need to receive education and or training. Partial completion of an online course related to children with ADHD does not come close to establishing that K.F. is able to now meet the needs of Ka and K.

[38] K.F. committed to following through on the children's current medical and educational supports in place. Following through on existing supports in place does not indicate that he can appreciate their ongoing needs.

[39] K.F. also indicated that he is better equipped to deal with the needs of the children because he has the support of C.N.'s aunt. The support of C.N.'s aunt was noted in the PCC trial. It is not new. The court would have to infer the support of C.N.'s aunt as she did not file an affidavit in this proceeding and did not participate. The court only had the evidence of K.F. to confirm her ongoing support.

[40] K.F. noted the support of one of his four sisters, KaF. He indicated that this sister is prepared to provide support to him in relation to the children now that C.N. is "gone". The evidence, however, shows that there remains a tie between K.F. and C.N.- she is not "gone". If the support of K.F.'s sister is conditional on C.N. not being a part of K.F.'s life, that conditional support may be tenuous in the circumstance.

[41] The evidence does not lead to a finding that the risks posed by inadequate parenting related to the needs of the children have been addressed by K.F..

Change in circumstances- Inadequate parenting (services for K.F.)

[42] Since permanent care was granted, K.F. has only been involved in three hours of online programming. He has not been in counselling, has not had any other services, and has not done any self-education. This minimal engagement in services since the permanent care trial cannot be said to ameliorate the concerns.

[43] K.F. testified that he has a large extended family to support him. K.F.'s large extended family existed at the time of the PCC hearing. The new support of his sister, conditional on C.N.'s lack of involvement is too tenuous to rely on to terminate permanent care.

FINDING- CHANGE OF CIRCUMSTANCES

[44] K.F. has not proven a change of circumstances sufficient to warrant a termination of the proceeding.

[45] As noted by Judge Daley in *M.D. v Children's Aid Society of Halifax*, [1993] N.S.J. No. 306 (Fam. Ct.) [affirmed on appeal in *M.D. v Children's Aid Society of Halifax*, [1994] N.S.J. 191 (C.A.)] at paragraph 11, the parent must show a "significant, relevant and positive change of [his] circumstances or the child's circumstances."

[46] K.F. is unable to prove the significant changes required. He is living in the same residence, doing the same job with the same extended family. Although indicating he is not in a relationship with C.N., the extent of that relationship is unclear. The concerns which brought the children into the child protection system have not been addressed by K.F. since the permanent care decision.

BEST INTERESTS OF THE CHILDREN

[47] Having made the finding that there is no significant change in K.F.'s situation, the inquiry could end there. As noted in the case of *G.S. v. Children's Aid Society of Cape Breton*, 1996 NSCA 97, the parent must first prove a change in circumstance prior to a consideration of the children's best interests.

[48] This principle was affirmed by the Court of Appeal in *D. (M.) v. Children's Aid Society of Halifax*, [1994] N.S.J. No. 191 (NSCA). The court affirmed the comments of the trial judge at paragraph 61 of their decision:

> "If there is no change of the circumstances of the person applying for the termination or change of the circumstances of the child, then there are no grounds for terminating the permanent order. The change must be significant, relevant and a positive benefit for the welfare of the child to result in a termination order […] section 48(1) is a two-step process. First is the proof of a change in circumstances. This requirement is based on the assumption that the original order was made on proper grounds and was made in the best interests of the child, and should not be interfered with, except by appeal, unless the circumstances have changed. The second step is the application of the child's best interest rule to the change of circumstances. If it can be proven that the change has, or will have a positive effect on the child, then the requirements have been met for the Court to make an appropriate order. It is my view that a [termination] order requires proof of a change of circumstances before applying the best interests test."

[49] The case of *N.H. v Minister of Community Services and K.H.*, 2017 NSSC 159, highlights the analytical framework for the court to undertake on applications to terminate. In that case, the justice found that there had been significant positive changes in relation to the parent and thereafter turned to a consideration of the best interests of the children. Despite the positive changes of the parent, it was not found to be in the children's best interests to terminate the order.

[50] Even if I were to find that K.F. had made significant changes to his life, I would not terminate the order nor would I place Ka and K in his care subject to supervision. An examination of the children's best interests takes into account the factors as noted in s. 3(2) of the *Children and Family Services Act, supra*. I have taken the legislative factors into account in assessing the evidence specific to Ka and K.

[51] Counselling with the children has been consistent during the child protection proceeding and post permanent care. The children have seen the same counsellor throughout. By consent, the counsellor was accepted to be able to provide expert evidence. A number of reports have been provided by the counsellor. The counsellor reports positive progress with both children. Both are more regulated and settled and are able to better regulate their emotions.

[52] While in the care of their parents, Ka and K regularly missed school. They did not have appropriate supports, and were not meeting any of the academic

milestones. Since being placed in care, Ka is now "developing as expected" or is "well developed" in nine of the twelve areas outlined in her "Learner Profile". K still struggles with school but his report card of June 2022 noted that had shown "some development in his ability to follow directions and instructions more independently" as well as "following daily routines more independently." It is worthy of note that K was noted to be a "very caring student who shows empathy towards others who are in distress."

[53] It is acknowledged that Ka and K are in different foster homes. This is the result of the placement with both children breaking down early in the child protection proceeding. The breakdown in the joint placement resulted from the significant behavioural issues of the children at the time.

[54] The Minister has recognized the importance of sibling contact and has commenced joint therapy sessions between the children. The children began to express their wish to see their sibling and that they missed each other.

[55] As noted by K.F., the lack of sibling contact for a significant period of time is concerning. Even when children are placed in permanent care, all reasonable steps need to be taken to ensure that the children's needs are met. Clearly sibling contact may be one such need.

[56] Evidence has been presented by the Minister to show that there is some sibling contact outside of the counsellor's sessions. The Minister indicates that respite care has been arranged so that the siblings may have contact every second weekend. This contact had not occurred at the time of this proceeding. The delay in setting up meaningful contact is of some concern to the court.

[57] The evidence overall discloses that Ka and K are doing much better now than they were at the time of the permanent care hearing. The children's service providers noted that consistency, stability and structure was essential for the children. K.F. acknowledges that the children are doing much better.

[58] They have appropriate medical and educational supports. Their significant medical issues are addressed by a team of people including: doctors, pediatrician, speech language pathologist, dentists, counsellor, and school psychologist. The significant educational issues are addressed by the children's teachers, resource teachers, learning center teachers, and Educational Programs assistants.

[59] It is clear that the stability for Ka and K has benefitted them greatly. Even K.F. admitted that they are in a better place now then they were at the time of the permanent care hearing. Despite their improvement, he thinks Ka and K will be better in his care. I disagree.

[60] There is ongoing conflict and difficulties in K.F.'s extended family. This conflict occasionally involves K.F.. The court heard evidence in relation to K.F.'s sister, S..

[61] Evidence disclosed that C.N. has ongoing contact with K.F.'s sister, S.. K.F. conceded that C.N. will sometimes stay with his sister, S.. It is also acknowledged that K.F. provided contact information for S. as a possible place to serve C.N. with the documents of this proceeding. The affidavit of service confirms that C.N. was served at a residence on the same street as S..

[62] K.F. would not acknowledge that the civic number where C.N. was served was the residence of S.. He denied knowledge of S.'s civic number. K.F. further denied that he attended S.'s house for a number of years. He testified that they will see each other at family events. It is difficult to reconcile the denials of K.F. with his knowledge of the fact that C.N. was likely staying with his sister, S. at the time of service.

[63] The evidence disclosed that K.F. will provide assistance to S. as needed by her. For example, S. has been the victim of domestic violence since the PCC trial and he has been called to assist. As a loving brother, he is not to be faulted for providing such assistance, but it could be at the expense of the stability of the children in his care.

[64] On another occasion in 2022, K.F. intervened when S.'s partner or former partner was intoxicated and was involved in a physical altercation with K.F.'s adult son.

[65] There were also concerns related to K.F.'s adult son. K.F. admitted that his adult son from another relationship is an alcoholic and has extensive involvement with the criminal justice system. The evidence revealed that K.F. has provided a place for his adult son to stay on occasion.

[66] Police intervention was necessary to remove K.F.'s adult son from his home in July 2022 and September 2022. On both occasions, K.F.'s adult son was unwilling to leave K.F.'s home when asked by K.F.. On one occasion, K.F. confirms that the altercation between them escalated to the point that his adult son spit on him.

[67] K.F. loves his children. Despite all his difficulties, K.F. wants to ensure the safety of his adult son. He wants to help him when he can. He provided him a place to stay when he needed it until it got out of hand. Again, this may be the appropriate response of a father who's child is suffering from addiction issues. This, however, is greatly concerning as it relates to the stability and consistency

needed for Ka and K..

[68] K.F. indicates that his adult son will not be welcome to stay with him if Ka and K are in his care. There is no evidence that K.F.'s adult son was staying with K.F. as a result of an invitation from K.F.. Even if he was no longer invited to stay with K.F., it is clear that the adult son has not abided by his father's requests to leave, necessitating police involvement.

[69] Even if I accept that K.F.'s contact with S. is minimal, there are difficulties. Even if I accept K.F.'s contact with C.N. is minimal, there are difficulties. There are difficulties in the relationship between K.F. and his adult son. The difficulties and the chaos are ongoing. The question is the level of risk to Ka and K..

CONCLUSION

[70] K.F.'s sister, S., his adult son and C.N. are not the reason K.F.'s application failed. His application is dismissed because he did not do the work to remedy the concerns. He did not do the necessary programs and services to address his issues.

[71] There was no evidence that he has any information related to the children's neurodevelopmental condition and how to best address their needs in relation to that diagnosis. As well meaning as K.F. may be, his actions do not support that much has changed in his parenting abilities for Ka and K.

[72] Counsel for K.F. indicated that an option available to the court pursuant to s.48(8)(c), is to place the children in the care of K.F. for six months subject to the supervision of the Minister. This option is not accepted by the court.

[73] This is not a situation where K.F. has remediated the concerns to such an extent that he merely requires more time to prove the concerns have been completely alleviated. His efforts to remediate the concerns have been minimal. The very clear time frames in the *Children and Family Services Act, supra,* are there to provide a time frame within which a parent must address the risks to their children.

[74] K.F. has been involved with the Department of Community Services in relation to concerns of his parenting since shortly after Ka's birth. Over the course of two child protection proceedings, he has had significant time and significant services to address his issues. He has had over twenty months since the permanent care order and has done little.

[75] His application to terminate the permanent care order is dismissed.