

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Minister of Community Services v. TR and KW*, 2023 NSSC 312

Date: 20231013

Docket: *SFHCFSA* No. 128437

Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

TR and KW

Respondent

Judge: The Honourable Justice Theresa M Forgeron

Heard: March 2, 2023, and May 26, 2023

Decision: October 13, 2023

Counsel: Deanna Bru, counsel for Minister of Community Services
Matt Conrad, counsel for the Respondent, KW

By the Court:

Introduction

[1] Family violence devastates and harms. The Minister must investigate credible allegations of family violence involving children. After investigating, the Minister determines whether a protection application should be initiated. Investigations are completed, and protection decisions made in the face of busy workloads and competing demands, while social workers are expected to comply with professional standards, guidelines, and policies. Not every investigation flows seamlessly. Not every decision is made flawlessly.

[2] In the present case, KW (the father) alleges that the Minister's investigation and decision-making were profoundly flawed. The father states that protection workers abused their power and did not act fairly. He says that workers failed to conduct a thorough, professional, and unbiased investigation; failed to keep an open mind; failed to respect his rights and the rights of his children; and generally failed to meet their statutory mandate. The father states that some workers were dishonest, colluded with TR (the mother), and misled the court. As a result, the father seeks a substantial costs award to offset his legal fees and to incentivise changes to child protection policy and procedures.

[3] The Minister denies KW's allegations. The Minister states that the father's allegations of collusion, bad faith, dishonesty, and bias were not supported by the evidence. The Minister states that workers followed protocols when conducting the investigation and making decisions, all of which were done in the best interests of the parties' children. Any mistake was unintentional and not indicative of a larger pattern of improper conduct. Further, the Minister notes that costs can only be awarded in child protection proceedings in exceptional or rare circumstances, which do not exist in this case. As a result, the father's costs request must be denied, or, in the alternative, only nominal costs should be granted.

[4] The mother neither took a position nor participated in the father's motion for costs.

Issue

[5] There is only one issue that I must decide - Did the father prove rare and exceptional circumstances justifying a costs order?

Background Information

[6] The father and mother are former common law partners who have three children – a seven-year-old daughter, L; and four-year-old twins, Ha and Hu. Although the parties separated in about 2021, there was no court order or written agreement outlining a parenting plan or schedule.

[7] On October 13, 2022, following a disagreement about the parenting schedule, the father attended the mother's home. The twins were in bed, while the daughter was in the same room as her parents. As the father held the daughter in his arms, the mother and father began to argue. The argument became heated and physical, leading both parents and the daughter to fall on the floor. After 911 was called, the police arrived. No charges were laid.

[8] On October 14, 2022, the mother contacted the Minister's office to make a referral about the prior evening's events. Upon reviewing the referral, the agency decided to investigate, assigning a priority II, same-day response. A 10-step investigation plan was established, which included interviewing the children.

[9] That same day, a child protection social worker and a social work student interviewed the daughter at her school. The worker established rapport and began asking questions about the events of October 13th. The daughter said that she had felt scared and that she had asked her father on two occasions to put her down. She said that the father squeezed her torso, that she "felt sick", and that she "couldn't even breathe." In response to a question about safety, the daughter said that she did not feel safe at her dad's house, noting that she felt "kind of nervous and scared." The twins' interviews were uneventful, which is not surprising as they were asleep when the argument occurred.

[10] Following the daughter's interview, the worker and supervisor discussed the file, deciding to implement a safety plan pending the completion of the investigation. The safety plan required the father's parenting time to be supervised and for another adult to transfer the children during all parenting exchanges. The agency did not want the parties to have contact in the children's presence.

[11] After the decision was finalized, the social worker visited the father. The worker described the safety plan and reviewed the daughter's disclosure. The father agreed, but questioned whether the mother's parenting time would also be supervised.

[12] On October 17, 2022, the father contacted the worker to recount an event that had occurred in early September 2022, which he said had not caused him concern at the time, but, upon reflection, should likely be investigated. On the same day, an anonymous referral alleged that one of the twins did not want to go with his father. Neither referral was investigated because it did not meet agency requirements.

[13] The agency continued with the original investigation, connecting with various collaterals. The social worker also re-interviewed the children. During her second interview, the daughter said that her father apologized and that she felt better. The daughter was no longer afraid in the father's care.

[14] Although the parties initially adhered to the safety plan, there was an eventual breakdown. The father no longer had anyone available to supervise his parenting time, as the paternal grandfather had returned to Newfoundland. The father's counsel contacted the agency to advise of the lack of an available supervisor. On November 22, 2022, the mother also advised the worker about the father's lack of supervision.

[15] On November 24, 2022, a risk management conference was convened. The agency decided to file a protection application seeking a supervision order. Although no longer asking that the father's parenting be supervised, the agency wanted to ensure no in-person contact between the parties in the children's presence. The agency also sought a provision for counselling and parenting support.

[16] About seven weeks later, on January 12, 2023, the agency filed a protection application. During the first appearance, the agency agreed to withdraw its application in favour of an interim order made under the provisions of the *Parenting and Support Act*, RSNS 1989, c 160. The interim order stipulated that the parties would have no contact in the children's presence, and that the parties would engage in counselling. As the mother and father consented to incorporating these terms into an interim order, the Minister withdrew the protection application.

[17] Before the protection application was withdrawn, however, the father sought costs. A contested costs motion was heard on March 2, 2023, and May 26, 2023. At the conclusion of the hearing, I reserved my decision.

Analysis

[18] Did the father prove rare and exceptional circumstances justifying a costs order?

Discussion of Legal Principles

[19] Although courts rarely order costs against child protection authorities, costs may be appropriate “in exceptional circumstances of improper or overbearing action”: *Family & Children’s Services of Cumberland County v DMM*, 2006 NSCA 75, at para 37; and *Children’s Aid Society of Cape Breton Victoria v DC*, 2004 NSCA 146, at para 6. Moreover, the Nova Scotia Court of Appeal recently confirmed that the exceptional circumstances test continues to be the standard for an award of costs against the Minister, while adding that thrown away costs may be awarded if a pattern of procedural errors emerges, as it did in *Nova Scotia (Community Services) v JP*, 2021 NSCA 45, at para 74.

[20] Despite their limited availability, costs have been considered by Nova Scotian and Canadian courts on several occasions. For example, in *Children’s Aid Society of Cape-Breton-Victoria v M*, 2007 NSSC 119, costs submissions were invited because the agency repeatedly failed to disclose serious and long-standing child protection concerns associated with the father’s household – chronic neglect, sexual abuse, death of a child, substance abuse, and violence. Misled by the agency’s failure to disclose, the court approved the agency’s plan to place the children in the father’s care in another province. Once the child protection concerns were brought to light, the court ordered the children’s return and invited costs submissions.

[21] In *Children’s Aid Society of Algoma v M*, 2001 CanLII 25594 (Ont CJ), costs of \$77,000 were awarded due to the agency’s negligent and unfair conduct, which included ignoring its own expert report. Instead of acting in a neutral fashion, the society supported foster parents in a custody battle where indigenous family relatives were a viable option. The foster parents would not have maintained a 12-day custody hearing without the agency’s support. The court found that the family relatives acted reasonably, were successful, and should not be deprived of their costs.

[22] In *Children’s Aid Society of Toronto v SW*, 2018 ONCJ 772, the agency was ordered to pay costs of \$10,000 to the father because the agency acted unfairly and unreasonably by not engaging with the father during the 12 months it was involved with the mother before the protection application was filed.

[23] In *Children’s Aid Society of the Region of Peel v LM*, 2022 ONCA 848, the respondent’s appeal of an order setting aside a costs award against the agency on the issue of state funded counsel was granted. Costs of \$15,000 were assessed against the agency.

[24] In *Alberta (Child, Youth & Family Enhancement Act, Director) v NL*, 2022 ABQB 120, the court ordered costs on a full indemnity basis given the exceptional circumstances at play.

[25] In contrast, our courts have held that solicitor client costs can be awarded only in rare and exceptional circumstances in which it is necessary to underscore the court's disapproval of a party's reprehensible litigation misconduct: *Doucette v Halifax (Regional Municipality)*, 2016 NSSC 32, at para 3.

Decision

[26] I find that because the father did not prove exceptional circumstances of bad faith or improper or overbearing conduct, I must dismiss his costs request. I do so after carefully considering the six prongs of the father's argument which I will now individually address.

Failure to conduct a thorough, professional, and unbiased investigation.

[27] As part of his submissions, the father raised concerns about the worker's failure to contact the police to determine their observations, given that the police attended the home following the 911 call; the worker's failure to consider the police's decision to not charge; the worker's failure to properly interview the children according to the Step Wise protocol; and the worker's failure to balance the inconsistencies in the various statements provided. The father said that these factors, when combined, are proof that the investigation was not professionally undertaken.

[28] I do not agree with the father. The agency was faced with a credible protection concern – family violence directly involving a young child. Family violence is a serious and pervasive societal issue. Following protocol, the agency created and followed an appropriate plan to investigate the family violence referral.

[29] During the investigation, the protection social worker attended the school to interview the children. The worker established rapport with the children, conducted individual interviews, and then recorded her findings reasonably contemporaneously. Although the worker's interviews were not perfect, they were nevertheless conducted in good faith. The interviews are not reflective of overbearing or improper conduct on the agency's part.

[30] In addition, I find that the Minister did not reach out to the police for two valid reasons. First, the police did not witness the October 13th incident. The police responded after the incident occurred. Second, on October 19, 2022, the police did in fact make a referral and provided their particulars at the time.

Failure to remain open-minded.

[31] Under this heading, the father said he proved exceptional circumstances because the worker did not properly consider the father's parenting application and his concern that the mother was manipulating the daughter. He also said that the agency failed to investigate his statement that the mother improperly kept the children on the evening of October 13th. Finally, he said that the agency failed to obtain the mother's phone which she used to record the incident. From the father's perspective, these failures confirm that the agency did not consider his version of the events.

[32] I disagree with the father's perspective. The agency was investigating a credible allegation of family violence – not the failure to follow a verbal parenting schedule. The parties confirmed that no parenting order or written agreement existed. The parties confirmed that on October 13, 2022, they had argued about the parenting schedule. Rather than leaving the dispute to be sorted out through appropriate legal channels, the father decided, without invitation, to attend the mother's home. Predictably, the visit soon took a negative turn when the verbal argument escalated. The Minister's focus was appropriately on what occurred after the verbal argument escalated, and not on the parenting schedule.

[33] Despite this finding, I do agree that the worker should have obtained a copy of the October 13th phone recording taken by the mother. The recording would have been a relevant piece of the overall evidence to be assessed. The worker's failure to do so, however, was only an error. It does not prove bad faith or overbearing or improper conduct.

Failure to reassess.

[34] The father suggested that the agency did not properly reassess its position after interviewing a neighbour, the father's cousin, and the family doctor, who all confirmed that the father was an excellent parent and that they had not witnessed any child protection issues while the children were in his care. The father also noted that the agency did not consider his concern that the mother had been unfaithful.

[35] I disagree with the father's perspective for three reasons. First, family violence often occurs behind closed doors and may lack corroborating evidence: *Barendregt v Grebliunas*, 2022 SCC 22, para 144. Second, faithfulness is not relevant to the issue of family violence. Third, the agency did reassess its position after interviewing the daughter for a second time. The daughter confirmed that the father had

apologized, and that she no longer felt unsafe with the father. As a result of these comments, and the outcome of their investigation, the agency agreed to amend the safety plan. The father's parenting time would no longer be supervised, but there was to be no in-person contact between the parties in the children's presence, including during all parenting exchanges.

Failure to respect rights and dignity of children and parents.

[36] The father said that the agency was not respectful of his rights or his children's rights, noting that he was warned of serious consequences if he failed to follow the agency's safety plan; that he was misled about the agency's investigation into his referral and about the status of the protection application; and that the agency did not consider that the father's family lived in another province and were unavailable to supervise his parenting time.

[37] The father's examples do not prove exceptional circumstances of bad faith or improper or overbearing action for four reasons:

- While conducting its investigation, the worker informed both parties of the agency's expectations regarding compliance. The parties were appropriately informed of the importance of compliance, and advised that the agency would file a protection application if they did not follow the safety plan. The agency was not threatening either party. Rather, the worker was advising the parties of the standard outcome if they did not comply.
- The intake worker and supervisor correctly determined that the agency was not required to investigate the father's referral that in early September 2022, the mother threw a shoe at the daughter. When making his referral, the father said that he was not concerned about the September incident at the time it occurred, and that it was an accident. The father only became concerned because of the referral of the October 13th incident. In addition, the daughter confirmed that she felt safe with her mother. Further, there was no present risk to the daughter based on the shoe incident.
- The protection social worker was not part of the decision to dismiss the father's referral. When the father asked the social worker about the status of his referral, she therefore only provided general information about the typical process.

- The availability of supervisors is not a significant factor when assessing the need for supervised parenting time. The need for supervision is based on the assessment of the children's best interests and protection risks.

[38] On the other hand, once having made the decision to file a protection application, the agency should have processed the protection application more quickly. The failure to do so, however, does not amount to bad faith or overbearing or improper conduct.

Failure to carry out statutory mandate.

[39] The father said that the agency failed to carry out its statutory mandate by interviewing the children at their school; by failing to provide adequate and timely disclosure; and by constructively taking the children into care.

[40] I once again disagree with the father's perspective for three reasons. First, it was important that the agency speak with the children in a child-focused and age-appropriate fashion, in a neutral location where the children felt comfortable. The children's school was the appropriate location. The timing of the first interview was also appropriate in that it occurred without notice to either parent, reducing the likelihood of manipulation or tampering.

[41] Second, the agency made both parties aware of the essential reasons underlying their investigation. The agency's duty to disclose all materials does not arise absent a formal application or order to disclose: Peter McVey, *Annotated Children and Family Services Act*, 2nd ed (Toronto: LexisNexis Canada Inc, 2017), page 364. Once the Minister finally filed the protection application, the agency provided disclosure.

[42] Third, the Nova Scotia Court of Appeal rejected the concept of constructive taking into care in *Nova Scotia (Minister of Community Services) v DS*, 2023 NSCA 67. Although I am troubled by the significant delay in the filing of the protection application, the delay in and of itself does not prove bad faith or overbearing or improper conduct.

Failure to act fairly and according to principles of natural justice.

[43] The father submitted that the agency failed to act fairly and according to principles of natural justice by colluding with the mother, accepting her version of events despite inconsistencies in the statements of the mother and daughter, and

despite statements from credible and reliable persons that they had never observed family violence.

[44] I disagree with the father's characterization. There is no credible evidence of collusion between the agency and the mother. The agency properly investigated a referral of family violence directly involving a young child. The agency's decision to investigate was appropriate. The agency's investigation was independent of the mother. It was not controlled or directed by the mother. The father's characterization is without merit.

[45] Further, the agency discontinued the protection application once the parties were able to negotiate an interim order under the *Parenting and Support Act* incorporating the agency's concerns and directing remedial steps to mitigate the protection concerns.

[46] While the agency's investigation was not the model of perfection, and while the agency waited too long to file its protection application, any missteps were inadvertent and did not amount to bad faith or overbearing or improper conduct.

Conclusion

[47] Despite his well-presented submissions, I must deny the father's costs motion. While the agency's investigation was not conducted flawlessly, and while the decision to initiate a protection application was not without issue, the agency neither acted unfairly nor without regard to its legislative mandate. The evidence does not support a finding of exceptional circumstances which would merit any form of a costs award. The evidence does not support a finding of bad faith or overbearing or improper conduct.

[48] The Minister is to draft the order.

Forgeron, J