

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. C.L.D., 2014 NSSC 21

Date: 20140220

Docket: SFHCFSA-088450

Registry: Halifax

Between:

M.C.S.

Applicant

v.

C.L.D.

Respondent

Restriction on publication: Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act*, S. N. S., 1990, Chapter 5 applies and may require editing of this judgment or its heading before publication. Section 94(1) provides:

"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."

Publishers of this case further take note that in accordance with s. 94(2) no person shall publish information relating to the custody, health and welfare of the children.

Judge: The Honourable Justice Beryl A. MacDonald

Heard: December 12, 2013 and January 6, 2014, in Halifax, Nova Scotia

Oral Decision: January 15, 2014

**Written Release
of Decision:** February 20, 2014

Counsel: May S. Knox, Counsel for the Applicant
Susanne Litke, Counsel for the Respondent

By the Court:

[1] In this proceeding the Mother requested, what has come to be called, a “Placement” Hearing. She made this request when the parties returned to complete the so called “30 Day Interim Hearing”. When the *Children and Family Services Act*, S.N.S. 1990, c.5 was developed the 30 Day Interim Hearing was expected to resolve the issue of placement. Theoretically time to complete a full interim hearing would be granted at the 5 day hearing. However this rarely happens, usually because the parents are self represented, or if represented, the lawyer involved has had little time to consider whether an interim hearing will be required. As a result a new date for the parties to return is made within the 30 day period but very close to the end of that period. Only 15 minutes is set aside for that appearance. If a parent wants to contest placement, a hearing date usually cannot be provided before the end of the 30 days and even if this could be accommodated by “bumping” other cases, counsel do not require this. Instead “no contest” is often entered in respect to the placement provisions of the Interim Order. The parties are then given a scheduling notice to permit them to find an early date for the “Placement Hearing”, usually with the next three to four weeks, (although the period may be longer than this).

[2] In this hearing the question arose, “ is a Placement Hearing a continuation of the 30 Day Interim Hearing stage or is it a Variation Hearing pursuant to section 39 of the *Children and Family Services Act*”?

[3] Section 39 (4) of *The Children and Family Services Act* is strictly worded. It states “ within thirty days after the child has been taken into care or an application is made, whichever is earlier, the court **shall** complete the interim hearing.... (I emphasize the word shall)

[4] I have not found any reported decision suggesting this time limit can be extended. I do not accept that the principles expressed in *Children’s Aid Society & Family Services of Colchester (County) v. W. (H.)* (1996) 155 N.S.R. (2d) 334 can be used to justify extending this time limit. Even if they were applicable, the factual circumstances in this case are very different from those that existed in *Children’s Aid Society & Family Services of Colchester (County) v. W. (H.)*. In this case both parties agreed to end the 30 day interim stage. The order confirming that decision has been issued. As a result this proceeding is a variation pursuant to section 39 (9) of the *Act*.

[5] The hearing completed before me had one purpose. This court was to decide whether the child, presently in the Minister’s care, should be returned to the care of the Mother under supervision. Considerable time was spent discussing the appropriate burden of proof to use in this proceeding. The Mother’s counsel argued that the proper burden of proof on a variation proceeding pursuant to section 39 (9) of the *Act* is for the Minister to prove, on a balance of probabilities, there is a substantial risk to the child’s health or safety that cannot be adequately protected against by a supervision order.

[6] Counsel for the Minister argued it need only prove there were reasonable and probable grounds to believe there is a substantial risk to the child's health or safety that cannot be adequately protected against by a supervision order.

[7] Professor Rollie Thompson, in "*The Annotated Children and Family Services Act*" discusses variation pursuant to section 39 (9) and he says at page 162:

What of the burden and test on any application to vary an interim order? Consistent with basic principles, the party seeking the variation should bear the burden of proving a change in circumstances since the initial order. That said, what of section 39 (7) on a variation application? Section 39 (7) plainly applies to any order under clauses (d) or (e) of subsection (4), whether made initially or on a variation application. Thus, were an agency to apprehend and seek a variation under subsection (5), the substantial risk test would apply. Conversely, where a removal order is made initially, the burden on a parent seeking a variation would be the "lighter" one of showing a significant change in either the "substantial risk" in future or the adequacy of in-home measures. This apparently asymmetrical allocation of the burden flows logically from subsection (7) and the broader principles of least intrusive intervention.

I agree with Professor Thompson's analysis. As a result the requirements of section 39(7) still apply to a variation proceeding under 39 (9). Section 39(7) sets out the burden of proof to be based upon "reasonable and probable grounds to believe" not on a "balance of probabilities". An application by a parent requires proof, from the parent, that there are reasonable and probable grounds to believe there have been significant changes since the date of the last order that indicate supervision will adequately protect the child.

[8] The Mother is not contesting the finding that there are, based on the information provided to the Minister, reasonable and probable grounds to believe the child is in need of protective services. She is contesting the consequences that may flow from that finding in respect to whether the child's health and safety, and that includes emotional health, are at substantial risk of harm and that the risks cannot be reduced under a Supervision Order.

[9] The information that raises the protection concerns can be summarized as follows:

- The Mother's homelessness
- The Mother's marijuana use
- Failure by the Mother to enroll her daughter in school
- The conflict that occurs between the Mother and her mother (the child's maternal grandmother)

- Failure to permit the child to be interviewed when there was an allegation the child was sexually abused
- The parentification of the child
- The distortion the Mother's religious belief may bring to her decision-making processes and the implication this may cause her to be uncooperative and fail to abide by directions of the Minister and orders of this Court.

[10] For reasons that will become apparent, I have decided the child is to return to the care of the Mother under supervision.

Homelessness

[11] The Mother now has an apartment which, although small, would appear suitable given her financial circumstances. The Minister suggests this Court cannot trust her to remain in that apartment based upon her previous history of homelessness. There are many reasons why people become homeless. The Mother certainly appears to have made some questionable decisions in the past about her residences. She does need to learn how to make better decisions. I believe she can.

[12] The Mother did spend approximately 4 months in one shelter and refused to go to another. I cannot say I blame her given that it appears the child was sexually assaulted in the shelter in which they had resided.

[13] The Minister may eventually prove the Mother did little or nothing while in the shelter, and after she left, to find suitable housing. At present all they have as proof is a comment by a staff person at the shelter that, from her perspective, the Mother was not actively seeking a residence. The Mother testified she was trying to find a residence but she did make a choice not to move into substandard apartments in what she considered to be dangerous neighborhoods. This is not an entirely irrational decision although it may be ill advised given her economic circumstances.

[14] The evidence does not convince me that the Mother's previous homelessness will cause her to leave her present residence and as a result become homeless once again. If the Minister is not satisfied with the residence she now is renting I suggest it help her find more suitable housing within the constraints imposed by her income. The effect of her belief in God and whether she will leave if God tells her to I will discuss later in this decision.

[15] I consider it appropriate to comment on the reason why the Mother was forced to leave the shelter. She broke a rule forbidding residents to possess a weapon. Her weapon was a paring knife. I understand a paring knife is of concern in a shelter. It can be used to cause harm to another person. The Mother was a person whose child had been sexually attacked and may have

felt she needed protection but she states she had the knife to assist her in cutting up food. Whatever the operational motive she broke a rule and was required to leave. I do not conclude from this that she is a deliberate, irrational, rule breaker. There are reasonable explanations about why she had that knife in her possession. She should not have kept it but I can understand why she might have decided to do so.

Marijuana Use

[16] The Mother has admitted she has used marijuana. There is no evidence describing how much marijuana she uses. She admits to casual use of this drug. I ask myself whether smoking one or two marijuana cigarettes a day is any worse than having 2 pints of beer or 2 glasses of wine a day. Are such persons addicted to alcohol? Would their use of alcohol amount to a protection concern? I am not promoting the use of marijuana; it is an illegal drug. However, I question whether the use of marijuana on a casual basis is enough to prevent one from parenting one's child. The Mother has testified she is not presently using nor will she use marijuana if the child is returned to her care. I accept she has the capacity to commit to this promise and she will obey an order forbidding its use.

Failure to Enroll the Child in School

[17] The child is now enrolled in school and it appears the child is a very bright. The child's lack of formal schooling has not impeded the child's progress. This does suggest the Mother has educated the child sufficiently to allow the child to have success at the present time. The Mother has testified she will continue the child's enrollment in school as this proceeding moves forward. With the Minister's supervision of her parenting I do not expect she will do otherwise. The consequences would be another separation of parent and child.

Conflict between The Mother and the Maternal Grandmother

[18] Family relationships often determine our ability to deal with life stresses and anxieties. Many families are dysfunctional and can be harmful to one another. However some dysfunctional families can also be supportive. Everything depends on the circumstances.

[19] The Mother has not had a good relationship with her mother, yet she has spent considerable time living with her mother who has permitted her to do so. After the child was born the Maternal Grandmother did offer the Mother a home for at least 3 years. Unfortunately the family dynamic caused the Mother to be less than receptive to her mother's advice and they fought. They fought in front of the child and occasionally there were physical altercations between them. While the use of physical force is concerning, there is no evidence of significant severity nor that the use of force was continuous. The events were episodic. The only description of physical abuse is that on one occasion the Mother grabbed the Maternal Grandmother by the arms and squeezed. The Minister was involved on one occasion as a result of a complaint received from the Mother's sister, who did not live with the family, and who reported information received from the Maternal Grandmother. The Minister's agent met with the Mother and warned her about the potential consequences if the reported behaviour continued. No court

proceedings were commenced. The Mother testified that after meeting with the Minister's agents she moderated her response to the Maternal Grandmother and avoided any physical response. They did continue to argue with one another. I accept her evidence.

[20] The Minister suggests negative conclusions should be drawn because the Mother did nothing to remove herself and the child from the Maternal Grandmother's home. I will not do so. Protection proceedings are about good enough parenting not perfect parenting. Some children will be exposed to adult arguments and possible also to heated arguments. It is unrealistic to expect otherwise. The concern must be about the nature of the arguments, their frequency, whether there is a power imbalance between the parties that may generate fear or helplessness, the consequences, whether there was resolution or continuing tension, was the exposure of the child direct or indirect, and whether the child has suffered or is likely to suffer continuing distress as a result of that exposure.

[21] The evidence before me does not suggest the situation between the Mother and the Maternal Grandmother was so toxic that she should have immediately chosen to leave the Maternal Grandmother's residence. In addition that residence was likely preferable to the type of housing a person with one child on social assistance could obtain. Although the Mother had an education that may have permitted her to become employed, she made the decision to parent her child while out of the workforce. I am not prepared to draw a negative conclusion about that decision. It may not have been the best decision but it is not an irrational one, particularly when the child is not of school age. Finally, the information about the Mother's relationship with the Maternal Grandmother has little relevance to the present situation because the Maternal Grandmother is now living in Prince Edward Island. The information can only be relevant to suggest the Mother will defy those who give her advice. This could impede safe parenting. Given the other evidence about the Mother's response to those who give her advice this may be a problem she will need to resolve. However, resolution can be undertaken while she is parenting. The order will require her co-operation. She will be quite aware of the consequences if she does not do so.

Failure to Permit the Child to be Interviewed

[22] While it is unfortunate the Mother did not permit the child to be the subject of an appropriately arranged interview in respect to the sexual assault, I can understand her concern about the potential re-victimization of the child as a result. Unfortunately too much analysis of her thought process rested upon her statements about "praying to God" before making her decision. Those around her took this literally deciding that if God did not provide an answer then the Mother would do nothing. There is a difference between waiting for a miracle and taking time to make a decision. Many people do pray for guidance before making a decision. Those who have no faith basically talk to themselves when making decisions. There is a voice in their head that carries on the discussion. Those who choose to call this process, talking to God, should not be immediately assessed as delusional.

Parentification

[23] Parentification is a word used to describe a role reversal. The child exhibits behaviours that support and promote the emotional and/or physical needs of his or her own adult parent. Often these children provide their parents with meals, clean up the house, look after siblings and engage in activities one would expect the parent to perform. They reassure a parent that he or she will be all right when upset; they shield the parent from the emotional consequences of the parent's action or inaction, and they adjust their behaviour to suit their parent's emotional interests. There is significant consensus that, if present, parentification is emotionally damaging to a child. It is a form of child abuse. The problem, as always, is whether the behaviours of the child are consistent with that diagnosis and whether there are other reasonable explanations for the behaviour.

[24] In some cultures children in need to grow up very quickly and take on responsibilities that would never be placed on the shoulders of children in Canada. In our culture there appears to be a consensus that we should not burden children with adult responsibilities particularly when they are six years old. It is difficult to say what long term emotional damage may be done to a child who has taken on this role. I would need more information about this particular child, and this phenomenon, before I would be convinced that the Mother cannot learn how to relieve the child of the burden the child seems to have assumed in attending to her mother's emotional needs. The evidence is far from supporting the proposition that there is a substantial risk of harm to this child's emotional health, at this time. Parentification is a protection concern that needs to be addressed long-term but its impact in the short term does not appear to be so severe or significant as to warrant a continuing separation of mother and child.

Religious Belief

[25] I have already made some comment about the Mother's religiosity. The events described in paragraphs 75 to 112 in the affidavit of Heidi Lynch, filed as Exhibit 1, Tab 2 in this proceeding, have lead the Minister to decide that the Mother's decision making abilities are extremely deficient because of her faith. She will take no active steps to help herself unless God tells her what to do. If he tells her nothing she will do nothing. If he tells her to leave her residence she will do so etc...

[26] I interpret her behaviour differently. It is clear to me that the Mother does not appreciate or accept other people telling her what to do. In respect to the final event that lead to this proceeding, she believed she would eventually find a place for her and her daughter to stay even in the face of the likelihood she may not. She testified she would be able to find shelter with the help of the church. However she had not confirmed this with church personal by the time the social worker spoke with her on the street after she and the child had effectively been evicted from their previous residence. Although she may have eventually made her way to the church and received the help she expected, the Minister did not, understandably, provide her with that opportunity. Unfortunately for the Mother her way of expressing her desire to make her own decisions, whether they are productive or destructive, is to use God as her excuse. She does need counseling but her primary parental deficiency was her failure to provide adequate housing. That has now been remedied.

[27] The Mother has testified she is prepared to accept counseling. She requests the counselor share her belief in a divine being. That would be helpful but a well trained therapist should be able to assist her in facing life's realities and provide her with strategies to use her faith as a support not as an excuse for personal inaction, or poor parental decision making. I do not accept that her faith in a divine being will now cause her to refuse to follow the direction of the Minister or to obey a court order. Should she do so the consequences will be the removal of the child from her care.

[28] After analyzing all the factors I have discussed I find there are reasonable and probable grounds to believe there have been significant changes since the date of the last order that indicate supervision will be adequate to protect the child.

[29] The child is to return to the care of the Mother under supervision of the Minister. The Mother is to co-operate with and follow the advice of the Minister. She is to maintain adequate housing. She is not to use non-prescription drugs. She is to submit herself to any drug testing requested. She is to accept and attend all counseling arranged for her benefit and this will include counseling with a counselor who is not a believer in God if a person of faith cannot reasonably be found to assist her. She is to attend parenting courses as arranged for her by the Minister. The child must continue to attend school.

Beryl MacDonald, J.S.C.