SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v.P.J.*, 2014 NSSC 87

Date: 2014-03-05
Docket: Halifax No. SFHCFSA-081443
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

P. J. and T. M.

Respondent

Restriction on Publication:
Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

Section 94(1) provides:

> **"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 relative of the child."**

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Douglas Campbell

Heard: February 3, 4, 24, 25, 26, 2014, in Halifax, Nova Scotia

Counsel: John Underhill, for the Applicant
Sarah Hebb, for the T. M.
Samira Zayid, for P. J.

By the Court:

[1] This is an Application pursuant to the *Children and Family Services Act*, S.N.S. 1990, c. 5, (hereinafter referred to as the "CFSA") by which the Minister of Community Services (hereinafter referred to as the "Agency") seeks an order that the two children who are the subject of this case be placed in the Permanent Care and Custody of the Agency, without long-term access to the parents and for the purpose of placement for adoption.

[2] The male respondent is hereinafter referred to as "the Father" (being the biological father of the younger female child and not so of the older male child, although he may meet the definition of "parent" in the CFSA with regard to that child).

[3] The female respondent is the biological mother of both children and is hereinafter referred to as "the Mother".

[4] The children who are the subject of this proceeding are a male and a female child; the first of whom is just more than 11 years old and the second of whom is just less than nine years old. Both have special needs.

[5] The Mother and the Father are together as a couple and as such are presenting a joint plan of care for the subject children. They have co-operated with agency services, during all periods of Agency intervention, to a very significant degree, in pursuit of the goals set for them by the Agency.

[6] Compared to most parents who are involved in motions for Permanent Care that have been brought to this Court, these parents have committed themselves more fully to the Agency inspired services designed to remedy the identified child welfare concerns. These parents rank ahead of most in terms of their commitment to those services and to the exercise of their Court-managed access to their children during the period while this process has been underway.

[7] These parents have not abandoned their children; and, to the contrary they have absolutely committed themselves to making the significant changes in their lifestyle and their parenting skills that would be essential to their resumption of unsupervised care of their children. They must be commended for their effort.

[8] Those facts are the foundation for the Respondents' contention that the Agency has not met the burden of proof that would justify the requested order for Permanent Care and Custody.

The Mother's health

[9] The mother suffers from a disability referred to as "Cerebellar Afaxia" which is a progressive disease affecting her speech (in a significant way) and her sense of balance. She commented that this condition does not affect her parenting skills but that it does affect certain tasks by which she might teach her children certain things that depend on her speech.

[10] One or both of the subject children seem to have inherited the gene and therefore the potential for the development of this disability eventually.

History of Child Welfare Engagement:

[11] There have been 3 apprehensions of these children by the Agency. In addition, there was a voluntary care arrangement for one child prior to the first apprehension and there was an apprehension of both children by a New Brunswick child welfare agency which I will refer to below. To summarize, the children have been in some form of care, including foster care, for a majority portion of their respective lives.

[12] Further, the mother's two other older children are no longer in her care as a result of certain child protection interventions in another province that resulted in consent arrangements.

The First Agency Involvement in this Court:

[13] Following the voluntary care arrangement referred to above, the Agency's first apprehension resulting in a Temporary Care & Custody Order came about as a result of allegations of various child protection issues that included domestic violence between the parents, substance abuse including both alcohol and illicit drugs used by both parents, instability of residence, excessive physical discipline by the mother against the male child, family skills deficits and mental health issues of the mother. This was against a backdrop of significant traumatic upbringing events in the mother's family of origin.

[14] When these issues resulted in an apprehension of both children, intensive services were employed which eventually, based on a guarded conclusion by the agency that the concerns had been addressed, resulted in a termination of the Court process in June 2007 and a consequent return of the children to their parents.

The second Agency Involvement in this Court:

[15] The Agency's second apprehension resulting in a Temporary Care and Custody Order regarding these children occurred because of child protection issues that largely mirrored those of the first apprehension and were addressed with somewhat similar services. That court-managed proceeding was finalized by a termination in January 2011 and a consequent return of the children to their parents. Some professionals involved were guarded in their opinion that reunification/termination was appropriate and that services had successfully resolved the child protection issues. Given the consent of the Agency and both respondents, this Court accepted the then prevailing view that termination/reunification should occur.

The Third Agency Involvement in this Court:

[16] After a number of months following the second termination of Court involvement, the Agency became involved with this family for the third time, officially in November 2011.

[17] The triggering event was that the Mother's other and older daughter alleged that the Father (that is, the male Respondent herein) had sexually assaulted her during an event at the Respondents' home. Most persons involved on that occasion were drinking alcohol (beer), despite the mother's stated rule that there should be no alcohol in that home - a rule that she imposed as part of her lifestyle change occasioned by her commendable response to the alcohol-related Agency concern that was part of the reason for the first and perhaps second apprehension of the children.

[18] There was testimony from the mother that she herself had not been drinking alcohol but there was contradictory evidence suggesting that she had consumed a moderate amount of beer.

[19] A police referral, following the allegation of the sexual assault, triggered Agency investigation and involvement.

[20] The parents soon afterwards fled Nova Scotia and moved with the children to New Brunswick without Agency approval or knowledge whereupon a New Brunswick Child Welfare Agency intervened and placed the children in Temporary Care. It seems undisputed that this move was done in a clandestine way and that the Respondents had offered a bogus reason (a threat against their lives or safety by a Criminal element) which was later recanted (at least in as much as it motivated the move), that might have justified their decision to move.

[21] In his most recent affidavit, the Father confessed that the true reason for the move was to avoid an agency investigation that might involve the apprehension of his children and that his earlier offered reason (the safety threat) had not been the true reason for the clandestine move to New Brunswick.

[22] As an aside, let me say that I attach minimal significance to the fact that the couple resorted to a "knee-jerk" defense by which they attempted to run from the Agency and then to justify the move by reference to an untrue circumstance. The power held by the Agency to potentially permanently apprehend children from parents is so intrusive and overpowering that it is not difficult to understand how a parent or parents would resort to almost any defense, including fabrication of facts, to avoid that outcome.

[23] Generally speaking, children should not be required to endure permanent separation from otherwise capable parents because of a clandestine attempt to hide them (even if falsehoods are employed) from an agency which those parents see (wrongly) as an enemy force. While such a course of action by the parents is not to be endorsed, there must be a better reason before permanent care should be ordered.

[24] In her affidavit, the mother acknowledges that the move to New Brunswick with the children was a mistake. She and the father moved back to Nova Scotia, mainly, (I would conclude), because they had run out of money. The father stated that the reason was to face the alleged above-noted criminal charges. Counsel for the Agency points out that such objective could have been achieved while living in New Brunswick closer to the children.

[25] In any event, the result of this decision was that the children were left in New Brunswick in foster care until the order there would expire. To their credit, the parents travelled often from Nova Scotia to New Brunswick to visit the children there.

[26] At the end of the currency of the New Brunswick Order, the children were transferred to Nova Scotia and were apprehended by the Nova Scotia Agency after which this third (and current) court involvement unfolded.

[27] In the end, the sexual assault charge against the Father by the "stepdaughter" was not prosecuted. The father contends that the allegation had no merit and that the stepdaughter had certain motives that might explain a false allegation. The Parental Capacity Assessor concluded that the allegation should be given no weight because it had not been proven. She, as will be referred to below, nonetheless concluded that Permanent Care and Custody of the children should be awarded to the Agency.

[28] In should be noted that the two concerns that caused agency involvement became redundant; that is, the sexual assault charge was not prosecuted and the clandestine removal to New Brunswick was reversed.

[29] The Agency takes the view that a Permanent Care and Custody order must be granted to protect these children from harm founded by a conclusion that they continue to be children in need of protection as defined by the CFSA.

[30] It argues that, despite the above redundancies, the processes (alcohol use in the home that led to the sexual abuse allegation and the clandestine removal of the children to New Brunswick with a later recanted excuse) illustrate such a serious lack of judgment on the part of the parents in the context of the then 2 Agency Apprehension involvements that the children continue to be in need of protection which can only be remedied by an order for Permanent Care and custody.

Context: It is against the context of these background factors and involvements that the Court must decide whether to grant or dismiss the Agency's request for a Permanent Care and Custody order relating to these children.

[31] If the third Agency apprehension had been premised on a repeat of the child protection concerns raised in the first two proceedings, the Court would be left with an undeniable conclusion that permanency planning for the children would trump any plan for more remedial time to be offered to the parents for a third opportunity to perform their responsibility to provide a safe environment for the children. However, the third Agency apprehension was not so occasioned.

[32] Therefore, the Court must determine whether to grant the requested Permanent Care Order in this actual context. The Parents believe that they had met the Agency stated goals by the time of the conclusion of its second apprehension involvement, which to a certain degree was acknowledged by the agency witnesses in their testimony.

[33] In response to that point, Counsel for the Agency argues that the above referenced incidents, characterized in these remarks as being ultimately redundant, nonetheless show a level of bad judgment by the parents which connect the third Agency involvement to the earlier 2 involvements such that the Court should conclude that nothing less than Permanent Care and Custody will provide a safe environment for the children.

[34] A review of the evidence from various witnesses, some of them being experts capable of offering opinions in various fields, must be made. That review follows:

[35] **Andrea Boyce** was qualified by virtue of her credentials as a registered social worker with a Masters degree as an expert in child and family therapy. She had provided counseling to the male child. She concluded at those times, respectively, that gains were made after both the first and second Agency interventions that would justify the return of that child to his parents.

[36] Her reports showed some hesitation in making that recommendation. She concluded that the male child loves his parents but that he cannot trust them for protection (words which I have speculated to be "adult" words and not those of the child). She confirmed that the child does well in foster care.

[37] **David Cox:** This registered psychologist provided two reports. His credentials as an expert to provide opinion evidence were not contested. In his recently prepared report dated November 1, 2013, he summarized his findings at pages 16, 17 and a portion of 18 thereof.

[38] He concluded that the male child's emotional adjustment and psychosocial functioning had improved since joining his foster family in June 2012 and that he had benefited greatly from a highly skilled foster parent and others. Mr. Cox stated: "it is expected that his behavioral and emotional functioning would again decline if he did not have this level of family and school support".

[39] The clear implication in that passage from his report and from my interpretation of his testimony at Trial was that the child would not have the required level of support if returned to his parents.

[40] **Dr. Harry Bawden's Report** was introduced by consent as were his credentials as an expert to give opinion evidence as a Psychologist. He provided a neuropsychological report regarding the female child. He concluded that she had an intellectual disability of mild severity and that her academic skills were well below primary level (she is almost 9 years of age). He concluded that she would need to continue to follow up in an individual program plan. His conclusions regarding this child were remarkably similar to those of Mr. Cox in regard to the male child.

[41] W**endy Green,** Registered Social Worker was qualified, by consent, as an expert in individual therapy. She ultimately became the counselor for the mother. She confirmed that the mother suffered from early childhood trauma. After each of the first two Agency apprehension involvements, she supported the return of the children to the parents and noted a number of positive gains in the counseling process. She was somewhat guarded, however, in her prognosis as to whether ultimate success had been achieved.

[42] In her testimony, she indicated that the lack of progress in the first two agency involvements suggested that she should decline to be involved in the third case. In cross-examination she offered the opinion that the mother needed more professional work after the end of the counseling work.

[43] **Donna Touchie,** Registered Social Worker, MSW, was qualified as an expert and filed reports. She functioned as the personal counselor for the mother but the relationship ended at the mother's instance. She testified that some progress had been made but that the counseling relationship ended before it could have reached fruition.

[44] **Heather Power** holds a Masters of Science in Clinical and Forensic Psychology. She prepared a Parental Capacity Assessment dated March 8, 2013 (noting, as I do, that the third Agency involvement began in November 2011). In it, she confirmed that she placed no emphasis on the above-noted sexual assault allegation by virtue of the fact that it had not been proven. In that 64 page report, she detailed her study and concluded that she believed that the parents "want the best for their children".

[45] In the second last page of that report she stated that the parents' "problems have been chronic and serious in nature and, while some progress has been made and the parents are to be credited with this, it is this assessor's opinion, based on their previous progress and current status, that they have a poor prognosis [to] be able to make the changes necessary to parent…[the two children] in the long-term, particularly when considering…[the children's]… special needs and, even if changes are made, the changes are unlikely to be sustained in the long term, after the Agency ceases its involvement". In the end she recommended that the children be placed in Permanent Care and Custody of the Agency with a plan for adoption**.**

[46] In addition to these professional witnesses, the court heard evidence from Angela Sangster, family skills worker, and Anne Harling-Briggs, family skills worker, Mekisha Johnston, access supervisor and other witnesses including the two Long Term social workers who had the main conduct of the case.

[47] In summary of the testimony of all of these witnesses, their perspective collectively was that, despite concerted effort by both parents to comply with Agency services and to work toward agency goals, the children would continue to face harm and/or the risk of harm and therefore would continue to be in need of protection if returned to the care of their parents. Permanent care was the common recommendation of all Agency witnesses who offered a qualified opinion.

[48] There are a number of Statute-based principles and jurisprudential principles which must bear on the Court's deliberation with regard to this very important issue.

[49] **Section 42** of the CFSA makes it clear that at the end of the statutory process there are only two alternatives available to the Court:

> 1) to terminate the proceeding with the effect that the children would be returned to the care of the parents from whom they were apprehended; or
>
> 2) to make an order for Permanent Care and Custody.

[50] When the statutory deadline has not been reached, that same section allows the court other options including the return of the children to parents but subject to a Supervision Order - which is being suggested by both respondents.

[51] In this case, the outside statutory deadline occurs on June 13, 2014 some 3.5 months from these trial dates. Both respondents have urged the court to order a supervision regime until the outside statutory deadline to allow the parents to prove their abilities.

[52] The case law makes it clear that 1) there is no principle that requires that a case should be extended to the maximum statutory deadline; and that, 2) permanency planning for children is a priority.

[53] I have concluded that such a short period (3.5 months) given the lengthy history of Agency intervention and services will not afford the parents the opportunity to reverse the child protection concerns by proving their capabilities given their past history and that nothing would promote the best interests of these children by deferring today's decision for such a short period of time instead of making an order for permanency planning in favour of either the Applicant or the Respondents.

[54] Section 42 (4) of the CFSA states that an otherwise appropriate permanent care order should not be declined when the concerns are unlikely to be resolved in the time allowed by the statutory deadline.

[55] In this case, I am satisfied that a continuation of Agency involvement even if it included appropriate services would be unlikely to allow the parents to reverse the concerns by the outside date of June 13, 2014. Therefore, I see the Court's practical options as being those statutory alternatives mentioned above; namely, termination of the proceeding or Permanent Care and Custody.

[56] Section 42 (2) of the CFSA requires that no order for permanent care should be made when less intrusive measures could succeed. From my above comment, it follows that there are no less intrusive measures available that could reasonably be expected to succeed within the statutory timelines.

[57] It is not surprising that a body of decided cases makes it clear that the test for returning children to parents is not whether those parents have the best possible plan and can provide the best possible environment for the children. In other words, the fact that alternative plans might benefit the children to a greater extent, is not a reason to deny the children a return to their parents. I must therefore not inquire whether these parents have the best possible plan; the real test is whether

the children would continue to be in need of protection if returned to the care of their parents.

[58] I have concluded that, despite the practical redundancies of the two triggering events that brought on this agency's third apprehension, and the somewhat exceptional commitment by both parents to change their lifestyle, their questionable judgment measured against the somewhat questionable progress made by both parents in the first two apprehensions when considered in the context of all of the expert opinions and their reasons (which reasons this Court adopts), these two children would face long-term protection concerns if returned to the parents.

[59] Of at least equal significance is the uncontradicted evidence that the children have prospered (against all odds, given their special needs) in foster care. The opinion evidence, and the Court's conclusion, is that they are unlikely to cope well with their emotional, social and educational development if responsibility for those environments were left to their parents. While their future may be uncertain in a combination of foster care and adoptive care homes, their prognosis in those settings is clearly more likely to promote their best interests and to eliminate their otherwise continued need for protection.

[60] The Agency plan is to place the children for adoption if this Court should order Permanent Care and Custody in favour of the Agency. There was evidence from an adoption specialist which suggests that, despite the special needs of these children, their prospect for adoption is positive. I accept that proposition.

[61] Concern by the respondents has been raised that adoption could result in the subject children being separated from each other. I accept the notion that such separation would be undesirable. However, I also accept the evidence from the Adoption Specialist that sibling adoption is at least a realistic possibility.

[62] The actual placement of the children following a Permanent Care Order is beyond the mandate of the Court and falls instead within the mandate of the Agency. This Court should not pre-judge how the potential adoption might unfold after the Court has completed its involvement.

[63] I accept the notion that both adoption, per se, and adoption as siblings is a viable option. However, that conclusion does not replace the need for a more fundamental conclusion as to whether the children would continue to be in need of protection if returned to their parents.

[64] Considering all of the evidence, and after paying special attention to the contextual circumstances mentioned above, I have concluded that there is no less intrusive solution to promote the pursuit of these children's best interest than to place them in the Permanent Care and Custody of the Agency with a plan for adoption and I so order.

[65] I have considered all of the requirements of the CFSA, including those enunciated in section 42 thereof. There will be separate orders issued in respect of each of the subject children placing them in the Permanent Care and Custody of the Agency.

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Douglas C. Campbell, J.