SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v. D.R.*, 2014 NSSC 132

Date: 20140311
Docket: SFHCFSA-085204
Registry: Halifax

Between:

M.C.S.

Applicant

v.

D.R. and A.D.

Respondents

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.

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 MacDonald

Heard: February 17, 18 and 19, 2014, in Halifax, Nova Scotia

Written Decision: April 10, 2014

Counsel: Jean Webb, for the Applicant

Sarah White, counsel for the Respondent, A.D.

By the Court:

[1] On March 11, 2014 I delivered an oral decision in this matter. After delivering my decision I was asked by counsel for the Minister to provide my decision in written form. I had reserved the right to add additional information to expand upon my reasoning if I was requested to provide a written decision. This is the requested written decision.

[2] In this decision I will not be discussing a detailed analysis of every fact and submission that was presented to me during the proceeding. I have carefully read all of the documents provided and I have considered all relevant information. I have reviewed the oral testimony. I will comment upon certain aspects of the material contained in some documents that cause me concern and I will attempt to explain why. I will make reference to decisions of this court and others on the points of concern I will raise. I will use the words Minister and the Agency interchangeably.

[3] Decisions that must be made in Protection files are never easy to make. My understanding about the challenges parents have experienced and my compassion toward them cannot overwhelm the analysis I must consider based upon the principles I am directed to apply.

[4] The first principles I must consider, in a case such as this, are those expressed in the opening paragraphs of the *Children and Family Services Act*, S.N.S. 1990, c.5. Those paragraphs are called the preamble to the *Act*. In the preamble the stated purpose of the *Act* is to protect children from harm, to promote the integrity of the family and to ensure the best interests of children. This preamble establishes the priorities under the legislation. I am directed to protect children from harm but in doing so I am to recognize that promoting the integrity of the family is often the first and best means of protecting children and ensuring their best interest. Subsequent paragraphs in the preamble require the Province to provide services to help parents protect their children when there have been identified risks to their health and safety. However, in providing those services the *Act* does recognize what is called the child's sense of time. A child, particularly a young child, has immediate needs that cannot be delayed until his or her parents are ready to parent. This is why the *Act* has set out maximum time periods. If a parent is not ready to parent when those maximum time periods are reached, the

child must be placed in the care of the Minister, or in the care of a third party who has come forward during the proceeding who appears to have the necessary parenting skills. Parents may be given the time that is available pursuant to the *Act* to remedy the concerns that resulted in the protection application but the court is not required to provide every parent with the maximum time the *Act* provides. Whether the maximum time will be provided depends upon the age of the child, the nature of the identified protection concerns, the services that can be provided to alleviate those concerns, the ability of the parent to make the necessary improvements to eliminate or reduce the identified concerns in the time remaining and whether the situation of the child is such that providing that additional time is in the child's best interest. Obviously there is a balancing of these various factors that must occur in every decision.

[5] The *Act* does make it clear that the best interest of the child analysis applies after the court has determined the child is in need of protective services. The standard of proof for a finding that a child is in need of protective services is on a balance of probabilities after examining the evidence presented to the court about the protection concerns. The problem in this case is that there never has been a formal protection finding about the child's biological Father (the Father). The child was originally taken out of the care of the child's biological Mother (the Mother). The Father was only identified in September as the biological father of the child. By that time the Minister had determined its plan of care for the child to be placed in the Permanent Care and Custody of the Minister. Nevertheless the Minister recommended certain services to the Father and suggested it may revise the plan if it thought a revision would be appropriate.

[6] Had there been a protection hearing evaluating protection concerns in relation to the Father there were a number of provisions of section 22 of the *Children and Family Services Act* that may have applied although, for some, the substantial risk analysis may have been difficult to prove. The sections to which I refer are those dealing with a substantial risk of sexual abuse which has two aspects, one of which is a substantial risk a child will be sexually abused by a parent and the other is a substantial risk of sexual abuse by another person when the parent knows or should know about the possibility of sexual abuse and would fail to protect a child. Best practice suggests the "should know" provision of this criterion ought to be read narrowly to mean willful blindness.

[7] The other section 22 category that may have applied is substantial risk of chronic and serious neglect, although the nature of the argument here would be outside of the norm usually considered under this section. The suggestion would likely have been that, because the Father had no parenting experience, there was a substantial risk of neglect. I questioned whether I was required to make a protection finding about the Father or whether he was in the same position as a relative or neighbor who came forward with a plan of care for a child in a protection proceeding. I decided the latter was the appropriate procedure to use.

[8] I will not list the factors the court is to take into account in the best interest analysis. Those factors are clearly identified in the *Act* and I have considered all of those that apply to this proceeding.

[9] The Father's plan of care is for the child to be placed in his custody. He intends to parent the child in a family unit he has established with his present partner M. M is the biological mother of two children, a two-year-old and a five month-old. Both were taken into care by the Minister arising out of an ongoing child protection proceeding before a Provincial Family Court in this Province. Because the Father's plan is to parent in the unit including M, and possibly also her children, some evidence in respect to the other proceeding has been provided in this proceeding.

[10] While not divided and identified, the Minister would be aware of three aspects of the Father's plan. The first would be his parenting in a household including M, the second would be his parenting in a household including M and one or both of her children, the third would be his parenting alone. The third option must be considered because there is no guarantee that the Father and M will continue to reside together, although their expectation is that their relationship will continue. I sincerely hope this will be a reality for them. However, I cannot act upon wishful thinking, hopes and dreams. I must consider all of these parenting arrangements when determining the best interest for this very young child.

[11] The evidence in this proceeding, as is the case in most protection proceedings, consists not only of first hand observations and party admissions but also of inadmissible hearsay, multiple hearsay, and reliance upon potentially unreliable children's statements many collected several years ago when the Father and M were children themselves. The parental capacity assessment has, to some extent, been influenced by this inadmissible evidence because the assessor has reviewed Agency's case files relevant to this and the other proceeding. However,

no objection has been taken to much of this evidence. The dangers implicit in such evidence have been clearly identified in *Children's Aid Society of Halifax v. P.M.H.*, 2006 NSSC 75; *Children's Aid Society of Toronto v L.(L.)* 2010 Carswell Ont 920 and *Children's Aid Society of Cape Breton-Victoria v D. (N.)* 2002 CarswellNS 227

[12] I have reviewed the evidence with these cases in mind. The Minister argues that it is not in the best interest of this child to be parented by the Father because:

- His personal past and the past of his family contain allegations of and convictions for sexual assault on minor children, including siblings. The Father denies the sexual assaults occurred and as a result any child in his care is at risk either from him or members of his family or others. He will not protect the child and he will not be viligent to protect the child from others because he does not believe there is any risk.

- M's past contains allegations that her partners, friends and family have sexually and physically assaulted her and she has done nothing to protect herself against these persons even when she should have known they presented a risk to her health and safety. She cannot protect herself and therefore she cannot protect children under her care.

- M has suffered depression when under stress, in particular the birth of a child, and this caused her to attempt suicide. If her children were returned to her, and if this child was placed with the Father, there would be three children under 2 in the household. This would place stress upon M and the parties' relationship. The Agency is not satisfied either party could maintain appropriate parenting when under stress.

- The Father has not sketched out any plan to deal with appropriate housing, employment, and financial support while unemployed except to suggest he will deal with these issues when the child is placed with him.

- The Father's parenting skills are non-existent. He has only been attempting to acquire those skills since September and he is not always receptive to learning what is required. He needs continuing guidance and could not at this time parent alone.

[13] Evidence about the past sexual offences for which parties and their family members have been found guilty are relevant, but the opinions about the likelihood of these persons to re-offend appear to have given little consideration to the length of time since the offences occurred, the nature of the offences, and the efforts the individuals and the families involved have made to rehabilitate and reunite. It is noted as a concern that the Father is in denial about his own offences and the offences committed by his father. The Father was found not guilty of an offence against a female younger than he. He was never charged with offences against his siblings. Any case against him has not been tried before me on the balance of probability test. The Agency believes he did commit sexual assaults and considered those to be substantiated at the time. Their decision is relevant but it does not prove the offence was committed. The allegations are almost ten years old.

[14] The Father's father was convicted of sexual assault committed against his daughter, the Father's sister. This also is an offense committed several years ago and this court has been informed that father and sister now have a continuing relationship. Because of this it is understandable the Father has questioned the validity of the conviction at the time. Wrongful convictions have happened. Perhaps he knows more than the Agency does about reasons why his sister may have falsely accused her father or about why in the face of the abuse she would forgive him and forge a relationship with him. None of the reports before me attempted to ask these questions but merely made assumptions about behavior from the fact that the convictions exist and the Agency's review at the time accepted the reports from the children then involved. Certainly there are strong indications about the truthfulness of the allegations, but this does not tell us anything about what individuals have done since the allegations were made and convictions entered to rehabilitate themselves and protect vulnerable persons who may be in their care in the future. If these persons are to be labeled as a "risk" should not a proper risk analysis be conducted? These individuals do not have the financial resources to undertake such a task on their own.

[15] The Agency has not clearly told the persons it condemns what exactly it wants from them. What does the Agency need to hear or know about them to assess their risk of reoffending? One criterion appears to be an acknowledgment that the offenses occurred as alleged. I have already explained why it may be difficult for the Father to give the Agency that acknowledgment. Without this acknowledgment is there no other means by which he could convince the Agency

that neither he nor his family members present a risk to vulnerable young children? One would have thought the passage of time without further allegations of abuse, the reuniting of family members who may have been estranged after allegations of abuse, may have been factors the Agency, and an assessor, could take into account. Neither of these factors appears to have been explored, perhaps because the Agency considered these to be factors to be proven by the Father. Unfortunately providing evidence to an assessor or to an Agency to round out their decision making is not something generally done by Respondents. They do not know how to overcome the weight of the prejudicial information contained in the files maintained by the Agency.

[16] M suffers a similar uphill battle in respect to her past. In addition, she does have a worrisome pattern of aligning herself with people who abuse her. Some of this is likely because she has a limited choice of persons with whom she can have a relationship. In addition, to ask her to avoid her family, who may often be her only support, does not take into account the fact that even abusive families can provide shelter and assistance. Finally I am not as convinced as the Minister's agents are that she should have known about the potential for abuse from some of those who did abuse her. Decisions made with the benefit of hindsight are often easy to make. Persons who abuse others are often charming and charismatic. They can also occasionally be nurturing and supportive. It is not always easy to know whether these persons will cause harm. Because M is distrustful of the Agency she likely was not prepared to accept its advice about the people who were her friends and family members. Interestingly M has been a person who, when abused, reported to others about the abuse and it does not appear she continued in long-term relationships with her abusers. Her relationship with the Father has been stable for some time which suggests she may be learning how to keep and maintain a stable relationship. There have been no allegations that the Father is abusing her or that he has abused any other partners he may have had in the past.

[17] The Father was quite vague in his testimony about how he would financially support his son. He was asked whether he had made specific inquiries about childcare facilities. I can understand why his answers were unsatisfactory to the Minister but the reality is he is on social assistance and no doubt assumes he could continue to be on social assistance until he obtained employment. Because he is not working he would not need childcare. I am satisfied he does know how to

obtain childcare should he ever become employed. As a result I do not see these omissions as significant failures that would suggest this child should not be in his care.

[18] I would have conducted a more detailed analysis about the relevance of the evidence about the Father's and M's lack of insight in respect to the risk of sexual and physical abuse if I had decided these were the most pressing issues to explore in respect to this child. However, I have decided the primary issues relating to this child's best interest are his age, the length of time he has been in foster care, and the Father's lack of parenting skills. These skills can be learned but so far this has been a slow process. This child cannot wait for the Father to become a capable parent. The Father has to understand the cues this child gives now. The child cannot teach him what to do. I cannot rely on M continuing in a relationship with the Father and I am concerned about the stress M may experience if she is primarily responsible for parenting 2 or 3 children under the age of 2 if her children are returned to her care in addition to this child. I am satisfied the evidence before me does suggest M has only recently recovered from her postpartum depression. While she did reach out for help her life has significant complications that may once again contribute to mental illness and inability to cope. As long as she remains mentally healthy the Father's lack of parenting skills may be compensated by her parenting of the child. However, the evidence from those who have evaluated M's mental health status suggests there are still significant concerns that may lead to her destabilization. I do not want to place this child in a family where there is significant likelihood the child may subsequently need to be taken into care, either because this family unit has failed, or because, although the parties are still together, M is unable to provide supportive parenting assistance to the Father.

[19] I must assess the Father's capabilities as he appears before me now, not as he may appear months from now at a time when he may have taken sufficient parenting courses to have improved his parenting skills. The present situation today is that he lacks appropriate parenting skills, and the person who would compensate for this has significant challenges relating to her own past parenting that can be predictive of future challenges, the combination of which may place this child once again in need of protective services.

[20] The timeline for this child does not reach its maximum limitation until August 2014. I have considered whether the issues I have identified may be

corrected within the time remaining. Five months may be considered by many to be ample time within which corrections can be made by these parents. I must balance whether these parents, who are, for reasons I do understand but cannot ignore, - resistant to the recommendations that have been given to them by the Agency and by those who have worked for the Agency, - who are both struggling in his and her own way with the consequences of their past, - who may need each other to maintain stability but who may be emotionally vulnerable because of that dependency, - who have never parented any child together and one of whom has never parented child at all, can realistically be expected to make the necessary improvements in their lives within the next five months. In evaluating this I must also decide whether it is in the best interest of this child to have him to wait another five months. He has been in foster care since birth. He is 12 months old and no doubt has become bonded to the foster family now caring for him. A change to a new family will be stressful and because of this he needs to be placed where he likely will remain. I do not have confidence that the Father can provide this stable placement. I consider it to be in the best interest of this child to be placed in the permanent care and custody of the Minister.

Beryl A. MacDonald, J.