SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. A.M.*, 2014 NSSC 251

Date: 20140704
Docket: SFSNCFSA 074698
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

A.M. and J.W.

Respondent

DECISION

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	June 26, 2014, in Sydney, Nova Scotia
Written Release:	July 4, 2014
Counsel:	Adam Neal, Counsel for the Minister of Community Services
	A.M., Self-Represented
	J.W., Self-Represented

By the Court:

BACKGROUND:

[1] A.M. is the mother of twin girls J.D.M. and J.A.M., born September […], 2006.

[2] The children were placed in the permanent care and custody of the Minister of Community Services by order of Justice Darryl Wilson on October 10, 2012.

[3] A.M. has applied to terminate that permanent care and custody Order and have the children returned to her care under the *Children and Family Services Act*. The Minister of Community Services filed a summary judgment Motion on the evidence on February 20, 2014.

[4] A.M. is also involved in a custody dispute involving her older daughter and her parents (SFSNMCA-89367). I have been assigned to hear both cases.

[5] A.M. directed correspondence to the Court dated June 16, 2014, requesting that a different Judge be assigned to the hearing on this file. Although A.M. did not use the specific terms or file the appropriate documents, I am treating her correspondence as a Motion by correspondence, as she is self-represented. She states in her correspondence that she is seeking a "fair chance in court

proceedings" by having another Judge hear the case. In other words, she is asking me to recuse myself from the *Children and Family Services Act* proceeding. An oral decision on the recusal issue was delivered on June 26, 2014. The decision on summary judgment was reserved. This decision deals with both motions.

ISSUES:

[6] The issues are:

1. Should the recusal motion be granted?
2. Should summary judgment be entered?

THE LAW:

[7] The case law sets out some principles to be considered in recusal motions:

1. The starting presumption is one of judicial impartiality, thus the burden is on the Applicant to prove disqualification.
2. The standard is that of a reasonable and right minded person, reviewing the matter realistically and practically with a full opportunity to consider the matter.
3. The grounds alleging bias (or reasonable apprehension of bias) must be specific and serious.

4. A prior judicial finding against the person alleging bias does not create a reasonable apprehension of bias, nor does it preclude a judge from hearing another matter involving that person.

[8] Justice Oland in the Court of Appeal decision of **C.B. v. T.M.**, 2013 NSCA 53 held that to successfully argue lack of impartiality, the party raising the issue must demonstrate that the beliefs, opinions, or biases held by the judge preclude reaching a fair decision.

[9] In the case of **Littler v. Howie**, 2013 NSSC 84, Justice Forgeron held that the husband's four complaints to the judicial council did not result in a finding of bias or raise a reasonable apprehension of bias. Nor did comments made by the Court encouraging the parties to retain legal counsel, discussions about costs consequences at a Pre-Trial Conference, and a past ruling and decision which were unfavorable to the husband create bias or a reasonable apprehension of bias.

[10] Justice Forgeron ultimately recused herself for other reasons not relevant to the case before me.

ANALYSIS – RECUSAL:

[11] The starting presumption is judicial impartiality. A.M. must rebut that presumption on the civil balance of probabilities.

[12] I have had limited involvement in the case involving custody of A.M.'s older daughter. I issued an Interim Order suspending payment of child support payments on a related file, pending the outcome of the custody hearing. I also conducted a Pre-Trial Conference on the file. In my view, such limited involvement does not result in bias or even a reasonable apprehension of bias.

[13] A.M.'s stated reason for seeking a "new judge" on this file is that I am scheduled to hear evidence on another file involving her family. That is not reason to recuse myself.

[14] A.M.'s reasons for requesting recusal are not specific. She simply states she is seeking a "fair chance" and points to the fact that the same judge is assigned to both files. The Court is unable to assess whether any serious issues are being raised, due to the lack of specifics.

DECISION – RECUSAL:

[15] I find that a reasonable and right-minded person reviewing the matter realistically and practically, with a full opportunity to consider the matter, would not find bias or a reasonable apprehension of bias in these circumstances.

[16] I therefore decline to recuse myself.

ANALYSIS – SUMMARY JUDGMENT:

[17] The Summary Judgment Motion was heard on June 26, 2014. The Minister took the position that the evidence contained in the Affidavit filed by A.M. and J.W. in support of their application to terminate the permanent care and custody Order shows no genuine issue for trial, and that the parties have not established that there is a "real chance of success" for the matter to proceed (**Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] S.C.J. No. 60, at para. 27).

[18] ***Civil Procedure Rule 13.04*** states as follows:

> **13.04 (1)** A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
> **(2)** The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

> **(3)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> **(4)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> ….

[19] The focus in this motion is not on the nature of the legal claim, rather it is on the sufficiency of the evidence. In determining the sufficiency of the evidence, this Court must consider the governing legislation. Section 48 of the *Children and Family Services Act* deals with termination of a permanent care and custody Order. At section 48(10), the test for termination is stated as follows:

> (10) Before making an order pursuant to subsection (8), the court shall consider
>
> (a) whether the circumstances have changed since the making of the order for permanent care and custody; and
>
> (b) the child's best interests.

[20] This Court must therefore, in considering whether a genuine issue for trial has been raised, consider that legislation and the evidence filed on the Application.

[21] A.M. and J.W.'s Application to terminate the permanent care and custody Order was filed on December 16, 2013, along with a parenting statement. They had earlier filed an affidavit on November 22, 2013.

[22] In the Joint Affidavit filed by A.M. and J.W., they point to a number of reasons why the permanent care and custody Order should be terminated. They state that:

- charges against J.W. have been dismissed;
- there are no new charges;
- they have new resources available;
- they have accessed counselling on their own initiative;
- a pivotal witness lied in the original hearing;
- they have been denied access with the twins; and
- the twins have been unable to have a relationship with J.W.'s family.

[23] The Minister filed an Affidavit in support of its motion for summary judgment. The exhibits to that affidavit include the Court of Appeal decision in relation to Justice Wilson's Order for permanent care and custody. The appeal was dismissed. There is also attached a copy of Justice Haley's decision of December 12, 2013, dealing with the parties' infant daughter, who is not the subject of this proceeding. The Minister relied upon historical evidence from the hearing before Justice Wilson in the latter proceeding.

[24] The Minister also provided a copy of the recent Court of Appeal decision in relation to Justice Haley's permanent care and custody order for the infant child. That decision was released on May 16, 2014. The appeal was dismissed.

[25] The hearing into these matters was adjourned pending the outcome of that appeal decision.

[26] The Application filed by A.M. and J.W. involves the couple's twin daughters. The Minister's position is that the decision of Justice Haley, being very recent and upheld on appeal, determines this Application. However, Justice Haley's decision deals with a different child and as such, his decision is helpful but not determinative of the issue before this Court. Different children have different needs and interests, and it is the best interests of the twins which must be considered in this proceeding.

[27] It is clear from the decisions of Justice Wilson and Justice Haley that all of the issues raised by A.M. and J.W. in the Affidavit filed on November 22, 2013, were adjudicated by the court at some prior point. For example, by the time Justice Wilson ordered permanent care of J.D.M. and J.A.M., the charges against J.W. for sexual assault and sexual touching involving one of the twins had been dismissed. Charges remained outstanding for sexual touching of another child.

[28] When Justice Haley rendered his decision, he referenced the dismissal of the other charges. In that case, A.M. and J.W. argued that the Minister ignored the fact that all charges against J.W. had been dismissed. Justice Haley stated:

> [85] The Respondents rely upon the dismissal of criminal proceedings against J.W. as evidence that the allegations are untrue and unproven. I cannot accept such an assertion. I agree with the comment of Justice Wilson at paragraph 70 of his October 3, 2012 decision:
>
> > The withdrawal of criminal charges with respect to the allegations of the sexual touching and sexual assault involving (J D) do not risk reduce substantial risk of sexual harm to the children in the future.

[29] From this, it is clear that Justice Haley was aware that J.W.'s charges involving an unrelated child had been dismissed, but he was not satisfied this reduced the risk to the parties' infant child.

[30] A.M. and J.W. also assert they were never offered services by the Minister, but Justice Wilson noted in his decision that services were refused. Justice Haley dealt with services as well. He found that "… the main limitation on the provision of services in this case was the Respondents themselves. They blame the Minister but they would be well advised to re-examine their conduct in this regard."

[31] Justice Haley further noted that the parties indicated a willingness to take and accept services and testified that they had each independently sought out counselling services, however, the court had not been provided with any evidence in this regard. In their affidavit filed in this Application, A.M. and J.W. note that

they have been attending counselling with Family Services and they provide the names of both their clinical therapists.

[32] A.M. acknowledged on June 26, 2014, that Justice Haley was aware she had been seeing a therapist. The same is true with J.W.

[33] A.M. also alleges that an important witness to the original case lied. That allegation was raised before both Justice Wilson and Justice Haley. Justice Wilson found the witness was credible. He relied on her evidence to conclude there was risk to the children. Justice Haley accepted that assessment.

[34] A.M. and J.W. also point out there are no new charges against J.W., and A.M. has never been charged. Justice Haley was aware at the time of his decision that all charges against J.W. had been dismissed. The fact that no charges have been laid since does not demonstrate a change in circumstances.

[35] The issues of access and lack of a relationship with J.W.'s family are not relevant to this Application. The permanent care Order for the twins provided for no access with the parents. This hearing was not the proper forum to revisit that issue.

[36] Lastly, A.M. says their resources have improved and the parties have obtained a three-bedroom home. It is her position this constitutes a change from

when Justice Wilson made his decision, and that this puts her and J.W. in a better position to parent the children. The Minister points out that A.M.'s ability to provide a home for the children was never an issue; the issue was the risk posed by J.W. and A.M.'s refusal to acknowledge such risk. The availability of a home is a change, but not one relevant to the risk addressed by the permanent care and custody Order.

[37] J.W. acknowledged there has been no new evidence presented to the Court. He requested an adjournment to allow the parties to seek advice and amend their affidavit.

[38] I declined to adjourn the matter. The Minister's motion for summary judgment was filed February 20, 2014. The matter came before the Court on February 10, 2014, at which time Justice Wilson set a hearing date of March 13, 2014. Justice Wilson urged A.M. and J.W. to seek legal advice on the Minister's motion.

[39] As it turned out, the hearing was adjourned pending the outcome of the appeal of Justice Haley's decision. The motion was eventually heard on June 26, 2014, more than five months after the Minister's motion was filed. There was ample opportunity for the parties to retain counsel and they failed to do so.

DECISION – SUMMARY JUDGMENT:

[40] I find that the Minister has established there is no genuine issue for trial. Under the legislation, A.M. and J.W. are required to show a change in circumstances which would justify terminating the permanent care and custody Order. The issues raised by parties in the Application to terminate the permanent care and custody Order are not new.

[41] If their Application proceeds, A.M. and J.W. must also prove on a balance of probabilities that returning the children to their care would be in the children's best interests. On this motion, they have not established that there is a real chance of success of doing so (**Guarantee Co. v. Gordon Capital Corp.***(supra)*).

CONCLUSION:

[42] The summary judgment motion is granted. The Application to terminate the Order for permanent care and custody granted by Justice Wilson on October 3, 2012, is dismissed.

MacLeod-Archer, J.