FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (*Community Services) v N.M.*, 2014 NSFC 24

Date: 2014-11-17
Docket: FKCFSA 092226 & 092534
Registry: Kentville

BETWEEN:

Minister of Community Services

Applicant

and

N.M.*, *P.R.,* and *J.F.

Respondents

AND

Minister of Community Services

Applicant

and

***N.M.*, *P.R.* and *E.R.* (child)**

Respondent

Decision

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

JUDGE: The Honourable Judge Marci Lin Melvin

HEARD: November 17 and 18, 2014 at Kentville, Nova Scotia

COUNSEL: Sanaz Gerami, for the Applicant Minister of Community Services
Kelly Richards for Respondent N.M.
Nicole Mahoney for Respondent P.R.
Sharon Cochrane for Respondent C.M.
David Thomas for Respondent J.F.
John MacMillan for Respondent E.R.

By the Court:

Introduction

[1] Before the court are two variation applications made in the above-noted matters for a variation pursuant to s. 39(9) of the *Children and Family Services Act*, R.S.N.S., ch.5, made by Respondent N.M.

[2] Section 39 (9) sets out:

> The court may, at any time prior to the making of a disposition order pursuant to Section 42, vary or terminate an order made pursuant to subsection (4).

[3] Counsel agreed to combine the proceedings, as the evidence would have been virtually the same in both.

[4] N.M. is seeking to vary placement of the children, who are in foster care pursuant to a consent protection order. She seeks to have them returned to her home.

[5] P.R. also seeks a variation and wishes to have the children placed with him or with N.M.

[6] C.M. supports N.M.'s plan, while J.F. supports the child returning to one of the respondents.

[7] The Child Respondent E.R. simply wants to remain in the community where he presently resides in foster care.

[8] The children involved are the Child Respondent E.R., born December […], 2000, and E.M., born July […], 2013.

[9] E.R. is the child of N.M. and P.R.

[10] E.M. is the child of C.M. and J.F. C.M. is the child of N.M. N.M. and P.R. assumed the parenting roles for the child E.M.

[11] Both children were taken into care on July 27, 2014, as a result of an incident of family violence where N.M. stabbed P.R. with a knife. This was done while the child E.M. was being held by P.R.

[12] P.R. was taken to the hospital where he required surgery as the result of the stabbing. Affidavit evidence of the Applicant at the time of the Protection Application (Exhibit 6) sets out that hospital staff had advised P.R. would be in the hospital for some time due to the extent of the injury.

[13] N.M. was charged with aggravated assault.

[14] There is past evidence of family violence. P.R. has six convictions for assault, several against N.M. and one against the mother of another child.

Issues

#1 Has there been a material change in circumstance that would allow the court to consider varying the placement of the children?

#2 If so, should the court vary placement of the children at this time?

Evidence

[15] N.M. testified that she was involved in counseling one day weekly or bi-weekly with Sheila Bower Jacquard, where she has attended four sessions and missed three. Further, N.M. has had one session with psychologist Susan Squires for a mental health assessment, missing a second appointment as well as sees Carolyn Price Weiland weekly at her home.

[16] Her evidence is that the relationship with P.R. is over. She is on an undertaking relating to the criminal charges that she not have contact with P.R. The family court order also prohibits contact between N.M. and P.R. She says she does not want to lose her freedom or her children and, as such, will not have contact with P.R.

[17] Her evidence is that she now lives with her daughter C.M. and they are getting along better than they had been.

[18] N.M. and P.R. had been together as a couple in a fractious, on-again off-again, violent relationship for fifteen years. According to N.M., there is a history of a lot of drug use and alcohol. Her evidence is the Department of Community Services was involved at certain times throughout their life together partly because of the violence and the children were exposed to the violence. On one occasion, when E.R. was ten years old, he intervened when P.R. was trying to choke N.M.

[19] As her son, E.R. wishes to remain in the community where he now lives in foster care. N.M. is willing to move to that community if she were to be successful in her application. E.R. is doing better in the new school, really likes it, has new friends, no longer requires an aide and is involved in M.M.A. twice a week. He is not stressed about family violence in foster care although she believes he misses his family. Regarding E.R.'s new school she said: "He likes it, he really likes it."

[20] She said she would move to the community where E.R. now lived, she would have to give her landlord three-month's notice, which would be March, but she had communicated with the E.R.'s foster mother asking for her to keep E.R. with her until she could move there in March. N.M. then said that E.R. wanted to return to the community where she now lives to go to a specific high school next year, so she would move back. The court found this evidence convoluted and not well thought out.

[21] Her evidence regarding the child E.M. is that E.M. had a diaper rash; the foster parents often forgot to send diaper rash cream and wipes for the access

visit and did not provide snacks for the children while she exercised access. The Minister's evidence was that a purchase order was provided to her to purchase snacks and food for the visits.

[22] P.R. testified. He is now residing with his parents and if the children were placed in his care, his evidence is that he would have his father drive E.R. to school in the area where his foster home is. It is to be noted that his father did not testify. P.R. testified regarding E.R.: "He's enjoying [his new community], he likes his new school … his love for the community grew since then and I don't want to subtract that from him."

[23] He too was concerned about the rash on E.M.'s bottom. He said he thought E.R. was depressed. P.R. was worried that the children had to go into foster care respite for two weekends since being in care. He is concerned with the bonds the children have with the family being harmed.

[24] He admitted in cross-examination to domestic violence but said: "It was a two-way street." He became defensive and somewhat hostile while on the stand. He admitted to six convictions for assault and that he has anger issues, but "… was not opposed to trying to fix [himself]." He used to have two visits a week with E.R. but they were cut back at E.R.'s request. He testified he had been to three or four sessions for a mental health assessment.

[25] During previous involvements with the Department of Community Services, he and N.M. participated in couples counseling and did the positive relationship program, just prior to the stabbing. The last matter with DCS concluded in January 2014. He said any future contact with N.M. would be through a third party with regard to the children.

[26] The Minister called four witnesses. Carolyn Price Weiland testified she has no concerns regarding the bonds the child E.M. has with N.M. and P.R. Her concerns if P.R. were to have the children would be the potential of contact direct or indirect with N.M. She has no concerns that either N.M. or P.R. could provide for their physical needs. She testified that both N.M. and P.R. are capable but they have just started services and they should be further along in order to return the children safely. Her concern regarding N.M. is further exacerbated by the potential of emotional tension between N.M. and C.M. She said: "… right now it seems to be stable but that tends to waive."

[27] Witnesses Kendra Mountain and Lindsay Parker echoed Carolyn Price Weiland's concerns: these are early days with N.M. and P.R. not being far enough along in their therapies to be considered truly engaged. Neither is there evidence to understand how their toxic and violent relationship affected the children nor that they have protocols and strategies in place to ensure these types of behaviors do not happen in the future.

[28] Foster care respite was explained as being weekend care if the foster parents had to go away for a weekend. This was done, rather than taking the children with them, so the various respondents could continue to have their parenting time with the children on the weekends and so E.R. could participate in

his M.M.A. activities. The evidence is the two foster families provide respite for one another and E.R. is friends with a child in the respite home.

Analysis

[29] The heartbeat of family law is and must be the best interests of the children. The *Children and Family Services Act***,** ss. 2(1) and 2(2) defines the purpose of the *Act* as protecting children from harm, promoting the integrity of the family and assuring the best interests of the children. The *Act* confirms that the paramount consideration, however, is the best interests of the children.

[30] The first issue the court has to determine is whether there has been a change in circumstances.

[31] When the children were apprehended they were living with both P.R. and N.M. The children no longer live with them but are in foster care. The evidence is that P.R. and N.M. no longer live together. For those reasons, although orchestrated by the state, there is a material change in circumstances and the court can consider the respondents' variation application.

[32] The second issue for the court to determine is: should the court vary placement at this time?

[33] The court finds that the children were removed from a frightening and violent situation. The evidence differs: one version is that P.R. was holding E.M. when N.M. stabbed him; P.R. testified this was not true. The court does not rule on this point at this stage. What matters is that the children were in the home when this happened. No child should ever have to worry that this would be a scenario they would have to wake up to or witness.

[34] The respondents argue the emotional bonding with their children, particularly E.M., will suffer if the children are not returned to them but remain in foster care. The evidence is the children were subjected to emotional and physical violence for much of their young lives. Was the emotional welfare of their children a consideration then?

[35] Preserving a family unit is only to be considered if it is in the best interests of a child (See: *New Brunswick (Minister of Health and Community Services) v. M.L.*, [1998] 2 S.C.R. 534, at p. 599). This maxim has been maintained and cited in child welfare jurisprudence throughout Canada.

[36] N.M. and P.R. have asked the court to believe it is in the best interests of the two children that they be placed with one of them. They ask the court to believe that: ***although*** they have been involved in an on-again, off-again, violent and abusive relationship for fifteen years, with no apparent compunction that the children were involved and witnessing the acts of violence between them; ***although*** P.R. has convictions for assault against N.M.; and, ***although*** N.M. is now charged with aggravated assault for having stabbed P.R. – that the children would now be safe in either of their care.

[37] The past history of the respondents needs to be considered. It is

admissible, germane and relevant. Past history can be used in assessing present circumstances. The evidence of past experience is invaluable to the court to assess a present situation. While it is possible the respondents will remain apart, the court is concerned with probabilities not possibilities (See: *Nova Scotia (Minister of Community Services) v. Z.(S.)*, 181 N.S.R. 99 (C.A.); *Minister of Community Services v. N.L. and A.M.*, 2011 NSSC 35).

[38] The civil test to be applied is on a balance of probabilities**.** Have the respondents proven on a balance of probabilities that it is in the best interests of the children for the court to vary placement and return the children to either one of their care?

[39] The court is not convinced N.M. and P.R. will remain apart. Their own evidence of the history of domestic violence between them, their pattern of reuniting and exposing the children to violence is powerful.

[40] Counsel for N.M. in her submissions argued it would be the perfect time to return the children to her client because she is on an undertaking from the criminal court not to have contact with P.R. and also by virtue of the family court order. Effectively, the court could be assured of her compliance. N.M. does not want to lose her freedom or her children, by her own admission.

[41] The court can only interpret that to mean that if there were not stringent measures in place to prevent their contact, there might be contact. Any contact between P.R. and N.M. would potentially have disastrous consequences for the children. They have been through enough.

[42] The witnesses for the Minister have said these are early days. After fifteen years of a toxic interaction, a mere three or four counseling sessions, the other scant number of sessions these parties have had with other counselors since the apprehension and the incomplete mental health assessments, do not satisfy the court that the parties understand or recognize what they have to do to effectively parent these children. It is not near enough time to believe N.M. and P.R. have well and truly engaged in services. They have, after all, been involved in services before, prior to the stabbing. P.R. in his testimony said he was not opposed to "try and fix" himself. It is clear he knows he is not there yet.

Conclusion

[43] The court has considered all of the evidence as well as the relevant jurisprudence. The Respondents N.M. and P.R. have not shown the court that they have made enough progress to vary placement of the children. The court is not convinced N.M. and P.R. will remain apart. N.M. and P.R. have not shown on a balance of probabilities that it would be in the best interests of the children to be in either of their care.

[44] The court finds that it is not in the best interests of the children to be placed with N.M. or P.R. at this time.

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Judge Marci Lin Melvin