IN THE FAMILY COURT OF NOVA SCOTIA
Citation: Annapolis County (Community Services) v. S.J.D., 2008 NSFC 28

Date: 20080821
Docket: 08D058052
Registry: Yarmouth

Between:

The Minister of Community Services (Annapolis County)

Applicant

v.

S.J.D. and B.C.J.B.

Respondents

Revised decision:	This decision has been revised on October 29, 2008 and replaces the previously distributed decision.
Publication restriction:	Section 94(1) of the **Children and Family Services Act** applies and may require editing of this judgment or its heading before publication
Judge:	The Honourable Chief Judge John D. Comeau
Heard:	Annapolis Royal (June 24, 2008) and Digby (August 7, 2008), Nova Scotia
Written Decision:	August 21, 2008
Counsel:	D.B. MacMillan, for the Applicant P. van Feggelen, for the Respondent, S.J.D. M. Hansen, for the Respondent, B.C.J.B.

Editorial Notice

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

The Application:

[1] This is a protection hearing under Section 40 of the **Children and Family Services Act**. The child, R. (female) born February *, 2008 *(editorial note- date removed to protect identity)*, was apprehended from the hospital on February 25, 2008, as being in need of protective services under Section 22(2)(b) & (g) of the **Children and Family Services Act** as follows:

> (b) There is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);
>
> (a) The child has suffered physical harm, inflicted by a parent or guardian of the child, or caused by the failure of a parent or guardian to supervise and protect the child adequately.
>
> (g) There is a substantial risk the child will suffer emotional harm of the kind described in clause (f) and the parent or guardian does not provide or refuses or is unavailable to consent to services or treatment to remedy or alleviate the harm.
>
> (f) The child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal or self-destructive or aggressive behaviour and the child's parent or guardian does not provide or refuses or is unavailable or unable to consent to services or treatment to remedy or alleviate the harm.

[2] At the five day stage hearing, March 4, 2008, the court found the child in need of protective services based on reasonable and probable grounds. The

Minister (referred to also as the Agency) was granted interim care and custody with access agreeable among the parties. On April 3, 2008, the court confirmed its finding of in need of protective services and an Order was made also restating the same care, custody and access provisions as the previous order. Time for the continuation of this interim hearing was extended by consent in the best interests of the child.

[3] On April 17, 2008, the interim hearing continued and the court rendered its decision by way of court order issued on that date. This was not a consent order and evidence was presented by affidavit, a professional report and argument by counsel. Submissions were made by counsel for the Applicant and the two Respondents. An affidavit and representations were also made by counsel for a placement of the child with the maternal grandmother. She was not joined as a party.

[4] After having read the affidavits and the professional report, the court expressed concerns about the large number of children in the grandmother's home (7 at the time) but found no real danger or substantial risk as defined in Section 39(6) and placed the child with the grandmother under Section 39(4)(d) of the

Children and Family Services Act with supervision by the Agency. The grandmother was to cooperate with all reasonable requests by the Minister's agents and to participate in any assessments the agents required and comply with anything required by an assessment.

[5] This was not a consent order, although counsel for the Minister saw fit to protest the court's decision in the order he prepared and the court issued with the following clause:

> AND UPON MOTION: by counsel for the Respondents, with counsel for the Applicant objecting thereto.

[6] The Minister's agent, following this adjudication and order, by affidavit dated June 23, 2008, in clause 2(b) made the following statement:

> In regard to the matter of R., His Honour Chief Judge Comeau ruled that there were reasonable and probable grounds to believe that she was in need of protective services. Despite the ongoing protection concerns regarding (the grandmother), R. was ordered into the care of her maternal grandmother ... under the supervision of the Minister. R. was taken from a foster home that day and was taken to her grandmother's home.

[7] Protest of court's rulings are best left to the appeal process. Although, the court respects both counsel and the agent's compassion and enthusiasm for their role in the child protection process.

[8] A pre-protective services hearing was held on May 15, 2008, and the protection hearing commenced on June 24, 2008, and adjourned to June 26, 2008, with a further adjournment to August 7, 2008, at which time it was completed.

[9] A protection hearing is to determine whether or not a child is in need of protective services as of the date of the protection hearing. The circumstances of the parents must be examined to determine whether the child is in need of protective services because a dismissal requires return of the child to the parents (see Section 39(2) of the **Act** which is also applicable to a dismissal under Section 40(5)).

[10] Counsel for the Respondent, S.J.D., indicates there is an application under the **Maintenance and Custody Act** whereby the Respondent parents and the grandmother agree she would have custody. If this consent order were issued, the child is not in need of protective services. Evidence, which will be discussed later

under “The Facts”, indicates the grandmother’s intent would be that her daughter would eventually take back custody of the child when it is deemed she is fit to do so. The Respondent-mother admits she is, at this time, unable to care for the child and the father wants access but would agree it be supervised.

Issues:

[11] Does the evidence support the allegations set out in the Notice of Hearing? Should the court consider the circumstances of the parents or the third party placement at the protection hearing? Is the child in need of protective services?

The Facts:

[12] The Notice of Hearing contains the affidavit of the Minster’s agent dated February 28, 2008. She has been involved with the Respondent parents since October 2007. Their other child, T., was taken into care on August 21, 2007, because of domestic violence concerns between the parents. They were asked to participate in a domestic risk assessment and services which would be recommended but they refused to cooperate.

[13] A Parenting Capacity/Home Assessment was completed by Coleen Shepard and forms part of the evidence. The Respondent-father refused to participate, although the Respondent-mother has attended individual counselling sessions at Mental Health as recommended.

[14] The Respondent-father says no arrangements were made for him to participate in an assessment nor urine testing.

[15] The dynamics between the parents have been turbulent filled with ongoing violence. This may be due to the drug addiction of the father which he admitted in his evidence. At one point, he was hospitalized as a result of an overdose of "crack" cocaine. He has described a large menu of different types of drugs he has used.

[16] Since the older child, T., came into care on August 21, 2007, the Agency placed him in the home of the maternal grandmother. The Respondent-mother also lived there for a time but, at the time of the protection hearing, she had moved out at the request of her mother. She presently lives with a roommate in the same

apartment building as the Respondent-father but indicates they have no relationship and do not communicate.

[17] On October 2, 2007, by further interim order, the older child, T., was placed in the care of the grandmother. The agent, in her affidavit of February 28, 2008, explains why the Agency was in favor of this placement.

> This was considered by this office to be an acceptable short-term arrangement, as (the grandmother) has a history of extensive child protection involvement, is a single parent of seven of her own children, has limited support, and her husband is due to return to that home after serving prison time for 10 convictions of sexually related offences against a child.

Professional Report:

Parents' Circumstances

[18] A professional report was commissioned by the Agency prior to the birth of R.. The report, dated February 15, 2008, was done by Coleen Shepard, M.S.W., R.W.W. Under the reason for the report, the assessor states:

> The children in question are T., born March *, 2007, (*editorial note- date removed to protect identity*) and the child, S.J.D. is expecting...

[19] And further:

> Finally, it should be noted that this assessment has not been ordered by the court. Rather, the parties agreed to participate on a voluntary basis. Given the Respondent-father's refusal to continue after an initial interview, it has not been possible to fully assess him as a parent. However, information he and others have provided to the evaluator is included in this report as are some of the evaluator's impressions of him and concerns about him.

The Mother, S.J.D.

[20] R.'s mother, S.J.D., was born August *, 1988 (*editorial note- date removed to protect identity*), and reference is made in the report to her early childhood and the absence of a father figure.

[21] The assessor interviewed a large number of collateral sources including the family physician who made the following statement:

> I have concerns about S.J.D.'s ability to care for this baby based on the fact that she is voluntarily not caring for her first child. Her present pattern of prenatal care makes me concerned that she has not matured greatly over the course of becoming a mother. I am worried that she will not be a vigilant mother once this baby is born.

[22] The assessor describes the Respondent-mother's, S.J.D., emotional instability and volatility.

> With regard to her emotional instability and volatility, S.J.D. tends to minimize her past behavior saying that her relationship with B.B. brought out the worst in her and that she didn't have a serious problem handling her anger before she was involved with him. She readily acknowledges that she has a temper but says that she wasn't violent until she met B.B.; that she put up with so much from him and realized that she could get his attention, or get rid of him, if she acted violently as well. She adds that, he caused her so much hurt and pain that she wanted to get back at him so she would threaten him; lash out at him physically and throw things at him. She adds that the only way she felt in control was when she threw things at him and damaged his property. While all of this may be true, the reality is that S.J.D. has a long history of anger in relationships. The child welfare worker who has known the family for many years supports the grandmother's impression that S.J.D.'s temper was "terrifying" and violent at times; that she had extreme mood swings and has had a serious problem with anger management which was evident from the time she was a young child. Agency file notes written in 1999 indicate that school personnel were very concerned about S.J.D.'s violent behavior so her difficulty with anger management is definitely long-standing. The grandmother says that S.J.D. will now only push so far because she knows that this is her last chance so she is trying to control her temper.
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> **The Father, B.B.**

[23] The father of R. did not participate in this assessment but through his own statements and collaterals, the maker of the report was able to provide the following:

> Although the information the evaluator has about B.B. is limited, by his own reporting he did not have a normal or happy childhood. B.B. presents as being a very angry and disturbed young man who appears to have the potential for violent behavior. The fact that he was taking anti psychotic medication is worrisome as well. B. acknowledges that he's "hyper" and "has a bad temper." His temper

outbursts are intense and unpredictable. He has little tolerance for frustration and appears to have significant difficulty coping with everyday life.

The evaluator has no information from professionals about B.'s mental health and the treatment he may have received in the past. By his own reporting, he is bipolar and had ADD or ADHD. S.J. says that, when she first met B.B. two years ago, he was "a really good guy." However, his attitude changed drastically a few months later. She suggests that this might be due in part to the fact that he stopped taking medication after he left the halfway house in April, 2006. She adds that, to her knowledge, B.B. hasn't taken any medication since that time and suggests that he should be diagnosed properly and receive treatment as indicated.

There is no evidence that B.B. assumes responsibility for his inappropriate and abusive behavior. He becomes angry and defensive when reminded, for example, that he could demonstrate an interest in his son, and a willingness to change, by getting a lawyer, arranging to have his access to T. reinstated. Obviously B.B. doesn't want to hear this. His reaction was to angrily state that, if they don't get T. back at the court hearing in February, he'll take off and that will be it as far as he's concerned. The fact that B.B. wouldn't even see his son on Christmas Day when, at his request, arrangements were made for him to do so speaks volumes about how unreasonable and angry he can be if things do not go his way.

Their relationship with one another

Given their problems as individuals and their history together to date, it is safe to say that there is little likelihood that S.J.D. and B.B. could ever have a healthy relationship with one another. They do not trust or respect one another. S.J.D. complains about the many lies B.B. tells her, often about stupid little things that are of no consequence. He has lied about being willing to do what has been asked of him to get their son back. He has repeatedly told her that he has a lawyer, has arranged for counselling and is willing to participate in assessments.

The physical conflict between them is long-standing. File notes dated August 3, 2007 state: "the level and frequency of physical violence between the couple is serious." S.J.D. describes subsequent incidents including breaking a window at B.B.'s apartment in November. She describes this incident saying that she intended to move out so she had been gradually taking her things from his place

> and went over one day when he wasn't home to get the rest of her belongings. However, he returned home unexpectedly; she told him she was leaving; he took some of her things back into the house and locked the door; she threatened to smash the window with a rock, which she did, and he "freaked out and left" because he was afraid the police would be called. A subsequent altercation that she "knows how to push his buttons" saying that she grabbed the Christmas tree; threw it across the living room and he "flipped out." S.J.D. adds that she often throws things to shut him up.

[24] Relevant to the protection hearing, the assessor believes that both children, T. and R., are in need of protective services to the extent that eventually it is a recommendation for permanent care and adoption.

The Law:

[25] The **Children and Family Services Act** provides for a protection hearing not later than ninety days after the date of application.

> **Protection hearing**
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> 40 (1) Where an application is made to the court to determine whether a child is in need of protective services, the court shall, not later than ninety days after the date of the application, hold a protection hearing and determine whether the child is in need of protective services.
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> (2) In a hearing pursuant to this Section, the court shall not admit evidence relating only to the making of a disposition order

> pursuant to Section 42 unless all parties consent to the admission of such evidence or consent to the consolidation of the protection and disposition hearings.
>
> (3) A parent or guardian may admit that the child is in need of protective services as alleged by the agency.
>
> (4) The court shall determine whether the child is in need of protective services as of the date of the protection hearing and shall, at the conclusion of the protection hearing, state, either in writing or orally on the record, the court's findings of fact and the evidence upon which those findings are based.
>
> (5) Where the court finds that the child is not in need of protective services, the court shall dismiss the application. *1990, c. 5, s. 40.*

[26] Counsel for the Respondent-mother points to the definition of "parent" in Section 3(1)(r) of the **Act** and says, as a result of the placement order, the grandmother comes under this definition. Consequently, the evidence at the protection hearing, to determine whether the child is in need of protective services, should be that of the grandmother and not that of the biological parents (the Respondents) from whom the child was apprehended.

[27] Although the placement with a relative, found to be in the child's best interests, provides for her protection, those circumstances are not what should be considered at a protection hearing.

[28] The comparison can be made to placement with a non-relative in a foster home. Placement circumstances are not relevant to a protection hearing for policy reasons. In *I.C. et al v. Children's Aid Society of Shelburne County et al*, Bateman, J.A. made reference to *Children's Aid Society of Metropolitan Toronto v. D.S.* [1991] O.J. No. 1384 (Prov. Div.) which discussed placement circumstances versus the initial and continuing family/parental situation at p. 79.

> There is no logic in the notion that there can be a 'best interests' comparison of two placements in the sense of determining which of two placements is 'better' and at the same time accommodating the legal priorities given to the family at the initial stages. The fallacy in that position is unbecoming. It is high time the key people in the protection field were clear about these distinctions. Once the family placement has been deemed inadequate, then, and only then, do 'temporary' foster placements open up for comparison.
>
> . . . . .
>
> If comparisons between foster parents and original families were legitimate from the outset, it would be tantamount to declaring open season on each and every child who was moved, however temporarily, into a foster home. When could it not be said that there was an attachment between a foster parent and a child and that moving the child back to the family would break the attachment. When could it not be said that the foster home had advantages over the original home. It would be ironic if foster homes were being chosen where the foster parents were so casual that there was no attachment or where the resources were no better than the family that was being assisted.

> A major portion of protection work involves a temporary removal of children from a family situation, the putting in place of some help and then a return to the family, often with supervisory safeguards and programmes. According to a recent report from Ontario's Child, Youth and Family Policy Research Centre only five per cent of all children involved with the Children's Aid societies end up in permanent care.
>
> One cannot place children in temporary care on an emergency basis or as a precaution pending a hearing on preliminary protection issues as contained in section 37 and 53 of the **Act** and then use the time it takes to get to the hearing as part of a rationale for not returning the child to the family. (Emphasis added)

[29] The intent of the **Children and Family Services Act** is set out in Section 2 of the **Act**.

> **Purpose and paramount consideration**
>
> 2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child. *1990, c. 5, s. 2.*

Circumstances of parents on date of Protection Hearing:

[30] Both parents testified at the hearing. The Respondent-mother, S.J.D., has resided in L. since about mid-June. It was around this time that her mother asked her to leave the home in which her children reside. The reasons for this appear to be tensions with her brother.

[31] She does not have a relationship with the Respondent-father, B.B., although by coincidence, she happens to live in the same apartment building as him. They run into each other occasionally.

[32] She says R. is very well taken care of at her mother's and R. appears to be a normal child in every way.

[33] The mother's long term plan includes going back to work and getting her own place so that eventually she can get her children back with her. She admits to not being ready to parent at the present time and is still working with the Agency. Taking some parenting courses is her plan for the fall.

[34] She has had counselling with psychologists Boyd and Pick but that is now completed. She does not now drink or use drugs.

[35] There have been physical altercations with the father, B.B., in the past, the last being April 17, 2008. On this date both had been drinking at a bar and the father became drunk and followed her to her mother's house and physically assaulted her but he never got in the house. He was charged with assault. She says their relationship is at an end.

[36] The father, B.B., indicates he does not care where the child, R., is. He just wants to see her. He was willing to cooperate with the Agency when they asked him for a psychiatric evaluation and urine samples but it never happened, it was never arranged.

[37] At the present time, he supports the placement of the child with the grandmother but wants to work on supervised access.

[38] He admits to the April 17th assault and hopes the Respondent-mother will drop the charges. His evidence is they both used drugs and he paid for her use of alcohol, marihuana and magic mushrooms. He personally has tried all kinds of drugs “except the needle.”

[39] Steps were taken to help with his anger problem in a course of “Options to Anger” through Correctional Services.

[40] It is his opinion the mother, S.J.D., is a good parent and they have no relationship. He is not planning to parent his children but wants supervised access.

Conclusions/Decision:

[41] The purpose of a protection hearing is to determine, as of the date of the hearing, whether the child needs protective services. A protection hearing is conducted taking into consideration the purpose of the **Act** and the remedy, if the evidence discloses, the child is not in need of protective services.

[42] In the case before the court, the Minister alleges that the child is in need of protective services because there is a substantial risk of physical harm as set out in Section 22(2)(b)(a) of the **Act** and specifically referred to earlier. There is also a substantial risk alleged that the child will suffer emotional harm and the parent does not provide or refuses or is unavailable to consent to services or treatment to remedy or alleviate the harm (22(2)(g)). This section specifies the emotional harm alleged in clause (f) of Section 22(2):

> (f) The child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawn, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide or refuses or is unavailable or unable to consent to services or treatment to remedy or alleviate the harm.

[43] Counsel for the mother indicates that none of these allegations have been proven because, as of the date of the protection hearing, the child is in a safe place where she will not suffer physical or emotional harm.

[44] This argument does not stand because at a protection hearing the principle set out in the **Act**, in the preamble, is applicable.

> AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate.

> AND WHEREAS the rights of children, families and individuals are guaranteed by the rule of law and intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of law;

[45] In other words, the intent of any protection hearing is to find out whether the children need the protection of the state or does the evidence disclose no risk to their best interests. If the latter is the case, the child should be returned to their parent(s).

[46] Counsel for the mother says that, in this particular case, the parent is the grandmother with whom the court made a temporary placement. He refers to the definition of parent in Section 3(1)(r)(iv):

> An individual residing with and having care of the child.

[47] Or (vi):

> An individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child.
>
> . . . . .
>
> But does not include a foster parent.

[48] To make this type of argument at the protection hearing would, in effect, be contrary to public policy with respect to the foster care system or child placement initiatives.

> There is no logic in the notion that there can be a best interests comparison of two placements in the sense of determining which of two placements is better and at the same time accommodating the legal priorities (referred to in the preamble of the Nova Scotia **Children and Family Services Act**) given to the family at the initial stages. (See *I.C. et al v. Children's Aid Society of Shelburne County et al, supra)*

[49] At this point in time, at the protection hearing, the court must take into consideration the circumstances of parents. In this particular case, the biological parents.

[50] The court has reviewed the parents' circumstances earlier in this decision and it is clear neither is singularly capable of caring for the child. As well, they are not jointly able to parent the child. They admit this. The Respondent-father, B.B., has problems with alcohol, drugs and his anger. The Respondent-mother, S.J.D., is not settled, requires parenting courses and there is potential for domestic violence when they are together. At the present time, they are not together but their relationship has always been an on again/off again one. It is, therefore, not a certainty that they will not get back together.

[51] When they are together, the child would be in danger of physical harm. Separate, they both need services in order to protect the child from emotional harm. Those services include parenting courses, counselling, drug rehab and much more.

[52] The court finds that the Minister has made out the allegations set out in the protection application and Notice of Hearing and finds that as of the date of the protection hearing, the child, R., born February *, 2008 *(editorial note- date removed to protect identity*), is in need of protective services.

[53] The April 17, 2008, Interim Order continues in full force and effect.

[54] This matter comes before the court again on September 18, 2008, at which time a date for a disposition hearing will be set.

John D. Comeau
Chief Judge of the Family Court
of Nova Scotia

dentresr