FAMILY COURT OF NOVA SCOTIA

Cite as: Nova Scotia (Community Services) v. E.L., 2011 NSFC 10

Date: 20110426
Docket: FKCFSA-074982
Registry: Kentville

Between:

The Minister of Community Services

Applicant

v.

E.L., F.L. and H.H. Respondents

IN THE MATTER OF: the children, B.H. (D.O.B. November [...], 1996),
E.H. (D.O.B. April [...], 1998), and
K.H. (D.O.B. March [...], 2001)

WRITTEN REASONS FOLLOWING ORAL DECISION

Restriction on publication: **PUBLISHERS OF THIS CASE PLEASE TAKE NOTE** that Section 94(1) of the **Children and Family Services Act** applies and may require editing of this judgement 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 Judge Marci Lin Melvin
Heard:	April 20, 2011 in Kentville, Nova Scotia
Written Decision:	April 26, 2011
Counsel:	Donald B. MacMillan, for the Applicant Linda Rankin, for the Respondent, E.L. F.L., Self-Represented H.H., Not present and not Represented by Counsel

By the Court:

[1] The Applicant made application to the Family Court for the Province of Nova Scotia for a finding that the aforementioned children were in need of protective services under the *Children and Family Services Act*, section 22(2), paragraphs (b), (g) and (ja), which state:

> A child is in need of protective services where:
>
> (b) there is a substantial risk that the child will suffer physical harm inflicted or caused or 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 substantial risk that 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;
>
> (ja) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (j);
>
> (j) the child has suffered physical harm caused by chronic and serious neglect by a parent or guardian of the child, and the 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] The Applicant sought an Order as follows:

(I) that the children remain in the care of the Respondent, E.L., subject to the supervision of the Applicant;

(ii) the Respondents, E.L. and F.L., shall not be together in the presence of the children;

(iii) the Applicant shall have access to the children where and when requested;

(iv) the Respondent, E.L., shall attend for a mental health assessment and comply with any recommendations out of same;

(v) the children named herein shall attend for individual counselling;

(vi) The Respondents, E.L. and F.L., shall attend for relationship counselling with Boyd & Pick Psychological Services Inc.;

(vii) the Respondents, E.L. and F.L., shall attend for and cooperate with a Parental Capacity Assessment, to be performed by Sheila Bower-Jacquard Psychological Services Ltd.;

(viii) The Respondents, E.L., and F.L., shall cooperate with the services of a family support worker, to be provided by the Applicant;

(ix) the Applicant shall have direct access to information from all service providers engaged with the Respondents;

(x) reasonable costs for the provision of services set out above shall be deemed to be costs of this application.

[3] In support of this Application, the Applicant filed an affidavit of Mary Louise Vessey, a long-term protection casework supervisor employed by the Applicant. She apparently had no direct knowledge of the matter and stated in her affidavit:

> "I have familiarized myself with this file and at various times conferred with Ms. [Annette] Davidson with respect to the circumstances of the children."

[4] Counsel for the Respondent, E.L., argued the Applicant's case that there were reasonable and probable grounds to believe the children were in need of protective services had not been met and the Applicant's affidavit contained nothing that would allow the Court to make such a finding. F.L. was self-represented and he agreed. Both asked the Court to dismiss the matter. H.H. was not present and there was no evidence of service. There is no affidavit evidence before the Court that provides any hint as to which Respondent, F.L. or H.H., is the parent of which children or what status either one may have.

[5] Section 22 (1) defines "substantial risk" as a real chance of danger that is apparent on the evidence.

[6] In **M.J.B. v. Family and Children's Services of Kings County,** [2008] N.S.J. No. 299 (C.A.):

> **I do not have any doubt that the burden of proof in child protection cases rests on the person who asserts the need for protection. Nor do I have any doubt that the standard of proof is the standard in civil cases, namely, the standard usually called 'the balance of probability'. Sometimes, applying that standard the seriousness of the allegation being made is thought to**

> **require a higher and more particularized measure of confidence on the part of the decision maker that the balance of probability test has been met. But the test remains the same. The weight of the evidence must show that it is more probable than not that the assertion being made is correct.**
>
> **When the assertion being made is about a past event then the actual occurrence of that event must be shown by the weight of the evidence to have been more probable than not. That is the case with past abuse, neglect or harm to a child.**
>
> **But where the assertion being made is that there is a risk that an event will occur in the future, then it is the risk of the future event and not the future event itself that must be shown by the weight of the evidence to be more probable than not. That is the case with consideration of a threat of future harm.**
>
> **The result is that in considering past abuse the degree of certainty that it has occurred will be more than is required in considering whether the abuse will occur in the future. A ten percent risk of future abuse may meet the test of the risk being shown to exist on the balance of probabilities, whereas a ten percent assignment of the probability that the abuse had occurred in the past would not meet the balance of probability test.**
>
> **In assessing the risk of future harm, (which is called the threat of future harm in s. 2), there is room for a variable assessment depending upon the nature of the threatened harm which is in contemplation. A threat of harm through neglect of the child's hygiene might well have to be much more probable in order to meet the balance of probability test than a threat of serious permanent injury through physical or sexual abuse. Generally speaking, a risk sufficient to meet the test might well be described as risk that constitutes 'a real possibility'.**

[7] Although the Court may and often does consider evidence of past abuse or neglect in a new Application under the Act, there must be some new incident, event, or substantial concern that 'triggers" a new Application to the Court.

[8] Initially, therefore, a Court must look at three factors:

> (1) Is there evidence to show that there is a substantial risk of harm to the children in their present situation? ("Present" being defined as the situation they were in at the time of the Application before the Court.)
>
> (2) Is there a substantial risk of harm based on past evidence?
>
> (3) Based on the foregoing, is there a substantial risk of future harm?

[9] As noted above, the Applicant has proceeded on sections 22(2) (b), (g) and (ja).

[10] Sections 22(2) (b), (g) and (ja) pertain to a future risk of harm based on past or present evidence. The Court has to consider the evidence as adduced by the Applicant and apply it to the wording of the above sections.

[11] Is there evidence before the Court of past abuse?

[12] The Applicant's affidavit is scant in that regard, but there it is clear there were certainly serious child welfare concerns from 1998 to 2007.

[13] Ms. Vessey's affidavit states:

> **2. Ms. L. And her children have been known to various child protection agencies in Newfoundland, New Brunswick, Ontario and most recently, Nova Scotia, going back more than ten years.**
>
> **3. Issues pertaining to the children being neglected by their mother, being subjected to physical and/or sexual abuse and witnessing domestic violence, together with serial transience and residences in women's shelters have been chronic, although the majority of these issues have de-escalated since Ms. L. began living in [...] in 2007.**
>
> **4. Ms. L's relationship with the Respondent, H.H., was marked by issues of domestic violence, the couple and two children residing for extended periods of time in his long-haul truck, or the children being left with various care givers while Ms. L. and Mr. H. travelled.**
>
> **5. In 1998, a New Brunswick paediatrician voiced concerns centred around environmental deprivation syndrome with regard to the child, B.H.**
>
> **6. The Applicant's file recordings indicate that the two older children were taken into care by child protection authorities in Newfoundland in 1999, and that the Respondent, E.L., was herself taken into care as a child due to sexual abuse and neglect issues.**
>
> **7. Agency records indicate that in January of 2001, the child, B.H., disclosed to RCMP that a body had "licked her bum and touched her privates in her bathroom" while her brother, E.H., may have been present. In February 2002, while the children were left with an alternate care giver while Ms. L. travelled with a trucker, the child disclosed that somebody had hurt him "between the legs" but then said his mother had told him he was not supposed to talk about this. At approximately the same time, a referral source indicated that Ms. L. had left the children with a named male individual who had been**

convicted of sexual assault against a child, and the children looked dirty and were smelling bad.

8. In February, 2004, the child, B.H., allegedly walked in to a room to discover her mother naked and masturbating in front of a video camera for a boyfriend on the internet. Ms. L. stated to a social worker at around this time that she could not cope with three children. Two months later a court application was brought alleging Ms. L. displayed poor parenting, no household management, no ability to set limits or establish a routine, and that the children were demonstrating attachment issues.

[14] Is there evidence to show that there is a substantial risk of harm to the children in their present situation?

[15] There is an apparent gap in either the information provided to the Court, or ministerial involvement from 2007 until a case recording of the Applicant dated January 31, 2011, which notes that B.L. (age 14) and E.L. (age 12) "appear to be significantly delayed, rarely smile or react spontaneously to stimulation and present with a flat, expressionless face".

[16] Two earlier incidents of what might be considered "present" occurred in 2010 and are set out in Ms. Vessey's affidavit, but there is no evidence that the Applicant was aware or involved at that time, or if it became known to them subsequently.

(1) **9. In August and October of 2010, police intervened in two domestic violence incidents between Ms. L. and Mr. L. On both occasions, the children were present. On the first occasion, Mr. L. reported being removed from the home by the police and on the second occasion he left on his own. On both occasions E.L. invited him back to the home within 24 hours.**

[17] There is no information to the extent of these incidents, whether charges were laid, or whether it was merely as a result of arguments.

(2) **12. Despite Mr. H's history of violence and emotional and physical abuse, Ms. L. did permit him to have extended period of unsupervised access to the children during the summer and at Christmas 2010.**

[18] The remaining incidents, as noted in Ms. Vessey's affidavit, do not pertain to any specific date, so the Court has no idea as to when these purported incidents may have occurred with the exception of the sentence in paragraph 14(b) which states: "However, Ms. L. recently told Ms. Davidson that she would not attend further sessions at Boyd and Pick."

[19] The remaining incidents noted in the affidavit are as follows:

11. On two occasions, E.L. has been abusive to the visiting social worker and appeared to have orchestrated confrontations in her driveway so as to avoid the worker observing the inside of the children's home.

13. Although Mr. and Mrs. L. appear to not get along, Mr. L. is seen as a caring and protective parent. His access is restricted by the Department of Community Services to Monday, Wednesday and Friday, 8:00 a.m. to 8:00 p.m. The Applicant has made no objection to those parties being together at any time, so long as none of the children are present.

14. a) Ms. L. attended one session with Susan Squires at Boyd & Pick Psychological Services; however, she left that appointment prior to the session having been completed. Mr. L. has not attended and agent Ms. Davidson has attempted to contact him in that regard without success.

b) Ms. Squires informed agent Davidson that she would recommend that Ms. L. participate in a Parental Capacity Assessment. However, Ms. L. recently told Ms. Davidson that she would not attend further sessions at Boyd & Pick.

c) Part of the Applicant's case plan would include counselling for the children. Ms. L. has stated that the children will not attend and indicated to me that she will not allow agent Davidson to speak to the children alone.

d) Ms. L. did see a therapist at Adult Mental Health, and that enterprise reported that a proper diagnosis could not be completed as Ms. L. did not participate fully in the assessment. However, Adult Mental Health did indicate that Ms. L. demonstrated characteristics consistent with a personality disorder and depression.

[20] As noted in **M.J.B.**, supra, the burden of proof in child protection cases rests on the person asserting the need for protection. Clearly, therefore, the standard of proof is the 'balance of probability'.

[21] Has the balance of probability test been met? Has the weight of the evidence shown that it is more probable than not that the assertion being made is correct? Has the past evidence, when considered in light of the evidence of the present, shown the Court that a substantial risk of harm to these children is more probable than not? And finally, would a reasonable or prudent person properly informed believe the children are in need of protective services?

[22] Based strictly on the Applicant's affidavit, there is no evidence, on a balance of probabilities, to show a substantial risk of harm. There is no "real chance of danger that is apparent on the evidence". The children's "expressionless faces", and the fact they visited with H.H. in the summer and at Christmas of 2010 (with no evidence of anything untoward occurring), and that Ms. L. recently told the Applicant she would not attend psychological sessions, is simply not evidence to show substantial risk of harm.

[23] Although it is a minimal test at this stage, even if the evidence noted in paragraphs 11, 13 and 14 of Ms. Vessey's affidavit is current, it is not remotely sufficient to allow the Court to find it is evidence of a substantial risk of harm.

[24] Given the above, a reasonable and prudent person properly informed could not conclude that the children were in need of protective services.

[25] The weight of the evidence used to trigger this Application - that it is more probable than not that the children are at risk of physical or emotional harm, or neglect - is not sufficient to find there are reasonable and probable grounds to believe the children are in need of protective services.

[26] The brief outline of evidence from 1998 to 2007 speaks of a very troubled past for these children. Yet there is no evidence from 2007 up to the present. The evidence of the present - which caused the Minister to bring this matter to Court - is insubstantial. The Minister has not convinced the Court that there is a substantial risk of harm at present to these children. Therefore, strictly based on the brief evidence before the Court, the probability test has not been met.

[27] The application of the Minister is therefore dismissed.

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M. Melvin

A Judge of the Family Court
for the Province of Nova Scotia