

FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. C.M.,, 2015 NSFC 21

Date: 2015-09-29

FKCFSA-092226 & 092534

Registry: Kentville, N.S.

Between:

M.C.S.

Applicant

v.

C.M., N.M., P.R. & E.R.

Respondents

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

Judge: The Honourable Judge Marci Lin Melvin

Heard: September 9, 2015, in Kentville, Nova Scotia

Written Decision: September 29, 2015

Counsel: Sanaz Gerami, for the Applicant, M.C.S.
Deborah Bowes, for the Respondent, C.M.
Kelly Richards, for the Respondent, N.M.
Nicole Mahoney, for the Respondent P.R.
John MacMillan, for the Respondent E.R.

Editorial notice:
Edited by Judge for grammar, punctuation & readability

By the Court:

[1] This is a variation application pursuant to section 46 [1] of the *Children and Family Services Act*, dated July 13, 2015, by respondent P.R., for an order placing the children E. M., born July [,,,], 2013, and E. R., born December [,,,], 2000, in his care, subject to the supervision of the Minister of Community Services.

[2] P.R. and N.M. are the parents of E.R., and grandparents of E.M.

[3] P.R., N.M., E.R. and C.M.[mother of child E.M.] are all represented by counsel.

[4] Minister's Plan to Transition the Children to P.R.

[5] The Minister had been working with P.R. with a view to transitioning the children back into his care, by the end of June 2015.

[6] Backlash to Minister's Plan

[7] On June 10, 2015, N.M. called the agency and said if they planned to return the children to P.R. she was withdrawing.

[8] A meeting was scheduled with the workers the next day. As a result of the comments made by N.M. on that day, the agents applied for and were granted peace bonds against her.

[9] Those comments included: "I hurt P.R. because P.R. hurts me every single fucking day. And you give them the kids. P.R. is on fucking pills every fucking day, and you give him the kids? He sits there and snorts pills when he has E.R. Although "let's give him the kids". Good going Kendra. Good going. You're going to lose your fucking job, and I will see you at two, and I got a lot to say to you."

[10] In an agency Affidavit, the deponent noted:

"N.M. further stated she was scared because he [P.R.] has done things in the past to her like make her eat shit, "pissed on my six month old baby while I was holding him in my arms", beat her up for 15 years. She said he pimps out women, deals drugs and has threatened to kill her in the past. She said

99% of people are afraid of him. She thinks he will hurt or send someone else to hurt her."

[11] On June 12, 2015, P.R. was asked to participate in urinalysis, subsequent to the referral being made. The evidence was that P.R. indicated he was not available until the next day. When the test was finally conducted on June 15, 2015, P.R. claimed he did not have enough urine to provide a collection.

[12] On June 17, 2015, N.M.'s father advised the agency that P.R. may be giving N.M. drugs through her boyfriend. He further said that P.R. was a drug dealer and no one would talk about it because they are afraid of him. He also told the agency that P.R. is not anyone who should have children or animals in his care.

[13] **Minister Changes Plan**

[14] As a result the Minister determined it would no longer be in the best interest of the children to return the children to his care. On June 26, 2015, the agency made a decision to seek care follicle testing from P.R. and N.M. In the alternative they suggested that both attend inpatient treatment and participate in random urinalysis.

[15] **Position of Remaining Respondents**

[16] Although N.M., based on the above, was clearly not in favour of the children being transitioned to P.R.'s care, neither N.M. nor C.M. took a position with respect to P.R.'s application to vary.

[17] E.R., through counsel, made it known that his wish was to return to the care of his father, P.R.

[18] **Pretrials**

[19] There were several pre-trials during which time the Court suggested the matter might easily be resolved if all parties used some common sense.

[20] Although the child is fourteen and wants to reside with his father, because of the concerns of the Minister and their request for hair follicle testing prior to the child being returned and P.R. refusing to engage in this process, there was no agreement and the matter proceeded to hearing.

[21] Legislation Considered

[22] Section 46 [1] of the *Children and Family Services Act* reads:

"A party may at any time apply for a review of the supervision order or an order for temporary care and custody..."

[23] Where an application is made pursuant to this section, before making an order the Court must consider the following pursuant to section 46 [4] of the *Act*:

[24] Have the circumstances changed since the previous disposition order was made?

[25] Has the plan for the childcare, that the Court applied in its decision, been carried out?

[26] What is the least intrusive alternative that is in the child's best interest?

[27] Is the Court satisfied, that the circumstances justifying the earlier temporary care and custody order, unlikely to change within a reasonably foreseeable time not exceeding the remainder of applicable maximum time?

[28] In order to determine the answers to the above, the Court must look briefly at the reasons why the children were brought into care, the Minister's plan of care for the children, as well as what the conditions were when the previous disposition order was made.

[29] Is there a Change in Circumstances?

[30] The present application, commenced July 29, 2014, is as a result of an incident of domestic violence.

[31] According to the Affidavit filed by agency worker Kendra Mountain at that time, on July 26, 2014, a detachment of the RCMP responded to an emergency duty call at the residence of N.M. and P.R. When they arrived on the scene they learned that N.M. had stabbed P.R. in the leg. He was in surgery during the time of the call because of serious artery damage to his leg. P.R. was holding the child E.M. at the time.

[32] C.M., mother of the child E.M., advised the officer that she and her brother, E.R., had been physically and emotionally abused by P.R.

[33] C.M. advised she had witnessed P.R. grab E.R. by the neck and choke him.

[34] N.M. advised the agency workers she had put up with P.R.'s abuse for fifteen years and had had enough.

[35] This is not the first time the agency has been involved with the parties.

[36] P.R. argues that the circumstances have changed since the previous disposition order was made. He says he participated in every service requested by the Minister and participated in domestic violence counseling with Elaine Boyd-Wilcox receiving positive reports, completed his family support work, and participated in a psychological assessment report.

[37] P.R. said that when the Minister's plan changed - that the children would not be returned to him because of an anonymous referral that he was buying and/or selling drugs while caring for E.M. - he agreed to urinalysis.

[38] The Court finds the evidence pertaining to the urinalysis issue is a convoluted and unbelievable chain of events that did not allow the urinalysis to be completed during the time when the alleged drugs would have been able to be detected.

[39] Although P.R. may have participated in the above noted services, the Court has to be concerned with whether the circumstances have actually changed since the previous disposition order was made.

[40] In other words, has P.R. - although having participated in some services - reached the point where there is a significant and material change in his lifestyle to allow a Court to find the children would be safe and protected in his care?

[41] Has the Plan for Childcare been Carried Out?

[42] In the agency plan of care filed for the children in January 2015, the Minister notes:

"The agency will review this plan of care in June 2015. Given the severity and long-standing nature of the concerns, it is anticipated that a period of approximately six months of consistent participation in services and demonstrated stability will be needed prior to the agency considering transitioning E.M. and E.R. back to the care of either [Grand] Parent.

If sufficient progress towards addressing the protection concerns has not been made by that time, the agencies plan will be to seek permanent care.

At this time, the agency is working towards a return of E.M. and E.R. to the care of either [grand] parents; however this is dependent upon their engagement and progress in the proposed services and sufficiently addressing the protection concerns."

[43] What the Court has to consider at this juncture is not only how engaged the parties have been in services and the progress of the proposed services but whether or not the protection concerns have been sufficiently addressed.

[44] The Minister argues: "P.R.'s applications and argument are fraught with denial and concerns minimizing concerns and assertions and supported by evidence."

[45] The Minister argues that the severe and long-standing protection concerns regarding P.R. are substance-abuse, involvement in dealing substances, domestic violence, and his anger.

Further she requests the Court take past parenting into account as it "... Is relevant to the current proceeding," citing **MCS v. NL**, 2011 NSSC 35, Forgeron, J.:

"An examination of past circumstances helps the Court to determine the probability of the event reoccurring. The Court is concerned with probabilities, not possibilities. Therefore, where past history aids in the determination of future probabilities it is admissible, germane, and relevant."

[46] Anonymous Referral

[47] P.R. argues that the Minister's decision to seek a continuation of the order for temporary care and custody was based on an anonymous referral that P.R. was buying and/or selling drugs while caring for E.R.

[48] The Minister argues that the agency received anonymous referrals all the time. She argues there are reasons why a referral source chooses to remain anonymous and in this situation it was because the referral source expressed a fear of P.R.:

"This evidence was heard during the trial and it was not refuted. The anonymity of a referral does not in and of itself determine credibility of the

referral and whether it is accepted for investigation. The determination whether to investigate a referral is done on a case-by-case basis."

[49] The Minister argued P.R.'s extensive history of involvement with drugs, the circumstances of this case, and other events which happened in a very short period of time, resulted in the Minister changing it's mind.

[50] In **DCP v. CP & TP**, 2014 PECA 18, the Court held:

"A trial is a search for the truth. The law of evidence as it has been developed and refined over hundreds of years facilitates the search for the truth. It is designed to weed out unreliable evidence so that decisions are based on trust where the evidence. This, in turn, enhances the faith and trust of litigants, and the public, in the fairness and integrity of the judicial system. A decision to remove the child from the care and custody of its parents, either temporarily or permanently, is a serious one, which should only be made on evidence that is trustworthy. Complying with the laws of evidence in child protection cases is not a burden on the parties; it is an obligation."

[51] P.R. argues that the Court should not consider the evidence of the agency workers from the anonymous referral source saying he is buying and or selling drugs.

[52] The Court finds however that the evidence received from the anonymous referral source is but a piece of the puzzle.

[53] The Minister received information from other referral sources who did not remain anonymous. They are noted in Kendra Mountain's Affidavit dated August 9, 2015.

[54] There is evidence from Respondent N.M. as noted above.

[55] There is evidence of R.M., N.M.'s father, of having left a message with the agency that he was very concerned about E.M. going to P.R.'s.

[56] There is evidence of access worker Alicia Hayes, with respect to an access visit by P.R., when the children were not where they were supposed to be.

[57] These people were not subpoenaed by any party to testify. But they were not anonymous.

[58] Combining the above with the past history of P.R.'s parenting, the Court finds there were significant red flags for the Minister to put a hold on transitioning into the care of P.R.

[59] Credibility

[60] The Court noted P.R.'s demeanour on the stand. As hair follicle testing and P.R.'s refusal to participate has been a hot topic, the Court observed P.R.'s hair to be trimmed in a neat short cut.

[61] On the stand P.R. finally agreed to participate in hair follicle testing. His argument for refusing all along was the false positive findings of one particular lab and he was worried that something like this might happen to him.

[62] The Court finds that P.R. - for whatever reason - was uncomfortable on the stand. The Court finds his evidence was by times evasive.

[63] Wishes of the Child – E.R.

[64] Although it is clear that E.R. wishes to return to the care of his father, and although the Court has given serious weight to the child's wishes, those wishes are also but one piece of the puzzle.

[65] In order for the Court to bring the child's wishes to fruition, the Court must be certain that it is in the best interest of the child or children to be placed in a situation where they wish. It is up to the parents or in this case P.R., to ensure that the children will be properly cared for, and not exposed to risk, which includes violence whether it be domestic violence or otherwise, and illicit drug use and abuse.

[66] What is the Least Intrusive Alternative that is in the Best Interests of the Children?

[67] This is an important element in the consideration of the best interests test.

[68] Common Sense

[69] In the numerous pre-trials before this court since P.R. filed this application, the Court has implored all of the parties to use common sense. The Minister had said from the beginning that if P.R. would participate in hair follicle tests and a few

other issues were resolved, the plan would still be to return the children to his care. How much simpler can it get? P.R. continued to refuse to have hair follicle testing until the day of the hearing.

[70] The Court orders hair follicle testing for Mr. Reid.

[71] Conclusion

[72] The Court finds that although P.R. has participated in services as set out in the plan of care, the circumstances since the previous disposition order was made and indeed since the children were brought into care, have essentially remained unchanged.

[73] There is still evidence of angry/violent behaviour on the part of P.R. of a fractious relationship between P.R. and N.M. and of drug use or abuse.

[74] And although P.R. has argued that some of this evidence is as a result of an anonymous referral and is therefore hearsay, the Court finds there is other evidence to lend weight to the referral and given past parenting there is enough to put a hold on transitioning the children until further investigation and results from the hair follicle testing can be determined.

[75] There has not been sufficient progress towards addressing the protection concerns at this time.

[76] The best interest of children is the heartbeat of the Family Court. In an ideal world best interests look like this: all children would be in a loving home, safe and protected, with parents or a parent whose main concern is what is in that child's best interests. Foster care is not ideal for children. But in some instances it is better than the alternative.

[77] Having considered all of the evidence, and assessing the credibility of P.R., the Court finds that it is not in the best interest of the children to return to P.R.'s care at this time.

[78] This does not mean that the children may not be returned to him in the near future, pending the results of the hair follicle testing, and the investigation as a result of the events leading up to the Minister's change of plans in June 2015.

[79] Thank you counsel for the excellent job you have all done given your difficult and respective positions.

Marci Lin Melvin, J.F.C.