FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. D.S., 2016 NSFC 20

Date: 2016-07-20
Docket: FKCFSA-096827
Registry: Kentville, N.S.

Between:

MCS

Applicant

v.

D.S. and S.M.

Respondents

Restriction on Publication: 94(1) of the *Children and Family Services Act*

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge Marci Lin Melvin
Heard	July 20, 2016, in Kentville, Nova Scotia
Counsel:	Sanaz Gerami, for the Applicant Claire Levasseur, for the Respondent D.S. Cheri Killam, for the Respondent S.M.

By the Court:

[1] The Applicant Minister seeks an Order placing the child, S,, born April […], 2015, in the permanent care and custody of the Minister with no Order for access post-permanent care. The Respondent parents do not contest the Minister's Application and, in fact, today have indicated that they are consenting to the Minister's Application for permanent care and have not presented alternative plans. Rather, they seek the Court invoke the special circumstances provision of the ***Children and Family Services Act,*** *RSNS, c. 94*, hereinafter referred to as the ***Act,*** allowing post-permanent care access pursuant to s. 47 (2)(d).

[2] **Facts**

[3] The child was born on April […], 2015. She is medically frail, diagnosed with hydrocephalus in utero. She had surgery when she was two days old and a shunt was placed in her brain. She has minimal brain tissue. The Respondent mother and child went home from the hospital together when the child was two weeks old. There were numerous medical and other appointments for the mother and child to attend and the mother relied on the father for transportation. As the Respondents suffered a difficult relationship, many of the appointments were missed.

[4] The Applicant took the child into care on July 10th, 2015. The child, S., does, and will, require a great deal of interventions in all aspects for her entire life. She has two older sisters who have had sibling time with her since birth. Her parents have also had parenting time with her two hours each week.

[5] This child is in a contracted foster home that is medically approved for raising a child with S.'s medical and developmental needs. The foster parents are prepared to keep the child long term and continue to facilitate access with her biological family. The foster parents are not planning on adopting her.

[6] The Applicant recognized the child's chances for adoption are limited but permanency is still the plan for the child. The Applicant sought permanent care. In an Affidavit of the Applicant Minister of March 23rd, 2016, the affiant stated a decision was made to support ongoing contact between the child, parents and siblings in light of the child's prospects for adoption and her foster parents plan to keep her long term. This position has not changed. The Applicant Minister would not consent to an Order for post-permanent care access but would consent to a Memorandum of Understanding specifying access post-permanent care. The reasoning for this was the Minister did not wish to impede permanency for this child in the event that adoptive parents were approved.

[7] As the Respondent parents were not satisfied with the Memorandum of Understanding setting this out and sought rather an Order, the matter was set for hearing.

[8] **Issue**

[9] Have the Respondent parents shown special circumstances exist pursuant to s. 47(2) (d) of the ***Act***?

[10] **Argument**

[11] The uncontroverted evidence is that this child has high and complex medical and developmental needs. The Applicant Minister argued the child's high needs do not constitute special circumstances pursuant to s. 47 (2) (d). She argued that if they did, most Respondents could use this argument in matters involving permanent care and custody with parents who are unable to meet the needs of the child. The Minister further argued that the child's high needs are considerations for whether an Order for Permanent Care and Custody is in the child's best interests, not criteria for a special circumstances access Order.

[12] Further, the Minster submits that a special circumstance must be a circumstance related directly to the absence of an adoptive plan and/or prospects

for adoption of the child which must be identified and established by the parent on the evidence.

[13] Although the ***Act*** allows either of the parties to make a Variation Application should access be ordered and permanency adoption found, the Minister's position was that the time to get through the variation process potentially causes an unnecessary and significant delay in the child's life and cited case law reflecting that scenario.

[14] The Respondent parents argue that the child's high and complex medical needs are part of the panacea before the Court to invoke the relevant section and find there are special circumstances. In oral argument, Respondent counsel, Ms. Levasseur, argued that in addition to the child's special needs, her ongoing familial access while in foster care was also a factor in the special circumstances argument.

[15] Ms. Killam argued that if this were the Supreme Court Family Division, rather than a provincial statutory court, the Court could exercise its *parens patriae* jurisdiction to order access, "regardless of the agency's position". Her argument is essentially that rural Nova Scotians are prejudiced by not having a unified Family Court or Supreme Court Family Division throughout the Province.

[16] Ms. Killam argued that S. had such high needs she was unlikely to be adopted and it was in the child's best interests to continue to have contact with her parents and her siblings and Ms. Levasseur concurred with this argument.

[17] Ms. Levasseur argued that any proposed adoption was "way too early" given the foster parents' position that they are willing to undertake long term care for the child.

[18] **Analysis**

[19] At the conclusion of a Disposition Hearing, the Court is vested with making an Order pursuant to s. 42 of the ***Act*** in the child's best interest and one option is to place the child in the permanent care of the Minister in accordance with s. 47 of the ***Act***. The Respondent parents are not contesting and are consenting to an Order for Permanent Care and Custody which is legislatively based on the following provisions:

a. The child remains in need of protective services;

b. Less intrusive alternatives are not available;

c. The circumstances are unlikely to change;

d. The Order is in the child's best interest.

[20] The uncontradicted evidence is that although the Applicant Minister seeks permanency, it includes ongoing contact between S., her parents and siblings. There is no evidence before this Court to suggest that the Applicant Minister intended this to be Court ordered access.

[21] The Court finds this to be a supportive approach, given the confines of the statutory framework and evolved jurisprudence. As argued by Ms. Killam, this Court cannot rely on the common law. It is a statutory based Court and the authority of the Family Court is statutory based. Rural Nova Scotians do not have the same access to justice as those in the jurisdictions where there is the Supreme Court Family Division. It is that simple.

[22] For this Court to order access post permanent care, it must find special circumstances exist. And if the Court finds there are special circumstance, only then does it have the statutory authority to consider an Order for access post-permanent care. The legislators, in drafting this provision, did not provide a road map as to what special circumstances entail. What appears clear from the most recently evolved jurisprudence is if permanency is within the purview of the Applicant Minister's plan, and access post-permanent care could de-rail or impede that process, then special circumstances enjoy but a ribbon thin interpretation.

[23] In **A.J.G. v. The Children's Aid of Pictou County,** 2007, NSCA 78, the Court held that recourse to special circumstances is only available when permanency planning in a family setting is not planned and not possible and access would not impair future placement opportunities. This is echoed in **Family Services of Colchester County v. K.T.** (*infra)* which holds the onus is on the natural parents to establish special circumstances exist. An access Order must not impair permanency and that any special circumstances not impair permanency.

[24] In the matter before the Court, the Minister has been clear that although S.'s prospects for permanency are limited, they are not to be discounted. If at any time they are discounted, it would be up to the Respondent parents to make further application to the Court.

[25] In the **Children's Aid Society and Family Services of Colchester County v. E.Z.,** [2007], N.S.J. No. 410 (C.A.), the Court held that permanent placement of the child takes precedence over access and an access Order must not be made where it will impair a child's opportunity for permanent placement. Thereafter, in **Children and Family Services of Colchester County v. K.T.,** [2010], NSCA 72, MacDonald, C.J.N.S. held:

> "In special circumstances, post permanent care access is possible although given the stark change in focus, such circumstances are rare and limited to those that would not jeopardize the new focus, namely an alternate stable placement."

[26] More recently, in **P.H. v. Nova Scotia Community Services,** [2013], NSCA, 83, Farrar, J.A. holds:

> This Court respects the legislature's clear intention to promote a stable placement for children in permanent care, including adoption without the barriers that continued access can create. The child's best interests are naturally in the mix when a trial judge is considering access, but by this point an entirely fresh balancing act is unnecessary. . . . If it is in the child's best interest to be placed in care, waiting adoption or similarly permanent placement, then it makes logical sense to ensure that access is only ordered if it will not impair those plans.

[27] It is clear that once an Order for Permanent Care and Custody is made, it is in a child's best interest to have an unimpeded right to permanency. A child's limited prospects for adoption, whatever those prospects might be, do not negate that fact.

[28] The heartbeat of child-centric law is the best interest test. It is an equal opportunity test. All children, no matter what their circumstances, their prospects, their ancestry, their familial history, and in this case, their medical frailties might be, have the complete and absolute right of having a decision made based on and in their best interests. To find that S., as a result of medical frailties, is impeded in her path to permanency is to take away that right.

[29] The Court finds that the issue of the child's medical frailties is a consideration for the test applied for a finding at disposition.

[30] The child remains in protective services as a result of her medical frailties. Less intrusive alternatives are not available because her parents are not capable or able to take care of her. The circumstances are not likely to change as she will require incalculable amounts of care and time and financial resources to care for her, given her diagnosis and prognosis. And, therefore, being in the permanent care and custody of the Minister in a specialized foster home is in the child's best interests, as recognized and consented to by the Respondent parents.

[31] The Court finds therefore that her medical frailties do not constitute a special circumstance.

[32] Respondent counsel also argued that part of the special circumstances test is that the Minister allowed familial access with the child in a specialized foster home and ensured that the child was moved to this specialized foster home in the same area as the family lived to ensure easier access. This is not a special circumstance. The Court routinely orders familial access in matters under the ***Children and Family Services Act***. The Court commends the Applicant Minister for ensuring

the child was easily accessible to the parents and her siblings so that neither S. nor her family had to travel long distances for contact.

[33] **Conclusion**

[34] Although the facts of this case are heart breaking, tragic, the Court has carefully reviewed the evidence and arguments and finds the Respondent parents have not adduced any evidence or arguments that would allow the Court to order access post-permanent care, pursuant to s. 47 (2)(d). The child's medical frailties, the familial access to the child, the long term foster placement and the Applicant's supporting continued contact simply do not add up to special circumstances.

[35] The Court has also carefully reviewed the jurisprudence and it is clear that in circumstances where the Court grants an Order for Permanent Care and Custody, access cannot be ordered where permanency is planned. However, in this case, unlike so many others, there is hope. The Applicant Minister is prepared to sign a Memorandum of Understanding between the parties that the Respondent parents and their two children will continue to have access with S. in her long term placement.

[36] Further, the Court has been advised that if the Applicant Minister continues to support contact, she will seek an adoptive home that is open to an openness

agreement. This Court highly approves of this plan and believes it is a fair way to ensure that access continues between S. and her parents without impeding any permanency in S.'s life. And, of course, it is always open for either party to make Application pursuant to the ***Act*** should any of these circumstances change.

_____

Marci Lin Melvin, JFC