FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. J.P.,* 2017 NSFC 4

Date: 2017-03-06
Docket: FPICCFSA-096261
Registry: Pictou

Between:

Minister of Community Services

Applicant

v.

J.P. and J.A.

Respondents

Restriction on Publication: Pursuant to s. 94(1) of the *Children and Family Services Act*, S.N.S.

Judge:	The Honourable Judge Jean Dewolfe
Heard	November 24, 2016 and November in Pictou, Nova Scotia and November 29, 2016 in Truro, Nova Scotia
Counsel:	Spencer Dellapinna, for the Applicant Damian Penny, for the Respondent J.P. Jennifer Madore, for the Respondent J.A.

By the Court:

Introduction

[1] The Minister of Community Services ("the Minister") seeks an Order for Permanent Care and Custody pursuant to the *Children and Family Services Act*, ("the Act"), with respect to two children, K, 3 ½, and B, 1 ½, with no provision for access. The Respondent, Ms. P. is the mother of the children. The Respondent, Mr. A., is the father of the children.

[2] The children have been in the temporary care and custody of the Minister since May 2015. At that time they were 2 years of age and 2 months of age, respectively.

[3] The position of the Respondents has changed over time. At a placement hearing in June 2015, Mr. A. sought to have the children placed in his care. However, at the commencement of the within hearing, Mr. A. supported Ms. P.'s plan to have the children returned to her care.

[4] In March 2016, Mr. A.'s parents were added as parties at their request and sought to have the children placed with them. In October 2016, Mr. A.'s parents withdrew their application and were removed as parties to the proceeding.

[5] Ms. P. filed an affidavit with the Court setting out her plan to have the children returned to her care. However, in cross-examination on November 29, 2016, she stated that she accepted that the children could still be at risk from her addictions and mental health issues if they were returned to her care. She then indicated that she felt it was in the children's best interest to "stay where they are", i.e., in the foster home in which K. has resided since June 2015, and in which B had resided since November 2016. She stated that putting a plan of care forward and testifying was the only way that her wishes could be heard.

[6] The Minister explained that as Ms. P. is Mi'kmaw and K and B are Mi'kmaw children, Mi'kmaw Family and Children's Services ("the Mi'kmaw Agency") would be responsible for placing the children should permanent care be ordered. The current foster family is not a Mi'kmaw family. It was agreed by the Minister, the Minister's expert witness, Valorie Rule and the Respondents that the foster mother had done an exceptional job with K., who has special behavioural needs, and that she had also promoted Ms. P.'s relationship with the children by providing ongoing information and photos throughout the time that the children have been in her care. The foster parent was willing to accept the children as a long term placement. The Minister acknowledged that the Mi'kmaw Agency would, in all likelihood, place the children with a Mi'kmaw family. It was also

recognized that neither the Court nor the Respondents would have any control over the Mi'kmaw Agency's placement decision. The Minister agreed as follows should permanent care be ordered:

> "The Minister will consider the parents' position that the current foster placement of the children is the best long-term placement for them in making any long-term decision making."
>
> "The Minister is supportive of the potential of an adoptive placement entering into an openness agreement with the parents."

[7] Given Ms. P.'s testimony, Mr. A. changed his position and consented to permanent care. Ms. P. ultimately did not take a position, but put the Minister to its burden of proving that the children are children in need of protective services pursuant to the *Act*.

Evidence

The Minister

[8] The Minster introduced a number of affidavits from child protection workers, toxicology reports from random urine samples collected from Ms. P., case recordings in relation to the Minister's involvement with the Respondents and the children, and Court documents from a previous child protection proceeding involving Ms. P. and her older child.

The affidavit of a child protection worker previously involved in the matter was admitted by consent, as were the toxicology reports.

S. 96 Application

[9] The Respondents consented to the inclusion of the previous child protection files from 2009 to 2011, relating to Ms. P.'s older child. The Minister indicated that these were being introduced primarily to provide historical context for the current proceeding, and the Court approached this evidence accordingly.

Case Recordings

[10] The Respondents objected to the admission of the Minister's case recordings as business records and a *voir dire* was held. Ms. P.'s lawyer argued that it was not necessary that they be admitted as business records, given that the various employees of the Minister could be called as witnesses and would be able to give best evidence. Also, she noted the prejudicial nature of some of the recordings, in particular, anonymous referrals.

[11] This Court found that the case recordings are business records, and as such are subject to the business records exception to the hearsay rule. This Court also

found that the probative value of these business records outweighed the prejudicial effect and they were therefore admitted.

[12] The Minister's case recordings clearly were made in circumstances in which they can be considered to be business records. They recorded events contemporaneously. They provide context for the actions and decisions of the Minister, and provide the basis for the Minister's affidavits. The Minister has made some of its employees available for cross-examination. In addition, the Minister indicated that it was willing to make available any employees who contributed to the case recordings be available for cross-examination at the request of the Respondents' counsel.

[13] This Court has not given any weight to anonymous reports (which Ms. Madore identified as most prejudicial), and these were considered only for their contextual value in understanding Agency decisions

Expert Evidence

Valorie Rule

[14] Valorie Rule, Clinical and Forensic Psychologist, was qualified by consent as a psychologist with expertise in psychology and the preparation of parental

capacity assessments. Her Curriculum Vitae, a parental capacity assessment dated July 4, 2016 and a letter dated July 11, 2016 were entered into evidence. She testified that she had prepared over one thousand parental capacity assessments in her career.

[15] Ms. Rule performed a number of psychometric tests on the parties, interviewed the parties and collateral contacts and observed the parents with the children. She also reviewed the Agency's current file, as well as its file with respect to Ms. P. and her older child.

[16] Ms. Rule concluded that although the parents love their children, "they have not shown a willingness to fully engage in the extensive services offered by the Agency", and it was "highly unlikely that an acceptable level of change will occur before the timeline is exhausted" (p. 111).

[17] Ms. Rule expressed concerns as to Ms. P.'s attachment with the children, which was unsurprising, she felt, given her substance abuse history. She described Ms. P. as always depressed, and viewing the world negatively and without hope. She also diagnosed Ms. P. with a long standing generalized anxiety disorder which renders her "hyper vigilant" and "hyper-reactive". She also identified personality disorder maladaptive traits which lead to dramatic, histrionic, argumentative,

confrontative and narcissistic behaviours. These traits are highly resistant to change. She credited Ms. P. with being very honest regarding her history. She noted that Ms. P.'s reaction to stress has been to turn to addictions for numbing.

[18] Ms. Rule was very clear in her opinion that unless Ms. P. can resolve her multiple past traumas (sexual assault, her parents' addictions and violence, and the violence she herself has experienced), addictions treatment alone would be unsuccessful and would leave her more vulnerable. Ms. Rule expressed great empathy for Ms. P., noting that she had never had a loving relationship or friends and has no contact with her family. Ms. Rule observed that while Ms. P. was very intelligent, she had little emotional insight into her children's needs. She exhibited a lack of warmth, spontaneity and joy, and they rarely approached her.

[19] Ms. P.'s only identified support at the time of the assessment was Mr. A. Ms. Rule did not view him as being supportive of Ms. P. Ms. Rule described a chronically unhealthy relationship between Ms. P. and Mr. A., the end result being "complete chaos". In her words, "calmness, comfort and rest" did not exist in their home. The Respondents' respective personality issues and Ms. P.'s drug and alcohol use made coping with two children very difficult.

[20] She described Ms. P.'s parenting style as "authoritarian", while Mr. A. was "permissive". She described the negative consequences of these parenting styles to the children.

[21] Perhaps most startling was Ms. Rule's characterization of Ms. P. "the most damaged person psychologically" she has ever worked with, who has been untreated her whole life, and therefore Ms. Rule felt it was not surprising that she has been unsuccessful in completing services and changing her behaviours.

[22] Ms. Rule recommended that Ms. P. seek dual diagnosis psychotherapy "to address substance use disorder and maladaptive personality traits", and that Mr. A. also participate in psychotherapy "to address his maladaptive personality traits" (p. 112).

Employees of the Minister:

Aleeta Cowan

[23] Aleeta Cowan, social worker, submitted an affidavit which was entered by consent. Ms. Cowan was the social worker for another family who were neighbours of Ms. P. They had observed and reported behaviour by Ms. P. which

led, in part, to the children coming into care, (e.g. leaving the children alone, asking to buy prescription drugs).

Shalyn Murphy

[24] Shalyn Murphy, adoption worker, submitted an affidavit and was cross-examined. She testified that since the children had one Mi'kmaw parent, the Minister would have no role in placing the children after a permanent care finding, if they were accepted for placement with the Mi'kmaw Agency. She also testified that the Minister would be unable to proceed with adoption for the children if an access order was made post permanent care.

Amy Sutherland

[25] Amy Sutherland was the long-term social worker for Ms. P. and Mr. A. She submitted a number of affidavits setting out the chronology of the Minister's involvement with the Respondents. She reported that Ms. P. did not engage with the Family Support Worker as she did not feel she needed help as a parent. She noted mood instability, and at times Ms. P. was noted to be intimidating and threatening, and was unable to accept advice.

[26] In response to Ms. P.'s assertion that her circumstances have changed, Ms. Sutherland agreed that Ms. P. had obtained reasonable accommodation for herself. She also noted that people can sometimes focus more on themselves without the stress of having to care for children. Ms. Sutherland testified that she was unsure as to whether Ms. P. and Mr. A. were currently in a relationship, due to recent statements made by Ms. P. She continued to have concerns as to their instability and past conflict in front of the children. She also noted that Mr. A. appeared to be Ms. P.'s only support.

[27] Ms. Sutherland also identified the Agency case recordings, and the previous Agency file relating to Ms. P. and her older child in which many of the same concerns were noted.

Toxicology Reports

Mary Saunders

[28] Mary Saunders, the child in care worker for the children, provided an affidavit and was cross-examined. She described K as having "thrived" in her foster home. She initially presented with developmental delays and special needs, but was able to overcome these and formed a positive bond with her foster parent.

Since November 2016, both children have been placed in the same foster home and are doing well together.

Respondent's Evidence

Mr. A.

[29] Mr. A. provided a dated affidavit which had been introduced at an earlier placement hearing. He was not cross examined. His counsel initially indicated that he supported Ms. P.'s plan to have the children placed with her, but after Ms. P.'s testimony, he changed his position, and consented to permanent care. Mr. P. was working in Alberta and was not present in Court except on the first day of the hearing.

Ms. P.

[30] Ms. P. submitted an affidavit in which she indicated that she had stable, appropriate housing, received disability income and has participated in a methadone program for eighteen months due to an addiction to hydromorphone. She also indicated that she regularly attended sessions with an addictions counsellor and a mental health counsellor, and received support from both the Women's Centre in Truro and the Native Women's Counsel of Nova Scotia. She

also testified that she saw her family doctor monthly and was prescribed medication for depression, anxiety and sleep.

[31] On cross examination Ms. P. admitted she could relapse with respect to drugs and alcohol, and that she could still place her children at risk.

Law

[32] This application is made pursuant to the *Act*.

[33] The Court is required to make a disposition that is in the child's "best interests": S. 42(1). The factors which the Court must address in reaching this determination are set out in S. 3(2):

> "Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of the family;
>
> (b) the child's relationships with relatives;
>
> (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity:
>
> (d) the bonding that exists between the child and the child's parent or guardian;
>
> (e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
>
> (f) the child's physical, mental and emotional level of development;
>
> (g) the child's cultural, racial and linguistic heritage;
>
> (h) the religious faith, if any, in which the child is being raised;

(I) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case:

(l) the risk that the child may suffer harm through being removed, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;
(n) any other relevant circumstance."

[34] S. 42(2) provides:

"The court shall not make an order removing the child from the care of a parent or guardian unless the Court is satisfied that less intrusive alternatives, including services to promote the integrity if the family pursuant to Section 13,

(a) have been attempted and failed;

(b) have been refused by the parent or guardian; or

(c) would be inadequate to protect the child."

[35] S. 42(3) states that:

"Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person."

[36] S. 42(4) provides that:

"The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time

> not exceeding the maximum time limits, based on the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent of guardian. *1990, c.5, s. 42*."

[37] The Minister must prove on a balance of probabilities that there continues to be a substantial risk that the children will suffer harm as per Section 22(2) of the *Act*.

[38] The test which must be applied is not whether other plans for the child will provide the best parenting, but rather whether a parent can provide "good enough" parenting without subjecting the children to a substantial risk of harm.

Analysis

[39] The statutory timelines have expired for these children. No family or community placements have been identified. Therefore, the Court has two choices, return children to Ms. P.'s care, or order permanent care.

[40] This Court accepts the expert evidence of Valorie Rule, and agrees with her assessment as to Ms. P.'s parenting ability. Ms. Rule's report is thorough and thoughtful, and her conclusions were not shaken but, rather, were fortified on cross-examination. Ms. Rule's opinions are supported by Ms. P.'s own testimony and are consistent with the progress of this file, as well as the history of Ms. P.'s previous child protection file. Ms. P. honestly discussed her traumatic past, and it

is clear that as a result, she has turned to drugs and alcohol to cope. She suffers from severe depression and anxiety. The effects of her inadequate parenting have already been evident in K's behaviours, and in the lack of attachment between Ms. P. and the children.

[41] It is obvious that Ms. P. has not received sufficient treatment and does not have sufficient supports so as to alleviate the substantial risks which would exist if her children were returned to her care. While Ms. P. may be stable and able to care for herself, I am unable to conclude that she would be able to maintain this stability if faced with the necessity of parenting two young children.

[42] Therefore, the Court finds that Ms. P.'s plan is insufficient to protect the children from substantial risk of physical and emotional harm.

[43] I find that services which could have reasonably helped Ms. P. were offered, but were not completed by Ms. P.

[44] The Minister has met the burden of proof. I find that it is in the best interests of the children that they be placed in the permanent care and custody of the Minister.

Access

[45] S. 47(2) provides as follows:

> (2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that:
> (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
> (d) some other special circumstance justifies making an order for access.

[46] The Nova Scotia Court of Appeal considered s. 47(2)(d) of the *Act* in **Children and Family Services of Colchester County v. K.T.** 2010 NSCA 72 at paras. 39-41:

> "39 Therefore, from my reading of s. 47, three conclusions relevant to this appeal are clear. First, the Agency effectively replaced the natural parents. This puts the onus on the natural parents (or guardian) to establish a special circumstance that would justify continued access. Second, by the virtue of ss. 47(2)(a) and (b), an access order must not impair permanent placement opportunities for children under 12. Section 47(2)(c) is consistent with this. It provides that if no adoption is planned then access will be available. This highlights the importance of adoption as the new goal and the risk that access may pose to adoption. Third, for children under 12, the "some other special circumstance" contemplated in s.47(2)(d), must be one that will not impair permanent placement opportunities.
>
> 40 Therefore to, rely on s.47(2)(d) as the judge did in this appeal, the (special) circumstances must be such that would not impair a future permanent placement. When then would s.47(2)(d) apply? Consider for example a permanent placement with a family member which will involve contact with the natural parent. Presuming that the adopting parents would be content with that arrangement, the adoption would not be deterred. See **Children's Aid Society of Cape Breton-Victoria v. M.H.**, 2008 NSSC 242 at para. 25.

> 41 In short, access which would impair a future permanent placement is, by virtue of s.47(2), deemed not to be in the child's best interest. This represents a clear legislative choice to which the judiciary must defer."

[47] It is not clear if the Respondents continue to seek access. However, I accept the evidence of Shalyn Murphy that the current plan for these children is adoption, that access post permanent care would negatively impact the ability to place the children for adoption, and that therefore, such access would significantly impact permanency planning.

[48] No special circumstances have been identified and therefore there will be no access ordered beyond a good-bye visit for each parent.

Additional Clauses

[49] The Court requests that the Minister draft an order including clauses with respect to placement and openness as agreed.

Jean Dewolfe, JFC