FAMILY COURT OF NOVA SCOTIA

Citation*:*

F.J.R. v. Nova Scotia (Community Services), 2014 NSFC 27

Date: 2014-04-01
Docket: FKCFSA-084746
Registry: Kentville, N.S.

Between:

F.J.R.

Applicant

v.

Minister of Community Services
K.J.M. and L.L.
And "The child"(by Neil Kennedy, his *guardian ad litem*)

Defendants

Judge:	The Honourable Judge Marci Lin Melvin
Heard	February 24, 25, 26 & 27, 2014, in Kentville, Nova Scotia
Decision	April 1, 2014
Counsel:	Michael V. Coyle, for the Applicant, F.J.R. Sanaz Gerami, for the Respondent, Minister of Community Services Brock Beazley, for the Respondent, K.J.M. Anita Hudak, for the Respondent, L.L. Marion Hill, for the Respondent, the child, by guardian ad litem, Neil Kennedy

By the Court:

[1] This matter involves two children.

[2] Child welfare concerns of domestic violence between F.J.R. and K.J.M., and the Applicant's alcoholism, have existed since 2008.

[3] F.J.R. was incarcerated at the age of sixteen for three and one half years, and accumulated a significant number of criminal convictions during the years that followed. He has a history of violence towards women.

[4] The Court held on a previous application that F.J.R. and K.J.M. had a 'toxic' relationship.

[5] It is illustrated as follows:

[6] In January 2009, the Applicant, F.J.R., and the Respondent, K.J.M., met with the Agency. They were advised not to have contact with each other in the presence of the children due to the concerns noted above.

[7] By December 2009, (having been apart and back together numerous times, interspersed with domestic violence and alcoholism, and K.J.M. having terminated a pregnancy because she "…didn't want to be involved with F.J.R. all of her life") they were living together again. Since 2008 there have been four substantiated incidents of domestic violence, three with risk of physical harm.

[8] The parties continued with this pattern over the next few years: domestic violence woven through alcoholism and indecision, patterning their lives, but more importantly those of their children. When difficulties arose, the eldest child often ended up being cared for by his maternal grandmother, Respondent, L.L.

[9] In June 2012, however, as an end result of a previous court application, the eldest child was returned to F.J.R.'s care. But by January 2013, the same issues arose again and the children continued to be exposed to it. The Agency made another application that the children were in need of protection and the matter was once again before the court.

[10] The present application resulted in a finding that there were reasonable and probable grounds to believe the children were in need of protection.

[11] The matter proceeded through the usual stages of a protection application. At the protection stage, the parties consented to the finding, and the eldest child stayed with the Respondent maternal grandmother, L.L.

[12] The youngest child stayed with the Respondent, K.J.M.

[13] At Disposition, on July 17, 2013, the eldest child, [the child], was returned – on consent of all parties – to the Applicant F.J.R.'s care. A provision in the Consent Order issued at that time was: **"In the event of non-compliance by the Respondent, F.J.R., Respondents L.L. and K.J.M., with any of the terms and conditions of this order, the Applicant [Minister of Community Services] shall be entitled to take the child into care and bring the matter before this Honourable Court pursuant to s. 43(3) of the Children and Family Services Act."**

[14] One of the conditions was that F.J.R. and K.J.M. not have contact with one another in the presence of the children.

[15] On October 2, 2013, the matter was returned to Court pursuant to s. 43(3) of the ***Children and Family Services Act***, based on the non-compliance of F.J.R. and K.J.M. They had once again been together with the children present, for two weekends. Both parties admitted this to an agency worker, and the child, had as well. The parents have plainly breached this condition.

[16] The Court made a finding that there were reasonable and probable grounds to believe the children were in need of protective services, the threshold test at this stage, and the child was placed again with L.L.

[17] The Applicant appealed this Court's finding.

[18] In the reported decision **F.J.R. v. Nova Scotia (Community Services),** 2014 NS CA 30, dismissing the Appeal, Beveridge J.A., notes: "The Court could no longer rely on an order entrusting the appellant [F.J.R.] to protect [the child] and to assure his best interests."

Application Before the Court

[19] The Applicant Father seeks by application made to the Court on February 3, 2014, to vary the Order granted on October 2, 2013, and have the eldest child, returned to his care pursuant to s. 46(5) of the ***Children and Family Services Act***. He also seeks regular and unsupervised parenting time with the youngest child which at the time of the hearing was agreed upon.

[20] The Court reviewed the relevant sections pursuant to the *Children and Family Services Act,* R.S.N.S., 1990, ch 5, (s. 46(1), (4), and (5)).

[21] The Applicant, F.J.R., on cross-examination appeared, at times, frustrated and was borderline antagonistic. The Court finds as a result of his filed Affidavit evidence, his testimony and even his lawyer's submission, that the Applicant believes the agency workers, and the Respondents, are against him.

[22] On cross-examination by Ms. Gerami for the Minister, the Applicant father testified that while living with L.L., the child has his own room, in a home that is safe for him, he sees his sister and grandfather, there are no concerns of drugs or alcohol, no concerns of domestic violence, he (the Applicant father) works six days a week for ten hours a day, and that he was facing charges for criminal harassment against J.J.'s mother, Respondent, K.J.M.

[23] What is noteworthy regarding the Applicant, F.J.R.'s evidence, is that he did not indicate what his plan was if the child were to be returned. There is no plan of care. Would F.J.R. continue to work ten hour days, six days a week? Would he continue to work in Chester building a house and what time would he be home for the child? Would he be able to make the child any meals if he were traveling from Kentville to Chester every day? Or would he stay overnights in Chester? What about help with homework? What about just being there for the child, to talk, to do fun things, to interact? It was patently clear that the child requires therapy, which has been a provision in numerous orders. How would F.J.R. take the child to therapy, or meet with the therapist himself, or take the child to a doctor's appointment? What if the child was sick and couldn't attend school? Who would care for him? What would the child do if F.J.R. weren't there when the child got home from school? How would the child be able to be involved in extra-curricular activities? For example, sports, a school play, the debating club, anything that might require a parent to provide transportation for the child? None of these normal questions of every day parenting were answered.

[24] The Court struggled with F.J.R.'s credibility. Although F.J.R. says it is his hope and expectation that he and K.J.M. will now lead separate lives, how does the Court believe this is true, this time?

[25] The Court does not believe that F.J.R. will not have contact with K.J.M. in the presence of the children. As noted in the decision of the Court of Appeal, ***supra***, this Court cannot rely on an order entrusting F.J.R. to protect [the child] and to assure his best interests.

[26] It was apparent to the Court that F.J.R. believed he was in a battle against everyone in the room.

[27] The Applicant father stated in his Affidavit: "…it is my belief that the Agency takes the apparent, if unstated position that they can act with impunity towards me and that it acts as though it has the blessing of this Honourable Court to do so. I do verily believe that the Agency and certain of the Respondents have become so focused on me and doing whatever it is possible to punish or harm me through this proceeding that they have completely lost sight of the best interest of the children."

[28] When cross-examined on this point he said: "I totally agree with that. Yes." He testified that he felt harmed, hurt, it has been unfair towards him, and that the Agency is not focused on the best interest of the children.

[29] This is concerning to the Court. On behalf of the Applicant, Mr. Coyle argued, during oral submissions after the Court had made an order that the children were in need of protective

services: "…the plot thickens…and that afternoon without F.J.R. or myself present [the Minister] held a case conference...over our objections, they left here like the proverbial lynch mob looking for a tree…Lawyers who claim to have high ethical standards would engage in what they call a with prejudice or on the record case conference, the point of which was to see how much harm they could inflict on F.J.R." Mr. Coyle goes on to argue that nobody is thinking about the children. "It's all about the grown-ups. It's all about controlling F.J.R. and whatever…it is they are doing."

[30] In summation, Mr. Coyle likened the Court to the Royal Navy in "Lord of the Flies" and implored the Court to save his client, before the bad boys 'killed piggy.'

[31] The Respondent maternal grandmother, L.L., confirmed the contents of her Affidavits. She elaborated on a number of issues and withstood the test of her credibility on cross-examination. One comment particularly stands out: that the child takes her steak knives to his room, when she's not there, to protect himself. She said he is afraid of being alone.

[32] Debra Reimer testified that the Applicant F.J.R. took an anger management course with her and missed one out of the four three-hour sessions. She did not believe it impacted on F.J.R. in the manner she had hoped, and believed F.J.R. was more concerned with what he perceived of others rather than focusing on his own issues.

[33] Neil Kennedy testified, wearing two hats. He is the ***guardian ad litem*** for the child, and also is the assessor who conducted the Children's Wish Assessment. The Court uses Children's Wish Assessments because it is important in all matters concerning a child's welfare, where it is at all possible, to hear the voice of the child. It makes no sense to conduct a hearing with respect to an individual and not know what that individual wants. The child was quite clear: the child wants to go home to F.J.R.

[34] Having Mr. Kennedy wear two hats was not an ideal situation, but all counsel consented to it being in the best interests of the child. Furthermore, Mr. Kennedy is well known to the Court and his integrity was never in question.

[35] BriAnna Simons, a clinical social worker, testified that she had three meetings in an attempt to assist the child with what has been going on in his life. She says that the child appears guarded.

[36] Annette Davidson's testimony included that the position of the Minister is that the child remain with L.L., so that he would have a stable home base and not always be going back and forth between the Applicant, F.J.R. and L.L. The Minister is concerned with domestic violence and F.J.R.'s alcoholism, although he says he hasn't had a drink in perhaps two years.

[37] The Court finds Ms. Davidson to be a credible witness, whose demeanor on the stand was of one quite sympathetic to F.J.R.'s position.

[38] Respondent, K.J.M., did not testify.

The standard to be applied pursuant to s. 46(4) and (5) of the ***Children and Family Services Act*** is:

(1) Does the child remain a child in need of protective services as defined by s. 22(2) of the Act, or have the circumstances changed?

(2) And, what is in the child's, best interest?

[39] In **Catholic Children's Aid Society of Metropolitan Toronto v. M.(C).** 1994 CanLII 83 (SCC), [1994] 2 S.C.R. 165, L'Heureux-Dube, J., wrote for the Court at page 200:

> **"The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the need of protection. The need for continued protection may arise from the existence or the absence of the circumstances that triggered the first order for protection or from circumstances which have arisen since that time…"**

The status review as referred to above by Justice L'Heureux-Dube, is the equivalent of a review hearing under the ***Children and Family Services Act, supra.***

[40] The Minister placed the child, with his maternal grandmother, Respondent, L.L. It was the least intrusive alternative for the child's care, given his close relationship with L.L. That is the ***status quo***.

[41] It is neither the task of L.L., nor any of the other Respondents, to prove the placement was correct. It is rather, for the Applicant F.J.R. to establish a change in circumstances since the last order, and that the child's best interest is best met with him.

[42] Further, it is not the function of the Court, at this stage, to review the rightness or wrongness of the original finding. The Court must, however, evaluate whether there is a need for continued Court ordered protection. **(Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.) , *supra*).**

[43] Obviously a review is not an appeal. It is effectively a variation application, simply put: do the grounds upon which the original order was made still exist, or have they changed? And if they have changed, is it a material change, which would allow a Court to potentially vary the terms of the original order?

> **"The Court must consider whether the circumstances which prompted the original order still exist and whether the child continues to be in need of state protection. In so doing, the court may**

consider circumstances that have arisen since the time of the first order." CAS of Halifax v. C.V. [2005] N.S.J. No. 217 (C.A.), para. 8.

(a) Does the child remain a child in need of protective services as defined by s. 22(2) of the Act, or have the circumstances changed?

"The determination of whether the chid continues to be in need of protection cannot solely focus on the parent's parenting ability, …but must have a child-centred focus and must examine whether the child, in light of interceding events, continues to require state protection" Catholic Children's Aid Society of Metropolitan Toronto v. M. (C) , *supra*.

Definition of Child-Centred

[44] First it is necessary to have some idea of what "child-centred" may mean. It is well established that all matters before the Court involving a child's welfare must be child-centred, not parent-centred.

[45] In **Caitlin Jean Blennerhassett v. Daniel Alexander MacGregor,** 2013 NSCA 77 (CanLII) Fichaud, J.A. noted that the Justice at trial level blended her analysis of the principles from **Foley** (infra.), and the leading case on parental relocation, **"…in a child-centered analysis."**

[46] What does a Court look at when determining a child-centred plan? In addition to the factors enumerated in **Foley**, infra., Fichaud, J.A., makes note of Gass, J.'s observations in **Blennerhassett**: "a stable and nurturing environment, resulting in a happy and healthy child."

[47] Child-centred, from a Court's perspective, is evidence of a parent doing everything possible to ensure that the child is safe physically, secure emotionally, has enough to eat, a place to call home where the child knows he or she can sleep without concern, is encouraged and supported, is allowed to maintain close connections with family members, knows he or she is loved unconditionally and is happy.

[47] Upon a review of not only the applicable provisions in the ***Children and Family Services Act,*** but also the relevant jurisprudence, it is clear to the Court that a child-centred approach is designed to promote the child's personal qualities, whatever they may be. It is a right of passage for parents to recognize when they have a child, that they have chosen selflessness in favour of their offspring.

Evidence of Child-Centred Plan

[48] What evidence does the Court have of the Applicant father that he is presenting a child centred plan?

[49] Ms. Gerami argued for the Minister that the Applicant father provided parent-centric evidence. She argued: **"In his evidence, F.J.R. spoke about himself, his life and how he feels he has been wronged by the Agency, by K.J.M., and by L.L. The same comments were**

echoed by …. [F.J.R.'s] counsel today. The Minister submits that [F.J.R.'s] evidence failed to address or acknowledge or even remotely speak to the best interest of his [child], the [child] he would like to have returned to his care."

[50] The Court has reviewed all of the evidence with respect to this issue as noted above. Much of the evidence of F.J.R. is parent-centric.

[51] The Court found on the date of the Protection finding, on the consent of the parties, that the children were in need of protective services pursuant to s. 22(2)(b)(g) and (i) of the ***Children and Family Services Act.***

[52] Pursuant to s. 22(2) of the **Act,** a child is in need of protective services where:

> **22(1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.**
>
> **(2)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 as described in clause (a); …**
> >
> > **(g) there is a 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 or unable to consent to, services or treatment to remedy or alleviate the harm;**
> >
> > **(i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child's parent or guardian failed or refuses to obtain services or treatment to remedy or alleviate the violence;**

[53] This standard for determining if a child remains in need of protection at this stage is strictly Applicant oriented. It is not open to argue (and nor was it) that the child is no longer in need of protection because he is with L.L. The test of whether the child remains in need of protection on this type of application is whether the circumstances that prompted the original order still exist. The jurisprudence is very clear that if comparisons between an agency placement and an original parent were legitimate:

"…it would be tantamount to declaring open season on each and every child who has ever moved, however temporarily, into a foster home…When could it not be said that the foster home had advantages over the original home." (**I.C. et al v. C.A.S. of Shelburne County et al.**, Bateman, J.A., making reference to **Children's Aid Society of Metropolitan Toronto v. D.S.** [1991] O.J. No. 1384 (Prov. Div.).

[54] Although the child is residing with L.L., the circumstances of him being placed there remain the same. There are very cogent reasons as to why F.J.R. and K.J.M. were to have no contact with one another in the presence of the children. That the children were exposed to the high degree of domestic violence in their young lives is completely unacceptable. Even if this Court were not aware of the history of previous applications, the factors in the present application are glaring: F.J.R. and K.J.M. promise to stay apart. They don't. And the children suffer because of it.

[55] There is no evidence of a material change in circumstances from the granting of the Order in October 2013.

[56] The Court finds as a fact, the evidence is that F.J.R. has not even had the time or the transportation to see the child on a regular basis, on Sundays (apparently the only day F.J.R. could see the child, due to F.J.R.'s, work schedule). So he has had less time to spend with the child as opposed to more.

[56] The Court has considered the evidence in the analysis of whether the child continues to be a child in need of protection, and concludes that while the child's physical circumstances have changed, the circumstances that might allow the Court to make such a finding have not.

[57] The evidence of the Applicant falls short of proving the child is no longer a child in need of protection.

[58] The purpose and paramount consideration as set out in the ***Children and Family Services Act,*** s. 2(1), is to protect children from harm and promote the integrity of the family and assure the best interests of the children. The Act is very clear in s.2(2): "**In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child."** (emphasis mine)

[59] In 1993, Goodfellow, J., in **Foley v. Foley,** 1993 CanLII 3400 (NS SC), enumerated what has become the quintessential list a Court considers when determining best interests of a child. This list has subsequently been codified in other child centric legislation in the province. In all proceedings involving children's best interests, a Court is every mindful of the evidence and how it fleshes out the confines of this list.

[60] The Court has considered the Applicant Father's evidence in light of the above.

[61] There is little evidence with respect to the child's **physical environment**. In fact, there is nothing in any of the three Affidavit's filed by the Applicant Father as to his living arrangements. The Court found that perplexing, as that is usually the first item on one's – however formal or informal – plan of caring for a child. Only in redirect did counsel for the Applicant Father ask what type of living arrangements he had, and Ms. Hudak – counsel for L.L. – objected to the question. The Court noted it was an appropriate objection and said the response would go towards weight. Mr. Coyle for the Respondent slid in evidence of his client's two-bedroom apartment, including information about the child's room and possessions.

[62] There is no evidence with respect to **discipline,** or if the child has any rules or standards to follow.

[63] The Applicant F.J.R., has had a difficult and turbulent past. He has suffered through untold indignity perhaps much of his own making, due to the choices he made. At the tender age of sixteen he was sentenced to three and a half years in Dorchester Penitentiary. He has an extensive albeit somewhat dated criminal record. The Court has to consider what type of a **role model** he is and would be to the child. It is clear F.J.R. loves his child. It is equally clear (from the children's wish assessment) that the child loves him. However, there are criminal charges pending on a charge of criminal harassment pertaining to the Respondent mother of J.J. F.J.R. testified that he started drinking when he was eleven years old, has a drinking addiction, but hasn't had a drink in over two years. It must be noted, however, the Applicant F.J.R. has had the child in his care previously, and his past will never change, so he is perhaps no different a role model now than he has ever been.

[64] **The wishes of the child** require consideration. The child is almost 14 years old. The child's voice needs to be heard, and the Court is glad to know what the child wants. The child wants to return to live with F.J.R.

[65] Goodfellow, J., in **Foley**, ***supra.,*** makes this comment on the Court's consideration of the wishes of a child:

> **[A child's] [sic] wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;**

A child's wishes, as this Court often notes, is but one piece of the puzzle.

[66] There is evidence of the **time availability** of the Applicant Father, for the child. In cross-examination by Ms. Gerami for the Minister, the Applicant F.J.R. testified: **"I told her my work schedule was six days a week, ten hours a day."**

[67] Further the Applicant Father testified: **"Yes. I am building a house right now in Chester for Judge Alan Tufts."**

[68] It is clear to the Court, and the Court so finds, that the Applicant Father at this point in his life has a serious and dedicated work ethic. His testimony is that he works sixty hours a week, and only has Sundays on which to visit his children. There is no evidence before the Court as to if this will continue should the child return to his care, what time availability the Applicant Father would have with the child except Sundays, or if the Applicant Father plans on changing his schedule should the child be returned to his care.

[69] Further, L.L. testified that the child is afraid of being alone and when she gets home from work the child has taken her knives for protection. It is most concerning to this Court that should the child be with F.J.R. that the child would be alone most of the time.

[70] The Applicant Father testified in redirect that when the child is with him, the child sees an aunt and several other family members, which the Court considers scant evidence that he has ***the support of an extended family***, merely that he sees them.

[71] The Applicant Father has put forward again, only scant evidence regarding his ***emotional support to assist the child in developing self-esteem and confidence***.

[72] Although there are not two parents involved in this matter, the Respondent grandmother, L.L., is the closest living relative the child has to the mother, who died as a result of an epileptic seizure while in a swimming pool with the child, when the child was young. L.L. has been involved in the child's life, and so the Court also considers ***the willingness of a parent to facilitate contact with the other parent*** (or closest connection to a parent.) The Applicant Father testified in cross-examination that the child could visit with L.L. anytime the child wanted to see her.

[73] There is no evidence before the Court regarding ***the interim or long-range plan for the child*** and there is no evidence before the Court with respect to ***the financial consequences of custody.***

[74] The Court has carefully considered all of the evidence, paying particular attention to the evidence of the Applicant, F.J.R.

[75] There is very little evidence of F.J.R.'s parenting ability, as F.J.R. did not put a plan before the Court or tell the Court much about his ability to parent. Further, the Court was not convinced F.J.R. would not continue to put his child at risk of harm by exposing the child to the toxicity borne of domestic violence in his relationship with K.J.M.

[76] More importantly, however, is the focus on the child, not only the child's wishes, but how an order of the Court will promote the child's best interests, safely, physical and emotional well-being, and personal qualities.

[77] The Court has given serious consideration to the child's wishes. The child is almost fourteen. In a perfect world, the Court would have liked to send the child home. But the evidence of the Applicant F.J.R. fell far short of allowing the Court to make this determination.

[78] The Court agrees with Ms. Gerami for the Minister. F.J.R.'s evidence was very parent-centric. It did nothing to show that if the child were in F.J.R.'s care it would be in the child's best interest and promote the child's personal qualities.

[79] The child remains a child in need of protective services. The Court finds it in the child's best interest to remain in the care of L.L. under a supervision order. This is clearly the least intrusive alternative for the child's care.

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M. Melvin, JFC