

FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services). v. M.W.*, 2018 NSFC 16

Date: 20180810

Docket: No. FPICCFSA-110156

Registry: Pictou

Between:

M.C.S.

Applicant

v.

M.W. and V.F.

Respondent

Editorial Note: **Identifying Information has been removed from this electronic version of the judgment.**

Judge: The Honourable Judge Timothy G. Daley

Heard June 25, 27 and 28, 2018 in Pictou, Nova Scotia

Oral Decision: June 29, 2018

Counsel: Kent McNally for the Applicant
Shawn MacLaughlin for the Respondent V.F.
The Respondent M.W. self represented

Introduction

[1] This matter comes before the court on application by the Minister of Community Services (“the Minister”) who seeks a finding that the child, N.M. (“the child”), is in need of protective services. The child is 3 years old and has been diagnosed with Autism Spectrum Disorder (“ASD”).

[2] The Minister’s application was filed on June 4, 2018 and the matter first came before this court on June 8, 2018 to commence an interim hearing under section 39 of the *Children’s and Family Services Act* (“the Act”). I considered the evidence before me at that time as required under section 39(3) and made an interim finding on reasonable and probable grounds that the child was in need of protective services. Since the father, M.W. (“the father”) did not consent to that finding, the matter was set over for 2 and ½ days of evidence to complete the interim hearing.

Position of the Parties

[3] The Minister seeks a finding that there are reasonable and probable grounds to believe that the child is in need of protective services. The Minister also seeks an order that the child reside with his mother, V.F. (“the mother”), under the supervision of the Minister, that the father have access at the discretion of the Minister including supervised access, and that the parties engage in services to alleviate the protection concerns.

[4] The Minister says that those protection concerns include substantial risk of emotional and physical harm. The allegations include that the father has been emotionally abusive to the mother and the child during and after the end of the relationship by doing the following:

- repeatedly using abusive language toward the mother, at times in front of the child;
- sending over 1,000 text messages to the mother after separation, many of which are contrary to an Interim Order of this court under a *Parenting and Support Act* application;
- sending texts that were abusive and were an attempt to control the mother;
- sending many of these texts during the father’s parenting time with the child and placed the child at risk by distracting the father from child care, particularly given the child’s ASD diagnosis;

- leaving an abusive voice mail for the mother when the child was in the presence of the father during his access time;
- failing to accept the child's diagnosis of ASD and thereby placing the child at risk of physical and emotional harm if the father has care of him;
- exhibiting paranoid thinking and behaviors which place the child at risk if the father has care of him
- failing to demonstrate any insight into the harm to the child that was or could be caused by his behaviors.

[5] The mother supports the position of the Minister and agrees to the proposed order including services.

[6] The father opposes the finding and order and says he does not pose any risk to the child. Moreover, he says that the mother poses a substantial risk to the child and that he should have primary care of the child because he can provide a better parenting environment.

Test at Interim Hearing

[7] The test at this interim stage of the proceeding under section 39 of the *Act* is well described by Judge Levy of the Family Court in *Family and Children's Services of Kings County v. Y.B.* [2000] N.S.J. No. 263 as follows:

4 Thus, the essential inquiry for the court at this stage is to determine whether there are "reasonable and probable grounds to believe" that the children are in need of protective services. The inquiry is not whether the children are in fact in need of protective services, but only whether the evidence before the court leads one reasonably to conclude that they probably are. The decision is to be made on the basis of evidence that the court considers credible and trustworthy in the circumstances.

5 It is of some consequence that the words "reasonable" and "probable" are used conjunctively, that is to say that in order for the case to proceed beyond this initial stage that the court must find on the evidence that the grounds for belief are both reasonable and probable.

...

10 At the same time the presence of the words 'in the circumstances', referring to the credibility and trustworthiness of the evidence at this early stage, requires due attention. One cannot expect that even the most conscientious agency in the proper discharge of its duties can always have all the "I's" dotted or "T's" crossed within the tight time frames of the first appearance, or to have always uncovered by then the quintessential witness. Additionally, there is the ever-present

awareness of the danger to a vulnerable child of the setting of an unrealistic standard and of the precipitous dismissal of a potentially valid concern. Quite frankly, I confess that my overarching pre-occupation in these decisions, which are mercifully rare, is the horrific price some child might have to pay for my mistake.

11 That said, the decisions under section 39, are important not only to the child but to the child's family. There are to be taken in the context of the entire legislative scheme and of the purpose and philosophy of the Act. Only those matters where the agency has, by evidence that is credible and trustworthy in the circumstances, demonstrated that there are reasonable and probable grounds to believe that the child is in need of protective services, are entitled to proceed beyond a section 39 hearing. The court cannot escape addressing its mind to these requirements.

[8] Another expression of the test to be applied was set out by Justice Forgeron of the Nova Scotia Supreme Court Family Division in *Nova Scotia (Community Services) v. A.M.*, 2010 NSSC 227 when she summarized several decisions, including *Y.B. supra* and I include some of her findings as follows:

19 In ***Family & Children's Services of Digby (County) v. G.(D.)***, [2000] N.S.J. No. 199, 2000 CarswellNS 96 (Fam. Ct), Comeau C.J. held that what constitutes reasonable and probable grounds is a question of fact that depends upon the circumstances of each case. He suggested an objective test when he held that the facts must be such as would cause a reasonably careful and prudent person to believe, or have an honest or strong belief, that the child is in need of protective services.

20 In ***Family and Children's Services of Kings County v. Y.B., supra***, Levy J. compared the standard of proof required at this interim stage, with the standard of proof required at the preliminary inquiry stage of a criminal proceeding at paras 7 and 8. Levy J. noted two different results flowing from this comparison. They are as follows:

- a. Judges must direct their minds to the issue of credible or trustworthy evidence. The court must only act upon evidence that it considers credible and trustworthy in the circumstances.
- b. The court must assess the evidence. The application will only proceed when the court is satisfied that the Minister's case reveals reasonable and probable grounds.

21 In ***Children's Aid Society of Halifax v. T.W.*** [2004] N.S.J. No. 59 (S.C.), Lynch J. followed the approach taken by Levy J. She further held that the court's decision must be based upon the circumstances existing at the time of the interim hearing. In so doing, Lynch J. did not consider the circumstances which had resolved by the time the interim hearing took place.

22 *Credible and Trustworthy Evidence*

23 In *Children's Aid Society of Halifax v. L.L.* [1997] N.S.J. No. 456 (Fam. Ct.), Daley J. confirmed that speculation, unspecified reports, and concerns do not meet the threshold test set out in s. 39 of the *Act*.

[9] I adopt this approach to the definition of reasonable and probable grounds and the other considerations contained in these decisions.

Grounds for Protection

[10] The Minster alleges the grounds for protection are founded in s.22(2)(b) and (g) of the *Act*. The relevant portions of s.22 are as follows:

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

(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;

(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);

...

(f) the child has suffered emotional abuse, 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 abuse and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the abuse;

[11] Emotional abuse is defined in s.3(la) as follows:

(la) “emotional abuse” means acts that seriously interfere with a child’s healthy development, emotional functioning and attachment to others such as

(i) rejection,

(ii) isolation, including depriving the child from normal social interactions,

(iii) deprivation of affection or cognitive stimulation,

(iv) inappropriate criticism, humiliation or expectations of or threats or accusations toward the child, or

(v) any other similar acts

[12] The mother says that, throughout their relationship, the father was verbally abusive to her, both before and after the birth of the child and often in the presence of the child. This abusive behavior included raising his voice to her and using foul and demeaning language which made her feel diminished and abused. She says that she had been subjected to abuse in her youth, has many of the characteristics of Post-Traumatic Stress Disorder (though she has not been diagnosed) and has a heightened sensitivity to such verbal abuse.

[13] The mother says that the child, who has ASD, requires structure, routine and a calm environment. She says the child was often present during the abuse by the father and would try to withdraw, going to his room and hiding under his blanket. If he couldn't withdraw, he would seek physical comfort from his mother.

[14] The father says that he was aware of the mother's history. His evidence on verbal abuse is varying. He denies being abusive on any occasion except during one voice mail message left after separation. Yet at other times he admits to raising his voice and that his behaviors did constitute abuse. He says he has a better understanding of this after attending New Leaf, a counselling and support program for men who have been abusive in their relationships.

[15] I find the evidence of the mother on this issue to be credible and trustworthy. She gave her evidence in a clear and straightforward manner, did not evade or avoid questions and was persuasive.

[16] I do not find the father's denial of this behavior to be credible. He struggled throughout his evidence to find a fine line between admitting many of his behaviors while simultaneously attempting to deny, justify or minimize them or deny that they were abusive.

[17] The mother says that, between April 19, 2018 when this court granted an interim order under the *Parenting and Support Act* limiting communication between the parties to issues concerning the child, and June 4, 2018 when this child protection proceeding commenced, the father sent over 1,000 text messages to her. She says most of these messages were not about matters concerning the

child but included requests for reconciliation, inquiring about her whereabouts and accusing her of being involved in human trafficking among other allegations. He texted that he could hear the child crying in his neighborhood when the child was nowhere near there. He variously texted that he was watching her, he could hear the mother and accused her of being in the bathroom of his neighbor when she was nowhere near there.

[18] The mother says these texts made her feel bombarded, disturbed and she felt they were excessive and obsessive. She turned off her phone to avoid the constant ring at all hours and only turned it on once or twice a day to review the texts. She feared for her and the child's safety as she could not predict his behaviors. She stopped responding on advice of her support professionals and hoped he would stop texting. She feared he might escalate his behavior.

[19] The father admits that he sent these texts and says he now understands that doing so in such volume and discussing non-child related matters was inappropriate. He says he learned what that impact on the mother could be through his work with New Leaf. He says that most of the texts were seeking information on the child and when there was no reply, he followed up to see if the mother and child were safe. He feared her fleeing with the child as he says she had done previously.

[20] Cathy Grant, Director, counsellor and co-facilitator of New Leaf says that the father attended several group sessions so far but although he participated, he had gained little insight yet into the effects of his behaviors on the mother and child. She says that he tries to justify his actions and feelings despite speaking about the impacts. She described him as controlling and that he was hearing what was said but not yet listening. He has a need to be right.

[21] I find that the evidence of the mother and Cathy Grant on the issue of the texts and the father's insight to be credible and trustworthy. Despite articulating his understanding of the impact of the volume and content of the texts on the mother and child, I do not find the father to be credible. He often rationalized this excessive behavior and tried, at times, to blame the mother for failing to respond.

[22] I find both the volume and content of the texts to be abusive and indicative of controlling behavior.

[23] The mother says that many texts were sent when the father was caring for the child. She says that sending so many texts at that time posed a risk as it would

have distracted him from the needs of the child. Given that the child has special needs, any such distraction is a risk.

[24] The father denies that such texting took long, many texts were short and says he did it when the child was napping or sleeping. I do not accept this and accept the evidence of the mother on this issue.

[25] The mother says that on one occasion the father left an abusive voice mail for her and she could hear the child in the background. She believes the child would have overheard that call and that this was abusive to her and the child.

[26] The father admits to the call, its content and that it constituted abuse. He denies it posed a risk to the child. I do not accept this view and accept the evidence of the mother on this issue.

[27] To the allegation that the father does not accept the diagnosis of ASD and therefore he is unlikely to follow the appropriate care plan, posing a risk to the child, the father provides conflicting evidence. He struggled to articulate his position but in the end, he says that while he accepts that the expert has provided the diagnosis, he does not believe that the child has ASD. He says that on one occasion the child spoke a sentence and this proves that the child is not autistic.

[28] The belief that the child speaking on one occasion proves that he is not autistic is not supported by the evidence. The father filed a Diagnostic Assessment Report from Dr. Patricia Gerrior of the Early Autism Program at the Aberdeen Hospital which provided the diagnosis of ASD. In that report, Dr. Gerrior notes that in observing the child in the home of the mother, he did use two words which were repeated. She concluded that he scored low on communication skills but the Assessment does not say the child is completely non-verbal.

[29] The father goes on to say that despite his certainty that the child does not have ASD, he will follow the treatment and care plan for the child. I do not accept this evidence on this issue. He has concluded, without any professional training and without consulting any expert in the field, that the child does not have ASD.

[30] I note that the paternal grandmother, J.R., also provided evidence in which she made clear that she does not accept that the child has ASD and blames his circumstance on the mother for shaking him and slamming him onto a couch. The mother denies this and the paternal grandmother provides no more evidence of this allegation.

[31] Based on this, I do not find the father's claim that he will follow a treatment and care plan recommend by the autism team to be credible. I find that he struggles to says what he thinks is expected while he is likely to do something else. I therefore accept the evidence of the mother and Minister on this issue.

[32] The mother and Minister allege the father is exhibiting paranoid thinking and behaviors which indicate a mental health issue and poses a risk to the child. Examples include the content of texts discussed earlier, the evidence that he sat outside the agency offices for 2 to 3 hours after a meeting, that he had excessive communication and visits with the worker in which the same information was provided to him repeatedly, that he would not leave after dropping the child off to the mother at the local library after a visit and other similar behaviors.

[33] The father says he was acting out of concern and trying to understand the involvement of the Minister and gather information for his case. He denies being outside the offices for 2 to 3 hours, saying it was 45 minutes during which time he reviewed his plan to "make the rounds" to the RCMP and local police to gather information for his affidavits. He denies any mental health issue or any paranoid thinking.

[34] The father alleges that the Minister was making biased decisions based on his gender, race and occupation. He is African Nova Scotian and is employed by the military in the Reserves. The mother is white. He further alleges that decisions were being made by the Minister without considering the child's race, culture and best interests. He alleges a conspiracy among the mother, Tearmann House which is a shelter for women where the mother and child resided for a time, and the Minister to prevent his access. When challenged on this, he could provide no evidence or examples to substantiate these serious allegations. After struggling to respond for some time, it appeared that he decided to make these allegations and expected the Minister and mother to prove them false.

[35] On this issue, I find the evidence of the mother and the Minister to be credible and I accept that evidence. I do not find the father's evidence to be credible.

[36] The father says that he has begun engaging in services, such as New Leaf and Family Services, and is learning through these services. Though not specifically argued, this would go to the issue of whether he is addressing through services the risk of emotional harm.

[37] While I acknowledge his efforts, the evidence is that he has gained little insight into the risk of emotional harm to his child. Cathy Grant of New Leaf confirms this. His own evidence also confirms this. I find he has not yet mitigated that risk through such services.

[38] The father also alleges in his evidence that the mother is risk to the child. I have carefully considered his evidence on this regard and do not find it to be credible. She admits that she was involved in a child protection matter respecting an older son years ago. She admits to little contact with her family and none with her mother who raised her older child. Given its historic nature, do not find it represents risk to this child.

[39] The father alleges concerns about the mother's social group, human trafficking activities and drug use. The mother admits to using marijuana but denies any current use. She denies any issues with her social group or human trafficking.

[40] The father alleges that the mother is a risk given that she is unemployed and on social assistance, and that he can provide a better environment for the child.

[41] I do not find that the mother is a risk to the child on a reasonable and probable ground. The father has provided no credible evidence of such risk.

Decision

[42] Considering all the evidence before me, the submissions and the law, I find that the Minister has proven on a balance of probabilities that the child is probably in need of protective services both on the ground of substantial risk of physical harm and substantial risk of emotional abuse by the father. I find that there are both reasonable and probable grounds to believe that the child is in need of protective services. In making this finding, I have only considered evidence which I find to be credible and trustworthy.

[43] The father's various behaviors, including verbal abuse before and after the child's birth, verbal abuse in the presence of the child, excessive texting contrary to this court's order, the abusive content of many texts, his abusive voice mail in the presence of the child, his paranoid behaviors and position before this court and his denial of the diagnosis of ASD, both individually and collectively, lead me to this finding.

[44] I will therefore grant an order pursuant to s.39(4)(b) as follows:

1. The child shall remain in the care and custody of the mother subject to the supervision of the Minister of Community Services (“the Agency”) upon the following terms and conditions:
 - a. The mother shall co-operate and comply with all reasonable requests, inquiries, directions and recommendations of any representative of the Agency;
 - b. Any representative of the Agency shall have the right to enter the residence of the child to provide guidance and assistance and to ascertain that the child is being properly cared for pursuant to s.39(4A) of the *Act*;
 - c. The mother shall not allow the father to reside with or contact or associate in any way with the child unless authorized by the Agency. The mother shall immediately report to the Agency any unauthorized attempts by the father to reside with or contact or associate in any way with the child;
 - d. In the event of non-compliance by the mother with any of the terms and conditions of this Order the Agency shall be entitled to take the child into care and bring the matter back before this Court pursuant to s.39(5) of the *Act*.
 - e. The father shall have access to the child upon terms and conditions, which may include supervision, and as may be arranged from time to time by the Agency pursuant to s. 39(4)(f) of the *Act*;
 - f. The father shall not reside with or contact or associate in any way with the child except for access upon terms and conditions, which may include supervision, as shall be arranged from time to time by the Agency pursuant to ss. 39(4)(c) and (f) of the *Act*;
 - g. Both parents shall be referred to, cooperate with and participate in family skills instruction with a family support worker as arranged by the Agency pursuant to s. 34(4)(g) of the *Act*;

- h. The father shall be referred to, cooperate with and participate in individual counselling or therapy as arranged by the Agency pursuant to s. 39(4)(g) of the *Act*;
- i. The father shall be referred for the preparation of a psychological assessment, as arranged by the Agency pursuant to s. 39(4)(g) of the *Act*.
- j. All other terms and conditions requested by the Minister in her application.

[45] Counsel for the Minister shall draw the order.

Daley, J.F.C.