FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v TZ*, 2019 NSFC 13

Date : 2019-08-07
Docket : FBWCFSA-109107
Registry : Bridgewater

Between:

Minister of Community Services

Applicant

-and-

TZ

Respondent

Judge: The Honourable Judge Marci Lin Melvin

Heard: June 25, 26, 27 and 28, 2019

Final Submissions Filed: July 29, 2019

Written Decision Release: August 7, 2019

Counsel: Alan G. Ferrier, Q.C. for the Applicant

Scott Brownell, for the Respondent

That s. 94 (1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication. S. 94(1) provides:

> No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

By the Court:

Introduction

[1] This decision concerns EAZ, born March 6, 2018, and taken into care on March 7, 2018.

[2] The Applicant Minister seeks an order for Permanent Care. The Minister contends that the child cannot be placed with the Respondent TZ because of ongoing protection concerns. The Minister asserts the concerns are linked to TZ's extremely low functioning, an inability to learn parenting skills despite hundreds of hours of working with a support worker, a lack of appropriate insight, her lack of an adequate support network, her failure to identify the child's needs, her failure to recognize cues from the child, her lack of appropriate interaction with the child, and her underappreciation of the benefits of appropriate personal hygiene.

[3] The Respondent Mother seeks to have the matter dismissed, and placement of the child with her, believing she is capable of parenting EAZ.

[4] TZ was 22 years old when EAZ was born. Prior to the birth TZ had not realized she was pregnant, so she received no pre-natal care. She went to the hospital with abdominal pain believing she had the flu. She believed her "belly" had gotten larger because she had been eating "too much canned food".

[5] At the time of the child's birth, she advised she had no idea how she had gotten pregnant. She advised the hospital social worker she had not had sex with anyone. She subsequently identified a possible father but paternity testing confirmed he was not. She identified a second possible father, but did not know his last name or any contact information.

[6] TZ does not have a job outside of the home. Her education is limited. Her intelligence is in the .5 to 1st percentile. She lives with her mother. Her evidence is that her mother could help her raise the child, and although her mother is bedridden, she could put the child on her mother's bed so her mother could play with her.

Issues

[7] Does the child remain a child in need of protective services, and should an order for permanent care issue?

Evidence and Analysis

(a) Position of the Applicant Minister

[8] The Minister argues: "From the beginning of [the child's] life, concerns raised about [TZ's] ability to parent have been identified, corroborated and confirmed by hundreds of hours of supervision of access by the Minister."

[9] The Minister further contends that documentary evidence, confirmed by the witnesses during the hearing, show TZ's inability to learn basic "baby skills" despite repeated demonstrations and instructions, for instance, learning to complete a satisfactory diaper change took more than a year, and feeding and bathing the child remain a challenge.

[10] The Minister's evidence is that TZ continuously failed to identify the child's needs and does not recognize or appreciate the cues she gets from the child. The foster mother testified on behalf of the Minister that the child was usually lively and engaged, but when with TZ, had very little affect at all. The foster mother also testified that at times TZ's personal hygiene was unbearable, and she had to open windows and doors to air out her house while TZ was there and after she had left.

[11] The Family Support worker, Julie Nickerson, worked tirelessly with TZ, spending hundreds of hours attempting to teach her parenting skills. Although TZ would every now and again have a breakthrough and remember to do something, she had difficulties in all aspects of child care.

[12] The Court finds the evidence of the Family Support worker credible, and commends her for her patience throughout this journey to try to teach TZ to become a parent.

[13] A Psychoeducational assessment was prepared by Tony Campagnoni who, on consent of both parties, was qualified and testified as an expert witness on behalf of the Minister. The Court finds Ms. Campagnoni's evidence was credible and compelling. It is clear from the report that TZ's low level of functioning is all-encompassing. TZ's highest level of functioning in a couple of categories, based on her psychological testing, was comparable to a child aged eight.

[14] Ms. Campagnoni testified that TZ's psychoeducational testing was below the first percentile. Her evidence is:

> Standard scores of 85 to 115 are within the broad range of average with 100 being exactly average… Percentiles reflect a ranking and what number of people of the same age would score lower. In all areas, 1% or fewer of individuals

> [TZ's] age would score lower academically when considering the general population.

[15] Ms. Campanoni further testified that although TZ has a good heart, TZ has difficulty picking up on cues, difficulty with hands-on situations, difficulty seeing patterns and details, difficulty "putting things together", has a very slow learning curve, and all together this would be a dangerous situation for a child. Ms. Capagnoni's evidence was that the things TZ can do are extremely limited. Her evidence of TZ was that TZ has difficulty understanding why the Minister took the child, and thought it was because she had food on her shirt.

[16] The Court notes in terms of "Daily Living Area" in Ms. Campagnoni's report:

> [TZ] can take care of her basic needs in terms of hygiene. She reported needing reminders to take medication. She said she sometimes makes her own medical appointments. Around the house she reported that she can sweep, but doesn't mop or vacuum. She can prepare foods like KD and uses appliances such as the microwave and toaster. She finds following a recipe too difficult and does not use cleaners outside of laundry detergent. She can make calls and read a regular clock face. When asked about ordering in restaurants, she said she only remembers doing so once, at Dixie Lee. She makes purchases at stores and says that she can make change. She does not earn money in a job situation but she does have social assistance of $225 a month. She will spend some of this on food and the dollar store.

[17] Under the heading of "Maladaptive Behaviours", Ms. Campagnoni states:

> When asked about potential difficulties, it was discussed that [TZ] finds it challenging to interact with others, that she prefers to be alone, and that she lacks interest in life. She reported that she sometimes has temper tantrums where she will sit down, scream, and holler until mom gives in to her. She said she lies sometimes and can be stubborn. Also, she has some behaviours which could be linked to anxiety such as nail biting and eye twitching.

[18] Ms. Campagnoni concludes in her report:

> Lack of strong reasoning abilities can make decision making difficult. She lacks the mental flexibility to make quick decisions in an informed way. Weighing pros and cons as well as foreseeing problems places [TZ] in a situation where the outcomes of her decisions may be less than desirable…. In terms of parent training and skills work [TZ] would need a highly supervised situation with a "senior parent" who could provide fill-time modelling and feedback. [TZ]

> unfortunately, does not have a parent who would be well enough to take on such a role.

[19] Neil Kennedy was also qualified, on consent of both parties, as an expert witness and testified on behalf of the Minister. His evidence is that TZ does not possess the requisite skills to parent a child. His recommendation for the permanent care of the child, based on his observations of TZ's abilities, was unequivocal.

[20] Child Protection worker, Mitch Baker, testified to the risk of physical harm to the child in relation to TZ's inadequate parenting skills, her lack of ability to pick up on the child's cues to meet her needs, her ability to meet those needs, and her ability to ask appropriate questions. He noted although TZ has demonstrated commitment to the visits with her child, after having intensive parenting support three times a week for 90 minutes a time for over 250 hours, TZ is still not capable of doing even the most basic tasks for her child.

[21] The Court finds Mr. Baker's evidence was credible and compelling. He was not shaken on cross-examination, was forthright and respectful of TZ's limited abilities, at one point explaining his hesitancy with respect to the psychoeducational report: *"I sensed it was a very sensitive topic and my instinct was not to push the matter any further to cause harm to her."*

[22] Further evidence before the Court included a letter from Dr. Diane E. Edmonds, marked as Exhibit 3, with an attached letter from Dr. Andrew Lynk, Chief of Pediatrics at the IWK Children's Hospital. The child has some difficulties, requiring multiple medical follow-ups, including GERD, torticollis unspecified, alternating ecotropia, left lower facial weakness and microcephaly, which Dr. Lynk describes as "likely familial."

[23] Dr. Edmonds noted:

> It is difficult to predict the level of ongoing intervention and treatment that EAZ will require, as this will evolve as she grows and develops. In my professional opinion, however, a home environment that is nurturing and cognizant of potential difficulties/developmental delays is of paramount importance, as is close, ongoing consistent medical follow-up.

[24] The Court observed TZ frequently during the proceedings. Throughout, she sat in the Courtroom with a smile on her face.

[25] The Court noted counsel for the Minister and for the Respondent ensured all evidence presented was kind and genteel, so as not to hurt TZ with the obviously difficult subject matter. Clearly, all involved – with the possible exception of TZ - were very aware of the challenges faced on a daily basis by TZ. It could not have been easy to hear that one is in the lowest percentile of intellectual functioning. Yet the Court observed it did not seem to bother her. The only evidence that clearly caused her upset was that of her personal hygiene and emanating odour as a result.

[26] Nevertheless, and purely as a sidebar, the Court is compelled to note that both counsel for the Applicant and the Respondent, and all of the witnesses made this very difficult hearing a lesson in grace, humility, compassion, and respect.

(b) Position of the Respondent Mother

[27] TZ's position is also unequivocal. She wants her child returned. She has no qualms about parenting the child. Her evidence is that there is no risk of harm to the child if the child were to be returned to her care. She did not believe she was given a proper opportunity to prove her parenting abilities in her own home. Her evidence is that the workers for the Minister and the child's foster parent describe her unfairly. She believes she does have the required skills to care for the child now and as the child grows. She has a long-term plan of care for the child and would arrange for a family doctor, school placement, food, clothing and toys for the child.

[28] On cross-examination, the Court finds TZ presented by times as a petulant young child. She was quick to find a response, even when the response was contradictory.

[29] TZ's evidence was that the worker lied about TZ's abilities on everything, and all observations of the family skills worker and the foster mother were wrong, "especially about the smell," and they were not nice to her.

[30] She was upset that the foster mother took the child "… across the world, all the way to New Brunswick."

[31] TZ did not appreciate the nuances of properly holding a baby stating: "There's no right or wrong way to hold a child." She said at one point she did not offer the baby a drink because the baby didn't show she was thirsty.

[32] TZ's sister-in-law – CW - testified on TZ's behalf and although there is no evidence of TZ's parenting abilities with her own child, CW testified that TZ has had appropriate interactions with her children (being TZ's nieces and nephews). Both CW and TZ's sister, AZ, support TZ having the care of her own child.

[33] AZ's evidence is that TZ has looked after AZ's children and there have been no difficulties. The Court had concerns with AZ's testimony, and found it to be disingenuous, not only with her demeanor and the manner in which she responded to questions, but also for example, on direct she gave one version of the custody of her son who now lives with his father in another country, and on cross-examination the story changed. Her evidence lacked credibility. The court could not rely on it.

[34] Counsel for TZ argues: "In this matter there are conflicting descriptions of the Respondent's parenting abilities. This likely requires the court to make a determination on both credibility and reliability of the evidence given from each witness." Counsel refers to **Novak Estate (Re), 2008 NSSC 283.**

[35] The Court has considered the toolbox of strategies for assessing credibility based on **Novak**, and applied them where appropriate and finds the evidence of the Minister to be credible and reliable.

[36] Respondent counsel for TZ worked diligently to craft evidentiary velvet from factual tatters, but the Respondent's case regrettably remains threadbare.

[37] Not only are there issues of reliability and credibility, but also, the expert testimony as to TZ's limitations could not be refuted by any of the Respondent witnesses, including the Respondent and in the face of the overwhelming evidence to the contrary, TZ's evidence as to her ability to care for a child is simply not plausible.

[38] Finally, there was no compelling evidence to allow the Court to find there is any bond between the child and TZ. There was no evidence to show the child may have a bond with TZ, in fact quite the contrary. And certainly nothing to show TZ cared for, loved, or adored this baby.

Law

[39] As the matter before the Court is a Disposition Review, the Court confirms that all previous orders on file were correctly made on the consent of or with no opposition by the parties.

[40] Getting to this final stage has taken considerably more time than usual, time stretched to the breaking point, in the hopes that the best interests of this child might be met by an order returning the child to TZ, after TZ had learned how to properly parent. Given that this matter has gone well beyond the usual timelines, the Court has but two options: dismiss or make an order for Permanent Care.

[41] Section 42 (1) of the *Children and Family Services Act* sets out:

> At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:
>
> > (a) dismiss the matter; …
> >
> > (f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.

[42] As a sidebar, however, even if there were other options available to the Court for the placement of EAZ, given the evidence, and the child's sense of time and need for finality in a safe and loving home environment that is nurturing and cognizant of potential difficulties/developmental delays based on the child's limitations, the conclusion would remain the same.

[43] The Court must determine whether the circumstances that allowed the Court to find the child in need of protective services still exist, or whether changes or new circumstances have arisen, which may allow the Court to find that EAZ is no longer a child in need of protective services.

[44] In all matters involving the welfare of a child, the Court must be mindful of the best interests of the child at all times using a child-centric approach. I have often described this as the star on the top of the tree, but it could be any analogy that allows the parties to understand that it is the paramount, most important aspect of the case. This is set out in section 2(2) of the *Children and Family Services Act*.

[45] The Court is also mindful of other legislative factors which highlight the best interest of the child, as set out in section 2 (1) of the *Act* and include protecting children from harm, and promoting the integrity of the family. The *Act* as well must be interpreted using a child-centric approach.

[46] The burden of proof sits squarely on the shoulders of the Applicant Minister. In civil matters, the test to determine the burden of proof is based on a balance of probabilities.

[47] This is a difficult concept to explain to some respondents, so, for TZ's benefit: Picture the scales of justice with both sides of the scales equally balanced with credible evidence to support the positions of Party "A" and Party "B".

[48] As the matter continues, party "A" puts a bit more evidence in their side of the scale. Party "B" has no more evidence to put in it. The scales are no longer balanced equally, but one side weighs heavier, the balance of probabilities weighing in Party "A"'s favour.

[49] For the Minister to be successful in her application for an order for permanent care, she must have evidence which weighs heavier the than that of the Respondent TZ.

[50] In short, the Minister has the burden to prove why it is in the best interests of EAZ to be placed in the permanent care of the Minister instead of being placed with her mother, TZ.

[51] When the Minister seeks to remove a child from a parent in favour of an order for permanent care, the Court must ensure that all provisions of section 42(2) of the Act, have been met:

> 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 of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.

[52] On review of the evidence, the Court is satisfied that less intrusive alternatives to promote the integrity of the family have been attempted and failed, and further, would be inadequate to protect the child.

[53] The Minister relies primarily upon s. 22(2)(b) of the *Act* in support of her position that EAZ remains a child in need of protective services, and argues there is a substantial risk that the child will suffer physical harm caused by TZ's inability to adequately supervise and protect the child.

[54] Substantial risk is defined in s. 22(1) of the *Act* as meaning a real chance of danger that is apparent on the evidence. In **M.J.B. v. Family and Children's**

Services of Kings County, 2008 NSCA 64 (CanLII), Bateman, J.A., confirmed that in relying upon "substantial risk", the Minister need only prove that there is a real chance that the future abuse will occur, and not that future abuse will actually occur.

[55] Counsel for the Respondent urged the Court to consider **Nova Scotia (Community Services) v C.K.Z. and G.L.P., 2016 NSCA 61,** and argues:

> The CKZ and GLP case resulted in an Order for permanent care to the Minister. However, as the decision states this is based on a myriad of factors and not simply based on the intellectual disabilities of the parents. The lack of those other factors in this current case is a very important distinction. While the Minister takes the same position, that permanent care is in the child's best interest, [TZ]'s situation is factually distinct and an Order for Permanent Care is not appropriate under the circumstances.

[56] The Court has considered the Court's decision in **Nova Scotia (Community Services) v. C.K.Z., supra.:**

> [47] Nowhere in s. 22(2) is the protection status of a child linked to the specific attributes of his or her parent or guardian. It is, however, clearly linked to the actions, failure to act, or inability to act of the adults responsible for the child's care… Nowhere in that definition, or elsewhere in the Act, is the status of the child as being in need of protective services informed by the reason why their parents acted, failed to act, or have the inability to act in a particular manner.
>
> [48] We agree that the intellectual capacity of a parent is an important factor in implementing services to remediate problematic circumstances, and in some instances, evaluating the risk of future harm. However, the Act does not contemplate a finding that a child is, or is not, in need of protective services, being based upon where his or her intellectually disabled parents fall within a comparison to parents with similar attributes.

[57] The Court cannot find EAZ is a child in need of protective services simply because, in all areas, 1% or fewer of individuals the Respondent's age would score lower academically when considering the general population.

[58] The Court can, however, find EAZ is a child in need of protective services, if the Court finds that TZ's extremely low and limited level of functioning precludes her from being able to care for the child and prevents her from protecting the child from harm.

<u>Decision</u>

[59] The Court finds the Minister's concerns as to TZ's extremely low functioning, an inability to learn parenting skills despite hundreds of hours of working with a support worker, a lack of appropriate insight, her lack of an adequate support network, her failure to identify the child's needs, her failure to recognize cues from the child, her lack of appropriate interaction with the child, and her underappreciation of the benefits of appropriate personal hygiene, are valid and credible concerns.

[60] The Court finds that TZ has no ability to safely parent a child or protect the child from harm, given these concerns.

[61] The Court finds that the child would be in danger if placed in the care of TZ.

[62] The Court does this in the best interests of the child, EAZ, but also with a sincere appreciation for TZ's wish to parent this child. In any and all instances, if it is possible, this Court tries to ensure children and parents can be together as a family. Regrettably, it is simply not within the realm of judicial possibility for this to happen.

[63] Having reviewed all of the evidence and jurisprudence in relation to this matter, the Court finds the Minister has established on a balance of probabilities that there is a substantial risk of physical harm as contemplated by section 22(2)(b) of the Act.

[64] The child EAZ, born to TZ on March 6, 2018, remains a child in need of protective services.

[65] An order for the Permanent Care of EAZ will issue forthwith.

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MLM, JFC
August 7, 2019