

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *LAG v. The Minister of Community Services*, 2024 NSSC 157

Date: 20240531

Docket: SFHCFSA-132590

Registry: Halifax

Between:

LAG

Applicant

v.

The Minister of Community Services

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Terrance G. Sheppard

Heard: May 8, 2024, in Halifax, Nova Scotia

Written Decision: May 31, 2024

Subject: Leave to apply to terminate a permanent care and custody order under s. 48 of the *Children and Family Services Act*.

Summary: L.A.G. applied to terminate a permanent care and custody order. In order to make the application, she must be granted leave by the Court. For leave to be granted, the court must find that the applicant has “some realistic expectation of success.” Although the Applicant has addressed a number of the protection concerns that led to the permanent care and custody order, she has not yet addressed the key issue of her mental health. On that basis, she does not have a realistic expectation of success and leave is denied.

Issues:

- (1) Did the Agency breach the promises made during the settlement conference and, if so, what effect does that have on the leave application?
- (2) Should the Mother's application be dismissed because of errors in her pleadings?
- (3) Should the Mother be granted leave?

Result:

The Court found that the Agency did not fulfill its commitment to provide the mother with grief counselling. The Court refused the Agency's motion to dismiss the leave application because of deficiencies in the pleadings. The Court dismissed the Mother's leave application. Although the Mother was able to show considerable improvement in several areas, she did not produce evidence that her mental health issues had significantly improved or would stabilize in the future.

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SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *LAG v. The Minister of Community Services*, 2024 NSSC 157

Date: 20240523

Docket: SFH CFSA 132590

Registry: Halifax

Between:

LAG

Applicant

v.

The Minister of Community Services

Respondent

Judge: The Honourable Justice Terrance G. Sheppard

Heard: May 8, 2024, in Halifax, Nova Scotia

Released to the May 23, 2024

Parties:

Counsel: LAG on her own behalf
M. Kate Stephenson for the Respondent

By the Court:

Introduction

[1] LAG is the mother (the “Mother”) of five-year-old, LMA (the “Child”). Because of serious protection concerns, the Child was placed in the permanent care and custody of the Minister of Community Services (the “Agency”). The Mother now seeks to terminate the permanent care and custody order (the “Order”). The Mother cannot proceed unless she first obtains leave of the Court. To obtain leave, she must show that she has a realistic expectation of success at trial.

[2] The Mother states that she should succeed because, first, the Agency reneged on promises made during the settlement conference that led to the Order. Second, she says that she has a realistic expectation that she can convince the trial judge that she has addressed, or can address, the concerns that led to the Order.

[3] The Agency opposes the Mother’s application for three reasons. First, the Agency says that they did not breach the promises made at the settlement conference and, in any event, that argument is irrelevant. Second, the Agency says that the Mother's pleadings are deficient. Third, the Agency says that the Mother has not sufficiently addressed the child protection concerns that led to the Order and, therefore, she did not prove that she has a realistic chance of success.

Issues

[4] The parties raised the following three issues for my determination:

- Did the Agency breach the promises made during the settlement conference and, if so, what effect does that have on the leave application?
- Should the Mother’s application be dismissed because of errors in her pleadings?
- Should the Mother be granted leave?

Background Information

[5] On June 23 and 26, 2023, after a successful settlement conference, Justice MacKeigan placed the Child in the permanent care and custody of the Agency. The

Mother says she only agreed to the Order on the basis of the following promises made by the Agency:

- That she would have access to the adoption worker.
- That she would have continued access with the Child until the Child was placed for adoption.
- That the Agency would provide her with grief counselling for six months.

[6] When the Order was entered, the unresolved child protection concerns were:

- The condition of the Mother's home.
- The Mother's lack of support.
- The Mother's lack of truthfulness.
- The Mother's parenting deficits.
- The Mother's mental health.

[7] On January 24, 2024, the Mother made her first application to terminate the Order. The Agency correctly pointed out that the Order could not be terminated until February 16, 2024 because of the time requirements in section 48(6) of the *Children and Family Services Act (the "CFSA")*. In her application, the Mother correctly stated the relief sought as "CFSA – Terminate Permanent Care DCS".

[8] On April 12, 2024, the Mother once again applied to terminate the Order. This application was within the statutory timelines. However, the Mother incorrectly checked off the box for relief under the *Parenting and Support Act* and did not reference the *CFSA*.

[9] The leave application was heard on May 8, 2024. The matter proceeded by way of written material with no cross-examination. I reviewed the affidavit of the Mother sworn April 12, 2024; a letter from Evangeline Francis from North Grove dated, April 29, 2024; and the Affidavit of the Agency social worker, Julie Dalley, dated May 2, 2024. Both parties were given an opportunity to provide closing submissions.

[10] In addition, I granted the Agency's motion to admit evidence from a previous proceeding pursuant to s. 96(1) of the *CFSA* which information was placed in an exhibit containing 100 or so tabs of material. The motion was not opposed by the Mother. I advised the parties that where a document had been referenced, I reviewed it, but I did not review, in their entirety, the 100 or so tabs that the Agency produced.

Analysis

Did the Agency breach the promises made during the settlement conference and, if so, what effect does that have on the decision whether to grant leave?

[11] Part of the Mother's case relates to the promises which the Agency made at the time the Order was granted. The Mother says that she only agreed to the Order because of three promises made by the Agency. The Mother says that the Agency did not follow through with these promises.

Contact with the Adoption Worker

[12] The Mother says she was promised that she would have contact with the Child's Adoption Worker, although she acknowledges that she would not have any identifying information about prospective adoptive parents. The Agency says that the Mother had continuing contact with Julie Dalley, the Child in Care Social Worker, since December of 2021, and was provided regular updates.

[13] While this is not exactly the same thing as being able to have contact with Adoption Worker, I am satisfied that the spirit of the agreement was respected by the Agency, which was to make sure the Mother was in the loop on adoption planning for the Child.

Continuing Visits

[14] The Mother was assured that she would be able to continue her visits until the Child was placed for adoption. In fact, visits did continue until the end of November of 2023 when an adoptive home was identified.

[15] I am satisfied that the Agency did not breach that part of their agreement and it was reasonable for there to be a space between ending the Mother's visits and the Child transitioning to the adoptive home.

Renewal of the Contract for Individual Counselling

[16] The parties acknowledge that the purpose of this commitment was to provide the Mother with grief counselling to deal with the loss of the Child. The parties also agree that the counselling contract was to be renewed *after* the Order.

[17] The Mother states that the agreement was for a six-month renewal. The Agency reviewed the recording of the proceeding and states that there was no specific term of renewal agreed to and, further, the counselling provided to the Mother was sufficient and fulfilled their obligation.

[18] The Mother disagrees. She indicates that her counsellor was off for much of July and so she only had one or two sessions at most between June 26 and when the current contract expired on August 1. The Mother states that when the contract expired, the Agency refused to renew it.

[19] The Agency cannot dispute that the Mother only received one to two further counselling sessions after the conclusion of the settlement conference on June 26, 2023 and the issuance of the Order on August 2, 2023. The Agency did not dispute that after the contract expired on August 1, 2023, no further counselling was provided.

[20] I find that the Agency did not live up to its commitment to provide grief counselling to the Mother. The counselling contract was to be renewed *after* the Order. The Order was issued on August 2 and the counselling contract terminated August 1.

[21] Further, I do not accept the Agency's argument that their promise was to renew the contract after the conclusion of the June 26 settlement conference, and not the August 2 Order, for the following reasons:

- They did not renew the contract after June 26. It expired on August 1, and it was never renewed.
- If it were their intention to provide counselling for only one further month, it was incumbent on the Agency to spell this out at the settlement conference and put that on the record. This is especially so given that all previous contracts had been for six months. It would have been reasonable for the Mother to assume the contract would be renewed for an additional six months even if not specified

on the record. I recognize that not all contracts after a permanent care and custody finding are for six months, but they are most certainly not limited to one or two sessions.

- The counseling was to deal with the loss of her child; however, the Mother continued to see the Child until late November. The grief counselling could really only have begun in earnest after that.

[22] The Court is deeply disappointed by the Agency's refusal to renew the counselling contract. The Agency ought to fulfill all promises and commitments that are placed on the record after settlements conferences are concluded. Such promises often induce parents, such as the Mother, to settle. The leave application provided the Agency with an opportunity to recognize and correct their error. Instead, the Agency chose to justify it. The Agency's position is troubling.

[23] Had the Agency fulfilled its promise and provided the grief counselling, we may never have had to deal with the current application to terminate. Had the Mother been given the proper support to grieve the loss of her child, she may have never felt the need to file her application to terminate.

[24] I have given a great deal of thought on how the Agency's conduct in denying the Mother proper grief counseling impacts this decision. The Agency says, first, it did not breach its agreement, which as I have indicated, I do not accept, but secondly, that it is irrelevant.

[25] Had the Agency denied the Mother a service that was meant to improve any of the concerns identified by them during the proceeding, I may have exercised my jurisdiction under section 48(8)(c) and adjourned the hearing of the application for six months to allow the Agency to provide the service. However, the service they inappropriately withheld was grief counselling, which would not have directly addressed any of the underlying protection concerns.

[26] Reluctantly, I must conclude that the Mother does not have a remedy before me to address the Agency's failure to provide the promised grief counselling. The Agency's promises, albeit on the court record, are just that, promises that are not legally enforceable.

Should the Mother's application be dismissed because of errors in her pleadings?

[27] The Agency asks me to dismiss the Mother's application because of errors in her pleadings. Specifically, in her application, the Mother incorrectly referenced the *Parenting and Support Act* and not the *CFSA*.

[28] I reject the Agency's motion for two reasons. First, the Agency's argument is really a "form over substance" argument. The Mother is unrepresented and has no legal training. There is no prejudice to the Agency from proceeding with the matter despite the incorrect pleading. The Agency was well aware of what the Mother was seeking. Indeed, the Agency provided me with a detailed brief on section 48 of the *CFSA*. Further, in the Mother's first application, brought outside the statutory timelines, she clearly indicated that she was applying for termination of the Order made under the *CFSA*.

[29] Second, the Agency's motion is a fruitless one. Should the Court have granted the motion and dismissed the Mother's application on these technical grounds, nothing would have prevented the Mother from making a third application citing the correct Act, as she did the first time. Valuable court time would be wasted and a hearing on the merits would have been delayed, again further delaying permanency planning for the Child.

[30] As a result, I grant the Mother's motion to amend her pleadings to reference a termination of the Order under the *CFSA*. Civil Procedure Rule 83.03 allows a litigant to amend their pleadings with permission of the Court and, further, Rule 83.11 allows the Court to give permission to amend a court document at any time.

Should the Mother be granted leave?

The Mother states that she should be granted leave while the Agency disputes her application.

Legislation and Law

[31] Section 48(10) of the *CFSA* sets out what must be considered before terminating a permanent care and custody order. I must consider:

- Whether the circumstances have changed since the making of that Order; and
- The best interests of the child.

[32] In *G.(D.L.) v. Family and Community Services of Kings County* [1994] N.S.J. No. 657, Judge Levy discussed the test at the leave portion of a termination application:

[10] Rather, the applicant for leave must, in my opinion, present ostensibly credible and weighty evidence that those deficiencies in the parent or her circumstances that led to the care and custody order being granted have improved and are being convincingly and meaningfully addressed with the realistic expectation of success in the reasonable future.

[...]

[13] The applicant for leave does not have to prove that the children should be returned forthwith. What must be established however, is that there is sufficient evidence to warrant holding a hearing and having the agency plans put on hold; some reasonable prospect of success. The parent's rights and her evidence are to be weighed against whatever negative consequences there might be from holding a hearing, and the decision, as with all decisions under the *Act*, is to be made in the best interests of the children.

[33] Judge Levy's reasoning was subsequently adopted by our Court of Appeal in *Children's Aid Society of Cape Breton v. M. (L.)* [1999] N.S.J. 236. Although these decisions predate the changes to s. 48 of the *CFSA* in 2015, the test is still applicable.

[34] To summarize, at this stage, the Mother does not have to prove that the Order ought to be terminated and the Child returned to her care. Rather, the mother has to show that there is sufficient evidence that, if accepted by the trial judge, could lead the Court to conclude that the protection issues have been addressed. That is, the Mother must show "some realistic expectation of success."

[35] The starting point with an application to terminate a permanent care and custody order is to identify the concerns that led to the permanent care and custody order and then determine whether circumstances have changed since then.

Decision

[36] When the Order was granted, there were five outstanding protection concerns. I will now address each.

The Condition of the Mother's Home

[37] The Mother submitted pictures of her home which show it to be clean and very well maintained. Further, she states she will have the evidence of AB-A, a

neighbour and friend, who resides in the same apartment building and has been in her home frequently in excess of a year and who will confirm that the Mother's living space is clean, tidy, and organized. Further, the Mother will have the evidence of BF, an Early Childhood Educator, who will state that the Mother's home is clean and tidy and more than adequate for raising a child.

[38] The Agency took the position that there was "no" evidence to believe that the Mother had maintained a clean and tidy home. The Agency urged me not to accept the evidence of AB-A and BF because their statements were neither sworn nor tested by cross-examination.

[39] I disagree with the Agency. The leave portion of this application was not the appropriate time to enter into a detailed weighing of evidence or to make substantive findings of credibility. Rather, it was the Mother's opportunity to advise the Court of the evidence she would bring and then assess whether there was a realistic expectation of success if the Court accepted that evidence.

[40] I find that the mother showed that she could lead evidence, which if accepted by the trial judge, would have a realistic expectation of success in convincing the Court that the Mother had addressed the protection concern of an unfit home.

The Mother's Lack of Support

[41] The Agency said that the Mother did not produce evidence that this protection concern had been addressed. I disagree. The Mother proved that she could lead evidence, that if believed by the trial judge, would have a realistic chance of success. The mother said that her friend and neighbour, AB-A, is willing to be a 24-hour support, along with her mother, T. Further, BF, the early childhood educator, is willing to facilitate, support and assist however she can. Also, Exhibit 2 showed that the Mother had been actively involved with North Grove since the Order issued and has their support.

[42] The Mother's current position is in sharp contrast to the situation she was in during the summer of 2023. While she had engaged with North Grove at that time, she had no other family or friends to support her.

The Mother's Truthfulness

[43] In the prior proceeding, the Mother was not forthcoming with the Agency on a number of issues such as her relationship with SRA, the child's father. However, in this matter, the Mother provided her information in a straightforward, credible manner. There were no internal or external inconsistencies in what she told the Court. Further, she made admissions against her interests - for example, her shortfalls in the prior proceedings. The Mother's insight has improved considerably since the Order issued.

The Mother's Parenting Deficits

[44] The Mother did not provide sufficient evidence on this point. Although the Mother said that she located several parenting groups, she has not actually participated in any of the groups and cannot do so because she does not have a child in her care. The unfortunate catch-22 situation does not, however, produce a realistic chance of success that the mother's parenting deficits have been sufficiently addressed.

The Mother's Mental Health

[45] When the Order issued, one of the most pressing child protection concerns related to the Mother's mental health, and specifically her ability to maintain her mental health long term. Indeed, I consider this to be the overarching concern in that if the Mother's mental health were being properly addressed, all other protection concerns would likely resolve.

[46] The Mother states that she has been improving her mental health "through proper diet, exercise, yoga and meditation." AB-A would state that the difference in the Mother's mental health is incredible. During the hearing, the Mother advised the Court that, since the Order, she lost 35 pounds.

[47] The Mother also advised that she is not currently taking any medication, does not have a family doctor, therapist, psychologist, or psychiatrist. Further, she does not believe that a walk-in clinic would assist her.

[48] The Mother presented her case in a clear, cogent, and well thought out manner. It was obviously emotional for her, but she kept calm throughout. Clearly the proper diet, exercise, yoga, meditation, and weight loss have improved her mental health.

[49] I accept that the Mother's mental health has improved since August 2, 2023, and she should be commended for her efforts. However, while I accept that her mental health has improved, the Mother's mental health concerns cannot be alleviated solely through proper diet, exercise, yoga, and meditation given that various professional have indicated the need for long-term treatment:

- The Mother had a Mental Health Assessment completed by Sheila Bower-Jacquard on September 12, 2016 [Exhibit 7, Tab 23]. The Mother met the criteria for Avoidant Personality Disorder which "suggests a pervasive pattern of behaviour that will require diligent and consistent intervention." A psychiatric referral and therapy were recommended.
- The Mother had a Psychiatric Assessment conducted by Dr. Maryan Pogosyan on February 17, 2016 [Exhibit 7, Tab 24] and was found to "display traits of borderline personality disorder." Further, she met the criteria for Major Depressive Disorder and Panic Disorder. Medications and cognitive behaviour therapy, amongst other items, were recommended.
- The Mother had a Parental Capacity Assessment done by Debbie Emberley on July 5, 2020 [Exhibit 6, Tab 26]. Ms. Emberley said that the Mother no longer met the criteria for Major Depressive Disorder but rather diagnosed her with an Adjustment Disorder with Anxiety. It was recommended that the Mother continue her counselling to manage her mood and anxiety.
- The Mother had a Psychological Assessment done by Heather Power on May 24, 2022 [Exhibit 5, Tab 1]. Ms. Power diagnosed the Mother with Borderline Personality Disorder and recommended, amongst other things, Dialectical Behaviour Therapy, and a referral to a psychiatrist for medical treatment of ADHD, emotional regulation and to improve mood, energy, and motivation.

[50] Unfortunately, the Mother is not currently undergoing any therapy or professional treatment. She does not take any medication. She is not monitored by a doctor, psychologist, psychiatrist, or mental health professional. Accepting her evidence at its best, the most the Mother is able to show is that she is exercising, maintaining a proper diet, meditating, and doing yoga. That is simply not sufficient

in the circumstances of this case. The Mother has not shown that she has a realistic expectation of success in relation to this overarching concern.

Summary of Findings

[51] After considering all the circumstances, I must deny the Mother 's leave application. Although, the Mother convinced me that there is a reasonable prospect of success in establishing at trial that her home is now consistently clean and tidy, that she is truthful, and that she now has support, she did not show significant improvement in the overarching issue surrounding her mental health.

[52] Given this finding, I do not need to address whether granting leave would be in the Child's best interests.

Conclusion

[53] In my decision, I decided three issues:

- I found that the Agency did not fulfill its commitment to provide the Mother with grief counselling. I encourage the Agency to reconsider its position and to offer the Mother much-needed grief counselling. If the Agency does not agree, I encourage the Mother to seek out grief counselling through Mental Health Services, even though she is likely to experience a significant wait list. It is clear from all the material before me that the Mother continues to suffer from the loss of the Child, as well as another child who was also placed in the permanent care of the Minister. My decision today will only add to the Mother's grief.
- I refused the Agency's motion to dismiss the leave application because of deficiencies in the pleadings.
- I dismissed the Mother's leave application. Although the Mother was able to show considerable improvement in several areas, she did not produce evidence that her mental health issues had significantly improved or would stabilize in the future.

[54] The hearing date for June 12, 2024 shall be released.

[55] Agency counsel will draft and circulate the Order.

Sheppard, J.