SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. D.H., 2012 NSSC 459

Date: 20121226

Docket: SFHCFSA-080333A

Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

D. H. and V. W.

Respondents

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT S. 94(1) OF THE **CHILDREN AND FAMILY SERVICES ACT, S. N. S., 1990, CHAPTER 5** APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION. SECTION 94(1) PROVIDES:

> "94(1) 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."

PUBLISHERS OF THIS CASE FURTHER TAKE NOTE THAT IN ACCORDANCE WITH S. 94(2) NO PERSON SHALL PUBLISH INFORMATION RELATING TO THE CUSTODY, HEALTH AND WELFARE OF THE CHILDREN.

Judge: The Honourable Justice R. James Williams

Heard: November 5, 6, 15 and 26, 2012 in Halifax, Nova Scotia

Oral Decision: Rendered November 26, 2012

Edited for Release: June 7, 2013

Counsel: Peter McVey, counsel for the Applicant
Pavel Boubnov, counsel for the Respondent, D. H.
V. W., self-represented

By the Court:

[1] This is a child protection proceeding under the Children and Family Services Act. It concerns three children: W. M. H., born April [...], 2001; D. T. H., born October [...], 2003; and D. D. H., born October [...], 2004. D. H. is their father. V. W. is their step-mother.

[2] This morning before Court commenced, I was advised that Ms. W. and Mr. H. had been [...] . They are not present in court today. Mr. H. has counsel present. Steps will be taken to communicate this decision to Ms. W. and Mr. H. as quickly as possible. This decision is based on evidence heard in this Court on November 5 and 6, 2012.

[3] The Department of Community Services of the Province of Nova Scotia alleges that the children are in need of protective services pursuant to:

(1) s. 22(2)(b) of the Children and Family Services Act, and the section reads as follows:

> 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 (a).

Clause (a) states:

> If a 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.

(2) s. 22(2)(g) of the Children and Family Services Act:

> A child is in need of protective services where there's a substantial risk the child will suffer emotional harm of the kind described in (f), when 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.

Clause (f) states:

> A child has suffered emotional harm demonstrated by severe anxiety, depression, withdrawal or self-destructive or aggressive behaviour, when the child's 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.

[4] The finding in need of protective services is to be made as of the date of the hearing, as provided by s. 40(2) of the Children and Family Services Act.

[5] The Department also seeks an order for "psychiatric/psychological and parental capacity assessments of the Respondents," as referred to at page 40 of the Brief of the Applicant.

PARENTING BACKGROUND

[6] The parenting history of these children is both complex and tragic. It may be summarized as follows:

> [...]

DELAY

[7] The legal proceeding commenced April 5, 2012. It was terminated and a new proceeding commenced on July 10, 2012. Through this time frame Mr. H. was seeking legal counsel. He had applied for and was denied Legal Aid. He sought a court-appointed lawyer, pursuant to the process outlined by the Supreme Court of Canada, in the case of *New Brunswick Minister of Health and Community Services v. G.(J.)*, [1999], 3 S.C.R. 46.

[8] The Attorney General was the Respondent on that application. The application was heard September 24, 2012. I stayed this child protection proceeding on that date. My decision of October 5, 2012, appointed counsel for Mr. H.. Ms. W. is self-represented. She has not sought court-appointed counsel. She has had the opportunity to make that request.

[9] This matter was heard on November 5 and 6, 2012. Argument was received from counsel on November 15th, and adjourned to November 26, 2012 for decision.

THE EVIDENCE

[10] The evidence put forward by the agency included:

(1) Evidence from the proceeding, the *Minister of Community Services v. V. W. and W. P.* in relation to the child, S., born September [...], 2006. This was admitted in evidence with the consent of all parties pursuant to s. 96(1)(a) of the Children and Family Services Act, and subject to the limits imposed by s. 40(2) of the Children and Family Services Act.

(2) Evidence from the proceeding, *CAS of Halifax v. C.C. and D. H.* concerned the three children before the Court. Ms. W. has not consented to the admission of this file, and set forth reasons for doing so. The Minister of Community Services withdrew the request that this file be admitted pursuant to s. 96(1)(a).

(3) Out of court statements of S. P., Ms. W.'s daughter, made to an agent of the Minister, Cindy Bailey, on July 11, 2012. The Minister sought to have these statements admitted pursuant to s. 96(3)(b) of the Children and Family Services Act. A *voir dire* was held. I ruled these statements did not meet the test of threshold reliability and gave oral reasons for this.

(4) Evidence and audio recordings from the electronic intercepts of D. H.' and V. W.'s phone and motor vehicle. This evidence was made up of excerpts from the electronic intercepts authorized by a Justice of the Supreme Court of Nova Scotia [...] . The excerpts put before this Court were dated on and between[...]. They were admitted with the consent of the parties, although Ms. W. made it clear that they were excerpts, small windows of time, from constant 24-hour tapings over an approximate two month period and that they should be seen in that context.

(5) A series of Affidavits:

- Kimberley Hankin filed an Affidavit on July 10th, and another one dated September 20, 2012. Ms. Hankin is a social worker with the Department of Community Services.

- Jason Hurley, an RCMP officer, filed an Affidavit, dated September 25, 2012.

- Mr. H. filed an Affidavit, dated November 5, 2012.

- Ms. W. filed an Affidavit, dated November 2, 2012.

[11] All parties led *viva voce* evidence, oral evidence; some from witnesses to whom I have not referred. I have reviewed the evidence, documents and my notes. I have listened to the audio recordings put forward. I have not considered the evidence put forward by the Department from third parties concerning the children's circumstances since they came into care which were referred to in the Department's Affidavits. Most of this material was hearsay.

THE ISSUES

[12] 1. Are the children, W., D. and D., in need of protective services pursuant to s. 22(2)(g) of the Children and Family Services Act? Are they at substantial risk of emotional harm as described by the legislation?

[13] Apart from the alleged audio intercept excerpts, the evidence put forward by the Department of Community Services is largely contextual or background evidence, that taken on its own would not result in such a finding.

[14] Mr. H. and Ms. W.were referred to by the Department [...]

[15] The electronic intercepts capture a number of incidents involving V. W.'s interactions with S., or with S. and the other H. children.

[16] It appears for the most part, even on the occasions when the interaction is principally with S., that the other children are present or within earshot. The exchanges are angry, vitriolic, vulgar and, I conclude, emotionally abusive. They arise in or from everyday circumstances - a child hungry for supper, whining about a sibling, getting dressed to leave the home.

[17] The tone of the exchanges is frightening. It is difficult to listen to without wincing. That is the adult experience listening to this audio.

[18] S. and the three children before this Court experienced these exchanges firsthand. Ms. W. says that she was under pressure, that she had [...] “these are only excerpts, small windows”, that “most of the parenting was okay."

[19] Ms. W. refers to the absence of rules in Ms. C.'s home, to S. being jealous of the other children, [...], to a lack of family or friends for support,[...] and to the lack of any relief from child care, as stressors in her life. None of these circumstances change the children’s experience of her behaviour.

[20] Mr. H.’s presence on the audio is limited. There are occasions when it is clear that he is present. That said, there are also occasions when it seems he was not. When there, he is quiet, muted in comments. Sometimes he seems to try to be a peacemaker, sometimes he seems to step aside, staying out of the way of the verbal onslaught. Perhaps he was intimidated, perhaps he felt S. was Ms. W.’s biological child, and that he felt he should defer. In the end he allowed this emotional abuse to occur. His children, Ms. W.’s step-children, were present. He did little to protect them or S..

[21] On occasion, he threatens to spank. A statement like, "You are earning another smack," suggests it would not be the first.

[22] Ms. W.’s statements are extraordinarily abusive. Some seem provoked by the most mundane of events. For example, S. asking, "Mommy, are these on the right foot?", concerning her shoes as S. got ready to leave the home.

[23] S. was the principal target of Ms. W.’s outbursts. The other children were present, vulnerable and, I conclude, either harmed or at risk of harm from the

behaviour. The behaviour, simply put, is unacceptable. These parents have asked that the children, W., D. and D., be returned to their joint care.

[24] I have no hesitation in finding that W., D. and D. are children in need of protective services pursuant to s. 22(2)(g). There was and is a substantial risk of emotional harm. Ms. W. and Mr. H. suggest that there has been counselling with a Dr. Ryan and with a therapist, Mr. Augusta Scott. The evidence does not go beyond that. I have no way of knowing in any detail the content or outcomes of the counselling they have received. They have referred to grief, anger and parenting issues being addressed. I do not know if these counsellors are or were aware of the emotional abuse chronicled by the electronic intercepts. I do not and cannot conclude that the risk of harm has been addressed in any way by the counselling or programs that Ms. W. and Mr. H. have referred to.

[25] 2. Are the children, W., D. and D., in need of protective services pursuant to s. 22(2)(b) of the Children and Family Services Act? Are they in substantial risk of physical harm as described by the legislation?

[26] There is reference to spanking and to “earning another smack” in the audio excerpts. There is one occasion where spanking is threatened and there is a smack on the audio. Mr. H. said the smack was not a spank but him hitting the wall or smacking or slapping to get the child's attention. Even if a spank occurred from Mr. H., I do not conclude that the legislation or section in question is so broad as to regard a spank as physical harm in a child protection context.

[27] I would not condone spanking. There's much controversy in our society about it, as there should be. I am cognizant of the fact that [...], and that the evidence of spanking is limited and isolated.

[28] That said, the anger and emotion in Ms. W.-H.'s words and tone is visceral. To use a word she uses, it is "hateful." I conclude her words are threatening and shocking. I conclude that the Minister has demonstrated that these children are in need of protective services pursuant to s. 22(2)(b).

[29] I conclude that to prove a risk of physical harm, the Minister does not have to demonstrate that the physical harm has occurred, but merely that there is a substantial risk of it.

[30] In these circumstances, anyone listening to these audio tape excerpts would have concern for the risk of harm in the physical as well as emotional sense. There is no need for expert evidence.

[31] 3. Should the Court make an order for psychological/psychiatric and parental capacity assessments of the Respondent parents?

[32] Section 39(4)(g) of the Children and Family Services does not allow the court to order such assessments but rather allows the Court, at an interim hearing or under the terms of an interim order, as here, to order "the referral of the child or parent or guardian for psychiatric medical or other examination."

[33] By contrast, s. 43(1)(a) of the Children and Family Services Act allows the Court to impose conditions on a supervision order, including:

> an order for s. 43(1)(f), the assessment, treatment, or services to be obtained for the child by a parent or guardian or other person having the care of the child;
>
> s. 43(1)(g) the assessment treatment or services to be obtained by a parent or guardian or other person residing with the child;
>
> s. 43(1)(h) any other terms, the court feels appropriate.

[34] No supervision order is being made; the Court's authority then is to "refer".

[35] An order for a psychological, psychiatric or parenting capacity assessment is intrusive, very intrusive. The application by the Department at this point is framed in a very general manner. I am not prepared to make the order as currently requested. I am prepared to revisit the request for an Order providing for a referral for an assessment if the Department of Community Services identifies:

(1) what is to be assessed;

(2) who is to be assessed;

(3) who would do the assessment and what are their professional qualifications;

(4) what time frame would the assessment be completed within.

[36] The agency may or may not pursue this. I leave that to their discretion. The order, if made at this stage of the proceeding, would be, as I indicated, a referral. It would not compel Ms. W. or Mr. H. to attend the assessment.

[37] Their decision to do so (if an order was made after the Department provides the information I have indicated and if the Court in that circumstance made the order for a referral) would then be based on a concrete, specific order, not a general mandate to assess.

[38] A disposition order must be made within 90 days of today's date. A disposition pre-trial will be scheduled. If the agency pursues an assessment order, it will advise the parties and the Court of that intent by noon the day prior to the pre-trial. In that event, dates for the filing of affidavits concerning the assessment issue will be set at the pre-trial. Should either parent wish to file an affidavit in reply, they will be given an opportunity to do so.

[39] At the disposition pre-trial, dates would be set for the filing of an agency plan and replies, if any, from Mr. H. and Ms. W.. The agency must put forward an agency plan, that is legislatively mandated. Mr. H. and Ms. W.-H. will be given an opportunity to put forward their plan or plans. Whether they involve joint care, one of the parents' extended family or some other arrangement. They may ask in the circumstances of [...] that the matter of disposition be delayed. Time will tell.

[40] The matter is adjourned to a pre-trial on the matter of disposition on Monday, December 17, 2012 at 9:30 a.m.

J. S. C. (F. D)

Halifax, Nova Scotia