

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. J.R., 2010 NSSC 222

Date: 20100526
Docket: 070091
Registry: Sydney

Between:

The Minister of Community Services

Applicant

v.

J. R. and G. N.

Respondents

Judge: The Honourable Justice Theresa Forgeron

Heard: May 20, 25, and 26, 2010, in Sydney, Nova Scotia

Oral Decision: May 26, 2010

Written Decision: June 15, 2010

Counsel: Tara MacSween, Solicitor for the Applicant
Duncan MacEachern, Solicitor for the Respondent, J.R

Editorial Notice

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

Restriction on publication: Publishers of this case please note:

That s. 94(1) of the Children and Family Services Act applies and may require editing of this judgement 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. 1990, c.5

By the Court:

I. Introduction

[1] The child is almost three years old. His father is a 60 year old, retired *. His mother resides in *; she is pregnant with the parties' second child. The mother is seeking permission to locate to Canada so that the family can live together.

[2] On May 4, 2010, the Minister filed a protection application against the parents because of concerns of neglect and inadequate supervision. Initially, the child was placed in the care of a paternal aunt, with a provision for supervised access. At the first court appearance, it was agreed that the child would be returned to the supervised care of the father, but subject to conditions.

[3] The final stage of the section 39 hearing was contested. The father seeks a dismissal of the application. The Minister seeks a supervision order, and a finding that there are reasonable and probable grounds to believe that the child is a child in need of protective services.

II. Issues

[4] The court will determine the following two issues:

- a. Are there reasonable and probable grounds to believe that the child is in need of protective services?
- b. If yes, what interim order should be granted pending the completion of the protection hearing?

III. Background Information.

[5] The father resides in Sydney with the child. Although retired, the father owns rental properties, which he manages. He has earned three university degrees: *. He is a proud and loving father to the child, who is described as happy, well-groomed, and appropriately dressed.

[6] The Minister initially became involved with the family in the spring of 2009 because of reports that the child was left unattended in the father's car while the

father attended to business. An agency worker spoke to the father regarding his actions. The father promised that he would not leave his son alone in a car again.

[7] Less than a year later, the father contacted the agency and advised that he had left his son in the car while he went into a drug store to retrieve a pre-ordered prescription. Following this disclosure, the agency arranged to have a family support worker meet with the father to review supervision issues. The father cooperated. After the counseling was completed, the agency closed its file.

[8] The Minister took further action on April 28, 2010, after the agency received a police referral. The worker understood that the police found that both the child's babysitter, Mr. L., and the father were intoxicated. The Minister investigated this referral.

[9] The Minister commenced court proceedings because of the police referral, and the Minister's conclusion that the father had exhibited a pattern of poor decision-making, which raised concerns of neglect and inadequate supervision. The Minister felt that the child was at a substantial risk of physical harm.

[10] Since the court application was initiated, the father has cooperated and participated in all services. He has completed the counseling program provided by the agency's family support worker. These sessions dealt with supervision issues. He further completed the adult detox program, which provided education on the effects of alcohol. The father also complied with the various provisions of the supervision order.

[11] The five day docket appearance was scheduled for May 10, 2010. The final stage of the section 39 hearing was held on May 20, 2010. Affidavit and *viva voce* evidence was received from agency worker, Doug Thorne and the father. In addition, *viva voce* evidence was provided by Constables Alan McIsaac and Wayne Pitcher. Submissions were provided by counsel on May 25, 2010, and the court adjourned for oral decision on May 26, 2010.

IV. Analysis

[12] **Are there reasonable and probable grounds to believe that the child is in need of protective services?**

[13] Position of the Minister

[14] The Minister states that it has met the threshold requirements under s. 39 of the *Children's and Family Services Act* for the following reasons:

- a. The father left his son alone in his car on multiple occasions, and after confirming with the agency worker that he would not do so. The father's word thus cannot be trusted.
- b. The father left his son in the care of Mr. L., who was intoxicated, once again placing his son at a substantial risk of harm.
- c. The father's conduct shows a consistent pattern of poor judgment, neglect and inadequate supervision, which have repeatedly placed the child at a substantial risk of physical harm.
- d. The father minimizes the seriousness of his actions. Without an acceptance of responsibility, the father cannot make the necessary changes which will alleviate the risk of harm to his son.
- e. The Minister believes that the child is at a substantial risk for future harm based on the history of neglect and the chronicity of incident/agency involvement, and the probability that the child will be injured in the father's care is high [para 34 of Mr. Thorne's affidavit].

[15] Position of the Father

[16] The father states that the application must be dismissed for the following reasons:

- a. The Minister has not proven its case.
- b. The Minister's case is based upon speculation. The evidence does not support the contention that the child was ever placed at a substantial risk of harm.

- c. Although his son was left alone in his car, the father provided supervision because the child was always within eyesight, and because of the mechanics of the car.
- d. Mr. L. was not intoxicated while caring for the child. The father was not intoxicated. The father states that at best, the evidence shows he made an error in judgment.
- e. Any risk that may have existed, has been alleviated by the services undertaken by the father.

[17] **Legal Requirements**

[18] There is not an extensive catalogue of written decisions dealing with s. 39 of the *Children's and Family Services Act*. Nonetheless, several judges have articulated legal principles applicable to this stage of the protection proceeding.

[19] *Philosophy of the Act and Burden of Proof*

[20] In **Family and Children's Services of Kings County v. Y.B.** [2000] N.S.J. No. 263 (Fam.Ct.), Levy J. discussed the philosophical debate present in child protection proceedings at paras 9 and 10. He notes that although the primary role of the court is the protection of children, the integrity of the family unit must also be maintained to the extent possible. All measures taken must be as unintrusive as possible given the factual circumstances of the case. Levy J. also confirmed that an unrealistic standard of proof should not be adopted at this stage, as such could lead to the dismissal of an application respecting a vulnerable child in need of protection.

[21] Therefore, although the burden is upon the Minister to prove its case, the threshold is significantly lower than that found in s. 40 of the *Act*. The test set out in s. 39 of the *Act* requires the Minister to prove its case on a "reasonable and probable grounds" standard.

[22] *Reasonable and Probable Grounds Standard*

[23] In **Family & Children's Services of Digby (County) v. G.(D.)** 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.

[24] 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 be permitted to proceed when the court is satisfied that the Minister's case reveals reasonable and probable grounds.

[25] 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 of the interim hearing.

[26] *Credible and Trustworthy Evidence*

[27] 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*.

[28] In **Family and Children's Services of Kings County v. Y.B.**, *supra*, Levy J. expanded on this requirement at para 12:

12 In doing so, the very first thing a court has to do is to determine whether the evidence being presented, in whatever form, is in fact credible and reliable. Merely because some person about whom little or nothing is known makes or is purported to have

made a statement does not make that statement credible or trustworthy. It is a simple fact that some people and some statements are credible and trustworthy and some aren't. In my opinion there has to be some basis, be it grounds for confidence in the source, be it inherent in the evidence, or be it found in some extraneous corroboration that can enable a court to first decide, ('consider'), that the evidence is credible and trustworthy. If that determination cannot be made by the judge, then the evidence cannot properly be considered by the court.

[29] **Decision**

[30] I find that the Minister has not met the burden upon it. Pursuant to s. 39 (2) of the *Act*, I find that there are no reasonable and probable grounds to believe that the child is in need of protective services. As such, I must dismiss the application. I make this finding after thoroughly reviewing all of the evidence, the submissions of the parties, the legislation, the case law, and for the following reasons:

- a. The father will not leave his son unattended in a motor vehicle again. I accept the father's evidence that he has not done so since his session with the family support worker in February 2010. I do not share the agency's concerns about the father's veracity or intentions. I find the father to be a credible and reliable witness.
- b. I make this finding even though the father fails to appreciate the dangers inherent in leaving a child alone in a car. I accept that the father had his son within view during the majority of the time when the child was alone in the car. This finding, however, does not negate the fact that the child should never have been left alone in a car. Despite these facts, I am more than confident, and indeed I accept the evidence of the father, that the father will not leave his child alone in a car again.
- c. The agency closed its file after the father successfully completed the counseling with the family support worker on this issue. This action indicates that the agency likewise believed that the risk was properly addressed through counseling.

- d. The agency was given incorrect information about the father's condition on April 28, 2010 as found in para 21 of Mr. Thorne's affidavit. Neither Constable McIsaac, nor Constable Pitcher thought the father was intoxicated on April 28. I accept the father's evidence that he had only consumed a portion of a can of beer on April 28.
- e. I also accept the father's evidence that Mr. L. was not intoxicated on April 28, 2010. I acknowledge that Mr. L. did consume some beer, a portion of a can, before taking the child for a walk to see a car, and then to the playground. I further find that although Mr. L. smelled of alcohol and exhibited other signs of intoxication, Mr. L. was able to effectively and safely care for the child on April 28.
- f. I recognize that this finding conflicts with some of the oral evidence of Constable Pitcher. I find that Constable Pitcher had little time and limited opportunity to assess Mr. L.'s actual condition. Constable Pitcher only observed Mr. L. quickly on a few occasions while Mr. L. was sitting in the back seat of the police car looking after the child. Constable Pitcher also confirmed that in his "estimation", Mr. L. was "no harm" to the child, or "anything else".
- g. Constable McIsaac's evidence must be assessed in light of his over-reaction to the circumstances which presented on April 28, 2010. Constable McIsaac's over-reaction is seen by his summons of three additional police officers, and two additional police vehicles in a situation which was described as cooperative and devoid of any aggression.
- h. Constable McIsaac also exaggerated. For example, in his evidence, Constable McIsaac stated that "beer cans" were everywhere in the L. apartment. Constable Pitcher, however, said he observed 2-3 cans of beer. This is in keeping with the father's evidence that two cans of beer had been purchased earlier in the day. The father also said that if the police had checked the beer cans, as he requested, they would have found that the cans still had beer in them. I accept the father's evidence.

- i. Constable McIsaac's over-reaction likely stems from his belief that anyone who had alcohol in their system should not care for the child. As a result, Constable McIsaac made arrangements for the child to be removed from the father's care, and placed in the care of a paternal aunt.
- j. Constable McIsaac also admitted that he was not "thinking properly" when he stated that the father's apartment was in a state of disarray when making the referral to the agency. After he called the agency, Constable McIsaac remembered that the apartment belonged to Mr. L., and not to the father.
- k. The evidence of the police must also be scrutinized because of their decision to allow Mr. L. to continue to care for the child, in the back seat of a police car, for approximately 30 to 45 minutes, while the paternal aunt drove in from the north side area. If Mr. L. was as intoxicated as was stated, he would not have been left alone with the child; indeed, he would not even be capable of caring for the child. The fact that some police officers were watching Mr. L. from outside of the police car does not diminish my finding.
- l. Further, Constable McIsaac said he allowed Mr. L. to be alone with the child in the police car because he didn't want to separate Mr. L. from the child. Constable McIsaac stated that he didn't want to traumatize the child. Constable McIsaac was about to testify that Mr. L. was perfectly fine to take care of the child when he stopped mid-sentence. Although the words "the child" did not make their way into the evidence, I find that Constable McIsaac meant that Mr. L. was perfectly fine to take care of the child in his opinion.
- m. Finally, I find that any risk, which may have existed, has in fact been eliminated by the services undertaken by Mr. R.. Mr. R. took all recommended services. He cooperated and participated. I have no concerns about Mr. R.'s judgment as it relates to child protection issues.

[31] As the protection proceedings have been dismissed, it becomes unnecessary to address the second issue.

V. Conclusion

[32] In summary, I find that the Minister has not proven its case. I find that a reasonably careful and prudent person would not believe, would not have an honest or strong belief, that the child is in need of protective services in the circumstances of this case. The evidence in support of such a contention is not credible or trustworthy. The application is dismissed.

Dated at Sydney, Nova Scotia, this 15th day of June, 2010.

Justice Theresa Forgeron