NOVA SCOTIA COURT OF APPEAL
Citation: Nova Scotia (Health) v. J.K.D., 2010 NSCA 25

Date: 20100324
Docket: CA 318358
Registry: Halifax

Between:

Minister of Health

Appellant

v.

J. K. D.
(by his litigation guardian, P. D.)

Respondent

Editorial Notice

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

Judges:	Bateman, Hamilton and Beveridge, JJ.A.
Appeal Heard:	January 26, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Hamilton, J.A., Bateman and Beveridge, JJ.A. concurring.
Counsel:	John Underhill and Joseph R. Wall, for the appellant Matthew MacNeil and Gussie Postlewaite, for the respondent

Reasons for judgment:

[1] The Minister of Health ("Minister") appeals from the July 13, 2009 oral decision and subsequent order of Justice M. Clare MacLellan in which she found that the respondent, J. K. D., continued to be an "adult in need of protection" as that term is defined in s. 3(b)(ii) of the **Adult Protection Act**, R.S.N.S. 1989, c. 2, and ordered the Minister to pay (1) the transportation costs for Mr. D.'s wife to visit him one additional time per week at the nursing home where he has been placed and (2) certain dental costs.

[2] The Minister became involved with Mr. D. in December 2008 when she received an adult protection referral from his doctor, Dr. B. R., indicating (1) he suffered from frontal lobe dementia and a congenital brain disorder rendering him incompetent and (2) he had begun to show increasingly inappropriate behaviour such as physical and sexual aggression. At that time the respondent was living with his wife in *.

[3] Following her investigation the Minister applied on December 29, 2008 to the court for an order: that the respondent was an adult in need of protection; that he was not mentally competent to decide whether or not to accept the assistance of the Minister under s. 9(3)(a); authorizing the Minister to provide services to the respondent (including placement in a facility approved by the Minister and other services set out in the Minister's Care Plan); and for the appointment of a guardian. The judge granted the order in January 2009.

[4] Mr. D. was first placed in the * hospital, then in an extended care facility in * and finally, on February 19, 2009, in * in S. where he has remained since.

[5] In May 2009 Mr. D.'s guardian applied for an order (1) that he continued to be an adult in need of protection and (2) that the Minister pay the transportation costs for his wife to visit him one additional time per week and certain dental costs. Approximately one month later, the Minister applied to terminate adult protection's involvement with the respondent. Both applications were heard at the same time. The judge granted the respondent's application and dismissed the Minister's application resulting in the order under appeal.

[6] On the first question before her of whether the respondent continued to be an adult in need of protection, the judge concluded that he was because he was not receiving adequate care and attention as that phrase is defined in s. 3(b)(ii). She reasoned:

> [5] In relation to the emotional element which I examine, bearing in mind Dr. R.'s reports, who is a psychiatrist and has treated both parties, indicated by correspondence dated April 2, 2009 (as attached to Exhibit # 7, May 25, 2009):
>
> > I am writing on behalf of B. D.. B. is a long time patient at the Mental Health Clinic in *. She, as I am sure you are aware of, has significant other medical problems. Her husband has recently been placed under the Adult Protection Act in a long term care facility, *, in Sydney, N.S. I had recommended the importance of visits for her husband who has considerable difficulty with adjusting to his new placement. I would support certainly a minimum of twice a week trips for B. to visit him in Sydney and I wonder if she can be offered some assistance in this area. ...
>
> [6] Based on Dr. R.'s first letter read into the record, and based on the comments made by Mrs. D., legal guardian (Exhibit # 6 and viva voce) who is retained for this purpose, this is her purpose, to come and tell us what this incompetent person needs, and that is what she did. She stated this man is isolated, he can't mix with the people, the age difference is marked, he is in his room watching t.v. with his door closed. He relies on his wife. He misses his wife, he wants to see her every day. The reality is, at this stage, July 2009, he can't see her every day and, therefore, **I make on the balance of probabilities a finding under s. 3(b)(ii) that he, even in his physically attractive premises, is lacking adequate care and attention in that his soul mate is not able to see him more than once a week,** and that is only with the assistance of Social Assistance. Mr. MacNeil is right, the time this couple have left together is unknown. As Mrs. D. said, we don't know what it is , we're dealing with the here and now; and here and now Mr. D. needs his wife; he misses her. We know she misses him; and it sounds cruel but she's not the focus today. **Mr. D. misses her. He calls her when he falls on the floor; he calls her when he needs something; he is relying on her and he relies on her emotionally.** He has very few pleasures left in life unfortunately, the television, the cable and more importantly his soul mate, his wife. [emphasis added]
>
> [7] I note Mrs. S. A., the adult protection worker on this matter, wrote on February 20, 2009 in Mr. D.'s proposed plan of care that "arrangements have been made for his wife to visit several times a week" (Exhibit # 2).

[7] Thus the judge, after referring to Dr. R.'s correspondence on behalf of Mrs. D., the guardian's evidence and the five month old Minister's Care Plan, found that Mr. D. was not receiving adequate care and attention and hence continued to be an adult in need of protection because he was not able to see his wife, whom he missed and relied on emotionally, more than once a week.

[8] The judge did not mention other evidence that was before her indicating that the respondent was appropriately placed at * and was safe, content and receiving excellent care there. That evidence included evidence of D. S., a Registered Nurse on staff at *, who confirmed that there had been no behavioural problems with the respondent, describing him as doing "marvelous". She further described the respondent as follows:

> "... he sometimes remains in his room with his door closed. Nonetheless, other times he interacts with other residents and plays cards, chats with staff and participates in other activities."

[9] Also, on June 3, 2009, the respondent discussed his placement at * with S. A., an Adult Protection Worker, advising her that while he would rather be home, he liked the staff and food.

[10] Later on June 3, 2009, * staff advised Ms. A. that the respondent appeared content in his placement and there had been absolutely no behavioural issues or other safety issues since he became a resident of *.

[11] In addition, the respondent's wife, in her affidavit, swore that "K. has received excellent care while a resident of *", confirmed her belief that "K. enjoys residing at *" and expressed happiness that he "...is content and appropriately placed". She also swore that she did not want him transferred to another facility, even one closer to their home in *, which would allow her to visit him more often, because he is well placed.

[12] On cross-examination, Mrs. D. confirmed that the respondent was doing "marvelous" at *, and that he was receiving "marvelous care. They're good ... they're, the staff is a lovely staff".

[13] Further, Ms. D., the respondent's litigation guardian acknowledged that the respondent was receiving excellent care at *, with regular visits and outside trips with his father.

[14] It appears that the sole reason for the request for the court to find the respondent an adult in need of protection is due to the very unfortunate personal and financial circumstances of Mrs. D. which prevented her from being able to visit the respondent more than once a week and pay for recommended dental work.

[15] The appellant raises a number of interesting and complex issues regarding the ability of a court to make orders pursuant to s. 9(3)(c) of the **Act**. I need not address them for the reasons that follow. The parties agree that no order can be made without the court first making a supportable finding that a person is an adult in need of protection within the meaning of s. 3(b)(ii) of the **Act**. The appellant says this issue is a matter of law. As such, no deference is owed to the finding of the judge; the finding is reviewable by this court on the standard of correctness. The respondent suggests the finding by the judge is a question of fact or mixed law and fact. Deference is therefore owed to the judge's finding; it can only be disturbed on appeal if the judge made a clear and palpable error.

[16] I am satisfied that the question of whether Mr. D. was an adult in need of protection is a question of mixed fact and law. To reach her conclusion, the judge was required to properly interpret and apply the legal test set out in s. 3(b)(ii) of the **Act**, that defines when a person is an adult in need of protection, to the specific facts she found to exist with respect to the respondent's situation. In my opinion, the judge erred in law in a number of respects. She also arrived at factual conclusions that are unreasonable, unsupported by the evidence, and clearly wrong. However, I prefer to rest my decision on what I see as the most pervasive error of law that caused her to conclude that the respondent was an adult in need of protection, how she interpreted the legislation.

[17] The standard of review when reviewing a judge's finding of mixed law and fact depends on whether the error can be traced to an error of law which may be isolated from the mixed question of fact and law. Where that is the case, the extricated legal principle will attract the standard of correctness. In this case I am satisfied there is a readily extricable principle of law, i.e. whether the judge correctly interpreted and applied the phrase "is not receiving adequate care and

attention" in s. 3(b)(ii). Thus the standard of review is correctness; **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, paras. 26 and 36.

[18] The relevant portions of s. 3(b) provide:

> (b) "adult in need of protection" means an adult who, in the premises where he resides,
>
> ...
>
> (ii) **is not receiving adequate care and attention**, is incapable of caring adequately for himself by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his adequate care and attention; (emphasis added)

[19] There was never a question that the respondent fell within the last two of the three criteria that must be met under s. 3(b)(ii). He was incapable of caring adequately for himself by reason of mental infirmity and was unable to make provision for his adequate care and attention. The only issue was whether the first criterion, whether he was not receiving adequate care and attention, was fulfilled. The judge rightly focussed on this.

[20] I therefore must consider whether the judge correctly interpreted and applied the phrase "is not receiving adequate care and attention" when she found the respondent's inability to see his wife more than once a week fell within its ambit.

[21] This court considered the approach we are to apply in interpreting statutes in **Nova Scotia (Minister of Health) v. R.G.**, 2005 NSCA 59; [2005] N.S.J. No. 143:

> [25] When considering issues of statutory interpretation, the so-called "Driedger's modern approach" is now widely accepted in this country. Iacobucci, J. in **Bell Express Vu Limited Partnership v. Rex**, [2002] 2 S.C.R. 559 at ¶ 26 explains:
>
> > ¶ 26 In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
> >
> > > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their

> grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: [authorities deleted]. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[22] Thus we are to consider the correct interpretation of the phrase at issue, “not receiving adequate care and attention”, taking these principles into account. While a consideration of the grammatical and ordinary sense of this phrase is not determinative in this case, a consideration of its context, the scheme and object of the **Act** and the intention of the Legislature, is determinative.

[23] The purpose of the **Act** is found in s. 2:

> The purpose of this Act is to provide a means whereby adults who lack the ability to care and fend adequately for themselves can be protected from abuse and neglect by providing them with access to services which will enhance their ability to care and fend for themselves or which will protect them from abuse or neglect.

[24] This court has interpreted that purpose in **R.G., supra**:

> [29] Based on the above, this legislation, simply put, is designed to protect vulnerable adults from abuse and neglect. It targets only those who need protection, according to a detailed definition set out in the **APA**. Viewed with that purpose in mind, it follows that judges should only issue orders involving *adults in need of protection*. On this same basis, it should make no difference whether the application is for an initial order, a variance or a renewal. Conversely, for the same reason, an order should be terminated if the subject is not an *adult in need of protection....*

[25] The **Act** is aimed at protecting vulnerable adults from abuse and neglect. The fact the **Act** is aimed only at these serious conditions of abuse and neglect is indicated not only by the actual words used in s. 2 but also by the drastic measures the **Act** authorizes the Minister to take, with the court’s approval, when a person is found to be an adult in need of protection. For instance, under s. 9(3)(c) if a person

is found to be an adult in need of protection they can be removed from their home and placed in a facility, as the respondent was in this case. In addition, under s. 9(3)(d), protective intervention orders may be made prohibiting or limiting contact between an adult in need of protection and others who the Minister determines are a source of danger to that adult. Under s. 15 the Minister may call on peace officers to assist in the execution of orders made pursuant to the **Act**. Also, under s. 9(4) the Minister may advise the Public Trustee if there appears to be no guardian or an inadequate guardian for an adult in need of protection and the Public Trustee may assume immediate management of the estate of such an adult pursuant to s. 13(2).

[26] The **Act** is not aimed at putting vulnerable adults into merely more favourable situations than they find themselves in; it is about providing services to the adult which will help the adult care and fend adequately for himself or protect him or her from abuse or neglect.

[27] Considering the purpose of the **Act** to protect vulnerable adults from abuse and neglect and the intrusive measures that the **Act** authorizes once a person has been found to be an adult in need of protection, I am satisfied it could not have been the Legislature's intention to authorize initial or continued state intervention into the lives of adults who are safely placed in appropriate facilities and receiving "excellent" care, as the evidence indicated the respondent was, simply because that adult does not see his spouse more than once a week.

[28] When the meaning of the phase "is not receiving adequate care and attention" is considered in light of the context, scheme and object of the **Act** and the intention of the Legislature, I am satisfied the broad interpretation given to this phrase by the judge is wrong. To interpret this phrase that broadly would be setting the threshold, from which the intrusive powers of the **Act** could be launched or continued, too low.

[29] Accordingly, I would allow the appeal. As this disposes of the appeal, it is the only issue that I will deal with.

[30] Normally, on allowing an appeal, it is appropriate to reverse the judge's decision and terminate the order appealed from. That is unnecessary here as the order is no longer in existence. The order would have terminated, unless renewed

by a further application, by the legislated six-month limitation on such orders (see s. 9(5) and (8)). At the hearing of this appeal on January 26, 2010 counsel advised that the order under appeal was terminated by consent just prior to the six month anniversary of the order. Both counsel, however, urged the panel to nonetheless hear and decide the appeal, given the difficulty in having an appeal of this sort heard while the order is in force. The panel agreed to proceed with the appeal on this basis. Since the hearing of this appeal, we have been advised by counsel of Mr. D.'s unfortunate death.

[31] No costs were sought and I would not order any.

Hamilton, J.A.

Concurring:

Bateman, J.A.

Beveridge, J.A.