NOVA SCOTIA COURT OF APPEAL
Citation: ***A.K.S. v. Nova Scotia (Community Services)***,
2007 NSCA 86

Date: 20070719
Docket: CA 279542
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

A.K.S.

Respondent

Restriction on publication: **Pursuant to s. 94(1) Children and Family Services Act.**

Judge(s): Bateman, Hamilton & Fichaud, JJ.A.

Appeal Heard: June 15, 2007, in Halifax, Nova Scotia

Held: Appeal dismissed as per reasons for judgment of Hamilton, J.A., Bateman & Fichaud, JJ.A. concurring

Counsel: Peter C. McVey, for the appellant
Anne Malick, Q.C., for the respondent

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT 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.**

Reasons for judgment:

[1] The Minister appeals the February 20, 2007 unreported decision of Judge Corrine Sparks of the Nova Scotia Family Court in which she dismissed the Minister's application to place the 14 year old respondent in secure-treatment for 30 days at the Wood Street Centre pursuant to s. 56(3) of the **Children and Family Services Act**, S.N.S. 1990, c. 5 .

[2] The respondent has had a troubled childhood moving between the houses of parents and relatives throughout her life. At the time she appeared before the judge, she was in the temporary care and custody of the Minister. She was taken into the Minister's care on August 23, 2006 at her mother's request when her mother found her behaviour unmanageable and beyond her control. The respondent had been leaving home for varying lengths of time and refused to regularly attend school. In or about January 2006 she had been referred to the IWK Health Centre as a result of cutting her wrists. On July 6, 2006, she had refused to attend an appointment with a therapist offered by the IWK Mental Health Clinic.

[3] On October 16, 2006, following the respondent being taken into care and with her consent, another judge of the Family Court granted a 30 day secure-treatment order putting the respondent in the Wood Street Centre. The information before the court at the time of the October application indicated the respondent left her group home without permission (41 times in the first three weeks for varying lengths of time ranging from 30 minutes to 30 hours), refused to regularly attend school, refused to participate in any type of therapy offered by the Minister, was charged with two criminal offences and admitted to illegal drug use with a 24 year old male. In an affidavit a clinical social worker stated that she believed the respondent was "suffering from an emotional or behavioural disorder." There was no evidence that a formal medical diagnosis by a psychologist or psychiatrist had been made that the respondent suffered from an emotional or behavioural disorder.

[4] While at the Centre the respondent received treatment directed to the following goals: (1) to be able to recognize and express angry feelings without becoming emotionally out of control; (2) to follow the directions and reasonable requests of her guardian(s); and (3) to develop an understanding of the legal consequences of refusing to abide by the standards of behaviour set by society.

[5] After 30 days at the Wood Street Centre the respondent returned to live in her group home where she resumed her maladaptive behaviour. She stopped taking her birth control pills in December.

[6] On January 16, 2007, as part of the ongoing child protection proceeding concerning the respondent, she was ordered "to attend and participate in individual counselling and therapy with Karen Llewellyn," a service the Minister had made available to the respondent upon her discharge from the Wood Street Centre in November. She failed to attend approximately one-half of her scheduled appointments.

[7] On or about February 15, 2007 the Minister applied for a second 30 day secure-treatment order which the judge dismissed and which is the subject of this appeal. In support of her application the Minister filed an affidavit of another clinical social worker, Caroline Jeppesen, who had had no personal contact with the respondent. She swore in her affidavit that she believed the respondent was suffering from an emotional or behavioural disorder. Attached to that affidavit was a letter from Ms. Llewellyn, the respondent's therapist, in which she supported the Minister's application for a secure-treatment order and stated that she thought the respondent "would participate in the counselling process and has already to an extent, but she needs to stop running and settle down first in order to participate. She offered no opinion about whether the respondent was suffering from an emotional or behavioural disorder. Again there was no evidence that a formal medical diagnosis had been made that the respondent was suffering from an emotional or behavioural disorder. There was no evidence of suicidal ideation by the respondent after January 2006.

[8] Ms. Jeppesen and the respondent were the only two witnesses who testified at the hearing on February 20.

[9] The Minister's main argument on appeal was that the judge erred by interpreting s.56(3)(a) of the **Act** as containing a prerequisite to the granting of a secure-treatment order; namely, a formal medical diagnosis by a psychologist or psychiatrist that the youth was suffering from a specific emotional or behavioural disorder.

[10] The Minister's second argument was that the judge erred by overlooking or giving no weight to material evidence including Ms. Lewellyn's letter, the finding by the Family Court judge in October that the respondent was suffering from an emotional or behavioural disorder, the statement by Ms. Jeppesen that she believed the respondent was suffering from an emotional or behavioural disorder and the respondent's attempt to commit suicide in January 2006.

[11] The respondent's position on the Minister's first argument was that the judge did not make a determination that a formal medical diagnosis is required before a secure-treatment order can be granted. She pointed out that she did not argue before the judge, and she was not arguing before this Court, that such a formal medical diagnosis is required. She argued that the basis of the judge's decision to dismiss the Minister's application was that she was not satisfied on the evidence before her that the respondent suffered from an emotional or behavioural disorder, which she submitted must mean something more than rebellious behaviour.

[12] With respect to the Minister's second argument the respondent said that the judge did not err by overlooking or inappropriately weighing the evidence.

[13] Section 56(3) of the **Act** provides:

> 56 (3) After a hearing, the court may make a secure-treatment order in respect of the child for a period of not more than thirty days if the court is satisfied that
>
> (a) the child is **suffering from an emotional or behavioural disorder**;
>
> (b) it is necessary to confine the child in order to remedy or alleviate the disorder; and
>
> (c) the child refuses or is unable to consent to treatment.
>
> [Emphasis added]

[14] The standard of review in a case such as this is the civil standard of review explained as follows in **Children's Aid Society of Cape Breton-Victoria v. A.M.**, [2005] N.S.J. No. 132 (Q.L.):

> [26] This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg County v. G.D.**, [2003] N.S.J. No. 416 (Q.L.) (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.B.T.** (2002), 207 N.S.R. (2d) 109; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at paras. 10-16.

[15] The appropriate standard of review on questions of mixed fact and law ranges from correctness for extractable issues of law and, otherwise, palpable and overriding error: **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, ¶ 38.

[16] With respect to the Minister’s first argument, on reading the judge’s decision as a whole I am not satisfied she determined that it is a prerequisite to the granting of a secure-treatment order pursuant to s.56(3), that there be evidence of a formal medical diagnosis that the young person is suffering from an emotional or behavioural disorder. There is no statement to that effect in her decision and I am not satisfied that it is a reasonable to draw such an inference from her reasons.

[17] Being satisfied that the judge did not make such a determination, and with both parties taking the position that such a formal medical diagnosis is not required, it is not necessary that we decide whether such a diagnosis is required by s.56(3)(a). Given the absence of any expert evidence in the record as to the nature and scope of "an emotional or behavioural disorder," this is not the appropriate case in which to settle that issue.

[18] I note that several Nova Scotia Family Court judges have stated in different decisions that a formal medical diagnosis is not required; that a judge can make a determination of whether a youth is suffering from an emotional or behavioural disorder based on the other evidence before him or her: **Minister of Community Services v. T.M.M.L.J**., December 11, 2003, FT CFSA-29106, unreported (Judge David R. Hubley); **Minister of Community Services v. C.M**., July 14, 2005, FT

CFSA-04234, unreported (Judge Robert C. Levy); and **Minister of Community Services v. M.D.P.**, January 30, 2007, FT CFSA-49128, unreported (Judge David A. Milner).

[19] The parties agree that a formal medical diagnosis may be introduced into evidence at a hearing under s.56(3). In such event the diagnosis would obviously be of assistance to the judge hearing an application by the Minister, if accepted.

[20] I agree with the respondent that the judge dismissed the Minister's application on the basis that there was not sufficient evidence to satisfy her that the respondent was suffering from an emotional or behavioural disorder. She stated in her decision:

> What is a "disorder" as defined under the legislation? These matters come on fast for adjudication but the question of the meaning of an emotional or behavioural disorder is a crucial question for determination under the legislation in particular Section 56(3)(a).
>
> If the Court is being asked to establish that there is a pattern of established behaviour, there is no difficulty in the Court finding that there is a pattern of truancy, leaving late at night, sometimes even in pyjamas. While this behaviour is perhaps risky behaviour, but no evidence of self-harm and no evidence of suicidal ideation. In short, I do not have any difficulty concluding there is a pattern of behaviour of troubling if not risky behaviour. But the pivotal question becomes how does this troubling behaviour translate into an "emotional or behavioural disorder"? . . . In the present circumstances, the Court is asked to draw the conclusion that because there is a pattern of established troublesome behaviour there is, implicitly either an emotional [or] behavioural disorder.
>
> Regrettably, I cannot draw that conclusion based upon the evidence before the Court . . .

[21] This is a factual finding by the judge, entitled to considerable deference.

[22] This leads me to the Minister's second argument, did the judge err by overlooking or inappropriately weighing the evidence before her?

[23] For whatever reason, the evidence and the argument before the judge at the hearing of the Minister's application focussed on the respondent's "running" behaviour. The evidence on running indicated the respondent regularly left her

group home, often at night, for varying lengths of time and without informing those in charge of the home of where she was going. The persons in charge of the group home felt the respondent was putting herself at risk during these absences. The respondent testified that on most of these occasions she went to a friend's place that she considered safe. When Ms. Jeppesen was being questioned by the judge during cross-examination as to what behaviour of the respondent she felt constituted an emotional or behavioural disorder, Ms. Jeppesen indicated that in was the respondent's "running":

> Q. Okay. What . . . I guess you've got to help me with this. What is the emotional or behavioural disorder that's identified by those . . . by that reference?
>
> A. She's demonstrated a behavioural pattern of running and being unavailable.
>
> Q. So there's someone there that wants to help her and she's not there, therefore, she's unavailable. You would say that that's the nature of the . . . the behavioural disorder?
>
> A. The behavioural disorder is her pattern of running behaviour, being gone on a very regular basis to unknown whereabouts and engaging in unknown activities.
>
> Q. And that's what it is, you're saying because she's not there at...in the Centre . . . at Sullivan House, that that running behaviour is a pattern that you say is a behavioural disorder?
>
> A. I'm saying that the . . . she has an established pattern of running behaviour.
>
> Q. Okay. And that is the nature of the behavioural . . .
>
> A. Yes
>
> Q. . . . disorder under the legislation?
>
> A. Yeah.

[24] There was no suggestion that the suicidal ideation that had occurred over a year earlier continued to be a problem, with the respondent testifying that it was not.

[25] During argument at the conclusion of the hearing the Minister also suggested that it was the respondent's "running" that constituted the emotional or behavioural disorder:

> My friend was correct to point out that there is no evidence currently of, I guess, suicide . . . suicidal ideation or risk of cutting types of behaviour, but that's not the basis of this . . . this argument here today and the application is based on the running. We have 83 times the truant . . . 83 occasions she was gone without permission. AB69

[26] Given Ms. Jeppesen's evidence and the Minister's argument that the respondent's "running" was the evidence of an emotional or behavioural disorder required under s.56(3)(a), I am not satisfied the judge erred in concluding that the Minister had not proved that the respondent's "running" amounted to "an emotional or behavioural disorder." The judge may have accepted the respondent's testimony that when she left the group home at these times that she usually stayed at a friend's place where she thought it was safe. She may have determined that this "running" was a sign of the respondent's rebelliousness, her search for independence as part of growing up. The assessment of the evidence is for the judge.

[27] The fact the judge did not specifically mention Ms. Llewellyn's letter or Ms. Jeppesen's opinion in her decision is not reviewable error. A judge need not mention every piece of evidence in his or her decision. Ms. Jeppesen's opinion was before the judge during the hearing which immediately preceded the giving of her decision, as was Ms. Llewellyn's letter which Ms. Jeppesen referred to at least three times in her testimony. Both would have been fresh in her mind.

[28] The earlier finding was to be accepted as correct at the time it was made, but did not relieve the judge of the duty to carefully assess all of the evidence before her. The judge's decision to consider as one factor the finding of the Family Court judge in October that the respondent was suffering from a disorder but not to automatically adopt it as dispositive, as she did, is also not an error.

[29] There was no evidence before the judge that suicidal ideation remained an issue. The Minister had acknowledged this in his submissions to the judge at the conclusion of the hearing. The judge had the respondent's testimony that this was no longer an issue.

[30] The Minister has not satisfied me that the judge made a palpable and overriding error in finding on the evidence before her that the respondent was not suffering from an emotional or behavioural disorder. It is the judge's function to consider and weigh the evidence before her in reaching her decision. It is not for this Court on appeal to rehear the application and substitute our opinion for that of the judge.

[31] Accordingly, I would dismiss the appeal.

Hamilton, J.A.

Concurred in:

Bateman, J.A.

Fichaud, J.A.