IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

Citation: *Family and Children's Services of Cumberland County* v. *D.M.M.*, 2005 NSFC 34

Date: April 26, 2005
Docket: FAMCFSA-035180
Registry: Amherst

BETWEEN: **FAMILY AND CHILDREN'S SERVICES OF CUMBERLAND COUNTY** (APPLICANT)

- and -

D.M.M. and D.M. (RESPONDENTS)

- and -

S.D.M. and J.F. (THIRD PARTIES)

- and -

MINISTER OF COMMUNITY SERVICES (INTERVENOR)

Restriction on Publication: **Pursuant to Section 94(1) of the Children and Family Services Act**

Heard Before: The Honourable Judge David A. Milner, a Judge of the Family Court for the Province of Nova Scotia

Hearing Date: April 8, 2005 at Amherst, Nova Scotia

Decision Date: April 26, 2005

Counsel: Cindy A. Bourgeois, LL.B., for the Applicant
Jillian Fage, LL.B., for the Respondent, D.M.M.
Stephanie Hillson, LL.B., for the Respondent, D.M.
Thilairani Pillay, LL.B., for the Intervenor
Self-represented litigants, S.D.M.. and J.F. - Third Parties

TO PUBLISHERS OF THIS CASE:

PLEASE TAKE NOTE THAT SECTION 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADINGS 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.

INTRODUCTION

[1] Family and Children's Services of Cumberland County is a child protection agency. The agency has applied to court under the Children and Family Services Act (the "CFSA" or the "Act") and is seeking an order for permanent care and custody of a child.

[2] The child is an infant girl, taken from her mother's care shortly after birth. The respondents in these proceedings are the child's mother and father, who want to see their daughter placed in the care of one or both of them.

[3] The child's maternal grandmother, and her partner, have joined the proceedings as third parties. They are proposing that the child be placed in their care as an alternative to placement with either the parents or the agency.

[4] This is an interlocutory application by the parents for a parental capacity assessment: to be ordered by the court; to be conducted by an assessor who is independent of the agency; and to be paid for by public funds.

[5] The Minister of Community Services has intervened, to oppose the parents' application, since his Department would end up paying for the assessment, directly or indirectly. The Minister contends that the court has no authority to order that the assessment be done, and no authority to require that it be paid for with funds of the Department.

[6] The agency, although it does not consider that a parenting capacity assessment is necessary, is willing to provide one. However, because it would bear the cost of such an assessment, and because there are qualified professionals on its payroll who could do the assessment, the agency's position is that there is no need to pay an external assessor.

[7] The legal issue to be considered, is the nature and extent of the court's authority to order assessments.

POSITION OF THE PARTIES

[8] The agency and the Minister both say they have a discretion under the CFSA as to what services will be provided both outside and within court proceedings. They contend that the court has no authority to insist that any particular services, including assessments, be done, against the wishes of the agency, or to compel payment.

[9] The parents say they need to have their parental capacity formally assessed, because they have never acted as parents to the child except under the supervision of agency personnel. They do not know if they will be able to successfully parent their child, or what services might be needed to improve their parenting skills to an adequate degree.

[10] Without an assessment the parents feel they would be unable to properly present their case in court. They cannot afford to retain anyone to perform the assessment which they feel they need. They do not trust that a report prepared by an agency employee would be unbiased. Their position is that there cannot be a fair hearing without an independent assessment.

[11] The parents consider their right to obtain this assessment, at public expense, is a logical extension of their constitutional right to have state-funded legal counsel in a child protection proceeding.

[12] The grandmother and step-grandfather, as third parties in the overall proceedings, took no position in the interlocutory application.

PARENTAL CAPACITY ASSESSMENTS

[13] There has been no evidence presented on the point; however, my understanding from past experience as a judge is that the parental capacity assessment is a procedure used by social workers to help predict future achievement in parenting, and to identify services which might be needed to assist parents in their efforts along the way. The procedure purports to measure present capacity to parent.

[14] There does not appear to be a universally accepted standard for such assessments, although the approach developed and promoted by the late Dr. Paul Steinhauer is frequently used as a tool of social work in Nova Scotia. The parental capacity assessment is primarily a procedure used in social administration; not

specifically designed for court purposes, although sometimes received by courts as evidence.

[15] The Steinhauer model is presented as an assessment which can be used easily by social workers, trained in administering the test, as a tool in their daily work with families. Deficiencies in parenting skills and appropriate services can be quickly identified, within an objectively structured format, without having to take the time and incur the expense of referring clients to outside professionals in assorted disciplines.

[16] There is no specific reference to parental capacity assessments in the CFSA.

ROLE OF AN AGENCY UNDER THE CFSA

[17] The CFSA recognizes the historical presence of agencies in some parts of Nova Scotia and gives them authority and responsibility for administration of the Act in those areas. In other regions, where there is no agency, the Minister is given the same authority as an agency. Family and Children's Services of Cumberland County has operated as an agency for many years in northern Nova Scotia.

[18] An agency is given the responsibility to promote and provide services which support families and children in their homes and communities. An agency is also expected to protect children from harm, and one way of doing this is by applying to court to force families to accept services.

[19] The provision of voluntary services for families, coupled with the authority to take families to court and in some cases seek the permanent removal of children from their parents'care, can sometimes place an agency in a sort of "statutory conflict of interest". This conflict can often create distrust of an agency by families. While working to keep a family together the agency has to decide if that is possible; and if not, then the same agency can find itself trying to separate the family.

[20] An agency is given a discretion to determine where services to families are necessary and appropriate (Section 13).

[21] An agency is given a discretion to decide when a protection application should be made to court, and when a child should be taken into care (Sections 32 and 33).

JURISDICTION OF THE COURT

[22] The Family Court does not have its own budget from which funds are available to pay for services or assessments. The Family Court does not have its own staff who can provide services or conduct assessments; nor is there any associated "clinic" to which such functions can be assigned by the Family Court.

[23] The Family Court, as a creation of provincial statute (Nova Scotia's Family Court Act) does not have any jurisdiction, apart from statute, to order services or assessments even though they might be useful.

[24] Section 39(4)(g) of the CFSA authorizes the court to make an interim order for: "referral of the child or a parent or guardian for psychiatric, medical or other examination or assessment." (Underlining added.)

[25] Section 39(9) allows the court to vary an interim order at any time before a disposition hearing.

[26] There are provisions later in the Act which allow the court to order assessment, treatment and services in disposition orders, which include supervision orders and orders for temporary care and custody. At this stage, however, before the disposition hearing has taken place, the only statutory authority seems to be in Section 39.

EVIDENCE

[27] The parties to a legal proceeding decide what evidence to present in court. Those decisions are made, often with the assistance of lawyers, based on many considerations, including available court time, cost of obtaining the evidence, and financial resources.

[28] All of the evidence which all of the parties are able to put before the court should be considered and evaluated by the judge in reaching any decision.

[29] The professional qualifications of the assessor relate to the issue of admissibility of the assessor's opinions. Qualifications by themselves do not affect the weight to be given to the evidence. Once admitted, the evidence of professionals is subject to the same evaluation process as the evidence of ordinary witnesses.

[30] Professional assessments, as with all evidence, can be used to support or detract from the position of any party, regardless who prepares or presents the report. If an assessor appears to be unduly biased, that can lighten the weight to be assigned to the evidence.

[31] It should be recognized at the same time, however, that there is "statutory bias" inherent in all matters and proceedings under the CFSA: the paramount consideration of whatever is in the child's best interests (Section 2).

NATURE OF A COURT ORDER

[32] There are some legal definitions and descriptions of what a court order means. For instance, the following statements shed some light on the subject:

> Civil Procedure Rule 1.05.(t) states: "order" means an order of the court and includes a judgment, decree or rule.
>
> Family Court Rule 1.05(j) states: "order" means an order or other decision or judgment of the court.
>
> Section 3(1)(q) of the Children and Family Services Act states: "order" includes the refusal to make an order.

[33] I suspect that a court order is usually thought of as a command for something to be done by someone, with consequences for failure to comply - something like the order of a military officer to soldiers in battle.

[34] In some situations, however, a court order might be a routine request for something - like a customer ordering from a restaurant's menu.

[35] A court order can also serve as authorization for something to happen - like a doctor's "order" for a chest x-ray, or a prescription to be filled at a pharmacy.

[36] Sometimes a court order encompasses all of these notions and more, in attempting to influence future experiences. In a family law custody case, for example, an order usually establishes a legal framework within which parents enjoy their rights, fulfil their responsibilities, and otherwise influence their children on the way through childhood.

[37] Section 39(4)(g) of the CFSA allows the court to order the "referral" of a parent for assessment.

SOME SUPREME COURT OF CANADA CASES

[38] The Government of British Columbia was required under Canadian constitutional law, by decision of the Supreme Court of Canada, to provide interpreters to deaf residents to help them properly understand health care procedures. (Eldridge v. British Columbia [1997] 3 S.C.R. 624)

[39] The Government of New Brunswick was required by decision of the Supreme Court to provide free legal services as a constitutional right of needy parents in child protection court proceedings. (New Brunswick v. J.G. [1999] 3 S.C.R. 46)

[40] In considering obligations to provide for the best interests of an adult respondent in court proceedings under Nova Scotia's Adult Protection Act, the Supreme Court of Canada decided that the trial judge had authority to order Nova Scotia's Minister of Health to adjust his plan of care to reflect the particular circumstances of the adult. (Nova Scotia v. J.J. [2005] S.C.J. No. 13)

[41] The parents in this case ask that the court rely on these cases as authority to order that an independent parental capacity assessment be done by someone other than the agency and the Minister, and that it be paid for by someone other than the parents.

[42] The Minister and agency also rely on the Supreme Court in support of their position that the agency has a discretion under the Act - which should not be usurped by the court - to provide services. [Baker v. Canada (1999), 174 D.L.R. (4th) 193.]

CONCLUSION

[43] The parents have exercised their constitutional right to have legal counsel in these proceedings. I do not consider that right extends to a right to have specific evidence provided for them upon request. Otherwise, the Minister and agencies would lose their discretion to decide what services can be provided, and would lose control over the allocation of public resources entrusted to them.

[44] I am not satisfied that a parental assessment is essential to a fair hearing, or necessary for the court to be able to decide what disposition will be in the best interests of this child.

[45] Preparation of an assessment might prove useful to the agency in considering adjustment of its plan of care, and to the parents in preparing their plan for consideration by the court.

[46] I am satisfied that the agency's willingness to provide an assessment by an employee, specifically trained in preparing parental capacity assessments and not directly involved in the conduct of this case, is reasonable and not necessarily unfair to the parents, who are worried about receiving a biased assessment. I consider it would be a proper exercise of agency discretion and would be a reasonable use of public resources.

[47] The issue of bias as it might affect the reliability of the report, is an issue which can be addressed with the assessor following completion of the report, including disclosure through counsel, and also by questions and submissions in court. The parents and the other parties will be able to rely on all of the evidence, regardless of the source, in support of their respective positions at the disposition hearing.

[48] I therefore refer the parents for parental capacity assessment by any qualified person chosen by the agency and the Minister, which could include an employee of the agency.

[49] There should be no cost to the parents, and the costs attributed to the assessment should be considered part of the costs of taking into care in these proceedings. On the facts of this case, I do not consider there is statutory authority under Section 39 of the Act to order any different assessment in response to the parents' interlocutory application.

[50] I assume the parents will choose to participate in the assessment, which I ask be completed as soon as possible. Counsel might be able to assist in making the necessary arrangements.

[51] The disposition hearing could be arranged through counsel and court administrative staff; however, I will be available for a pre-hearing conference to address any scheduling or other issues.

[52] I thank counsel for their assistance and ask that they cooperate in the preparation of an order to summarize this decision.

David A. Milner, A Judge of the Family Court
For The Province of Nova Scotia