IN THE FAMILY COURT OF NOVA SCOTIA
Citation: Nova Scotia (Community Services) v. A., 2010 NSFC 9

Date: 2010 04 07
Docket: FBWCFSA-068123
Registry: Bridgewater

Between:

Minister of Community Services

Applicant

v.

A., B.,
and C.

Respondents

Publication restriction: 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.

Judge:	The Honourable Judge William J. Dyer
Heard:	April 7, 2010, at Bridgewater, Nova Scotia
Written Reasons:	April 22, 2010
Revised Decision:	The text of the decision has been revised to protect the identity of certain parties. This revised version is released on November 4, 2010.
Counsel:	Philip Gruchy, for the Applicant David Hirtle, for the Respondent, A. Shawn D'Arcy, for the Respondent, B. Kenneth Thomas, for the Respondent, C.

By the Court:

[1] I gave a truncated ruling in court, with reasons to follow. These are my reasons.

The Issue

[2] On the opening day of a protection hearing, the Department of Community Services (the agency) wanted to introduce written reports and oral testimony, which included opinions, by Dr. Kim Blake. She is a veteran pediatrician at the IWK Health Centre in Halifax and a member of its Child Protection Team.

[3] Strong opposition to admission of her opinions was mounted by the lawyers for the parents.

Background

[4] In early January, Dr. Blake examined two of children at the request of the agency. Dr. Blake's ensuing reports figured prominently in the agency's decision to take those children and their infant sister into care.

[5] At the interim stage, I considered the first-hand evidence of the agency's lead child protection worker. That evidence went unchallenged.

[6] Under section 39 (11) of the **Children and Family Services Act** (CFSA), I also admitted and acted on hearsay opinion evidence attributed to Dr. Blake and other individuals. I found the hearsay evidence to be credible and trustworthy in the circumstances.

[7] I concluded there were reasonable and probable grounds to believe that all three children were in need of protective services.

[8] Without concessions by the Respondents, the agency cannot resort to section 39 (11) at the protection hearing. And, under section 40 (3), the parents are not prepared to admit that any of their children are in need of protective services as alleged.

[9] The upshot is that the agency is being put to the strict proof of its case at the section 40 stage.

[10] At the interim phase, all the evidence came *via* affidavits filed by the agency. So far, the parents have not submitted any affidavits; and they have not testified.

[11] The parents' teenage son is now a party to the proceedings. He is independently represented by legal counsel. This child has filed an affidavit which has not yet been formally admitted into evidence. His counsel submitted that Dr. Blake should be qualified to give expert opinion evidence, provided the subject areas for her opinions are circumscribed.

Analysis

[12] My impression was that debate over Dr. Blake's qualifications (and perhaps the qualifications of others scheduled to testify) was anticipated. Yet, counsel did not file any memoranda or invoke any cases in support of their respective submissions. So, with respect, this is not the occasion to wade deeply into the complex subject of opinion evidence.

[13] The starting point, as a general rule, is that opinion evidence is not admissible. (See **R. v. D. (D.)**, [2000] 2 S.C.R. 275 at para. 49.) But, a major exception applies for expert witnesses who are frequently allowed to state conclusions about facts.

[14] Counsel did not mention that in some cases even the evidence of lay witnesses may be presented in the form of opinions. Broadly speaking, such evidence from lay witnesses may be admitted where they are in a better position than the court to form the conclusion; where the conclusion is one that persons of ordinary experience are able to make; where the witness, although not expert, has the capacity through experience to make the conclusion; and where the opinions being expressed are merely a compact way of stating facts that are too fine or complicated to be narrated effectively without some resort to conclusions.

[15] By contrast, the admissibility of expert opinion evidence (when challenged) must be decided by considering four basic criteria: necessity in assisting the court; relevance; a properly qualified expert; and the absence of any exclusionary rule

that would be offended if the opinion is admitted. (See **R. v. Mohan** [1994] 2 S.C.R. 9)

[16] Most, if not all, of the courtroom attention was focused on whether Dr. Blake was a “properly qualified expert”. The other criteria were not flagged for attention. Nonetheless, in general terms, I directed myself that expert opinion evidence is “necessary” where it provides information likely to be outside the experience and knowledge of the court.

[17] The “relevance” criteria requires a finding of logical relevance, plus a finding that the benefits of the evidence outweigh its costs. The first relates to materiality, weight and reliability; the latter relates to the risk that evidence might be accepted uncritically, its possible prejudicial impact, and any practical costs associated with presentation of the evidence.

[18] Case law routinely characterizes “expertise” as a rather modest status achieved when the expert possesses special knowledge and experience going beyond that of the court.

[19] Importantly, even if an initial determination is made to admit expert evidence, the court has an ongoing discretion to ultimately exclude that evidence. This discretion remains vested and is available if the manner of presentation causes its prejudicial effect to outweigh its probative value. Sometimes that call cannot be made by the presiding judge until all of the evidence has been entered.

[20] Normally, the party proposing the expert is called upon to indicate with precision the scope and nature of the expert testimony and what facts it is intended to prove. In the present case, it was clear that the doctor’s written reports captured the observation and opinion evidence the agency wanted the court to admit and consider. And, as expected, the agency moved to show that its witness was qualified to give relevant opinions.

[21] As the evidence unfolded, I reminded myself that I must decide whether the expert’s evidence meets the preconditions of admissibility [discussed above] sufficiently - such that the beneficial impact warrants its admission despite the potential harm that might flow from its admission.

[22] I was alert to the distinction between my role as an assessor of the preconditions to admissibility of expert opinion evidence and my role as a "gatekeeper". If the evidence does not meet all of the preconditions to admissibility it must be excluded. By contrast, the gatekeeper inquiry does not involve the application of strict rules but requires the court to exercise its discretion. The latter is sometimes described as akin to a cost-benefit analysis and is very much specific to each case. (See **R. v. J. (J.L.)**, [2000] 2 S.C.R. 300.)

[23] As mentioned, counsel chose to focus most of their attention on whether Dr. Blake is a properly qualified expert. I will do the same.

[24] A witness may acquire special or peculiar knowledge through study, training, or experience, or a mix of some, or all, of them. Once the threshold level has been met, any deficiency in expertise generally goes to the weight to be assigned to the expert's evidence. Normally admissibility is not affected. I should add that admissibility does not depend upon the means by which skills are acquired. It is enough that the court is satisfied that the witness has sufficient experience in the subject-matter at issue. The court does not have to dwell on whether the witness' skills were derived from specific studies or by practical training (which may affect the weight to be given to the evidence). (See **R. v. Marquard**, [1993] 25 C.R. (4th) 1 (S.C.C.) and **R. v. Mohan**. *supra*.)

[25] Dr. Blake is a pediatrician - that is, a medical doctor who specializes in the health of infants, children and adolescents. My ruling was that she is qualified to give expert opinion evidence regarding the health, growth, development, and care of those individuals, and that her qualifications [for the purposes of this case] include expertise in child protection. Implicit in the ruling was a determination that she could give medical opinion evidence regarding child abuse and neglect.

[26] I made my ruling with the stated principles in mind and the following evidence.

[27] Dr. Blake testified regarding her education, training and experience. She submitted abbreviated and long-form *curriculum vitae*. The latter spans 32 pages. I find it unnecessary and impractical to regurgitate all of her evidence going to her qualifications. But here are some of the highlights.

[28] Dr. Blake's secondary school education took place in Great Britain where she took her A-levels in physics, chemistry and biology. She also achieved standing in advanced mathematics. Her post secondary education started at the University of London (St. Bartholomew's Hospital). She received her MRCP designation in 1988; and by 1992 she was an Assistant Professor of Pediatrics at Memorial University in Newfoundland. In 1997, she became an Assistant Professor of Pediatrics at Dalhousie University in Halifax. By 1999, she was an Associate Professor. She is currently registered with the Nova Scotia College of Physicians and Surgeons.

[29] Dr. Blake holds past and current memberships in a number of Learned Societies. She is a Fellow at the Royal College of Physicians (Canada) and a member of the Canadian Pediatric Society. (The former is the equivalent of Britain's MRCP designation.)

[30] In recent years, Dr. Blake's academic appointments have included the position of Associate Dean of Undergraduate Medical Education at Dalhousie (2007 - 2008). She currently holds a full Professorship in Pediatrics at Dalhousie. Her *curriculum vitae* includes a number of awards and selected reviews. Appendix A includes reference to approximately 60 reviewerships. Appendix B includes reference to about 20 workshops in which she has been a presenter.

[31] She had extensive clinical experience from 1992 to 1997, including clinical work connected to child protection matters. She recounted her medical and court experience in Newfoundland for those years, specifically as it pertains to the pediatric aspects of alleged child abuse and neglect.

[32] Dr. Blake joined the IWK Health Centre in 1997 - first as an Emergency Pediatric Consultant. She has a wide range of experience at this Health Centre where she has several specialized areas of interest. One of those is child protection. She served as Medical Director of the Child Abuse Program for approximately 10 months and has attended court previously.

[33] Dr. Blake's extensive teaching credentials are set forth in detail in her long-form *curriculum vitae*. The same may be said for her experience in medical education research. Dr. Blake has written extensively; and has a host of peer reviewed publications and published abstracts. Admittedly, the prime focus in her publications and teaching has not been in child protection. I find, however, that

this goes to underlining the wide spectrum of her professional interests and skills; and that this does not diminish her expertise in the subject area of her evidence. At present, Dr. Blake said that about 50 percent of her work at the IWK is in connection with child protection; and that the balance of her time is devoted to general pediatric medicine.

[34] Dr. Blake said that child protection did not receive sub-specialty status within pediatrics in Canada until quite recently. So far, there are very few pediatricians who have pursued and achieved this new designation. Although Dr. Blake does not hold a formal sub-specialty designation, I am satisfied that her pediatric work includes extensive child protection involvement as a practical specialty.

[35] Dr. Blake was careful to say she does not have particular expertise in the area of child psychiatric medicine or other recognized sub-specialities such as orthopedics. However, she specifically noted that the child protection team does have the benefit of help from a pediatric psychiatrist. (Admittedly, the team could benefit from more psychiatrists but they are chronically in short supply.) The evidence was that referrals are made by her and other members of the team, to qualified psychiatrists and other sub-specialists, if and when the need arises. She mentioned that the team includes psychologists and other professionals such as primary care physicians, social workers, a nurse practitioner and others.

[36] Considering all of the foregoing, I conclude the submission that she is unqualified to give expert opinion evidence cannot be sustained. As stated in court, I find that the agency easily met the initial threshold for admission of her evidence for the stated purposes.

Dyer, J.F.C.