FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. J.J.*, 2018 NSFC 20

Date: 2018-10-29
Docket: FKCFSA-109284
Registry: Kentville, N.S.

Between:

M.C.S.

Applicant

v.

J.J.

Respondent

Restriction on Publication: 94(1) of the ***Children and Family Services Act,*** S.N.S. 1990, C.5.

Judge:	The Honourable Judge Jean Dewolfe
Heard:	August 30, 2018, in Kentville, Nova Scotia
Final Written:	October 29, 2018
Counsel:	Sanaz Gerami, for the M.C.S.

By the Court:

[1] This is an application by the Minister of Community Services ("the Minister") to enter the Respondent, J.J.'s ("J") name on the Child Abuse Registry pursuant to the "*Children and Family Services Act* ("the Act"). The Minister alleges that in 2014, while residing with T. and her daughters, J. sexually abused L., who was three years old at that time.

[2] J. filed a Notice of Objection to the Minister's application in May 2018. J. was present in Court on June 21, 2018 and was represented by counsel when the hearing date was set. He continued to be represented by counsel on July 11, 2018 during a telephone pre-trial conference. However, J. did not attend Court for the hearing. His counsel advised that J. had left him a telephone message stating he was moving to Ontario, and that J.'s telephone had been disconnected and mail returned. Counsel also advised that J. had previously advised him that he would not be contesting the application.

[3] J.'s counsel requested removal as solicitor of record, which motion was granted. The hearing then proceeded in the absence of J.

[4] The Minister, by separate application, also applied to enter T.'s name on the Child Abuse Registry. Both matters were to be heard on the same day with the same evidence although they were not formally joined. Therefore, all evidence in the hearing regarding T. was also entered as evidence on the hearing with respect to J.

LAW

[5] In this case, there has been no finding pursuant to 22 (2) of the **Act** and J. has not been convicted of a criminal offence against L.

[6] Therefore, in order to enter J's name in the Child Abuse Register the Minister must prove pursuant to S. 63(3) of the **Act**, on the balance of probabilities, that J. "abused" L. Abuse is defined by s. 62(b) as "sexual abuse", and by s. 62(c) as "intentional conduct" causing a child "serious emotional harm".

[7] The meaning of "sexual abuse" is to be ascertained objectively from its ordinary sense, and in its legislative context: *N.S. (Community Services)* v. *Z.*, 2012 NSSC 87.

[8] Abuse is sexual abuse if it is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated: *R.* v. *Chase*, (1987) 2 S.C.R. 392.

[9] Counsel for the Minister referred the Court to a number of provisions of the Act, including the preamble, the definition section, s. 22 (2) (c), s. 22 (2) (f) and (g). Counsel for the Minister also argued that the Court must be mindful of the purpose of the Child Abuse Register, *i.e.*, to protect children from abuse by practically restricting an individual's ability to work or volunteer with children.

FACTS

[10] In May 2014, J. and T. met. They moved in together along with T.'s daughters, L. (age 3.5) and E (age 5.5) in September 2014.

[11] In late December 2014, L. stated at her daycare that J. "pees" on her nightie, she doesn't like it and Mommy gets "mad".

[12] L. was interviewed that day by social workers, Kendra Mountain and Lael Aucoin, at her daycare ("the first interview"). L. restated that J. peed on her and added detail, *i.e.*, that his hands were on his penis, that he was "whole naked", that she was wearing her purple Dora nightgown, that he peed on her twice (her head,

face, elastic) and that the pee colour was grey. She said it happened, "last night", then stated it happened in the summer, but then said it was cold outside the last time it happened. She said she told her Mom and her Mom got mad at J. and told him never to do it again.

[13] L. was picked up from daycare by her father, G. Later that day, G. took L. to the New Minas RCMP station to be interviewed again by Kendra Mountain and Constable Melissa Lee of the RCMP (the "second interview"). At that time, L. said she remembered what she had told Kendra Mountain earlier, but said her Dad had told her not to say that again because someone would get in trouble.

[14] On further questioning, she said J. peed on her forehead, under her hair, on her hair, on her bedroom floor, and her bed, but not on her nightgown. She said her nightgown was pink and then said it was red. She said J.'s pee was grey, and J. was wearing underwear but there was so much pee it got on her forehead and clothes. She said it happened when it was cold outside "lots of times ago". She also reported that she had told her mother who had cleaned up the pee.

[15] L. was interviewed on two more occasions in February 2015. In an interview on February 19, 2015 ("the third interview"), she identified J. as her mother's boyfriend and then talked about boyfriends "peeing" on you. She also

rubbed her vagina area and said boyfriends did that and rubbed a handheld audio recorder and told the workers "boyfriends do that".

[16] In the next interview, on February 27, 2015 ("the fourth interview"), L. was angry and talked about seeing J. and T. in the tub and bathroom together and also talked about J. looking at her in the bathroom.

[17] On April 27, 2015 a joint interview of L. was conducted by Ms. Mountain and Cst. Lee ("the fifth interview"). L. was very aggressive with Ms. Mountain and would not answer any questions.

[18] On April 18, 2015, L. told BriAnna Simons that T. touched J.'s penis all the time; that J. told L. that she (L.) had a ticklish spot on her vagina; that J. had touched L's ticklish spot on her vagina five times; and that she (L.) had told T., who had talked to J. about it.

EVIDENCE

[19] The Minister's evidence was unchallenged. It consisted of an affidavit of Lael Aucoin, a Social Worker employed by the Minister; two reports from BriAnna Simons, L.'s therapist in 2015-2016; a C.V. and "STOP Discharge Report" of Mary McGrath; and two affidavits of T.

[20] Ms. Aucoin's affidavit contained various out of Court statements made by L:

> 1) initial referral information regarding L's disclosure to a daycare worker on December 23, 2014;
>
> 2) notes taken by Kendra Mountain (Social Worker) in the initial interview by Ms. Mountain and Ms. Aucoin with L. at her daycare on December 23, 2014: (the first interview);
>
> 3) notes taken by Kendra Mountain of an interview by Ms. Mountain, Ms. Aucoin and Cst. Lee of the RCMP on December 23, 2014: (the second interview);
>
> 4) notes of an interview of L. by Kendra Mountain and Tammy MacAskill (Social Worker) on February 19, 2015: (the third interview);
>
> 5) summary of an interview of L. by Devin Ogilvie (Social Worker) and Tammy MacAskill on February 27, 2015: (the fourth interview); and
>
> 6) comments made by L. to BriAnna Simons, L's therapist, in April 2015 (as contained in a report by Ms. Simons who testified before the Court).

[21] The Minister sought to introduce these hearsay statements without calling L. to testify.

[22] Section 96 (3) (b) of the **Act** permits this Court to admit out of Court statements by a child "having regard to the best interest of the child and the reliability of the statements of the child".

[23] Section 3(2) of the **Act** defines best interests.

[24] The Court finds that it is in L.'s best interests to have her statements admitted rather than provide *viva voce* testimony in the Court. L. is still only seven years old. It would not be in her best interests to repeat her story in front of strangers in a formal, unfamiliar courtroom setting.

[25] The second part of the s. 96 (3) test relates to the issue of reliability.

[26] Counsel for the Minister referred the Court to *Children's Aid Society of Halifax* v. *P.M.H.* 2006 NSCC 75. In *P.M.H.* Justice Williams noted that there must be a "circumstantial guarantee of trustworthiness" surrounding an out of Court statement by a child. At paragraph 16, he referred to CJC Lamer's comments in *R.* v. *Smith* 1992, 2SCR 915 and concluded: "Reliability thus flows from the circumstances under which the statement in question was made . . . "

[27] Counsel for the Minister also referred the Court to Paciocco and Stuesser on the *Law of Evidence* (6th ed., 2011) which lists factors that can be considered when determining the trustworthiness of a statement, as follows (p. 125):

- spontaneity
- naturally
- without suggestion
- reasonably contemporaneously with events
- by a person who has no motive to fabricate
- by a person with a sound mental state
- against the person's interest in whole or in part

- by a young person who would not likely have knowledge of the acts alleged
- whether there is corroborating evidence.

[28] However, counsel for the Minister also cautioned the Court that the threshold determination of reliability is a different and lower standard than that required of the Court in determining ultimate reliability of a child's statements.

[29] None of L.'s statements were made under oath, and the only evidence of a truthfulness discussion is during the first interview on December 23, 2014.

[30] L. was almost four years of age at the time of the initial disclosure of the first two interviews. She appears to be articulate and intelligent from the transcripts and the evidence of Ms. Mountain and Ms. Simons.

[31] The second interview on December 23, 2014 appears to have been video taped, and the third statement was audiotaped. However, the Court was not provided with either tape.

[32] There is no evidence as to whether the interviews with L. followed the "Step Wise" procedure, but the questions asked and the responses given in the first, second and third interviews were noted. Ms. Mountain, the notetaker for the first and second interviews, indicated that she went back to the office after the interviews and wrote down the exact words of the disclosures made by L.

[33] At least one interviewer from each of the first, second and third interviews was present for cross-examination at the hearing.

[34] The initial disclosure to the day care worker appears to be have been spontaneous. The day care worker was not identified and was not cross-examined. The Court finds that this statement is reliable and admissible to the extent that it explains subsequent actions, and informs the inquiry as to inconsistencies in L.'s statements.

[35] In the first interview, L. was described as talkative, easy to understand, and matter of fact. The questions were generally not leading and without suggestion. The interview occurred shortly after her initial disclosure and reasonably contemporaneously with events. In addition, there was discussion about telling the truth. The Court finds that this statement is reliable and admissible.

[36] In the second interview, it appears L. had discussed her disclosures with her father, G. She was described as more guarded and made changes to the details of the incidents when asked directly about them. The questions were geared at focussing L. on her previous disclosure that day and eliciting details, but were for the most part not leading and were without suggestion. The Court finds this statement is reliable and admissible.

[37] In the third interview, L. touches herself sexually but does not refer to the previously disclosed incidents. She does not talk about "boyfriends" peeing on you and identifies J. as her mother's boyfriend. The interviewers followed a similar procedure to the previous two interviews. The Court finds this statement to be reliable and admissible.

[38] In the fourth interview, L. talks about seeing her mother and J. in the bathroom and J. watching her in the bathroom. Similarly, this statement is reliable and admissible.

[39] While the statements made by L. in her initial disclosure and third and fourth interviews are reliable in the context of the process in which they were taken, they ultimately provide little useful evidence, except insofar as they speak to the consistency of L.'s statements.

[40] The statements made by L. to BriAnna Simons in April 2015 are reported in Ms. Simon's reports, and in Ms. Aucoin's affidavit. They were not made under oath, but were statements made in the course of therapy to a trained professional. I am satisfied as to the accuracy of Ms. Simons' recording, and accept her testimony that L.'s statements were spontaneous and not prompted. Ms. Simons provided significant details as to the context in which these statements were made. I am

mindful that they were made four months after the initial disclosure. They appear to relate to instances of sexual touching of L. by J. without reference to "peeing". Ms. Simons had no concerns that L. was being guided by another person.

[41] Ms. Simons also testified that the goal of therapy was to help L. work through her anger and trauma, and her behaviours as a result.

[42] Given the context of the statements made to Ms. Simons, I am prepared to admit them pursuant to s. 96 (3) of the **Act**.

[43] T. in her testimony confirmed that there were only J., herself, L. and L.'s sister living in the home prior to L.'s disclosure, and that J. was "very seldom" left alone with L. (maybe 3 times). She provided a confusing explanation of safety measures in her home, e.g. locks on bathroom door, but leaving the door open a crack while she was in the bath so she could see who was "coming" and "going". In previous statements (to Mary McGrath and as set out in her affidavit of April 20, 2018), she had accepted J. had abused L. However, on cross examination, T. testified that she believed something had happened to L. and she believed L., but was not sure J. was the person who had abused L. She denied cleaning anything like pee off L., and testified that L. had never disclosed anything to her. T.

confirmed that initially she had not believed L., and had blamed her mother for telling L. to lie about J.'s actions.

[44] T.'s testimony was therefore inconsistent with previous statements to the Minister and to Mary McGrath. The Court also found it was self serving and confused at times. I therefore accept L.'s statements in preference to T.'s evidence.

[45] **ANALYSIS**

[46] There is no corroborating or physical evidence for this Court to consider. Essentially, T.'s evidence confirms that J. had the opportunity to abuse L. L.'s statements are the only evidence of sexual abuse by J. This Court must therefore, assess and weigh those statements and determine if the Minister has proven its case on a balance of probabilities.

[47] The inconsistencies in L.'s statements are not significant. These inconsistencies are as follows:

- L. describes her nightgown as purple, then pink, then red;
- L. discloses in the first interview that J. peed on her nightgown. She describes various other locations in her second interview;
- L. first said that J. peed on her once, but later changes that to two times;

- L. said J. was wearing underwear when he peed on her, and later said he was "whole naked";
- L. initially said the incident happened "last night" (December.), but later said it happened when it was cold, and in the summer;

[48] These inconsistencies did not affect the core of L.'s disclosures. Throughout the first and second interviews, L. maintained that J. peed on her, the pee was grey, that she was wearing a nightgown, and her Mommy got mad. These aspects are consistent with her initial disclosure, and were not recanted or changed in the third or fourth statements in February 2015 or in her statements to Ms. Simons in April 2015.

[49] The facts that L.'s disclosures related to "grey pee" of a different colour, not the colours of urine, and involved nudity on J.'s part, are sufficient so as to establish ejaculation of semen by J. I accept L.'s statement that this occurred on or near her. Therefore, I find on the balance of probabilities that J. sexually abused L. It is not necessary to determine whether J. intentionally caused L. serious emotional harm.

[50] J.'s name shall be entered on the Child Abuse Register.

_____

Jean Dewolfe, JFC