

FAMILY COURT OF NOVA SCOTIA

Citation: *Minister of Community Services v. T.B.,S.B.*, 2021 NSFC 8

Date: 20211214

Docket: FPICCFSA-117392

Registry: Pictou

Between:

Minister of Community Services

Applicant

v.

T.B. AND S.B.

Respondents

Restriction on Publication:

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:

No person shall publish or make public information that has the effect of identifying a child who is a witness at or participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or relative of the child.

Editorial Note: Identifying Information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Timothy G. Daley

Heard: June 29, 2021

Counsel: Cherie Wheeler-McLeod, for the Applicant, M.C.S.
Robert Moores for the Respondent, T.B.
Amber Snow for the Respondent, S.B.

Introduction

[1] This decision concerns an application by the Minister of Community Services ("the Minister" or "the Agency") for final disposition and a finding pursuant to s.22(2)(c) of the *Children and Family Services Act* ("the Act") of sexual abuse of a child by a father.

[2] This application proceeded by way of a *voir dire* within a disposition review hearing and a written decision on that *voir dire* was rendered, admitting many of the out-of-court statements of the child into evidence.

[3] There is no dispute that a final disposition order should be granted terminating the Minister's involvement in favour of an order pursuant to the *Parenting and Support Act* granting the mother sole decision-making authority and primary residence of the children with no parenting time for the father.

[4] The question is whether the court should make a finding of sexual abuse before granting that disposition order. If such a finding is made, the father's name will be placed on the Child Abuse Registry.

[5] The child protection proceeding concerns a mother, T.B., a father, S.B. and their four children, S.R.B. (ten years old), K.R.B. (eight years old), C.R.B. (five years old) and L.B. (two years old).

[6] The Minister became involved with this family on a voluntary basis in March 2019, due to concerns about the mother's mental health, the state of the home and family violence. The mother and father ended their relationship at that time.

[7] The Minister's voluntary involvement continued until December 2019 when the mother reported that S.R.B. disclosed that her father had sexually touched her. Since that time, the father has had no parenting time or other contact with the children and does not seek any parenting time or other contact time in this proceeding.

[8] A joint interview with an Agency worker and a police officer was completed with S.R.B. on December 5, 2019. During that interview, as will be discussed below, the child disclosed being sexually touched by her father. No criminal charges were laid.

[9] Since that time, S.R.B. has disclosed being sexually abused by her father to other professionals involved in her care. She has also disclosed having nightmares about her father.

[10] The Minister filed a protection application in February 2020. Throughout the matter, the court found that the children were in need of protective service, including a finding of protection pursuant to sections 22(2)(b), (d), (f), (g), (i), and (k) of the *Act*. The Minister was permitted to reserve the right to call evidence with respect to the ground pled under section 22(2)(c) of the *Act*.

[11] Throughout the matter the children remained in the care of their mother under the supervision of the Minister. The maximum timeline for final disposition of the matter is July 20, 2021. The Minister is seeking a finding of protection pursuant to section 22 (2)(c) of sexual abuse of a child by a parent.

[12] Some out-of-court statements of S.R.B have been admitted following a *voir dire*. Respecting admission of those statements, the mother consented. The father denies the allegations and opposes the admission of the statements. The father did not and does not contest the necessity of the statements, only their reliability.

The Law

[13] The overarching purpose of the *Act* is as set out in section 2:

2(1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.

(2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.

[14] Section 96(3) of the *Act* addresses the admission of out-of-court statements by children in child protection proceedings as follows:

(3) Upon consent of the parties or upon application by a party, the court may, having regard to the best interests of the child and the reliability of the statements of the child, make such order concerning the receipt of the child's evidence as the court considers appropriate and just, including...

(b) the admission into evidence of out-of-court statements made by the child.

[15] There is no dispute among the parties that the out-of-court statements of this child are hearsay. The statements are reported by third parties. One statement is recorded by video as part of a joint interview of the child by the Agency and Police.

[16] There is also no dispute that the requirement of necessity has been satisfied. All parties agree it would be inappropriate to seek to have the child testify in this proceeding. Thus, necessity is not an issue.

[17] In assessing the ultimate reliability of these statements, it is incumbent upon the court to be mindful of the hazards associated with the admission of such hearsay statements given that they cannot be tested by cross-examination nor is there an opportunity to view the witness to assess credibility.

[18] I am also mindful of the guidance of the Supreme Court of Canada in *R. v. Khelawon* 2006 SCR 787 respecting hearsay. That decision makes clear the distinction between threshold reliability and ultimate reliability of such statements.

[19] In determining the ultimate reliability of the out-of-court statements, I will adopt a more functional approach and I confirm that I have reviewed each of the statements carefully.

[20] I am also mindful that the burden of proof rests with the Minister. The standard of proof is on a balance of probabilities, as set out in *C. (R.) v. McDougall*, 2008 SCC 53 (S. C. C.). That decision also made clear that evidence must be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. As well, I must scrutinize the evidence with care to determine whether it is more likely than not that an alleged event occurred. In this case, the issue is whether the father sexually abused the child. Evidence of that is found in

the hearsay admitted into evidence in the matter. Each of the statements of this child must not be considered in isolation but must be considered within the totality of the evidence, including the affidavit and *viva voce* evidence at the hearing.

[21] Credibility is a central issue in this matter. Helpful guidance on the assessment of credibility was provided by Justice Forgeron in the decision of *Baker-Warren v. Denault* 2009 NSSC 59 when she wrote as follows:

18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" **R. v. Gagnon** 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" **R. v. R.E.M.** 2008 SCC 51, para. 49.

19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: **Re: Novak Estate**, 2008 NSSC 283 (S.C.);
- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which he/she testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorney** [1952] 2 D.L.R. 354;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: **R v. Norman**, (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in **Re: Novak Estate**, *supra*, at para 37:

There is no principle of law that requires a trier of fact to believe or disbelieve

a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See **R. v. D.R.**, [1996] 2 S.C.R. 291 at 93 and **R. v. J.H.**, [2005] O.J. No. 39, *supra*).

[22] In making any credibility assessments I have considered the totality of the evidence, I have thoroughly reviewed the *viva voce* and documentary evidence, the submissions of counsel, and the applicable legislation and case law.

[23] The issue of reliability of child hearsay statements was addressed by Justice Forgeron in her decision of *Mi'kmaw Family and Children Services v H.F.*, 2013 NSSC 210. In that case, the issue of threshold reliability of the out-of-court statements was acknowledged, and the court was left to make findings of fact with respect to the ultimate reliability of the statements.

[24] Justice Forgeron's comments in this case are helpful with respect to the indicia of trustworthiness of a statement when she commented as follows:

53 Paciocco and Stuesser in the *Law of Evidence*, sixth edition, 2011, list factors that can be considered when determining the inherent trustworthiness of a statement, at p. 125, which factors include statements that are made:

- spontaneously,
- naturally,
- without suggestion,
- reasonably contemporaneously with the 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, and
- whether there is corroborating evidence.

54 The authors also list safeguards surrounding the making of the statement that could expose inaccuracy or fabrications at p. 125 of their text, which provides the following list of questions:

- Was the person under a duty to record the statements?
- Was the statement made to public officials?
- Was the statement recorded?
- Did the person know the statement would be publicized?

55 Further, the authors note that motive is an important factor in determining reliability. Any evidence that supports a motive to fabricate negatively impacts

reliability.

56 Substitutes to address hearsay dangers are reviewed at p. 127 by the authors including the following list of questions:

- Was the person under oath when making the statement?
- Was the making of the statement audio or videotaped?
- Was the person cross examined at the time the statement was made?
- Is the person available for cross examination?

The Statements of S.R.B.

February 18, 2020, Statement to J.S.

[25] J.S., a school counsellor at the child's school, gave evidence that she was seeing S.R.B. for counselling. J.S. began her work with the child in late January 2020 and met her for three sessions along with her brother, K.R.B. The goal was to increase their school attendance and address their behaviours.

[26] J.S. says that the mother disclosed the alleged abuse of S.R.B. by the father in December 2019. She said that, during her meetings with S.R.B., the child disclosed the same abuse on February 18th, 2020. She said S.R.B. told her that her father asked to watch her urinate and told her not to tell anyone about this. J.S. said the disclosure was spontaneous.

[27] In cross-examination, J.S. agreed that the child did not disclose any inappropriate touching, and that she did not record any of the sessions, nor did she explore the difference between the truth and a lie nor the importance of telling the truth.

March 12, 2020, Statement to Stephanie Duggan

[28] Stephanie Duggan is a counsellor with Tearmann Outreach, a service providing temporary housing, support and counselling for women and children experiencing family violence. She gave evidence that she has known S.R.B. from a prior counselling relationship when the mother and children were at Tearmann House in March 2019.

[29] Ms. Duggan says that she met with S.R.B. on March 10, 2020. The mother was briefly in attendance. She then met with the child alone and says that S.R.B. told her that she worries about family violence in her home and that the father yells at the mother, causing her to cry, and that he yells at the children. She expressed concern or worry that if the father were at home, he could hurt them.

[30] While playing with playdough in the course of the session, Ms. Duggan says she asked the child if there was anything else she wanted to talk about. S.R.B. spontaneously disclosed that her father touched her inappropriately and that she was fearful that if her father were at the home, he would hurt her and her mother and would touch her again.

[31] Ms. Duggan also said that S.R.B. disclosed having nightmares, waking up in fear of her father laying on top of her and that she was afraid her father would touch her.

[32] In a letter to the Agency of December 22, 2020, Ms. Duggan confirmed these statements by S.R.B., including the disclosure of alleged sexual abuse, which prompted referrals to the Agency and the Police.

[33] Ms. Duggan also confirmed in the correspondence that, when discussing visits with her father, S.R.B. responded, "I don't have to right now, and I don't want to see him."

[34] On questioning by the court, Ms. Duggan said that while playing with the playdough, S.R.B. said that her father touched her private parts and that he told her not to tell anyone. She described her father as being on top of her at the time. She described that he was standing up and looking directly at her. Ms. Duggan said that the statements were made spontaneously by the child.

March 12, 2020, Statement to Melinda Taylor

[35] Melinda Taylor is a social worker with the Agency and the caseworker for the respondent parents and children. Her evidence is that on March 12, 2020, she attended the home of the mother for a scheduled visit and she met with S.R.B. They went to her bedroom to look at her new bed and S.R.B. said that she got a new bed because "I was having bad dreams about daddy touching me". S.R.B.

went on to say that she had a new comfortable pillow and no longer had nightmares.

May 21, 2020, Statement to Melinda Taylor

[36] On May 21, 2020, Agency worker Melinda Taylor and another worker attended at the mother's home to interview S.R.B. and K.R.B. They first spoke to S.R.B., who disclosed that their father would lock them in their rooms when they lived with him, and that this had happened approximately five times. She also described other behaviours of the father in the home.

[37] S.R.B. then stated that her father had touched her, and that a friend had told her to tell people what her father had done to her. She did appear to be confused when describing her old home and specific details about it.

Statements to Doreen Coady-Shadbolt

[38] Psychologist Doreen Coady-Shadbolt gave evidence in the matter that she was retained by the Agency to provide therapy for S.R.B. and her mother. She gave evidence of the matter as a fact witness, not as an expert witness at this stage.

[39] In a report letter filed with the court on March 1, 2021, Ms. Coady-Shadbolt reports working with S.R.B. and refers to her as a delight. She describes working with the child, but slowly because S.R.B. has so much to say that it is hard to keep her on topic.

[40] Ms. Coady-Shadbolt says that S.R.B. disclosed being sexually abused by her father and that he spent time in her bedroom with her, but that they had not gotten into detail at the time of that report letter about when it may have occurred.

[41] In her *viva voce* evidence, she says that S.R.B. disclosed to her that her father touched her in what Ms. Coady-Shadbolt described as a sexually inappropriate manner and that she was open in her disclosure about this allegation. Ms. Coady-Shadbolt described the disclosure as spontaneous and took place while they were drawing pictures of family.

December 5, 2019, Joint Interview

[42] On December 5, 2019, a joint interview of S.R.B. was conducted by Sgt. Paul Pentz of the Stellarton Police Service and Melinda Taylor for the Agency. The joint interview was video, and audio recorded. At the time S.R.B. was eight years old.

[43] Sgt. Pentz took the lead and spent considerable time developing rapport with the child, asking about her family, pets, activities, school, and similar circumstances. In responding to these questions S.R.B. was clear and had good recollection. She demonstrated relaxed body language and was quite animated.

[44] When asked about her father, she described missing him, but that sometimes he was bad towards her. She then described him touching her in a spot where he was not supposed to touch her. She marked that spot on a drawing and said it only happened in the morning and at night. She said it was at their old house in the bathroom or bedroom. She said that he told her that he would be mad at her if she told anyone.

[45] When asked how often it occurred, she first said that it occurred about 10 times "I think", and that it occurred in the bathroom and the bath. She then went on to describe one occasion in the bedroom. She was getting dressed and her father came in and touched her. She says she was on the bed while getting dressed and he was standing up. He told her not to tell anyone, she said that he used his right hand and did it on purpose and his left hand was by his side. She said that was the only time she remembered.

[46] When asked about occasions in the bath or bathroom, she said she could not remember those. She said it only happened one time in the bedroom and nowhere else.

[47] As she made these disclosures and was questioned about them, her body language changed and became more closed. Her hands were fidgeting, and she often went silent.

[48] Later in the interview she said the touching occurred once in the bedroom and once in the bathroom. She repeated that he touched her with his hand.

[49] Sgt. Pentz provided direct evidence in the matter. On cross-examination, he admitted he was not trained in the Stepwise interview process but that he had taken several courses on interviewing children. He admitted that exploring the difference between the truth and a lie with and emphasizing the importance of telling the truth was good practice in such interviews, but he had not done so for this interview.

[50] He also admitted that there was inconsistency in the child's statements regarding the number of times S.R.B. said her father had touched her, and the locations where those incidents occurred. He also agreed that the child described her father as good to her and it was only after he had asked the child if the father was bad to her that she made the disclosures.

Evidence of S.B.

[51] S.B. provided evidence by way of affidavit and *viva voce* testimony at the hearing. In his affidavit he says that he regularly saw the children, including S.R.B., on at least a dozen occasions between March and September 2019, when his visits stopped. The visits were every 2 to 3 weeks for 3 to 7 hours and usually took place at the maternal grandmother's home or at times at that the mother's apartment.

[52] He says that there was no awkwardness or shyness with the children during that time. He was shocked when the allegations of sexual abuse were made in December 2019, and he categorically denies ever sexually abusing S.R.B. or any other children.

[53] As part of the Minister's evidence, an affidavit was filed by social worker Melinda Taylor. In it, she says that on January 13, 2020, she spoke to the father by phone. She says the father told her that he was innocent but wished to consult with a lawyer first to ensure he did not say the wrong thing. The father went on to say that if the allegations are recent, they would be a lie. When asked if they would be the truth if the allegations were older, the worker says that the father accused her of fishing for information and refused to answer the question.

[54] The father says that his comments were taken out of context. Given the timeframe of the discussion with the worker, January 13, 2020, and the fact that he hadn't seen the children in approximately four months, he meant that if the allegations were recent, he could not possibly have done the acts alleged as he hadn't been with the children in many months. He says it was not an admission that any prior allegation was true.

[55] He also went on to say that he has not seen the children since September 2019 and is not seeking to reinstate any parenting time or to reside with the children at any point in the future.

[56] He notes he was also not charged with any sexual offence in relation to S.R.B.. He did participate in an interview with the New Glasgow Police Service in January 2020 and was of the understanding that there was insufficient evidence and no reasonable likelihood of the conviction if the charge were laid.

[57] On cross-examination, the father stated he had no idea why S.R.B. said the things she did in her various statements.

[58] When asked about his relationship with S.R.B., he described it as normal involving normal discipline and there were no fights or disagreements with her. He had no explanation as to why Sophie would fabricate the story she told to each of the other witnesses.

Timeline

[59] Given that the timeline had expired by the time this decision was rendered, I find it necessary to consider whether to extend the timeline and I do so considering the best interests of the children. I find that it is in their best interest to extend the timeline to permit the court time to reflect upon the evidence and render this decision. The children remain in their mother's care and the father is not seeking any contact with them. While the timeline should normally be honoured, there are circumstances such as this where the court requires additional time to consider a decision and cannot be rendered within the statutory timeline. I therefore extended to the date of this decision.

Analysis and Decision

[60] When considering the weight to be placed upon each of the statements of S.R.B., as noted earlier, there are certain findings common to all the statements that both enhance or detract from their reliability.

[61] I find that, for each of the statements, except the joint interview with the RCMP and the Agency, none of the interactions and statements were recorded by audio or video. There was no opportunity taken to explore the difference between the truth and a lie to obtain a commitment from S.R.B. to tell the truth. As well, there is no corroborating physical evidence for any of the statements and no indication whether the statement made was reasonably contemporaneous with the event alleged.

[62] On the other hand, I find that there is no evidence of any motive for this child to lie respecting any of the statements. Each of the statements made were to a professional person, either a social worker, counsellor or psychologist who are experienced in receiving and making notes of such interactions and statements. None of the persons who were involved in those interactions have any apparent motive to fabricate or exaggerate what was told to them. In each case, including the joint interview, I find that the statements made were spontaneous and without prompting.

[63] The most significant issue raised by the father with respect to the weight to be given to the statements is the question of inconsistency among the claims made by the child in the various statements. For example, S.R.B.'s disclosure to J.S. was about her father watching her urinate and telling her not to disclose this to anyone. In that discussion, S.R.B. did not disclose any inappropriate touching.

[64] In contrast, it was Stephanie Duggan's evidence that S.R.B. spontaneously informed her that her father had touched her inappropriately and was fearful that if the father were at the home, he would hurt her and her mother and would touch her again. The child disclosed having nightmares, waking up in fear of her father lying on top of her and that she was afraid her father would touch her. Ms. Duggan confirmed S.R.B. told her that the touching was to her private parts, and she was told not to tell anyone.

[65] Portions of this disclosure by S.R.B., specifically of her father lying on top of her, nightmares, and fear of waking up to her father lying on top of her were not disclosed to J.S.

[66] Similarly, the statement of Melinda Taylor by S.R.B. that the father would lock the children in their rooms when they lived with him, and this happened approximately five times was not disclosed on other occasions. She did disclose her father had touched her, which was consistent with many of the other statements, though not all.

[67] Doreen Coady-Shadbolt testified that S.R.B. disclosed to her that her she was being sexually abused by her father and that he spent time in her bedroom with her.

[68] In her *viva voce* evidence, she repeated the disclosure of S.R.B. that her father touched her and clarified it was in a sexually inappropriate manner. This is consistent with many of the other statements made by S.R.B. to other service providers, though there is some lack of consistency respecting the details of those allegations.

[69] In the joint interview with police S.R.B. described her father touching her in a spot where he was not supposed to, and that it happened in the morning and at night in the bathroom or bedroom. She stated he would be mad at her if she told anyone.

[70] She was inconsistent in the frequency and location. At one point she said it occurred 10 times in the bathroom and bath and then described one occasion in the bedroom. She described a clear recollection of her father coming into her bedroom and while she was on the bed getting dressed, he was standing up and he touched her with his right hand with his left hand by his side. She said that was the only time she remembered.

[71] When assessing all this evidence I also consider the father's unequivocal denial of any abusive behaviour towards S.R.B. or any other child. I accept his evidence that if any of the allegations were within the timeframe after which he had no contact with children, it would be impossible for him to have done the

things alleged. But there is no timeframe attached to these allegations. That is another factor to consider but does not assist the father in that circumstance.

[72] I find that at the time of these alleged incidents this child was quite young. I find it reasonable to take into consideration that a child of that age would not be expected to recall details of all incidents in sequence and be able to repeat them in an identical fashion each time.

[73] I find that there is inconsistency, both as between the statements (the fact that the same allegations are not repeated in each conversation) and within the joint interview (when the child identified different numbers of times abuse occurred and the locations). I find that that is a circumstance that should be considered.

[74] On the other hand, as noted earlier, I find it would not be unusual or unreasonable to expect that the child would recall different events of abuse if they were occurring over time and would not necessarily repeat the entire range and detail of abuse each time.

[75] I find that that among all the statements, the common thread is that S.B. touched S.R.B. in a sexually inappropriate manner or behaved in a sexually inappropriate manner at different times and in different locations. There is significant consistency among all the statements of the child to the various witnesses respecting the allegations of sexual abuse.

[76] When I consider all the evidence before me, including the out-of-court statements of the child, the evidence of the various witnesses including the father and the submissions of counsel and after considering the *Act* and jurisprudence applicable to this circumstance, I find that the Minister has met the burden of proof on a balance of probabilities to establish that S.B. sexually abused S. R. B.

[77] I find the various statements that were made to service providers and in the joint interview to be credible and do not find that the inconsistencies among them, as described earlier, are sufficient to diminish their credibility. There is consistency in the allegation of sexual abuse by inappropriate touching and inappropriate sexual behaviour in the form of watching her urinate.

[78] I do not find the father's denial credible when compared with the evidence of the out-of-court statements of the child and the description of the making of those statements. As noted by the persons to whom she made the statements, she was spontaneous. She has no reason to fabricate or lie. I further note that the body language exhibited in the joint statement video enhances the credibility of the allegations. She was closed in her body language the closer the questions came to matters of sexual abuse and more open and responsive the further away those questions went.

[79] In concluding that the father has sexually abused the child, I am also mindful that no criminal charges were laid against the father as a result of the joint interview. I do not find that to be persuasive given that the burden of proof on the Crown is to prove any such allegation beyond reasonable doubt and the requirement that the police not lay a charge unless there is a reasonable prospect of conviction. The standard of proof in any criminal proceeding is much higher than required in the civil proceeding under the *Act*. While it may be unlikely that the Crown could prove these allegations of sexual abuse beyond a reasonable doubt, I find that the Minister has proven these allegations on a balance of probabilities.

[80] Therefore, I grant an order confirming the finding of sexual abuse under section 22 (2) (c) of the *Act*, conclude disposition and grant termination of the Minister's involvement.

Timothy G. Daley, JFC