IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia (Community Services) v. A. A., 2009 NSSC 206

Date: 20090703
Docket: SFHCFSA 062541
Registry: Halifax

Between:

Nova Scotia (Community Services)

Applicant

and

A. A. and C. D.

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 a 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 Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: Justice Lawrence I. O'Neil

Heard: Oral Decision May 8, 2009 in Halifax, Nova Scotia
Follow up Appearances May 15, 20 and 25, 2009

Counsel: John Underhill and Peter McVey , counsel for the Applicant
A. A., Self Represented (represented by Colin Campbell on May 20 and 25, 2009)
Robert F. Ford, counsel for the Respondent C.D.

Oral Decision: May 8, 2009

Introduction

[1] By way of background to the court's decision, the court has before it a protection application concerning the child O.A.D., born January *, 2009. The matter was first before me on February 3rd, 2009 for a five day hearing as required by s.39(1) of the *Children and Family Services Act*, S.N.S. 1990, c. 5. Ms. Jones represented Ms. A. at that time. The interim hearing was completed February 23, 2009. The protection hearing required by s.40(1) of the *Children and Family Services Act supra*, was to be completed by April 28, 2009. As a result of concerns about Ms. A.'s ability to represent herself in that proceeding, the court chose to adjourn the completion of the protection hearing to a date beyond April 28, 2009.

Issue

[2] The issue is how the court can assess Ms. A.'s ability to effectively represent herself in the subject proceeding.

The Evidence

[3] A significant basis for the apprehension of the child from the hospital, following her birth, was the Minister's concern with Ms. A.'s mental health and the risk of domestic violence. Mr. Underhill, on behalf of the Minister, expressed grave concerns with the child being in Ms. A.'s care, given that she was not taking her medication as required.

[4] This concern has been a consistent theme of the evidence advanced by the Minister. I am going to read parts of the affidavit of Ms. Finlayson, sworn January 29th, 2009, which puts this issue in context. At paragraph 9 she says:

> On December 12th, 2008, I received a second referral in relation to A. A. when Debbie Salvon, of the IWK Health Centres Reproductive Mental Health Unit advised as follows in relation to A.A.:
>
> a. She had significant concerns regarding A. A.'s mental health, explained that A. had been diagnosed with schizophrenia, has not been taking her medication at all since early on in her pregnancy;
>
> b. A. had been admitted to the Nova Scotia Hospital a few months earlier, at which time she admitted domestic violence from her partner;
>
> c. A. does not do well off her medication, deteriorating very quickly, exhibiting signs of psychosis and paranoia;
>
> d. A. is being followed by an early psychosis program. Diane Picot, a psychiatrist, Dr. Heather Millican;
>
> e. according to Debbie Salvon, Diane Picot feels that A. A. is holding on by a thread at this time, could deteriorate at any moment prior to her fall delivery, given the changes in her hormones;
>
> f. hospital staff are very concerned with the safety of A.'s baby after delivery, explained that even if A. is assessed as stable directly after delivery, she might become psychotic within a few minutes and there's even a risk if her psychosis leads her to feel that her baby is the devil; and
>
> g. A. is wonderful when on her medication, but exhibits paranoia. Ms. Salvon felt that the baby would be at high risk of being hurt given A.'s mental health.

Paragraph 29, sub(h) concludes with reference to A. A.:

> h. She is quite concerned, that is Diane Picot, this time about post partum depression, having seen A. at the hospital on January 27th, 2009 and although A. does not appear to be demonstrating psychosis, she does appear to be cognitively disorganized.

Additional affidavit evidence was been filed April 21, 2009.

[5] The affidavit filed April 21st makes numerous references to the health of Ms. A. at that time. Paragraph 16 is a reference to concern that she might harm herself. Paragraph 23, reports that she denies her psychosis, paragraph 25 contains a reference to a February 27th incident where she refused to return the child. I believe access was subsequently suspended pending a mental health assessment. That is referenced at paragraph 28. Paragraph 31 and 32 describe a lack of compliance with medication. Non compliance is also described as being part of her illness. She is described as having a disorganized thought process and an impaired cognitive state. She wanted to take vitamins as an alternative to medication. Para 37 referenced March 12th and states that stress puts her at risk of a psychotic episode. At para 49, there's reference to what was hoped to have been successful treatment to stabilize Ms. A. There's a reference to her having taken the first of what was anticipated to be three injections to stabilize her medical condition. However, she was still exhibiting delusional symptoms at that time.

[6] As of April 15th, she had received two injections with the third injection scheduled for April 28th and it was in the belief that this medical treatment would assist Ms. A. that the court adjourned the proceedings on April 24th. At para. 63 of the same affidavit, Ms. A. is described as still having an inability to make decisions, lacking insight, being ambivalent and being volatile.

[7] When issues of mental illness arise, it is important that we be mindful of the stereotypes that have long existed with respect to people who have mental illness. Poorly informed persons can reach incorrect conclusions about the behaviour of persons who suffer from mental illness.

[8] However, the court, in addition to having the evidence contained in the affidavits about the medical condition of Ms. A., has had the opportunity on a number of occasions to observe her in court. The court is not quick to come to medical conclusions that might explain her behaviour. However, the court is very concerned that she is incapable of conducting her case.

The Charter of Rights and Freedoms

-Protection of Disabled Persons

[9] The issues of mental and physical illness are specifically referenced in the Charter. Section15 in the *Charter of Rights and Freedoms*, the Equality of Rights section, protects against certain discrimination and has as its thrust, as indicated in the heading, Equality of Rights. I refer to that section only because it is clear recognition that we must be mindful of the importance of accommodating people with physical or mental disabilities when they are parties in judicial proceedings.

[10] I am not prepared to embark on a technical analysis of whether Ms. A. is one of those persons within the definition of s. 15. There is evidence before me that she suffers from schizophrenia, possibly delusions. She may be suffering from post partum depression, etc. The thrust or spirit, certainly of s.15 generally is towards accommodating people who have particular health issues, mental or physical.

-The Parental Interest

[11] I am mindful of the views of the Supreme Court of Canada in the *R.B. v. Children's Aid Society of Metropolitan Toronto* [1994] S.C.J. No. 24, also reported [1995] 1 S.C.R. 315. This case involved a discussion of religious freedom and whether parents could decide to withhold certain medical treatment; in that case, blood transfusions from their children. The case resulted in a discussion of whether the role of the parent or the liberty interest of the parent in that context is protected by s.7 of the Charter.

[12] The court was not unanimous. However, there was agreement that the role of a parent is one of the most significant roles a person can have and a parent has accompanying rights that should be protected, whether we talk of s.7 or we use other language. I reference this discussion because it reinforces the importance of fundamental justice in this case. Fundamental justice is always important. It is always important that this right be closely guarded, but when the issue under consideration is that of one's parenting choices, the courts must be particularly vigilant. At paragraph 83, Justice La Forest stated:

> On that basis, I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent.

He writes in the same paragraph:

> This recognition was based on the presumption that parents act in the best interest of their child. The Court did add, however, that "when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties."

[13] Chief Justice Lamer, in the *Minister of Health and Community Services v. G.(J.)* [1999] 3 S.C.R. 46 at paragraph 61 stated:

> I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.), supra*, at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

At paragraph 76 he continued:

> The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

[14] These statements I put on the record to simply emphasize the balancing that the court must achieve. The court is mindful of the importance of the time lines contained in the *Children and Family Services Act supra*, and accepts the high priority that must be assigned to meeting those time lines. In my view, the subject child's best interest require that the completion of the protection hearing be adjourned beyond the statutory time line for doing so. It is in the child's best interest that reasonable efforts be made to ensure her parents' participate in this proceeding. As

observed in the preceding paragraph, the child's best interests are presumed to lie with the parent. Safeguarding the parent's opportunity to meet a challenge to this presumption must be viewed as in the child's best interests. We may reach a point where the pendulum will swing against further delay, but in my view, we are not there at this time. (see: *D.G.* [2006] N.S.J. 432)

-Due Process

[15] I am also mindful of the due process requirement that is contemplated within the *Children and Family Services Act supra,* itself. This is the governing statute under which we are acting. Issues of notice, issues of disclosure, issues of due process and fundamental justice are certainly live issues and the court's obligation to respond to them are mandated by that statute.

[16] However, for the reasons I have just quoted from the foregoing decisions, I decided that this protection hearing could not be completed within those time lines. I made that decision within the time lines and the court must, with dispatch, do everything within its power to ensure that Ms. A.'s interest as a parent is protected by providing her due process and a meaningful participation in the protection hearing. Today, Mr. McVey provided cases that are helpful and deal with related issues. He specifically identified paragraph 104 in the *New Brunswick Minister of Health and Community Services v. G.(C.)* [1999] S.C.J. No. 47. The closing line of paragraph 103 is:

> This is because the parent voluntarily assumes the risk of ineffective representation, for which the government cannot be held responsible.

That is a person representing himself. Paragraph 104 goes on:

> If the parent wants a lawyer but is unable to afford one, the judge should next consider whether the parent can receive a fair hearing through a consideration of the following criteria: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent. The judge should also bear in mind his or her ability to assist the parent within the limits of the judicial role. If, after considering these criteria, the judge is not satisfied that the parent can receive a fair hearing and there is no other way to provide the parent with a lawyer (i.e., pursuant to a statutory power to appoint counsel), the judge should order the government to provide the parent with state-funded counsel under s. 24(1) of the Charter. I hasten to add that I am limiting my comments here to child protection proceedings, and need not and should not comment as to other kinds of proceedings.

[17] Ms. A. has communicated to the court that she wishes to represent herself. Given that there is concern that the choice may not be the product of a healthy mind or healthy judgment, the court does not take that communication as definitive of the issue. Ms. A. is free to choose to represent herself. That is not the matter that is of concern to the court. The real concern is her ability to make a choice of that kind.

[18] I have serious concerns that she can have a fair hearing if she represents herself. That is why I have delayed the commencement of the evidence. The court must consider the seriousness of the interests at stake. I've already commented on how serious those interests are. The complexity of the proceedings must be considered. These proceedings certainly have the potential to be very complex. The capacities of the parents to parent is a crucial issue.

[19] A judge should also consider his or her ability to assist the parent within the limits of the judicial role. I have considered that and I do not believe my efforts to assist Ms. A. will achieve the desired result of a fair proceeding for Ms. A..

[20] She is not here today. The court considered Rule 6, which may have permitted the court to appoint a litigation guardian for Ms. A.. The court has the affidavit evidence and other exhibits that were filed in anticipation of a protection hearing. Although identified, they are not formally filed. Rule 6 makes reference to the *Adult Protection Act,* R.S.N.S. 1989 c.2 and to the *Incompetent Persons Act.* Rule 1 defines a person under disability.

[21] The *Criminal Code* was amended in 1991 to provide at 672.11, that the court having jurisdiction over an accused in respect of an offence, may order an assessment of the mental condition of the accused if it has reasonable grounds to believe that such evidence is necessary to determine that issue, and the related sub sections go on to address the situation, when the accused is unfit to stand trial. There are various provisions dealing with the issues of criminal responsibility and fitness to stand trial. This part of the code was added to deal with the issues of competency to instruct counsel and fitness to stand trial. In addition, at 672.24, the code directs that where the court has reasonable grounds to believe that an accused is unfit to stand trial and the accused is not represented by counsel, the court shall order that the accused be represented by counsel.

[22] Obviously, these provisions govern in the criminal context. Those sections do not govern this proceeding. However, I take the references in the code to be some

guidance in terms of the appropriate response of the court when dealing with a litigant in a civil proceeding when there is evidence that causes the issue of the competence of the litigant to arise. These sections are an example of what efforts the court should make in a criminal trial.

Conclusion

[23] The court has rejected the option of calling witnesses on its own motion to deal with the issue of whether Ms. A. is so affected by mental illness that she cannot represent herself in the subject proceeding, if in fact the court was satisfied that the rules permitted it to do so.

[24] The Minister of Health, under the *Adult Protection Act supra* has a certain mandate with respect to dealing with a person who is incompetent within the definition of that *Act*. The state may or may not be in a conflict when balancing its responsibilities under the *Adult Protection Act supra* and *Children and Family Services Act supra* in this proceeding.

[25] I believe that the appropriate way for the court to proceed is to appoint an *amicus curiae* who initially, would have a limited mandate. That mandate would be to examine the record, including the filings, the proposed filings and the CFSA file material and to lead evidence on the issue of the competence of Ms. A., or to make an assessment as to whether her competence is an issue that should be placed before the court. That person could also make submissions on the issue of competence as defined in Rule 1.05(b)(r) and as referenced in Rule 6. Rule 6 speaks of a person who is an infant or a mentally incompetent person.

[26] In the event that the evidence establishes that Rule 6 is triggered, if I may use that language, then it is the court's judgment that the most direct way to deal with the situation would be to have a litigation guardian appointed for Ms. A..

[27] As to the cost and retainer of an *amicus curiae*, I have the decision of Justice Oland, in *C.V. v. Children's Aid Society* [2005] N.S.J. No. 310. In that case Mr. Yeadon appeared for the Legal Aid Commission, presumably to inform the court as to what as a practical matter, that commission could do.

[28] I understand that at the lower court level in that case, there may have been an *amicus curiae* appointed as well. An *amicus curiae* is to assist the court. He is not to

represent Ms. A., he is not to represent the Minister, he is to assist the court in dealing with a difficult issue, namely whether Ms. A. is so affected by mental illness that she cannot represent herself in the subject proceeding.

[29] The appointment of an *amicus curiae* is therefore deemed to be the most appropriate response, by the court to the circumstances of the parties.

[30] At the conclusion of its oral decision , the court reserved the right to add reasons, add authorities, to expand upon its reasoning and to expand upon references to the evidence as might be necessary.

J.

Addendum

1. The protection hearing was adjourned to May 15, 2009 to permit the Minister to contact the Nova Scotia Legal Aid Commission and to inform the Commission of the court's May 8, 2009 ruling.

2. On May 15, 2009, Ms. A. appeared. She was again self represented. Her presentation was significantly more controlled and her communication was clearer. She advised the court that she had continued to take medication and was scheduled for her fifth injection the next day. She also expressed a willingness to retain counsel. It was the court's impression that her health had improved markedly, presumably because she had resumed taking her medication

3. Also on May 15, 2009 Ms. Karen Hudson, Barrister & Solicitor, was present and represented the Nova Scotia legal Aid Commission. She advised the court that Mr. Colin Campbell, Barrister and Solicitor, was prepared to act as an *amicus curiae* or as counsel for Ms. A. should it be determined that she could instruct counsel. Mr. Campbell was not in attendance. The matter was adjourned to May 20, 2009.

4. On May 20, 2009, Mr. Campbell appeared with Ms. A. He advised the court that after meeting with Ms. A., he was of the opinion that she could instruct counsel and he was prepared to represent her.

5. In the circumstances, the court accepted Mr. Campbell's opinion and proceeded to a consideration of the parties' position in anticipation of the protection hearing. Mr. Campbell could not advise the court on behalf of Ms. A., given his late retainer. The matter was therefore adjourned to May 25, 2009.

6. On Monday, May 25, 2009, Mr. Campbell, on behalf of Ms. A., confirmed Ms. A.'s consent to a protection finding on the basis of s.22(2)(g) of the *Children's and Family Services Act supra*.

J.