IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. R.P. , 2007 NSSC 111

Date: 20070410
Docket: SFHCFSA-050721
Registry: Halifax

Between:

Minister of Community Services
(formerly Children's Aid Society of Halifax)

Petitioner

v.

R.P. and V.P.

Respondent

Editorial Notice

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

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 o this Act, or a parent or guardian, a foster parent or relative of the child."

Judge: The Honourable Justice Mona M. Lynch

Heard: March 12, 2007, in Halifax, Nova Scotia

Counsel: Elizabeth Whelton, for the Applicant
David Grant, for the Respondent, R.P.
William Leahey, for the Respondent, V.P.
Peter Katsihtis, for the Guardian Ad Litem

By the Court:

Background:

[1] The child, K.P., was born on October *, 1991. At the end of June 2006, prior to this proceeding, she was in the care of the former Children's Aid Society of Halifax pursuant to a voluntary care agreement with her mother under s.18 of the *Children and Family Services Act* (*CFSA)*. K.P. returned to her mother's care and in September 2006 was again placed in the care of the agency pursuant to a voluntary care agreement. While K.P. was in the voluntary care of the agency she was placed in three group homes.

[2] K.P. continued to place herself in situations of risk both before and after her placement in the care of the agency. She cut her wrists in an apparent suicide attempt on more than one occasion. She ran away from group homes and her whereabouts were unknown for extended periods of time. She damaged property and assaulted other residents at the group homes. She threatened the staff of the group homes. She used alcohol and narcotics. She was having apparently unprotected sex with older men. She was suspected of providing sexual favours to an older man in exchange for cigarettes. K.P. disclosed that she had been sexually

assaulted by a 60 year old male who had given her alcohol. She refused to attend school. Her violent, disruptive and risk-taking behaviour escalated over the time K.P. was in the care of the agency.

[3] There were two referrals made by the agency to the Wood Street Secure Care Centre, Nova Scotia's secure-treatment facility, for K.P. while she was in the voluntary care of the agency. The first referral to the Wood Street Secure Care Centre was made on October 23, 2006 and the second was made on November 8, 2006. Both times it was determined that K.P. did not meet one of the three necessary criteria for admission to the secure-treatment facility. Both times it was determined that K.P. did not meet s. 55(1)(b) of the *CFSA*: "it is necessary to confine the child in order to remedy or alleviate the disorder".

[4] K.P. was taken into the care of the former Children's Aid Society of Halifax, now the Minister of Community Services, pursuant to s. 33 of the *CFSA* on January 17, 2007. By interim orders dated January 23, 2007 and February 5, 2007, K.P. is in the temporary care of the Minister of Community Services. A Guardian Ad Litem was appointed for the child on February 5, 2007.

[5] K.P. contacted her mother in late February 2007 after she had been away from the group home without permission for a number of days. K.P. reported to her mother that she had been held for a number of days against her will and physically and sexually abused by an individual. The mother took K.P. to the I.W.K. Hospital for examination where it was determined that K.P. is pregnant. K.P. has been living with her mother since February 28, 2007. The father has submitted that K.P. is now residing with her maternal grandparents; that is contrary to the information provided by the mother. K.P. is still in the care of the Minister of Community Services (the Minister) pursuant to a court order dated February 5, 2007.

[6] The father does not agree that K.P. should live with the mother and wants K.P. placed in secure-treatment pursuant to ss. 54-60 of the *CFSA.* The father is asking the court to order that K.P. be placed in secure-treatment.

[7] The father has asked the court to order K.P. be placed in the secure-treatment facility without of the consent of the Minister and without an application by the Minister for such an order. The father is asking the court to use its *parens patriae* jurisdiction. Both the mother and the Minister oppose the application. The

Guardian Ad Litem for the child expresses concern as to whether the court has the jurisdiction to make the order.

Issue:

[8] Is it appropriate for the court to use its *parens patriae* jurisdiction to order the Minister to place K.P. in a secure-treatment facility?

Legislation:

[9] The scheme for secure-treatment is set out in ss. 54-60 of the *CFSA*. Section 55(1) allows the Minister to issue a secure-treatment certificate of not more than five days in relation to a child in care at the request of an agency if the Minister has reasonable and probable grounds to believe that, (a) the child is suffering from an emotional or behavioural disorder; (b) it is necessary to confine the child in order to remedy or alleviate the disorder; and (c)the child refuses or is unable to consent to treatment. Section 55(4) requires that the Minister appear before the court before the secure-treatment certificate expires to satisfy the court that they have complied with the requirements for the secure-treatment certificate

and to make an application for a secure-treatment order under s.56 if such an order is sought.

[10] Section 56(1) allows the Minister or an agency, with the consent of the Minister, to make an application for a secure-treatment order for a child in care. Section 56(3) limits the duration of the secure-treatment order to 30 days and requires that the court be satisfied that the child meets the same three criteria as for a secure-treatment certificate. On the same criteria the Minister or the agency may, under s. 56(4), apply to review the order for a period of not more than ninety days. Section 57 allows the Minister, agency, a parent or guardian of a child or the child to apply to the court to review a secure-treatment order. Section 58 allows the Minister, the agency, the child or the parent or guardian of the child to appeal the secure-treatment order or the review order.

[11] Regulation 35C(1) under the *CFSA* provides that no child shall be placed in a secure treatment facility and no court, judge, justice, youth court judge or tribunal shall order, renew or review placement of a child in a secure-treatment facility unless the placement, renewal or review is approved, applied for or consented to by the Minister. Regulation 35C(2) provides that the consent of the Minister for an

application shall be in the form of a letter signed by the Director of Child Welfare.

Analysis:

[12] The father has not argued that the legislative scheme violates either the *Canadian Charter of Rights and Freedoms* or the *Constitution Act, 1867.* I have therefore not considered whether the legislative scheme violates the rights of the child or the parents. I have not considered whether the statute or regulations are *ultra vires* the Legislature of the Province of Nova Scotia. I have not considered *mandamus* or *certiorari* as there is no application for either before me. The father's sole argument is that there is a gap in the legislation and asks that I use my *parens patriae* jurisdiction to order that K.P. be placed in the secure-treatment facility available in the Province of Nova Scotia.

[13] The father acknowledges that the wording of sections 55 and 56 of the *CFSA* is clear that only the Minister, or the agency with the consent of the Minister, has the authority to issue a secure-treatment certificate and to make an application to the court for a secure-treatment order. They do submit, however, that there is no

statutory mechanism to review the Minister's decision to approve or reject a request for secure-treatment. They submit that it was not contemplated by the legislature when the legislation was proposed that it would be possible for the social worker most closely involved in the care of the child to not have any real power to place the child in secure-treatment. They submit that these circumstances indicate the existence of a "legislative gap" in the statutory and regulatory plan relating to secure-treatment and that this gap was not planned. They submit that the gap consists of the absence of any provision for appeal from the Director's decision in order to protect the child against a poor decision made on inadequate or inappropriate information.

[14] It is clear that the paramount consideration in any matter under the *CFSA* is the best interests of the child.

[15] The Supreme Court of Canada has considered the *parens patriae* jurisdiction on a few occasions. In **Re Eve** (1986) Carswell PEI 22 (S.C.C.) the court considered an application by the mother for permission to consent to the non-therapeutic sterilization of her daughter. After considering the scope of *parens patriae* LaForest, J. says at p. 9:

> Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuick in Re X, at pp. 706-707, and Heilbron J. in Re D, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

[16] In **Beson v. Newfoundland (Director of Child Welfare)** (1982), Carswell Nfld 29 (S.C.C.) the Director of Child Welfare for the province had removed a child from an adoptive home seven days before the expiration of the probationary residence period of six months required for an adoption. The Supreme Court of Canada allowed the appeal by the adoptive parents and made an adoption order. They found there was a gap in the legislation which could be filled by an exercise of the *parens patriae* jurisdiction. The Director's failure to treat the adoptive parents fairly provided a basis for judicial review. Having no right of appeal from the Director's removal of the child from the home the court found was a gap in the legislative scheme which the Newfoundland courts could fill by exercise of their *parens patriae* jurisdiction. In paragraph 12, Wilson, J. quotes Lord Wilberforce

of the House of Lords in **A. v. Liverpool City Council and another,** [1981] 2 All E.R. 385 at p. 388:

> To the argument, therefore, that the High Court has a special and overriding jurisdiction because only there can the welfare of the child be assigned its proper place, the answer is clear: that there is no other principle on which any court or administrative body can (with the exception of public protection cases, and even there considerations must be mixed) act that that which is best for the child's welfare. It must, however, be borne in mind that, whereas the duties and powers of local authorities and of juvenile courts are defined and limited by statute, there is no similar limitation on those of the High Court.
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> This leads to the next and decisive question: given that both the High Court and the local authority have responsibilities for the welfare of the child, what is the relationship, or dividing line, between them? I think that there is no doubt that the appellant, the child's mother, is arguing for a general reviewing power in the court over the local authority's discretionary decision; she is, in reality, asking the court to review the respondents' decision as to access and to substitute its own opinion on that matter. Access itself is undoubtedly a matter within the discretionary power of the local authority.
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> In my opinion the court has no such reviewing power. Parliament has by statute entrusted to the local authority the power and duty to make decisions as to the welfare of children without any reservation of reviewing power to the court.

Wilson J. continues:

> The learned Law Lord then went on to deal with the relief that was available from the court in exercise of its parens patriae jurisdiction and gave as an example judicial review should the facts of the case warrant it. In the **Liverpool** case they did not. He stressed that the inherent jurisdiction is not taken away. It simply cannot be resorted to if the action the court is being asked to take is within the discretion of the local authority. He continued at pp. 388-89:
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> > But in some instances there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend. Sometimes the local authority itself may invite the supplementary assistance of the court. Then the ward ship may be continued with a view to action by the court. *The court's general inherent power is always available to fill gaps or to supplement the powers of the local authority: what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority.* (Italics in original)

[17] There are many, many cases which consider the *parens patriae* jurisdiction of the Superior Court and they are clear on many points. The inherent jurisdiction is available to care for those unable to care for themselves and the jurisdiction is available to protect children. It is available to fill legislative gaps. It is clear from the quotes above that the court is not to use its inherent jurisdiction if the action the court is being asked to take is given to the Minister by the legislature. I cannot substitute my decision for that of the Minister.

[18] The *CFSA* provides a complete code dealing with secure-treatment. As set out in **Re D.T.**, [1992] N.S.J. No. 289 (N.S.S.C.A.D.), collateral proceedings should be discouraged. The legislature has clearly reserved to the Minister the

decision to determine whether or not to issue a secure-treatment certificate. The legislature has clearly required that the Minister must consent to any applications for a secure-treatment order. I do not find a legislative gap in the *CFSA* in the decision making powers for applications for secure-treatment orders or the granting of secure-treatment certificate. It was clearly a deliberate decision by the legislature to limit access to secure-treatment by reserving those decisions to the Minister. The legislation and regulations clearly make the Minister the gate-keeper to secure-treatment.

[19] A secure-treatment order or certificate is a major intrusion on the liberty of the child and the legislature has recognized that major intrusion by limiting access to secure-treatment. There are clearly defined criteria that must be met before the Minister can issue a secure-treatment certificate. A certificate expires in five days but the Minister must appear before the court (even if they are not looking for a secure-treatment order) within that five days to satisfy the court that they have complied with the provisions for issuing a secure-treatment certificate. Any secure-treatment for more than five days requires a judicial determination as to whether the criteria for secure-treatment has been met before the issuance of the secure-treatment order. Secure-treatment is clearly a matter that the legislature

took very seriously and provided for safe guards so that children were not easily deprived of their liberty.

[20] The father asks me to find that there is a legislative gap as there is no mechanism in the *CFSA* to appeal the decision of the Minister to not grant a secure-treatment certificate or to not apply to the court for a secure-treatment order. I do not find that there is such a gap. This is not a case like **Beson** where the rights of the prospective adoptive parents were affected and they had no recourse. The decision of the Minister regarding secure-treatment can be revisited at any time. In K.P.'s case there was an application where the decision makers consulted with the social worker who made the application. There was a further application a few weeks later again with consultation. There is no limit in the *CFSA* on the number of applications and no time limit between applications.

[21] There is nothing before me as in **Children's Aid Society of Metropolitan Toronto v. Dizio**, [1990] O.J. No. 1335 to indicate that the Minister or decision maker in this case failed to adequately consider the best interests of the child. There is nothing before me as in **Beson** to suggest that K.P. was not treated fairly.

Conclusion:

[22] I do not find it appropriate to exercise my *parens patriae* jurisdiction to order the Minister to place K.P. in secure-treatment. I do not find a legislative gap in the secure-treatment provisions of the *CFSA* .

J.