

**SUPREME COURT OF NOVA SCOTIA**

**(Family Division)**

Citation: Nova Scotia (Community Services) v. K.C., 2016 NSSC 280

**Date:** 20161025

**Docket:** SFSNCFSA 094029

**Registry:** Sydney

**Between:**

Nova Scotia (Community Services)

Applicant

and

K.C-S. and C.T.

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.”

**Judge:** Associate Chief Justice Lawrence I. O’Neil

**Heard:** February 10, 11 and 12, 2016; June 21 and 22, 2016; and July 12, 2016  
in Sydney, Nova Scotia

**Counsel:** Adam B. Neal, Counsel for the Minister  
Damien Barry, Counsel for K. C-S.  
C. T., not participating

## By the Court:

### Introduction

[1] It is common for counsel for the Minister of Community Services, in child protection proceedings, to advise the court that a person identified as a biological parent or a possible biological parent of a child is, in the Minister's opinion, not a parent of the subject child within the meaning of the *Children and Family Services Act* S.N.S. ,1990 c.5, the *CFSA*. The Minister will often then explain to the court that, on this basis, notice of the child protection proceeding was not given to that person.

[2] The position of the Minister of Community Services turns on *inter alia* the meaning and effect of two statutory provisions. Section 3(1)(r) of the *CFSA* defines parent or guardian as follows:

#### Interpretation

3 (1) In this Act,

(r) "parent or guardian" of a child means

- (i) the mother of the child,
- (ii) the father of the child where the child is a legitimate or legitimated child,
- (iii) an individual having the custody of the child,
- (iv) an individual residing with and having the care of the child,
- (v) a step-parent,
- (vi) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child,
- (vii) an individual who has acknowledged paternity of the child and who
  - (A) has an application before a court respecting custody or access or against whom there is an application before a court for support for the child at the time proceedings are commenced pursuant to this Act, or

(B) is providing support or exercising access to the child at the time proceedings are commenced pursuant to this Act,

but does not include a foster parent;

[3] Section 33(2) of the *CFSA* requires notice of a child protection proceeding to be served when a child is taken into care. By virtue of s.36(1)(b), the child's parent or guardian is a party to a proceeding and s. 39(1) requires notice to parties when an application is made to determine whether a child is in need of protective services, the usual first stage of a protection proceeding. These provisions provide:

33(2) On taking a child into care, an agent shall forthwith serve a notice of taking a child into care upon the parent or guardian if known and available to be served.

.....

36(1)(b) The parties to a proceeding pursuant to Sections 32 to 49 are

(b) the child's parent or guardian;

.....

39(1) As soon as practicable, but in any event no later than five working days after an application is made to determine whether a child is in need of protective services or a child has been taken into care, whichever is earlier, the agency shall bring the matter before the court for an interim hearing, on two days notice to the parties, but the notice may be waived by the parties or by the court.

[4] Notice of a child protection proceeding must be given to a parent once a proceeding is commenced regardless of whether a child has yet been taken into care.

[5] The form and content of the notice of a child protection application is governed by R.60A.03 and related sections of the Supreme Court rules. Precise guidance is given.

[6] Herein, D.T. was identified in the court filings as the alleged biological father of the child Z., d.o.b. November 5, 2012. Late in this proceeding, the court learned D.T. had not been served with notice of this proceeding. The rationale for not serving D.T. being that he, in the view of the Minister, is not a parent or guardian as

defined by the *CFSA*. The court directed that he be personally served and directed that he appear.

[7] Clearly a determination that a person is not a parent or guardian is a critically important conclusion. To deny someone knowledge and notice of a child protection proceeding pertaining to her/his child can have profound implications for a child as well as the affected adult. These implications were borne out in a 2010 decision of Justice Forgeron, *Children's Aid Society of Cape Breton Victoria v. S.W., J.F. and K.B. and K.B. v. S.W.R.*, 2010 NSSC 104. In that case, the agency did not provide the biological father with notice of the child protection proceeding because, in its view, the father was not a parent as defined by the *CFSA*. The conclusion was based on a mistaken belief that the father was not involved in the child's life. In fact, the father had a right of access to the child pursuant to a court order.

[8] Justice Forgeron ordered that the father be served with notice of the proceeding.

[9] At the end of the proceeding, the father was granted care of his child.

[10] In a recent decision pertaining to the notice requirements when a private adoption is proposed, Justice Gregan discussed the principles of procedural fairness and natural justice (see *Re: Adoption of I.F.M.* 2016 NSSC 83).

[11] Justice Gregan referenced the decision of Justice Williams in *Nova Scotia (Minister of Community Services) v. J.O.Y.*, 2009 N.S.J. 325 as support for the conclusion that notice of the proposed adoption was to be given to the biological father.

[12] Justice Gregan also reviewed related jurisprudence on the issue of notice in the family law context (adoption); including two decisions of the Nova Scotia Court of Appeal (*Re Adoption of Child of D.F.T. and D.M.T.*, (1978) N.S.J. 683 and *Children's Aid Society and Family Services of Colchester County and T. (D.) and T. (L.) Respondent and the Department of Attorney General, and adopting parents, intervenor Respondents*, [1992] N.S.J. 289). Justice Gregan drew support for his conclusion, that in the situation before him, notice to the biological father was required from two more recent decisions of the Nova Scotia Court of Appeal

(*Bellefontaine v. Slawter* [2012] N.S.J. 251 and *Waterman v. Waterman* [2014] N.S.J. 652). Justice Gregan's commentary is a valuable discussion of the basic principles of procedural fairness that must also guide all process in child protection proceedings.

[13] It is trite to say that important Charter Rights are impacted by child protection proceedings. (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 and see also *Manitoba (Director of Child and Family Services) v. H.H. and C.G.*, 2016 MBQB 138).

[14] Herein, D.T. appeared at the conclusion of the Minister's evidence on July 21, 2016 and advised the court he did not want to participate in the hearing nor seek legal advice on whether he should. He did, however, confirm having visited the home of K.C-S. to see the subject child and that he did at times see the child. He further confirmed he was unaware of the child protection proceeding but seemed to know child protection authorities were involved in the life of the child Z., at some point.

[15] D.T. said he is uncertain whether he is the biological father of the child, there not having been DNA evidence to confirm it. He was not very persuasive when he claimed uncertainty in this respect. In any case, the court accepted his decision to support the plan of the Minister and to not participate in this proceeding.

## **Conclusion**

[16] A possible parent or guardian, whether a biological parent or not, should be served notice of a child protection proceeding. The important determination of whether one meets the definition of "parent or guardian" is one that should be made after the benefit of that person's input, if that is available. This is an underlying due process assumption of the notice requirements of the *CFSA* and the Rules of court. This notice requirement is a positive duty on the Applicant.

[17] If notice of the opportunity to participate in that determination cannot be given, that is an issue that should be raised with the Court by the Applicant.

**ACJ**