

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: Nova Scotia (Health & Wellness) v. F.S. 2017 NSSC 262

Date: 2017-10-04

Docket: Port Hawkesbury No. SFPAAPA 100893

Registry: Port Hawkesbury

Between:

Minister of Health and Wellness

Applicant

And

F.S., by Guardian Ad Litem, Guy Arsenaault & C.S.

Respondent

Judge: The Honourable Justice Darryl W. Wilson

Heard: May 16 & 23, 2017, in Port Hawkesbury, Nova Scotia

Counsel: Lindsay McDonald, for the Applicant
Roseanne Skoke, for the Respondent, C.S.
Lisa Fraser Hill, for the Respondent, F.S. (by his Guardian Ad Litem, Guy Arsenaault)

[1] This Adult Protection proceeding concerns F.S., age 22.

[2] The original proceeding was initiated by Notice of Adult Protection Application (after removal) on May 20, 2016. F.S. was removed from his mother's apartment in Port Hawkesbury and returned to a group home in the Truro area where he had been residing.

[3] F.S. had been in the care of the Minister of Community Services since age 5. His mother was unable to care for his needs. He has been diagnosed with an intellectual disability and Autism Spectrum Disorder with obsessive compulsive features.

[4] C.S., the mother of F.S., has physical disabilities and a limited range of intelligence.

[5] When F.S. turned 21, he came under the care of the Department of Community Services' Disability Program. A referral was made to the office of the Public Trustee to have the Public Trustee declared a substitute decision maker for F.S. The Public Trustee denied the request, taking the position that F.S.'s mother, C.S., could take that role and act in his best interest.

[6] In February 2016, Adult Protection received a referral from the Department of Community Services' Disability Program indicating that C.S. intended to take her son back home to live with her. Initially she did not act to remove her son from the group home. Arrangements were made for F.S. to have visits with his mother in her Port Hawkesbury residence.

[7] Another referral to Adult Protection was received in May 2016. Arrangements were made for F.S. to have a 10 day visit with his mother. Concerns were noted about the mother's ability to provide supervision and care, including appropriate medication administration. F.S. was removed from his mother's care and returned to the group home in the Truro area and the Minister made the first application under the *Adult Protection Act*.

[8] An Interim Order was granted on May 24, 2016 appointing a Guardian Ad Litem for F.S. and seeking a report. A report was filed and on July 12, 2016 an Adult Protection Order was made finding F.S. to be an adult in need of protection authorizing the Minister to provide services. The Order was reviewed on December 12, 2016. At that time, C.S. indicated, through counsel, an intention to apply for standing in order to apply for placement care and guardianship of her son, or in the alternative, an Order for meaningful access.

[9] On April 4, 2017 counsel for the Minister of Health and counsel for the guardian, consented to the mother's application for standing.

[10] On May 1, 2017 the Minister of Health filed a Notice of Motion for a declaration and Order respecting the substitute decision maker, specifically requesting a declaration that the mother may not and shall not act as substitute decision maker for her son and making a referral, asking the office of the Public Trustee to agree to appointment as substitute decision maker.

[11] A review of the Adult Protection Order of December 12, 2016 including consideration of the mother's application for placement care and guardianship, as well as the Minister's request for a declaration, was heard on May 16 and 23, 2017.

[12] On May 16, 2017 the Court heard from the Respondent, C.S. and her daughter, A.S., as well as the guardian ad litem and Joshua Tavares, the Adult Protection Worker.

[13] On May 23, 2017 the Court heard from Dr. Risk Kronfli, Consultant Psychiatrist, who was requested to review the extensive data and collateral material provided as it related to F.S. and his mother, C.S. He was asked to provide an opinion about the possibility of finding alternative support and accommodation for F.S. through his mother. He did not conduct a face to face consultation and

assessment with F.S. or observe any interaction between F.S. and his mother. The amount of collateral information reviewed by Dr. Kronfli was extensive. He lists the information in his report which was filed as an exhibit. Dr. Kronfli noted that F.S. suffers from a permanent disability that is physical and cognitive. His cognitive functioning is one of the lowest levels of cognitive abilities as detailed in several assessments reviewed by him. Dr. Kronfli also observed that F.S. suffers from an Obsessive Compulsive Disorder that is being treated. He has secondary seizure disorders which are being treated. He is on a complicated medication protocol. He presents behavioral manifestations that include challenges with violence at times, difficulty redirecting him, and constant assistance for anything other than walking or eating. Clear documentation support these findings.

[14] C.S. provided information on her circumstances, including a diagnosis by her family doctor, a Geriatric Assessment and a Occupational Therapy Assessment. While C.S. is officially independent, she suffers physical disabilities that are challenging. The Occupational Therapy Assessment indicates a need for support and a recommendation to have assisted living. The Geriatric Consultant indicates a high probability of the start of dementia. Interactions between herself and her son indicate a high level of lack of insight with regard to her own limitations and the challenges that her son faces in the activities of daily living.

[15] Dr. Kronfli concluded that F.S. requires intervention and actual supports provided on a day to day basis, requiring multiple caregivers and team members. Dr. Kronfli cannot envision the care of F.S. being outside a specialized residential structure or facility requiring a multi-disciplinary approach because of his extensive care requirements and unpredictable behavior at times.

[16] He does not recommend that C.S. have any level of unsupervised or overnight visits. She would require a high level of constant support and supervision by staff or by others if that were to happen.

[17] Dr. Kronfli recommended, based on his review of the collateral and documents, that C.S. not become the substitute decision maker.

[18] Dr. Kronfli's report was based on an extensive review of documents. He felt it would be a waste of resources if he were to conduct a face to face assessment of C.S. when he felt that it was not required and it would not add anything more to have an opinion with regard to the matter at hand. He concluded by stating that as a forensic psychiatrist who has been conducting this type of review and opinion for the courts for many years, his opinion is based on a high level of medical certainty.

[19] I have reviewed the evidence of the Guardian Ad Litem, the Adult Protection worker, the Respondent, C.S. and her daughter, A.S, and the exhibits

tendered by the parties. The Respondent's daughter, A.S., agrees that her mother is not able to provide care for her son in her home. In the past, A.S. indicated a willingness to act as a substitute decision maker but withdrew that option because she did not want to upset her mother, who was making an application for standing. She stated a willingness to act as substitute decision maker in the future.

[20] At the conclusion of the hearing the Court determined, based on a balance of probabilities, that F.S. was an adult in need of protection and that it was in his best interest that the Minister provide him with services including placement services. The mother's application for placement care and guardianship was denied.

[21] The Court reserved its decision on the Minister's motion for an Order/Declaration that C.S. may not and shall not act as substitute decision maker for F.S., and a referral, asking the office of the Public Trustee to agree to an appointment as substitute decision maker.

SUBSTITUTE DECISION MAKER

[22] The adult, F.S., lacks the necessary capacity to make healthcare and placement decisions. There is no personal directive. There is no guardian or Guardianship Application. There is limited jurisdiction under the ***Adult Protection Act, R.S., c. 2, s. 1.*** when dealing with these circumstances.

[23] Counsel for the Minister submits the Court has authority under sections 9(3) and (4) of the *Adult Protection Act* to make a declaration that the Respondent, C.S. is not able/capable to act as a substitute decision maker and a referral to the Public Trustee where there appears to be no guardian to act on behalf of the adult. The Minister hopes the Public Trustee would then ask the next nearest relative to act as substitute decision maker or assume the role of substitute decision maker itself.

[24] Section 9 of the *Adult Protection Act* provides as follows:

9 (1) Where on the basis of an assessment made pursuant to this Act the Minister is satisfied that there are reasonable and probable grounds to believe a person is an adult in need of protection, he may apply to a court for an order declaring the person to be an adult in need of protection and, where applicable, a protective intervention order.

(2) The Minister shall give at least ten days' notice of the application in the prescribed form to the person in respect of whom the application is made or some person having custody or control of that person and, where applicable, the person against whom a protective intervention order may be made.

(3) Where the court finds, upon the hearing of the application, that a person is an adult in need of protection and either

(a) is not mentally competent to decide whether or not to accept the assistance of the Minister; or

(b) is refusing the assistance by reason of duress, the court shall so declare and may, where it appears to the court to be in the best interest of that person,

(c) make an order authorizing the Minister to provide the adult with services, including placement in a facility approved by the

Minister, which will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect;

(d) make a protective intervention order directed to any person who, in the opinion of the court, is a source of danger to the adult in need of protection

(i) requiring that person to leave the premises where the adult in need of protection resides unless that person is the owner or lessee of the premises,

(ii) prohibiting or limiting that person from contact or association with the adult in need of protection,

(iii) requiring that person to pay maintenance for the adult in need of protection in the same manner and to the same extent as that person could be required to pay pursuant to the *Family Maintenance Act*.

(4) Where a court makes an order pursuant to clause (c) or (d) of subsection (3), it may advise the Public Trustee that there appears to be no guardian to act on behalf of the adult in need of protection or that it appears that there is a guardian or a person acting pursuant to a power of attorney who is neglecting or dealing with the estate contrary to the best interests of the adult in need of protection.

(5) An order made pursuant to subsection (3) expires six months after it is made.

[25] Section 14 of the *Personal Directives Act, 2008, c. 8, s. 1.*, provides as follows:

14 (1) Subject to the Hospitals Act, the Involuntary Psychiatric Treatment Act, clause 5(2)(c) and subsection 22(2), where a person who lacks capacity to make decisions regarding health care or a decision to accept an offer of placement in a continuing-care home or regarding home-

care services has not made a personal directive authorizing a delegate or setting out instructions or wishes regarding

- (a) health care;
- (b) a decision to accept an offer of placement in a continuing-care home; or
- (c) home-care services,

and does not have a guardian with authority to make such decisions, health-care decisions, a decision to accept an offer of placement in a continuing-care home and home-care services decisions may be made on behalf of the person by

- (d) the nearest relative who has capacity and is willing to make the decision; or
- (e) where there is no nearest relative who has capacity and is willing to make the decision, the Public Trustee.

(2) A nearest relative shall not exercise the authority given by subsection (1) unless the nearest relative

- (a) excepting a spouse, has been in personal contact with the person over the preceding twelve-month period or has been granted a court order to shorten or waive the twelve-month period;
- (b) is willing to assume the responsibility for making the decision;
- (c) knows of no person of a higher rank in priority who is able and willing to make the decision; and
- (d) makes a statement in writing certifying the relationship to the person and the facts and beliefs set out in clauses (a) to (c). *2008, c. 8, s. 14*

[26] C.S., the current substitute decision maker, is not able to interfere with F.S.'s placement because of the Adult Protection Order. The Adult Protection Order enables the Minister to ensure his continuing placement for a six month period. The Minister has not framed their application as a request for a Protective

Intervention Order because of the very particular language of s. 9(4). The Minister is not attempting to prevent C.S from having access to F.S.

[27] Counsel for the Minister submits that the Court, having reviewed the evidence, can determine that the Respondent, C.S. is not capable of making decisions for F.S.'s care. Once the Court determines an Order should be issued authorizing the Minister to provide services including placement in a facility, it may advise the Public Trustee that there appears to be no guardian to act on behalf of the adult in need of protection.

[28] Counsel for the Minister agrees that the Court does not have the authority to make the decision on who the substitute decision maker can be, but submitted the Court has the authority to prevent some people from being the substitute decision maker.

[29] Counsel for the Respondent, C.S., submits that once the Court makes an Order authorizing the Minister to provide F.S. with services, then the Minister has a responsibility of working with the family in terms of substitute decision making. Counsel for C.S. submits that if the Court was not going to place the child in her care, she would consent to her daughter acting as substitute decision maker, or both her and her daughter as joint substitute decision makers.

[30] Counsel for the Guardian Ad Litem supports the position taken by the Minister.

[31] I agree with the evidence of the Minister that when C.S. assumed the substitute decision making role for F.S., the decisions and choices she made placed him at substantial risk of harm and necessitated the Adult Protection intervention.

[32] C.S.'s evidence at the Adult Protection Hearing indicates a continuing lack of appreciation of her son's significant limitations and her ability to meet his very high level of care needs. Based on her past actions, and her current lack of insight into F.S.'s circumstances, and her inability to meet his needs, continuing Adult Protection involvement would likely be required while she continues as substitute decision maker for F.S.

[33] At the same time, I agree with counsel for F.S. that the hearing was not a hearing on C.S.'s competence. There was no application pursuant to s. 29 of the *Personal Directives Act, supra*, to determine C.S.'s capacity to act as substitute decision maker.

[34] The Court lacks the authority under the *Adult Protection Act* to appoint a substitute decision maker. The *Personal Directives Act, supra*, provides the legislative framework for the appointment of a substitute decision maker when an

adult lacks capacity and there is no personal directive. There is a role for the Public Trustee to play in these circumstances, which is set out in the legislation. However, until it is determined that C.S. lacks the capacity or is unwilling to act as substitute decision maker, continuing Adult Protection involvement will be required.

[35] Perhaps all parties can agree that C.S.'s daughter, A.S., and F.S.'s closest relative after his mother, can act as substitute decision maker. While Adult Protection can provide placement for F.S., they may have to consult with C.S. on other healthcare decisions while C.S. continues to act as substitute decision maker.

Wilson, J.