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."

SFHC-009620

IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

BETWEEN: **A.B.C. -** **APPLICANT**

-AND-

MINISTER OF COMMUNITY SERVICES - **RESPONDENT**

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September 25, 2008.

DECISION

2003-NSSF-047

HEARD: **BY THE HONOURABLE JUSTICE LESLIE J. DELLAPINNA ON OCTOBER 28, 2003**

DECISION: **NOVEMBER 6, 2003**

COUNSEL: **COLIN CAMPBELL** **- APPLICANT**

JAMES LEIPER **- RESPONDENT**

DELLAPINNA, J.:

An application has been made by A.B.C. pursuant to subsections 48(3) and (6)(d) of the **Children and Family Services Act** for leave to apply to terminate the permanent care order dated September 14, 1999 or in the alternative, to vary the terms of that permanent care order to allow her access to her daughter with a view to regaining custody. A.B.C. has also applied for an order pursuant to subsection 37(3) appointing a guardian *ad litem* for her daughter. This is the third such application by A.B.C. since the permanent care order was granted approximately four years ago.

At a pre-hearing conference on September 16, 2003 A.B.C.'s counsel took the position that personal service of A.B.C.'s application on the child is required by the **Children and Family Services Act**. The Minister opposes personal service and instead proposes that a guardian *ad litem* be appointed for the child and that notice be

effected through the guardian *ad litem* who, because of the child's special needs, should have a therapeutic background.

Prior Proceedings

The initial proceeding with respect to the child was commenced on February 5, 1998. T.J.C. was determined to be a child in need of protective services pursuant to subsections 22(2)(a), (g), (i) and (j) of the **Children and Family Services Act** on April 16, 1998. After a trial of several days, Justice Legere-Sers rendered a decision wherein she ordered that T.J.C. be placed in the permanent care and custody of the Minister. There was no provision for access. In arriving at her decision, Justice Legere-Sers made a number of conclusions including the following at pages 58 to 60:

> " T.J.C. has had a troubled, unstable, transient history since birth. The history of transience and domestic violence is documented in child protection records from other locations including Ontario, Alberta, New Brunswick and Nova Scotia. The lack of commitment to her education is documented in Ontario, New Brunswick and Nova Scotia.
>
> ...
>
> Unfortunately this child has been subject to this instability for most of her life. She is attached to her mother, misses her and wants to go home. She displays disturbed behaviour in foster care. This is not the first time the child has exhibited disturbing behaviour while in care. She now requires long term therapeutic intervention and stability. She will not receive this in her mother's or step-father's care. Going home virtually guarantees she will continue to be at risk emotionally, physically and educationally." [**Minister of Community Services v. A.B.C. and M.G.C.**, S.F.H. No.CFSA 98-10].

On June 30, 2000 A.B.C. first applied to terminate the permanent care order. On January 23, 2001 Justice Legere-Sers dismissed the application. At paragraph 58 of her decision, Justice Legere-Sers stated:

> " In the permanent care and custody order, it was clear that this child was a troubled child with special needs and would require fairly significant therapeutic involvement to sustain and improve her emotional development. It was clear that this was not a short-term fix. While adoption has always been the plan, and continues to be, the identified emotional needs of this child require immediate and sustained involvement." [**A.B.C. v. Nova Scotia (Minister of Community Services),** [2001] N.S.J. No.29].

On September 27, 2001 the Applicant brought a second application to terminate the permanent care order. On April 26, 2002 Justice Legere-Sers dismissed that application and stated in paragraphs 61 and 62 of her Decision:

> " With respect to this application for review, to introduce access with a view to transferring custody ultimately to the mother, the Applicant has not met the burden of proof. What changes that have occurred in A.B.C.'s life have not been significant enough to place her in a position now or in the foreseeable future to re-introduce her to the child.
>
> Had I been convinced that the changes in the mother's life were material, the other aspect to this application is the benefit to T.J.C. The overwhelming weight of evidence including the opinions of those most significantly involved in the therapeutic care of T.J.C. suggests that re-introducing access or contact between the mother and child would in fact be harmful in and of itself. It would also interfere with permanency placement.". **[A.B.C. v. Nova Scotia (Minister of Community Services),** [2002] N.S.J. No.200].

Legislation and Rules

The following sections of the **Children and Family Services Act** are relevant:

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.

...

3 (2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:

(a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;

(b) the child's relationships with relatives;

(c) **the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;**

(d) the bonding that exists between the child and the child's parent or guardian;

(e) **the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;**

(f) the child's physical, mental and emotional level of development;

(g) the child's cultural, racial and linguistic heritage;

(h) the religious faith, if any, in which the child is being raised;

(i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

(n) any other relevant circumstances. (Emphasis added.)

...

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

(a) the agency;

(b) the child's parent or guardian;

(c) the child, where the child is sixteen years of age or more, unless the court otherwise orders pursuant to subsection (1) of Section 37;

(d) the child, where the child is twelve years of age or more, if so ordered by the court pursuant to subsection (2) of Section 37;

(e) the child, if so ordered by the court pursuant to subsection (3) of Section 37; and

(f) any other person added as a party at any stage in the proceeding pursuant to the *Family Court Rules*.

...

37(1) A child who is sixteen years of age or more is a party to a proceeding unless the court otherwise orders and, if a party, is, upon the request of the child, entitled to counsel for the purposes of a proceeding.

(2) A child who is twelve years of age or more shall receive notice of a proceeding and, upon request by the child at any stage of the proceeding, the court may order that the child be made a party to the proceeding and be represented by counsel, where the court determines that such status and representation is desirable to protect the child's interests. (Emphasis added.)

(3) Upon the application of a party or on its own motion, the court may, at any stage of a proceeding, order that a guardian *ad litem* be appointed for a child who is the subject of the proceeding and, where the child is not a party to the proceeding, that the child be made a party to the proceeding, if the court determines that such a guardian is desirable to protect the child's interests and, where the child is twelve years of age or more, that the child is not capable of instructing counsel."

Positions of the Parties

It is the Minister's position that personal service of the actual application and supporting affidavit upon the child is not required by subsection 37(2) of the **Children and Family Services Act** and that Civil Procedure Rule 10.12(1) allows the Court to determine the appropriate manner of service. Further it is submitted that personal service on T.J.C. of the application would not be in her best interest. The Minister proposes that all that is required to satisfy the Section 37(2) is that the child receive

notice of the nature of her mother's application and proposes that the child's best interests would be served by the appointment of a therapeutically trained guardian *ad litem* who, in consultation with T.J.C.'s therapist would advise her of these proceedings in an appropriate fashion after which the guardian *ad litem* would report back to the Court.

It is A.B.C.'s position that notice must be given personally to T.J.C. of her mother's application. Further, it is her position that T.J.C. should be provided with a copy of A.B.C.'s supporting affidavit. It is further submitted on behalf of A.B.C. that it would be premature to appoint a guardian *ad litem* for TJ.C... It is argued that the appointment of a guardian *ad litem* can only be made after receiving input from T.J.C. and a determination then made as to whether or not she is capable of instructing counsel.

Discussion

Civil Procedure Rule 69.13(2) provides:

> "An application to terminate an order for permanent care and custody shall be filed in Form 69.13B, supported by affidavit, and served upon the other parties not later than ten days before the hearing of the application."

The child, T.J.C., is not a party and therefore this Rule does not apply to her. However, subsection 37(2) of the **Act** provides that a child who is the subject of such an application "who is 12 years of age or more" but under 16 "shall receive notice" of the proceeding. The issue, therefore, is not whether T.J.C. should be made aware of the application but rather how she is to receive notice.

Civil Procedure Rule 10.01(1) provides:

> " Unless personal service is expressly prescribed by an enactment or rule or a court so orders, a document need not be served personally."

However if personal service is required, Rule 10.03(1)(d) provides:

10.03(1) "Personal service of a document **is effected** on,

> (d) an infant, by leaving a true copy of the document with his father, mother or guardian, or if there is no father, mother or guardian, with the person with whom he resides or in whose care he is, or **with the person appointed by the court;**" (Emphasis added.)

Being under 19 years of age, T.J.C. is an "infant". See Sections 2 and 3(1) of the **Age of Majority Act**, R.S.N.S. 1989, c.4. Therefore if personal service is contemplated by section 37(2), Rule 10.03(1)(d) would apply. The effect of a permanent care order is to bestow upon the agency the legal guardianship of the child with "all the rights, powers and responsibilities of a parent or guardian for the child's care and custody" (Section 47). A child in T.J.C.'s position often has a parent, a guardian (the agency) as well as a foster parent with whom she resides. Because the child's parents and the agency may both have interests that are adverse to the interests of the child, it would be inappropriate to effect service on the child by leaving the documents with either of those parties. Similarly, a foster parent may have interests adverse to the child. For example, the foster parent may be contemplating an adoption application. Therefore, the most appropriate method of personally serving a child would be for the Court to appoint a person to receive documents on behalf of the child.

Rule 69.03(5) provides:

> " The court may appoint a person to act as litigation guardian for a person under disability if the person proposed as litigation guardian has filed a consent to act in that capacity and a certificate that he or she has no interest in the proceeding adverse to any interests of the person under disability."

Rule 1.05(v) defines a “person under disability” as meaning a person who is an infant or a mentally incompetent person.

Best Interests

But for the existence of Rule 10.03(1)(d), it would be necessary for the Court to determine whether it would be appropriate to serve the child, T.J.C., by leaving a copy of the application and supporting affidavit with her.

Section 2 of the **Children and Family Services Act** provides that the purpose of the **Act** is to protect children from harm. Further, in all proceedings and matters pursuant to the **Act**, the paramount consideration is the best interests of the child. Professor D.A. Rollie Thompson in his publication "The Annotated Children of Family Services Act" (August 1991) provided the following commentary with respect to Section 2(1) of the **Act**:

> " This subsection provides a succinct statement of the three inter-related purposes of the new Act, in order of priority. Consistent with the role of a purpose clause, the subsection is intended to provide guidance to courts and agencies charged with interpreting the Act. The first purpose is to protect children from harm, the over-riding concern of child protection legislation. Second, the promotion of the integrity of the family is recognized to be the first and best means of protecting children in a society like ours, which places the primary responsibility for the care and upbringing of children upon the child's parents. But, in a modern society it is accepted that the state has an obligation, not just to enforce laws protecting children but also to offer services to strengthen and maintain the family.
>
> ...
>
> The third purpose stated in the subsection identifies the ultimate goal of the family, family legislation and public services to families and children, namely to assure the best interests of the child."

With respect to subsection 2(2) Professor Thompson stated:

> " The "best interest" principle is intended to govern not only the substance of decisions under the Act, **but also the process whereby those decisions are reached**, e.g. a party status and representation for children (s. 37) or evidence of children (s.93(3)). **In exercising their discretion in matters of procedure under the Act, Judges should be guided by the best interests of the child**." (Emphasis added.)

Justice Legere-Sers previously found that T.J.C. is a child with special needs, a conclusion neither party is contesting. T.J.C. has just turned 13 years of age. Prior to the permanent care order she had a troubled and unstable life. As recently as April 2002, it was the opinion of Justice Legere-Sers that re-introducing access or **contact** for that matter, between A.B.C. and T.J.C. would be harmful to T.J.C.. Counsel for the Minister argued, and I agree, that personal service of A.B.C.'s application and affidavit on T.J.C. (by leaving the documents with her) would constitute contact.

The Court has before it two reports submitted by the Minister. One was prepared by Dr. John Curtis who is a psychiatrist with many years experience both as a practitioner and as an educator. In his letter dated October 8, 2003 he stated:

> " I should mention that my involvement with T.J.C. over the past while has been mainly to renew her medication, and that she has been seeing Carolyn Humphreys in therapy.
>
> My opinion on this is that T.J.C. would not be served well by being notified of the court proceedings. T.J.C. carries within her a fantasy of what it would be like to live with her mother. A lot of children who have been removed from their parents do this. She has instead of a "real mother" a "fantasy mother". T.J.C. has talked with me on a number of occasions about this and in her logical well-grounded self recognizes that the mother that she hopes for bears little relationship to the mother that she left. But fantasy often trumps reality, and I think in T.J.C.'s situation it would stir up unnecessary things within her.

> Carolyn Humphreys I gather will be supplying a report (as your note states), and I would think that her opinion should carry more weight than mine, as it would be more recent."

Dr. Carolyn Humphreys is a psychologist with a specialization in counselling psychology. She has appeared before this Court on many occasions as an expert witness. Dr. Humphreys provided a letter to the Department which was submitted to the Court. Her letter, dated October 13, 2003, addressed the issue as to whether T.J.C. should receive notice of the application in the manner suggested by A.B.C.. She stated:

> " It is my opinion that receiving this information would be detrimental to T.J.C.'s emotional and psychological functioning. I have a significant concern about how she would cope with the dilemma it creates. The dilemma lies in the fact that it would be impossible to provide any answers to T.J.C. about the outcome of such an application. This would put her in a position of extreme uncertainty about her future. She would be in a position for several months of wondering what will be happening to her. This will be the case whether she is feeling positive or negative about contact or reunification with her mother.
>
> Such a situation would be difficult for most children. For T.J.C., it would be particularly anxiety provoking as she does not cope at all well with instability and uncertainty. I believe that wondering and worrying about what is going to happen to her would start to dominate her thoughts and feelings and we would see deterioration in her everyday functioning. She would likely show more destructibility, irritability and aggression. She may regress to an old coping behaviour, that of disassociating with every day events.
>
> T.J.C. has been showing some increasingly stable and positive behaviour for the past few months. She is beginning to feel more positive about herself and her relationships with other people, both peers and adults. However, as I described in my letter of September 9, 2003, her functioning is quite fragile and could easily be impaired by information that she does not have the emotional resources to handle. I would be very concerned about jeopardizing T.'s progress in this way.
>
> I believe the negative consequences of receiving notice of this application would be quite considerable for TJ.C.., specifically because of the uncertainty it generates for her. I believe this would far outweigh any benefit T.J.C. would receive from knowing that her mother is making such an application."

I conclude that it would not be in T.J.C.'s best interests to be personally served with her mother's application. To the contrary, I find that there is a very significant risk that personal service of these documents on T.J.C. may in fact be harmful to her and the continuity of her care. I accept the opinion of Dr. Humphreys that "the receipt of this information could and very likely would be detrimental to T.J.C.'s emotional and psychological functioning".

Conclusion

The Civil Procedure Rules do not contemplate personal service on an infant, which includes a child as defined by the **Act**, by leaving the documents with the child. Rather, personal service is effected by leaving the documents with the child's father, mother, guardian or custodian. Because of the possibility of T.J.C.'s interests being adverse to the interests of those individuals, I find it would not be appropriate to effect service in this manner. A guardian shall be appointed to receive the documents on her behalf and for the purpose of representing T.J.C.'s interests throughout the application. A litigation guardian can be and should be appointed pursuant to Rule 69.03(5).

If necessary, I am prepared to conclude and do find that TJ.C.. is incapable at this time of instructing counsel and that the appointment of a guardian *ad litem* for T.J.C. is desirable to protect her best interests. She is barely 13 years of age. She has had a troubled past and she is a child with special needs including the need for ongoing therapy.

Notice of the present application shall be made to T.J.C. through a litigation guardian appointed for her. The guardian appointed for T.J.C. should, preferably, have therapeutic qualifications. Presumably, however, such a guardian will make recommendations to the Court after appropriate consultation with Dr. Humphreys.

It is not necessary for T.J.C. to actually see her mother's application or any of the other Court documentation. Personal service on T.J.C. is effected the moment the application and supporting affidavit is left with her litigation guardian.

I ask that Mr. Leiper prepare an order accordingly.

Leslie J. Dellapinna, J.