SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. R. H.*, 2022 NSSC 134

Date: 20220407
Docket: SFSBCFSA-124152
Registry: Shelburne

Between:

Minister of Community Services

Applicant

v.

R.H. and W.H.

Respondents

Restriction on Publication:

Section 94(1) of the *Children and Family Services Act* applies to this decision and provides as follows:

94(1) 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 a relative of the child.

Judge:	The Honourable Justice M. K. Christenson
Heard:	April 7, 2022, in Yarmouth, Nova Scotia
Oral Decision:	April 7, 2022
Written Release:	May 12, 2022
Counsel:	Alan Ferrier for the Applicant Claire Levasseur for the Respondent R. H. Respondent W. H., self-represented Susan Young for the *Guardian Ad Litem*

By the Court:

Background:

[1] S.H. is the much-loved daughter of the respondents R.H. and W.H., herein after referred to as respondent mother and father.

[2] S.H.'s family, her parents and three brothers, came to Canada in 2016, as part of a refugee resettlement program.

[3] Issues of domestic violence brought them to the attention of child protection authorities in 2017. The respondent father was charged with an offence of violence against his wife. I understand she jumped from a second story window following an assault by her husband. Ultimately, he pled guilty to the offence. He was sentenced to 110 days time-served on remand and was released on an 18 month probation order. The parents reunited, or at least continued to live together in the same residence following these events. The child S.H., lived with them.

[4] This family, once again, came to the attention of the authorities in November 2021, following another significant event.

[5] I understand from the affidavits filed that S.H. received a text message from a boy. The message was discovered by her brother, who brought it to the attention

of her father. It is alleged that S.H. was told to go to her father's room where she was disciplined for communicating with a boy without his permission.

[6] It is alleged she was punched five times in the face and lashed thirty to fifty times with a belt. The beating is alleged to have taken place over forty minutes. I understand S.H. suffered a broken nose and photographs of her injuries were taken by the police. The respondent father now stands charged with criminal code offences of assault and assault with a weapon. He was released on conditions which included no contact with his daughter.

[7] The Minister, understanding that S.H. was born in 2007, filed a protection application. The matter came before the Court for a five-day interim hearing and for completion of interim hearing. I found there were reasonable and probable grounds to believe the child was in need of protectives services under Section 22(2)(a), (b) and (g). Historically there was a separate proceeding in 2017, which operated under the same premise the child was born in 2007.

[8] The matter returned to Court for a pre-protection hearing. It was at that stage that the issue of jurisdiction was raised.

[9] The Minister, as a result of a report filed by the *Guardian Ad Litem*, learned S.H. may have been 16 years of age at the time of the beating, which if true, may mean I lack jurisdiction to deal with a protection application.

[10] It was determined the matter would be set for hearing far enough down the road, to allow the parties the opportunity to secure the necessary documentation to support their respective views. Except, no one bothered to do that. No orders of production were requested. No subpoenas issues compelling persons to attend and bring with them, evidence relevant to the issue I must decide.

[11] The Court was advised the date of birth provided in the official documents for Canada upon immigration indicated the child was born January 1, 2007. The permanent residency documentation which had expired contained the same date, as did the child's passport. The Minister wanted time to be able to secure these documents for the purpose of that hearing, in anticipation of their stated position that I had jurisdiction.

[12] I was told there would be multiple witnesses: two from the Minister, the respondent mother, likely the respondent father, and one witness for the *Guardian Ad Litem*. Parties were directed to file affidavits.

[13] The matter was set for hearing to determine both issues of jurisdiction and protection. Today it was decided protection would be differed, pending decision on the issue of jurisdiction.

[14] The matter proceeded on today's date, and I must now decide the following issue: Do I have jurisdiction to deal with the matter?

Position of the Parties:

[15] Despite asking for time to secure documentation to advance her position, the Minister opted not to seek it, or have it produced. Much to my surprise, the Minister filed three affidavits and a brief, all of which argued this Court lacked jurisdiction because they believed the child was born in 2005. That belief coming from various conversations had with school authorities and the respondent parents through a social worker who interviewed them. That social worker then provided an affidavit to the Court outlining those conversations. Neither respondent parent was under oath when interviewed.

[16] It is the Minister's position the matter should be dismissed for lack of jurisdiction. The evidence before the Court is not sufficient enough to prove on a

balance of probabilities that the child was under the age of 16 when the application was filed, despite official documentation which would suggest otherwise.

[17] The respondent father did not make a closing argument. Based on his interview with the social worker however, I infer that he agrees with the Ministers request to have this matter dismissed. He does so however, for slightly different reasons. He argues the allegations are false. In his interview with the social worker, he denied S.H. was lashed. He denied she sustained injuries; despite being advised of the photographs. He claimed "everything was a lie." He agreed with the Minister that the child was 16 years of age at the time of the alleged event. He chose however, not to testify to that fact. It is a material fact in question.

[18] The respondent mother supports the Minister's position. She too wants this matter done. She wants nothing to do with the R.C.M.P. or the child protection authorities. They are not welcome at her home. She agrees the child was 16 years of age at the time of the incident. She agrees this Court lacks jurisdiction. She too, opted not to present evidence on a material fact, which she could have testified to but has chosen not to. I drawn an adverse inference from her failure to provide that evidence.

[19] The *Guardian Ad Litem* alone, championed the cause of the child. It was the *Guardian Ad Litem* who argued the Court had jurisdiction. She did so on two separate grounds. First, the existence of the "official documentation" which according to her permanent residence documents noted her age to be 14, as did her passport from Syria. She argued that unless and until that documentation was officially corrected, the Court needed to continue acting in the best interests of this child. It was her position, that this remedial legislation required the Court to take a view of jurisdiction which was most advantageous to the child and her best interests. Acting on the date of birth as noted in her "official documentation," she was 14 years of age at the time of the incident, and I had jurisdiction.

[20] Alternatively she argued, that I should exercise my *parens patriae* jurisdiction, and act in the best interests of the child. Given the respondent father's denial of the incident, and the respondent mother's now claimed position that "she saw nothing," if I fail to act, no one will protect S.H. The *Guardian Ad Litem* also chose not to file evidence. Instead she attached a photocopy of the child's passport to her brief. But that is not evidence. I can not act on a photocopy attached to a brief.

Evidence:

[21] I had the benefit of receiving evidence from three witnesses, all of whom filed affidavits. The parties were directed to file affidavits if they wished to present evidence and filing deadlines were given. Only the Minister presented evidence for my consideration.

[22] The evidence on file consisted of various affidavits filed from social workers employed by the Minister. In the process of writing this decision I have reviewed and considered the entire evidence. It is not my intention to recite verbatim the evidence, it is a matter of record. It consists exclusively of the two affidavits from Yves Bouchard sworn November 22, 2021 and February 24, 2022; one from Patti Penney sworn February 23, 2022; and one from Sawsan Elborno sworn February 28, 2022.

[23] At this stage, I must note, what is lacking from the evidence. No one introduced any evidence related to the official documentation. No one attempted to present certified documents which illustrated the child's year of birth as being 2007. No one was subpoenaed to attend Court to produce this evidence. It exists, I have seen photocopies at least of the passport, it was attached to a brief, but no evidence to that affect was presented for my consideration.

[24] Further the two individuals best positioned to be able to testify about the birthdate chose not to do so. They chose not to give evidence under oath about a material fact known to them. Instead they chose to have conversations with a social worker, who then prepared an affidavit about what she was told. But nowhere is there any indication that in giving their statements to that social worker, that they were under any obligation to be truthful.

[25] Further there is reason to be concerned about the respondent parents' truthfulness. The parties seem to deny the existence of an incident which caused injuries to their daughter. Photographs were taken and injuries were documented. The respondent father denies this, and the respondent mother "saw nothing." I fear the parties were not truthful about many aspects of their interview. I question their credibility, which makes it even more difficult to rely on their oral statements about their daughter's birthdate.

[26] Further, in my view there is reason to be suspect about the various statements the parents have made about the child's birthdate. Various reasons were given to explain the error. I would have thought it would have been the same explanation, but it was not. Here are the various explanations given:

- The respondent mother explained that when the family came to Canada they had changed S.H.'s birthdate due to the cut-off from school.

- Hearsay statements from the Principal which I can not rely upon at this stage, indicated he was told when the family arrived at the first settlement camp, the parents provided a false date of birth for S.H. in order to increase their chances at being able to immigrate. This would suggest they have motive to lie when it suits their purpose.

- The respondent father told the social worker, it was the Lebanese government who made the mistake about the child's birthdate.

- The respondent mother told the social worker she does not know why the birthdate was changed on her passport. She stated the child knows her date of birth.

- The child told the social worker she was 14.

[27] It appears to me the parents evidence shifted based on their desired outcome.

Legal Framework:

[28] The Ministers application is made pursuant to Section 32 of the *Children and Family Services Act* ("*CFSA*"). That section limits jurisdiction of the court to

providing protectives services to children under 16 years of age at the commencement of the proceeding.

[29] It is the Minister's application, so it is her burden to establish that I have jurisdiction. She must do so on a balance of probabilities. It is not the parent's burden to establish I do not have it.

[30] The determination of the child's age is a finding of fact. Findings of fact are made based on the evidence presented. But this raises an interesting question as to the nature of evidence that I can rely upon. The Minister argued I could reply upon credible and trustworthy evidence.

[31] Applications under Section 39 of the *CFSA*, allows for the use of credible and trustworthy evidence however, that determination is in relation to the finding of the *prima facie* case for the grounds alleged at the interim hearing. I am now past that stage and we are at protection. It raises the question if I can rely on third party statements at all, even if I find them to be credible and trustworthy.

[32] Is the test balance of probabilities based on evidence that is credible and trustworthy, or evidence that is clear, cogent, and convincing?

[33] In my view, the appropriate test to determine age is on a balance of probabilities is based on evidence that is clear, cogent, and convincing. The burden falls to the Minster. If not, parties would act on the basis that jurisdiction is had, only to find out later, based on a different standard of proof that jurisdiction no longer exists. Jurisdiction is something you either have or you do not. It is the authority which allows you to act. It can not be given. Consent from parties does not create jurisdiction.

[34] Turning now to see what the cases say about evidence to establish proof of age, now that it has been raised.

Factors to consider:

[35] Surprising there is little written on this topic in the context of child protection proceedings. I have been provided with numerous cases which dealt with similar issues in the context of Youth Justice Court. It is true the *Youth Criminal Justice Act* ("*YCJA*"), like the *CFSA*, is remedial legislation, but a key difference exists between the two.

[36] The *YCJA* in Section 148 codified the various factors to be considered in making the determination of age. The *CFSA* contains no such section, but is helpful

to see what factors are considered to be relevant for the purpose of them determining a similar type of issue.

[37] Factors listed in Section 148 of the *YCJA*, as noted on page 3 of ***R. v. M.(L.)***, 2011 ONCJ 465 include:

- The testimony of a parent as to the age of a person of whom he or she is a parent. See *YCJA* s. 148(1).

- A birth of baptismal certificate or a copy of it purporting to be certified under the hand of the person in whose custody those records are held is evidence of the age of the person named in the certificate or copy. See *YCJA* s. 148(2)(a).

- An entry or record of an incorporated society that has had the control or care of the person alleged to have committed the offense in respect of which the proceedings are taken at or about the time the person came to Canada is evidence of the age of that person if the entry or record was made before the time when the offence is alleged to have been committed. See *YCJA* s. 148(2)(b).

- In the absence of any certificate, copy, entry or record mentioned in Section 148(2), or in corroboration of that certificate, copy, entry or record, the Youth Justice Court may receive and act on any other information relating to age that it considers reliable. See *YCJA*. s.148(3).

- In any proceeding under the *YCJA*, the Youth Justice Court may draw inferences as to the age of a person from the person's appearance or from statement made by the person in direct examination or cross examination. See *YCJA* s. 148(4).

[38] The *Guardian Ad Litem* relies upon the following cases in support of her argument that official documentation like the passport and the permanent residence card, have been accepted and relied upon by courts for the purpose of determining age:

- In ***R . v. Zarif***, 2013 MBPC 65, the court relied upon evidence that indicated that "passports are considered to be the gold standard in supporting documentation for immigration applications since typically other documents need to be translated. The court also considered evidence that during the immigration process, applicants have multiple opportunities to change any incorrect information in the application.

- In ***R. v. M.(L.),*** 2011 ONCJ 465, the court relied upon the date of birth on the accused's official documentation to determine age.

[39] I accept that other courts have, in certain circumstances, relied upon official documentation to determine age. Had that been an option before me in this proceeding, likely I too would have, but that evidence was never tendered.

[40] The Minister who sought time to obtain those documents, never obtained a production order to secure them, nor subpoenaed parties to produce them.

[41] So despite the strength of the argument advanced by the *Guardian Ad Litem*, I am of the view, that it is not an option before me. The passport photocopy attached to the brief is not evidence. Nor is it the role of the Court to run the case for the Minister, who has chosen not to find ways to put the official documentation before the Court. Where does that leave me? Not far.

[42] Based on the evidence I do have, it would appear:

- The parents have told third parties the child was born in 2005, which would make her 16 years of age at the time of the November beating. Those statements pre-exist the events of November 2021. The parents are parties to these proceedings.

- These parties have not testified to this fact, but could have. I draw an adverse inference while recognizing at the same time, it is the burden which belongs to the Minister. She could have subpoenaed them when they opted not to file affidavits.

- There is no official documentation, or certified copies of that documentation tendered before the Court to establish her year of birth as 2007.

- Hearsay statements from the school principal are not admissible.

- The child told the social worker she was 14 years of age. No evidence to support the necessity and reliability of the child's statement was offered. She too is a third party.

- The three social workers who filed affidavits have testified it is their belief the child was 16 years of age at the requisite time. That is really all that I am left with, by choice, but not by necessity.

[43] The Minister and both parents all argue the Court lacks jurisdictions. Based on what they have chosen to present, I concur. I am not satisfied that it has been established on a balance of probabilities based on evidence that clear, cogent and convincing, that S.H. was 14 years of age at the time of the incident which led to this child protection proceeding.

[44] In the event I am wrong on the applicable test, and if a court other than me were to reconsider this matter, even applying the less stringent test of credibly and trustworthy evidence, I would make the same finding.

[45] I can advise, I question the credibility of both parents, and the various statements they made about the official documentation showing 2007 as her year of birth.

[46] Clearly, there was a lack of consistency from both parties surrounding how and why S.H.'s date of birth was shown as January 1, 2007.

[47] I presume, but I do not know, that some form of attestation was required from the parties in order for that date to be used. Perhaps that is why the courts like to rely upon official documentation.

[48] Regrettably, some people in their human nature will tend to shift their evidence to what may best suit their purpose. I fear that could be the case at hand. But alas, I have no official documentation to rely on here. Had it been presented; the outcome likely would have been different.

[49] Should however, the Minister obtain such evidence, she would not be precluded from making a new application. Just like children taken into care may be

returned if the matter is not brought to court within five working days, nothing prevents the Minister from making a reapprehension and bringing the matter back to court once she can prove based on official documentation that the court has jurisdiction to proceed.

[50] Turning now to the second argument advanced by the *Guardian Ad Litem*, the issue of *parens patriae*. Clearly the Court has this jurisdiction however, it would not be appropriate for me to exercise it, in this case.

[51] As was noted at paras. 18 and 19 of ***M.Z. and G.Z. (Re),*** 2018 BCSC 325, Justice Butler wrote:

> [18] The court's *parens patriae* jurisdiction, similar to its inherent jurisdiction, can be exercised if no statute or rule confers jurisdiction: ***Senini (Re)***, 2016 BCSC 2299 at para. 31. The scope of the jurisdiction is broad. It is generally exercised in matters involving minors or adults who are mentally incapable of acting in their own interests.
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> [19] While the scope is broad, it should be used sparingly and only where necessary: ***L.S. v. British Columbia (Director of Child, Family and Community Services)***, 2018 BCSC 255 at para. 30.

[52] In this case, the jurisdiction of the court to deal with protection applications is set out in Section 32. I have that jurisdiction to the extent that the Minister brings those applications involving persons under 16 years of age, and they are made within five working days of the taking into care, or the date of the application.

[53] There is no need to resort to *parens patriae*, as the jurisdiction of the court to deal with protection applications is set out in the statute. *Parens patriae* is not required. There is no gap in the legislation.

[54] Given the decision I have made on jurisdiction I need not rule on the issue of protection.

[55] The matter is dismissed for lack of jurisdiction, and the Minister shall prepare an order which states so, and confirms the previous orders are of no force and effect.

[56] Thank you. Kindly close Court.

M. K. Christenson, J.