SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. J.O.Y., 2009 NSSC 69

Date: 20090120
Docket: SFHCFSA-061895
Registry: Halifax

Between:

Minister of Community Services

Petitioner

v.

J.O.Y.

Respondent

Restriction on publication:

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT S. 94(1) OF THE **CHILDREN AND FAMILY SERVICES ACT, S. N. S., 1990, CHAPTER 5** APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION. SECTION 94(1) PROVIDES:

> "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."

PUBLISHERS OF THIS CASE FURTHER TAKE NOTE THAT IN ACCORDANCE WITH S. 94(2) NO PERSON SHALL PUBLISH INFORMATION RELATING TO THE CUSTODY, HEALTH AND WELFARE OF THE CHILDREN.

Judge: The Honourable Justice R. James Williams

Heard: January 20, 2009, in Halifax, Nova Scotia

Written Decision: March 11, 2009

Counsel: Peter McVey, for the Applicant
Linda Tippett-Leary, for the Respondent

By the Court:

[1] This is a child welfare proceeding concerning J.O.Y. and her child, T.Y. The matter before the Court has been somewhat sidetracked by the issue of whether there should be service of some kind on a person or persons identified as having a paternal relationship to T.Y.

[2] Counsel for the Minister has made clear at the outset of the matter coming before me that he feels they are inconsistent practises and directions coming from this Court concerning service on fathers in child welfare proceedings. To be fair, it is probable that there are even inconsistent practises, not only between judges but from at least myself, from case to case with this issue.

THE AGENCY'S POSITION

[3] The **Children and Family Services Act** requires service on a parent or guardian of a child of a Notice Taking into Care if the parent, or guardian is known and available to be served. This is contained in s.33(2) of the **Children and Family Services Act**. Essentially that section makes it clear that the Agency can only be expected to act on the information it has at the time of a taking into care. The agency cannot be expected to know everything about a child's background.

[4] Section 32 deals with applications to find a child in need of protective services under the legislation and 39(1) provides that two days' notice to the parties will be given.

[5] The Minister essentially argues that except for limited exceptions there is no provision for service on non-parties in the legislation - those exceptions including the Mi'kmaq Family and Child Services Agency and circumstances where a child is over twelve years of age.

[6] Parties have a <u>right</u> to notice in these proceedings and parties are described and are defined in s.36(1) and s.3(1)(r) of the legislation.

> 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 [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.
>
> (2) At any stage of a proceeding, where an agency other than the Minister is a party, the court shall add the Minister as a party upon application by the Minister.
>
> (3) Where the child who is the subject of a proceeding is known to be Indian or may be Indian, the Mi'kmaq Family and Children's Services of Nova Scotia shall receive notice in the same manner as a party to the proceedings and may, with its consent, be substituted for the agency that commenced the proceeding.
>
> (4) On a hearing to review a disposition order pursuant to Section 46 or on an application to terminate, or vary access under, an order for permanent care and custody pursuant to Section 48, a foster parent, who has cared for the child continuously during the six months immediately before the hearing or application,
>
> (a) is entitled to the same notice of the proceeding as a party;
>
> (b) may be present at the hearing;
>
> (c) may be represented by counsel; and
>
> (d) may make submissions to the court,
>
> but shall take no further part in the hearing without leave of the court. 1990, c. 5, s. 36; 1996, c. 10, s. 5.

[7] Section 3(1)(r) of the **Act** defines “father” narrowly - far more narrowly than the biological reality:

> 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.

[8] The Minister argues that the way for a natural father, who is not a parent, to become involved in a proceeding is for him to apply to intervene in proceedings. This, of course, assumes he knows the proceeding exists.

PARTY STATUS IS NOT THE ONLY ISSUE

[9] I have indicated during argument that I am troubled by the failure of the agency to make a distinction between the agency having an obligation to give notice to parties under the legislation and the question of whether or not someone should be given notice that the Court is about to make a finding or come to a conclusion about their status, i.e. make a conclusion that they are (or are not) a parent (or a party) as defined by the legislation.

[10] The question for me is whether someone, a named known person, is entitled to notice where the Court is making a conclusion about their status, not whether that person has a right to notice to the proceeding as a party.

BACKGROUND

[11] I note:

a. that the orders filed by the Agency routinely, and indeed the order from Justice O'Neil at the interim hearing in this proceeding (despite this issue being alive at the time) was filed reciting, "Upon it appearing that proper persons have received notice of a protection application in accordance with the Civil Procedure Rules and the **Children and Family Services Act**";

b. that the Minister routinely asks the Court to make conclusions about who is a parent and who is not a parent at the outset of these proceedings;

c. that there are arguments against there being some broad requirement that every father receive notice of child welfare proceedings. Some of them relate to convenience, some of them relate to the fact that in some circumstances there are multiple possible fathers. Some, although not specifically spoken of in this situation, relate to circumstances that Ms. Tippett-Leary has alluded to where a possible father might have a history of violence with the mother, or have been a pimp, or other circumstances. All of these are serious considerations.

d. that the legislation is also clear, and Mr. McVey acknowledges, that someone who doesn't fall within the definition of a party within this legislation, be it the biological father, a grandmother, an aunt, or whoever, can apply to intervene in the proceeding seeking party status. One can hardly say that they could do that if they don't know about the proceeding however.

e. that the **Act** is also clear in requiring the Court and the Agency to consider the child's contact with relatives. I am not sure how it could be suggested that a child's relatives do not include paternal relatives. Issues of racial and culture heritage are alive in every case and are important issues for the Court to be aware.

f. that the case law in this area has predominently involved cases where there has been a collateral attack on an adoption placement, i.e. circumstances where natural fathers have attempted to intervene at the other end of a continuum that might be said to start with a court application by an agency under the **Children and Family Services Act (**to place a child with an Agency) and end with an Agency who has received a permanent care and custody order making an adoption placement.

g. that the legislation (including the **Maintenance and Custody Act** s.18(3) and other legislation) makes it clear that once an adoption placement has been made that there has been a placement commitment made (to a child) that is to be protected. The legislation seeks to insulate adoption placements from interference. Section 18(3) of the **Maintenance and Custody Act**

> provides that custody/access applications cannot be brought where there has been an adoption placement that has not been dismissed, discontinued or unduly delayed, or where there is an adoption agreement.

[12] In my view the **D.T.** (**Re D.T.** (1992) N.S.J. No. 387 (NSCA) and **D.F.T**. (**Re: Adoption of the Child D.F.T. and D.M.T.** (1978) N.S.J. No. 683 (NSCA)) (cases that concern post-adoption placement issues) involve quite different imperatives than the circumstances at the outset of a child welfare proceeding.

THE CASE BEFORE ME

[13] This situation, this circumstance, however, is not a collateral attack on an adoption placement (or adoption) and in the absence of some legislative assertion that is more specific, in my view, involves quite different considerations.

[14] This is the start of a process that may return a child, T.Y., to her mother, J.O.Y., but also may commit the child, T.Y., to the permanent care of the Agency and ultimately result in an adoption placement being made by that Agency.

[15] Counsel for the Agency has suggested that the best interest considerations have nothing to do with notice issues that are merely procedural.

[16] I disagree.

[17] I believe, the Court has a responsibility to children enmeshed in proceedings under the **Children and Family Services Act** to attempt to ensure that procedural irregularities do not occur. In my view the Court and the Agency has a duty to pursue information early and avoid circumstances that result in proceedings that are essentially collateral and involve issues of service.

[18] In addition, the Supreme Court of Canada in **The Children's Aid Society of Metro Toronto and Lyttle** (1973) 10 R. F.L. 131, SCC at page 143 suggests that there is a duty on a presiding judge in a child welfare proceeding to make inquiries concerning a child's paternity. While this case predated some of the legislative amendments and restrictions (and case law) that have been put in place, I conclude its assertion remains applicable today.

[19] Essentially my view is that if there is evidence before the Court indicating the identity or probable identity of the natural or biological father of a child, and if

the Court is being asked to conclude that that person is not a party as defined by the legislation, then the appropriate practice is to give that person notice, not as a party to the proceeding, but to give them notice that the Court is being asked to make a conclusion about their status within the proceeding. That notice, in my view, can be brief and need not contain all of the detail of the proceeding, subject to further direction of the Court.

[20] Counsel for the agency asked the Court to be specific as to what the Court's authority is for making such a direction. I have no authority save this Court's general authority to manage proceedings before it and the notion that if a court is making conclusions about the status of a person, that person is entitled as a matter of fairness and due process to notice of the proceeding in so far as their status is to be determined.

[21] In my view it is not unreasonable to expect that if a Court is making a conclusion about the status of someone that the Court have the authority to require a notice to them before the adjudication on that limited issue is made.

[22] There are many inconsistencies in the law's treatment of biological fathers. The legislation is clear in restricting when a biological father would presumptively be a party. I take no issue with the legislation in this decision. That is not my role.

[23] Ironically, Mr. McVey and Ms. Tippett-Leary have come this morning saying that they agree that L.B., who is named as the probable biological father here, should have exactly the kind of notice that I am directing be given. The Agency counsel and Ms. Tippett-Leary are agreed that they can decide who gets notice of a proceeding.

[24] My decision is simply that the Court shares that authority at least in so far as it relates to circumstances where the Court is making decisions about the status of a person.

[25] I am not saying that L.B. (the person named as the biological father) nor any person in his circumstances should be automatically treated as a party. If the evidence that is now available to me at this point is correct (and it may or may not be), then he may well not be a party as defined by the **Act**. Mr. McVey is correct when he indicates that if L.B. was found not to be a party, and if he wanted to

become a party to this proceeding he would then have to apply to be added by the Court.

[26] I recognize that the direction I am giving may not resolve the problem of inconsistencies from case to case or court to court.

[27] The evidence here is that L.B. is the probable father based on the evidence of J.O.Y. and her affidavit. If the Agency goes a step further and says this male person is not a party under the legislation, then the Court is entitled in addressing that issue, to require that there be notice to that person so they may or may not present evidence on that issue.

J. S. C . (F. D.)

Halifax, NS