IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. T. C., 2010 NSSC 69

Date: 20100226
Docket: SFHCFSA 062630
Registry: Halifax

Between:

Nova Scotia (Community Services)

Applicant

and

T. C., R. M. and D. W.

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."

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: Justice Lawrence I. O'Neil

Heard: October 16 and 23, December 8, 2009 and January 27, 2010 in Halifax, Nova Scotia

Counsel: Elizabeth Whelton, for the Applicant
Samira Zayid, for the Respondent T. C.
R. M., Self Represented
Colin Campbell, for the Respondent D. W.

By the Court:

Introduction

[1] This is a child protection proceeding. The matter was before the court on October 16, 2009 for what the parties believed was to be the final time. A consent permanent care and custody order was the anticipated disposition.

[2] The subject child B. W. had turned twelve (12) the preceding week, on October *, 2009.

Issue

[3] The court sought the parties' positions on whether s.41(4)(b) and (c) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 (hereinafter referred to as 'the *CFSA*') had been complied with. Section 41(4) provides:

> Consequences of consent order
>
> 41 (4) Where a parent or guardian consents to a disposition order being made pursuant to Section 42 that would remove the child from the parent or guardian's care and custody, the court shall
>
> . . . . .
>
> (b) ask whether the parent or guardian has consulted and, where the child is twelve years of age or more, whether the child has consulted independent legal counsel in connection with the consent; and
>
> (c) satisfy itself that the parent or guardian understands and, where the child is twelve years of age or older, that the child understands the nature and consequences of the consent and consents to the order being sought and every consent is voluntary.

History of Litigation

[4] On October 16, 2009 counsel for the Minister, counsel for the mother and the mother's partner expressed the view that in the circumstances, the court was not required to make any further inquiries but could comply with s.41 by accepting the representations of the Minister and the parties.

[5] The biological father was not yet a party to the proceeding and had not participated in the proceeding, but he was represented by counsel on October 16, 2009.

[6] The permanent care and custody hearing was adjourned to permit the parties and the court to consider the legal effect of s.41 on the proceeding.

[7] When the matter returned to court on October 23, 2009, the court learned that the child's biological father had advised the Minister's representatives that he would be submitting a plan for the care of the child. The Minister sought and was granted an adjournment of the permanent care and custody hearing so that the plan of the father could be considered.

[8] On October 23, 2009, the Minister also undertook to provide the child, B. W. with formal notice of the proceeding, as contemplated by ss.37(2) of the *'CFSA'*. Section 37 reads:

> Child 16 or more as a party
>
> 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.
>
> Child 12 or more as a party
>
> (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 childs interests.
>
> Appointment of guardian
>
> (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 childs interests and, where the child is twelve years of age or more, that the child is not capable of instructing counsel.

> Fees and disbursements of guardian
>
> (4) Where a child is represented by counsel or a guardian *ad litem* pursuant to this Section, the Minister shall in accordance with the regulations, pay the reasonable fees and disbursements of the counsel or guardian as the case may be, including the reasonable fees and disbursements of counsel for the guardian. 1990, c. 5, s. 37.

[9] The effect of s.41(4)(b) and (c) on the proceeding was not addressed on October 27, 2009 given the need for the adjournment to consider an anticipated plan from the child's father. The parties were directed to return on December 8, 2009.

[10] On December 8, 2009, a review order was taken out with the consent of the parties. It continued the temporary care and custody order governing B. W. The matter was again adjourned to January 27, 2010, to permit the child's father to present a plan for B. W.'s care.

[11] On January 27, 2010, the court was advised by the Minister that it was once again seeking a permanent care and custody order. The Minister also advised the court that Notice of the proceeding had been given to B. W. as required by s.37 of the '*CFSA*'.

[12] Consequently, the meaning and effect of s.41(4)(b) and (c) of the '*CFSA*' was again raised by the court, given the biological father was no longer presenting a plan of care and the parents were consenting to a permanent care and custody order.

[13] Counsel for the biological father again appeared. He sought the appointment of a guardian *ad litem* for the child. He advised that the biological father wants court ordered access, provided in the permanent care and custody order. The father therefore wants the child's opinion on access to his biological father communicated to the court.

[14] The matter was adjourned to February 26, 2010 for submissions on:

> (1) the meaning and effect of s.41(4)(b) and (c) of the *Children and Family Services Act*.

(2) whether the biological father should be provided access to B. W. as a term of permanent care and custody order.

Filing deadlines were set.

Decision

The Children and Family Services Act of Nova Scotia ('CFSA')

[15] The preamble to the *'CFSA'* includes the following:

. . . . .

AND WHEREAS children have basic rights and fundamental freedoms no less than those of adults and a right to special safeguards and assistance in the preservation of those rights and freedoms;

AND WHEREAS children are entitled, to the extent they are capable of understanding, to be informed of their rights and freedoms, to be heard in the course of and to participate in the processes that lead to decisions that affect them;

. . . . .

AND WHEREAS the rights of children, families and individuals are guaranteed by the rule of law and intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of law;

. . . . .

[16] The legislation distinguishes between the rights of children: under 12 years of age; between 12 and16 years of age and over 16 years of age. It further defines "child" to mean, "a person under sixteen years of age unless the context otherwise requires" (s.3(1)(e)).

[17] The *'CFSA'* provides for representation of children in certain circumstances. That representation may be by a guardian *ad litem* (s.37(3)) or directly by counsel (s.37(2)). A child may also be made a party to the proceeding (s.36(1)(c), (d), (e) and s.37(1) and (2)). Section 36(1)(c), (d), (e) provide:

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

. . . . .

> (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;
>
> . . . . .

[18] The appointment of a guardian *ad litem* is not a prerequisite to the child being represented by counsel. Under s.37(3), however, the child must first be granted party status before a guardian *ad litem* can be appointed.

[19] Section 37(4) provides that:

> (4) Where a child is represented by counsel or a guardian ad litem pursuant to this Section, the Minister shall in accordance with the regulations, pay the reasonable fees and disbursements of the counsel or guardian as the case may be, including the reasonable fees and disbursements of counsel for the guardian. 1990, c. 5, s. 37.,

[20] As has already been observed, the issue before the court is the meaning and effect of s.41(4)(b) and (c) of the *'CFSA'*.

[21] More precisely, the court has no evidence that the twelve year old "has consulted" independent legal counsel in connection with the parent or guardian's consent. It seems clear that the child has not done so. Nor has the court received evidence that the child understands "the nature and consequences of the consent and consents to the order being sought".

[22] The court has been advised by the Minister and the biological mother and her partner, that they believe the permanent care and custody order sought by the Minister is in the best interests of B. W. and that B. W. in fact, supports the making of the order. In my view, the safeguards of s.41(4)(b) and (c) would be redundant if that was all that was required to meet the court's obligation as described by s.41(4)(b) and (c). The safeguards in question are triggered by the consent of a parent or guardian.

[23] The biological father of B. W. accepts that a permanent care and custody order will be the outcome of the proceeding, but wants the order to provide for access, as permitted by s.47(2) of the *'CFSA'*.

[24] Sub-section 47(2) provides:

> Order for access
>
> (2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
> . . .
>
> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> . . .

[25] Clearly, the existence of a process for determining the wishes of a child of twelve years of age or older is contemplated.

-*Nova Scotia (Minister of Community Services) v. S. P.* 2006 CarswellNS 679; 2006 NSFC 40

[26] Judge Dyer J.F.C. considered the requirement for counsel to be appointed for a 12 year old child "M. P. C.", one of five children subject to the proceeding (see *Nova Scotia (Minister of Community Services) v. S. P.* 2006 CarswellNS 679; 2006 NSFC 40).

[27] "M. P. C." had turned 12 on January * and the court was being asked the following November to rule on whether "M. P. C." "should be afforded an opportunity to consult and retain counsel, independently; and potentially participate (independently) in this child protection proceeding".

[28] Judge Dyer, at paragraphs 42-44 summarized the options for ensuring representation of "M. P. C.":

> 42 In the present case, M.P.C.'s representation will effectively be constrained to one of two possible scenarios. The first would see her represented by a *guardian ad litem* who, in turn, would be represented in court by counsel under Family

> Court Rule 5.05(4). In that scenario, as Ms. Shepherd testified, the guardian determines what is in the child's best interest and the guardian's role is to advocate for that position.
>
> 43 The second scenario would see the child represented directly by a lawyer in a so-called traditional role -- that is, one in which counsel advocates for the child's stated position upon instructions from the young client.
>
> 44 The legislature established 12 years as the age for formal notice under the CFSA and for possible direct representation by counsel. The corollary to this, I believe, is a presumption that children who attain that age have the capacity to take advice from and to give instructions to lawyers. I expect that it is no coincidence that the age invoked is exactly the same age of responsibility established under the federal *Youth Criminal Justice Act* and the provincial *Youth Justice Act.*

[29] Judge Dyer expressed his conclusions as follows:

> 55 On the evidence as a whole, I am not prepared to sacrifice M.P.C.'s right to counsel in the interests of convenience or expediency even at this late stage and even if, with all due respect, the presenting issue should have been anticipated and addressed in early 2006. The potential consequences to M.P.C. and to her mother of a permanent care and custody order as sought by the agency are sufficiently grave that they should not be run over rough-shod, so to speak. The issue is more than one of process; it is one of substance.
>
> . . . . .
>
> 61 I will direct the agency to immediately assist M.P.C. with arrangements to consult with independent legal counsel and to keep the court and legal colleagues apprised of the developments. If a determination is made by independent counsel that M.P.C. is unable to instruct counsel and to receive advice, upon notice by the agency to this effect to the court and to the other parties, further directions may be sought.

- *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30

[30] In my view, the Supreme Court of Canada's decision in *A. C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 supports the conclusion of Judge Dyer. The obligation of the courts to consider and be influenced by the opinion of a child was the subject of discussion by the Supreme Court of Canada in that case. (Earlier this month, the Newfoundland Supreme Court considered this case in *P.H. v. Eastern Regional Integrated Health Authority*, 2010 NLTD 34, beginning at paragraph 45).

[31] The Supreme Court ruling pertained to a 14 year old who required a blood transfusion but refused her consent for the procedure, for religious reasons. The child protection agency apprehended her as a child in need of protective services and sought a treatment order under the *Manitoba Child and Family Services Act*. The child challenged the constitutionality of the provision authorizing the state to order medical procedures on a child under 16 years of age. The Manitoba legislation distinguished between children under 16 years of age and those over 16.

[32] The Supreme Court upheld the provision.

[33] The court discussed the need for a balancing of the “best interests” test of the Provincial Statute with the adolescent’s developing autonomy interest.

[34] The Supreme Court held that the arbitrary nature of assuming no one under the age of 16 has capacity to make medical decisions is lessened by providing children under this age with the opportunity to prove their level of maturity. On this basis, the provision is saved. Paragraph 107 and 108 read:

> 107 Given the significance we attach to bodily integrity, it would be arbitrary to assume that no one under the age of 16 has capacity to make medical treatment decisions. It is not, however, arbitrary to give them the opportunity to prove that they have sufficient maturity to do so.
>
> 108 Interpreting the best interests standard so that a young person is afforded a degree of bodily autonomy and integrity commensurate with his or her maturity navigates the tension between an adolescent's increasing entitlement to autonomy as he or she matures and society's interest in ensuring that young people who are vulnerable are protected from harm. This brings the "best interests" standard in s. 25(8) in line with the evolution of the common law and with international principles, and therefore strikes what seems to me to be an appropriate balance between achieving the legislative protective goal while at the same time respecting the right of mature adolescents to participate meaningfully in decisions relating to their medical treatment. The balance is thus achieved between autonomy and protection, and the provisions are, accordingly, not arbitrary.

[35] Like s.47(2), s.3(2)(j) of the ‘CFSA’ requires that the court consider, “the childs views and wishes, if they can be reasonably ascertained” when the court is called upon to assess the best interests of a child. I agree with Dyer, J.F.C., that the legislation presumes that children who reach the age of 12 can instruct counsel. This is a presumption our Legislature established and it balances a child’s

"increasing entitlement to autonomy as he or she matures and society's interest in ensuring that young people who are vulnerable, are protected from harm".

[36] A distinction is to be made between representation of a child by a guardian *ad litem* who in turn retains counsel to advise him/her and direct retainer of counsel by a child. The *'CFSA'* contemplates both circumstances. A child who can not instruct counsel directly has the option of representation by a guardian *ad litem*.

[37] The court has a special duty when a parent or guardian is consenting "to a disposition order that would remove the child from the parent or guardians care and custody". Clearly, the legislation recognizes that twelve year olds can be represented by counsel. This is significant when one considers the meaning and effect of section 41(4)(b) and (c), which impose a duty on the court to ask whether:

> 41(4)(b) . . . where the child is twelve years of age or more, whether the child has consulted independent legal counsel in connection with the consent; and
>
> (c) . . . where the child is twelve years of age or older, that the child understands the nature and consequences of the consent and consents to the order being sought . . .".

[38] As discussed in *Nova Scotia (Community Services) v. A.A. and C.D.*, [2009] N.S.J. No. 310, the appointment of an *amicus curiae* may be an option available to the court in these proceedings. I am not proceeding in that way given the plain meaning of s.47(4)(b), requiring that the child consult independent legal advice.

Conclusion

[39] I am not prepared to assume that "B. W." lacks capacity to instruct counsel. I am satisfied that the preferred option is for the child herein to be advised by counsel and in my view, the 'CFSA' requires that the court first seek the appointment of counsel under s.41(4)(b), before resorting to the appointment of a guardian *ad litem*.

[40] The question of whether the child supports access by his father, in my view, falls within the inquiry of his counsel on these facts and may well be the only question where the child's views can have a practical effect.

[41] I have come to this conclusion for a number of reasons. When assessing a child's best interests, the court must consider the child's wishes where ascertainable. The '*CFSA'* not only permits the child to have counsel, but mandates it by virtue of s.41(4)(b). Representation by counsel is consistent with our Charter values and the need to balance a child's maturity with restrictions on Charter Rights. As stated, the need to achieve such a balance was discussed by the Supreme Court of Canada in *A. C. v. Manitoba (Director of Child and Family Services) supra*. In addition, such an interpretation of the law is consistent with Canada's obligations under the *United Nations Convention on the Rights of the Child*, CAN. T.S. 1992, No. 3.

[42] I adopt the approach of Dyer, J.F.C.. The Minister is directed to assist "B. W." with arrangements to consult independent legal counsel and to keep the court and legal colleagues apprised of the developments. If independent counsel determines that B.W. is unable to instruct counsel and to receive advice, further directions may be sought.

[43] The matter will return in several weeks, on a date to be fixed by the Scheduling Office. A hearing to determine whether an access provision should be included in the permanent care and custody order will be scheduled at that time, if that is necessary. The parties agree that a permanent care nd custody order should issue.

[44] Counsel are not required to appear on February 26, 2010, given this written decision is in lieu of an oral decision.

J.