NOVA SCOTIA COURT OF APPEAL

Citation: *C.S. v. Nova Scotia (Community Services)*, 2018 NSCA 84

Date: 20181023
Docket: CA 478991
Registry: Halifax

Between:

C.S.

Appellant

v.

Minister of Community Services and K.J.

Respondents

Publication Ban: s. 94(1) Children and Family Services Act

Judge:	The Honourable Justice Hamilton
Appeal Heard:	October 19, 2018, in Halifax, Nova Scotia
Subject:	Child Protection; Sections 41(3), (4)(b) and (c) of the *Children and Family Services Act*, SNS 1990, c.5.
Summary:	The trial judge ordered that the mother's son be placed in permanent care for adoption and the mother appealed.
Issues:	Did the trial judge fulfill her statutory duties set out in s. 41(3) and (4)(b) and (c) of the *Act*?
Result:	Appeal dismissed. Section 41(3) does not prevent a parent from consenting to a permanent care order before the Minister files a written plan of care with the Court. Although the judge failed to ask the mother whether she consulted independent legal counsel in connection with her consent pursuant to s. 41(4)(b), this does not amount to reversible error. The judge knew from the proceedings that the mother did not want another lawyer, after her first lawyer was permitted to withdraw because of his inability to contact the mother and obtain instructions from her.

There was no fresh evidence before this Court suggesting prejudice to the mother from the failure of the judge to ask this question. The judge did not make a palpable and overriding error in concluding that the mother's consents were informed and voluntary.

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Restriction on Publication: s. 94(1) Children and Family Services Act

Judges:	Farrar, Hamilton, Van den Eynden, JJ.A.
Appeal Heard:	October 19, 2018, in Halifax, Nova Scotia
Written Release	November 8, 2018
Held:	Appeal dismissed, per reasons for judgment of Hamilton, J.A.; Farrar and Van den Eynden, JJ.A. concurring
Counsel:	Linda Tippett-Leary, for the appellant Peter McVey, Q.C. and Megan Roberts for the respondent, Minister of Community Services Daleen van Dyk and Jennifer Madore, for the respondent father, K.J.

Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 applies and may require editing of this judgment or its heading before publication.

Prohibition on publication

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.

Reasons for judgment:

[1] The mother appeals the trial judge's June 26, 2018 Order placing her son, K.J., in the permanent care of the Minister for the purpose of adoption. She argues the judge erred by failing to fulfill her statutory duties set out in s. 41(3), (4)(b) and (c) of the *Children and Family Services Act,* S.N.S. 1990, c. 5 ("*Act*"). These sections require a court to (1) "before making a disposition order, obtain and consider a plan for the child's care, prepared in writing by the [Minister]", (2) "ask whether the parent … has consulted independent legal counsel in connection with the consent" to the permanent care order and (3) "satisfy itself that the parent … understands … the nature and consequences of the consent and consents to the order being sought and every consent is voluntary".

[2] The father, also K.J., has not appealed but indicates he supports the mother's appeal.

[3] At the end of the hearing of this appeal, we dismissed it with reasons to follow. These are those reasons.

FACTS

[4] The son, K.J., was born on January 16, 2018. As the mother was advised on January 8, 2018 would happen, the child was taken into care at birth.

[5] The Minister filed a Protection Application with respect to the child two days later.

[6] The mother's three older children, presently all under the age of six-and-a-half, were previously subject to protection proceedings and were placed in the care of their maternal grandmother, maternal great-grandmother and a paternal aunt. The Minister discussed a kinship placement for the child with the mother before the birth, and with the father after. Those discussions did not result in a plan for a kinship placement being put forward.

[7] The Interim Hearing to deal with the Protection Application commenced January 22, 2018, at which time it was indicated to the judge, Family Court Judge Jean M. Dewolfe, that the mother had counsel, John MacMillan, who was not available that day. On the basis of the material before her, the judge found there were reasonable and probable grounds to believe the child was in need of protective services and ordered that he remain in the care and custody of the

Minister. The matter was adjourned to February 13, 2018 to allow Mr. MacMillan to be present.

[8] On February 13, the Interim Hearing was completed with Mr. MacMillan, on behalf of the mother, consenting without prejudice to the judge issuing an order providing that the child remain in the care and custody of the Minister, with access by the parents and that the parents receive services.

[9] The Protection Hearing was held on April 11, 2018. After being given time to consult with the mother, Mr. MacMillan consented on her behalf to her son being found to be in need of protective services pursuant to s. 22(2)(b), risk of physical harm, (g) risk of emotional harm and (k) risk of neglect.

[10] By June 6, 2018, the Minister decided to seek an order for permanent care and custody. On that date, the Minister's Notice to this effect, with affidavit in support, was filed with the Court and counsel for each parent.

[11] On June 19, 2018, Mr. MacMillan had the following letter served on the mother:

> Last week, I sent you by letter and by email, documents about your child protection proceeding. The Agency is seeking an Order for Permanent Care of your son [K.J.]. Court is tomorrow morning, June 20, 2018 at 11:30 am. I have not heard from you and have been unable to reach you, as you have not provided me with a phone number, and have not responded to my email or my letter.
>
> As a result, I am not able to do my job, and give you legal advice about this proceeding. My only option remaining is to ask the Family Court for permission to withdraw as your lawyer. I will be doing so immediately. I intend to appear at court tomorrow. I would urge you to attend as well, and to ask for a continuation of the Temporary Care arrangement, so that you can get a new lawyer.

[12] At the commencement of the Disposition Hearing on June 20, 2018, prior to the mother's arrival, Mr. MacMillan was granted leave to withdraw and left the courtroom. The Minister's counsel asked that the matter be set over for a week to allow the written plan for the child's care to be filed. The mother then arrived and the following exchange then took place:

> THE COURT: Oh, hi, [mother]. So [mother], your lawyer just withdrew. Are you okay with that? No? You're shaking your head. Why don't you come forward so I can pick you up on the mic, okay? So did you want to have Mr. MacMillan represent you or did you want to get another lawyer or?
>
> [MOTHER]: No, I just want to agree with where things are.

[13] The judge explained that the matter had been set over to allow the written Plan of Care to be filed. The Minister's counsel then stated orally, with the mother still present, that the Minister was seeking permanent care of the child, without access, to permit adoption:

> MS. SWANTEE: The plan would be to have the child, [K.J.] who was born January 16, 2018, placed in the Minister's permanent care and custody. ... Given the current legislation there's no ability for an order for access following that. … But if [the mother] is interested, I am sure that Ms. Jobes will set up a final visit for her so she will be able to say goodbye to [K.J.] and then we would move forward with a plan to look for an appropriate adoptive home for [K.J.].

[14] The father's counsel was present in the courtroom and the father joined the hearing by telephone. He confirmed his consent to permanent care followed by adoption, indicating he felt this was in the best interests of his son. The mother indicated she agreed:

> MS. VAN DYK: …Your Honour, subject to [the father's] confirmation today that that remains his instruction, my instructions have been to consent to a permanent care arrangement for the child because [the father] believes, given his current circumstance, that would be in his child's best interests.
>
> THE COURT: So [father], Ms. Swantee here, the lawyer for the Minister has said that the plan the Minister wishes to have for [the child] is to have him put into permanent care and then find an adoptive home as soon as possible. She indicated, given that [the child] is doing well and he's just a young baby, that there shouldn't be any problem with him finding a permanent adoptive home very quickly if you and [the mother] agree.
>
> [FATHER]: Yes.
>
> THE COURT: And do you agree with that?
>
> [FATHER]: I do agree to that and I'm only doing it for what's best for him right now.
>
> THE COURT: Yes.
>
> [FATHER]: Because I believe that it's in his best interests.
>
> **THE COURT: Thank you. And [mother] do you agree with that as well? You need to say yes or no, sorry.**
>
> **[MOTHER]: Yes.**
>
> THE COURT: Yes, and I know it's difficult. [The mother] has already agreed, already indicated she's in agreement with what the Minister is proposing and she just said yes here now. And I know it's hard. I see young parents often who have to do this and it's one of the things about actually being a parent. Sometimes you

> have to do what you don't want to do because it's what's best for your child and that's why…
>
> [FATHER]: Yes, and that's' exactly why I made the choice and that is why I talked it over with [the mother].
>
> THE COURT: Yeah.
>
> [FATHER]: I just want what is best for him right now.
>
> [Emphasis added]

[15] The written Plan of Care was filed on June 25, 2018. At the resumption of the Disposition Hearing on June 26, 2018, the father's counsel was present but the father was not. The father's counsel agreed with the judge that there was nothing unanticipated in the written Plan of Care and that the father had consented previously to a permanent care order with adoption to follow. The mother was present without counsel, having gone to the courthouse with her father. She received a copy of the written Plan of Care and proposed order at the hearing. The judge asked the mother if she was still consenting:

> THE COURT: When we talked about permanent care, this is a basic permanent care plan so [mother], and you're still consenting on the record, correct?
>
> [MOTHER] Yes.
>
> THE COURT: Thank you, okay, all right, well and we had a discussion last week about this and I [*sic*] canvassed the proposed plan of care with the parties, the Respondents and they both consented on the record acknowledging that it was in [the child's] best interests at this time to be placed into the permanent care and custody of the Agency. We talked about some openness but there will be no – obviously they understand there is to be no access and that the Agency is to be in the place of the parent, basically or to become the parent for this child. And understand that it is permanent. Is there anything else I need to [*sic*] canvass with [the father] in particular? –
>
> MS. SWANTEE : No, Your Honour, there have been no family placements that have come forward or community placements.

ISSUE

[16] As indicated above, the issues raised by the mother in this appeal are whether the trial judge fulfilled her statutory duties set out in s. 41(3) and (4)(b) and (c) of the *Act***.**

STANDARD OF REVIEW

[17] The appropriate standard of review is correctness with respect to s. 41(3) and (4)(b), where the direction to the judge is mandatory. The standard, without an extricable question of law, for s. (4)(c) is palpable and overriding error, as it calls upon the judge to "satisfy" herself that each parent is giving an informed, voluntary consent (see *Housen v. Nikolaisen*, 2002 SCC 33, paras. 8 and 10).

ANALYSIS

[18] Sections 41(3) and (4)(b) and (c) provide as follows:

> 41 (3) The court shall, before making a disposition order, obtain and consider a plan for the child's care, prepared in writing by the agency
>
> …
>
> (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 independent legal counsel in connection with the consent;
>
> (c) **satisfy** itself that the parent or guardian understands … the nature and consequences of the consent and consents to the order being sought and every consent is voluntary;
>
> [Emphasis added]

[19] The mother's argument, which she attempts to relate to the judge's obligation under s. 41(3), is that the consent she gave on June 20, which is referred to in the Permanent Care Order, was invalid because the Minister's written Plan of Care was not filed until five days later, on June 25. She says she could not give a valid consent until the written Plan of Care was filed.

[20] Section 41(3) requires a judge to obtain and consider a written plan of care for a child before making a disposition order, which the judge did in this case. It says nothing about a parent being unable to consent to permanent care until after a written plan of care has been filed. Nothing in s. 41(3) invalidates the mother's June 20 consent. The judge fulfilled her obligations under s. 41(3).

[21] The record indicates that on June 20, when the mother gave her consent, she knew that the Minister's plan of care was for her son to be taken into the

permanent care of the Minister for the purpose of adoption. The Minister's counsel clearly explained this in the courtroom on June 20, prior to the mother indicating her consent. The mother has not satisfied me that she did not understand what she was consenting to on June 20 or that her consent was invalid by virtue of being given before the written Plan of Care was filed.

[22] What is more, even if her June 20 consent had been invalid, she confirmed her consent in the courtroom on June 26, after the written Plan of Care was filed and she had received a copy. The fact the Disposition Order itself did not specifically refer to the mother's consent on June 26 is of no importance, given that the record makes it abundantly clear that the mother did confirm her consent in court on that date.

[23] The mother's second argument relates to s. 41(4)(b). She says this section makes it mandatory, given the use of the word "shall", for the judge to ask her directly if she consulted independent legal counsel, in connection with her consent, before granting the disposition order. She says the judge erred because she failed to do so.

[24] The Minister concedes that the judge did not ask the mother whether she consulted legal counsel in connection with her consent, either on June 20 or 26. She says however, that this does not amount to a reversible error because there was nothing to be gained by the judge asking this question in light of her knowledge of the protection proceedings.

[25] The judge knew, from her involvement in the proceedings from the outset:

(a) this was the mother's third child protection proceeding, regarding her fourth child;

(b) the mother was present in court for the five hearings relating to this protection proceeding;

(c) the mother had counsel between, at least, February 13 and June 20;

(d) the mother failed to be in contact with and instruct her lawyer, so that he was permitted to withdraw on June 20;

(e) that on her lawyer's withdrawal, the mother did not request a temporary order, or request time to find another lawyer, as recommended to her in writing by Mr. MacMillan, but instead, when asked by the judge if she wanted Mr. MacMillan or another lawyer to represent her, did not indicate an interest in either option; and

(f) the mother remained before the court as a self-represented litigant until the end.

[26] The record indicates that the mother understood the importance of child protection proceedings from her earlier experiences; had a lawyer; failed to contact and instruct him and did not indicate to the judge that she wanted Mr. MacMillan or another lawyer to represent her. This suggests the mother did not suffer any prejudice from the judge's failure to ask her if she had consulted independent legal counsel. The judge knew from her contact with the mother that she did not want a lawyer.

[27] With the record not suggesting any prejudice, it is notable to me that the mother made no application for the admission of fresh evidence in this Court, a procedure often followed when a parent is seeking to show they have been prejudiced. Thus, there is no evidence of why she failed to be in contact with, instruct or accept advice from Mr. MacMillan, that she intended to consult a lawyer regarding her consent and was not given an opportunity to do so or that she made any effort in June 2018 to consult a lawyer regarding her consent.

[28] It is clear s. 41(4)(b) makes it mandatory for a judge to ask whether the parent has consulted independent legal counsel in connection with their consent and judges must take care to ensure they do so. It is also clear that the best interests of the child are paramount in child protection proceedings, the *Act,* s. 2.

[29] In the circumstances of this appeal, (1) where the record shows the judge knew the mother was familiar with the importance of child protection proceedings; had been present in court throughout; had counsel; failed to contact or instruct him and did not indicate she wanted another lawyer when asked this question directly by the judge, and (2) where there was no fresh evidence indicating the mother suffered any prejudice as a result of the judge's failure to ask her if she had consulted independent legal counsel, the judge made no reversible error in not doing so.

[30] The mother's last argument is that the judge erred by not satisfying herself under s. 41(4)(c) that the mother understood the nature and consequences of her consent, did in fact consent to the permanent care order and consented voluntarily.

[31] The mother's counsel says the judge mistakenly attributed to the mother the father's comments on June 20 that it was in his son's best interests to be placed in permanent care.

[32] The judge appears to have inferred the mother consented to permanent care on June 20 because she felt it was in the child's best interests. When the judge asked the father if he consented to the permanent care order, the father stated twice that he did because it was in his son's best interests. He said this immediately before the mother was asked if she agreed and indicated she did. In these circumstances, the judge's apparent inference that the mother was consenting to the permanent care order because she felt it was in the child's best interests is not a palpable and overriding error.

[33] In support of her last argument, the mother's counsel also points out that the mother may not have been fully informed about the consequences of consenting as she only heard the Minister's plan with respect to her son described orally in court before she consented on June 20; that the mother may not have had enough time on June 26 to read and understand the written Plan of Care before she confirmed her consent; that the affidavits filed on behalf of the Minister show the mother had a history of mental illness and had suicidal ideation prior to the birth and that the mother was representing herself from June 20 on.

[34] This Court has dealt with a judge's obligation to ensure informed and voluntary consent under s. 41(4)(c) in *G.D. v. Family & Children's Services of Lunenburg County*, 1997 NSCA 123; *M.W. v. Nova Scotia (Minister of Community Services)*, 2014 NSCA 103 and *C.C. v. Nova Scotia (Minister of Community Services)*, 2015 NSCA 67. In *C.C.* this Court stated:

> [54] In this appeal, the appellants only raise concerns with respect to Judge Spark's obligation under s. 41(4)(c) of the *Act*. This Court has recently had the opportunity to consider *G.D.* in the context of an allegation that a lower court failed to meet the statutory obligation contained in that subsection. The Court in *M.W., supra*, noted:
>
> > [71] In *G.D.*, the appellant who had been represented by counsel, submitted that the consent she provided to an order for permanent care and custody in relation to her young child, was not fully informed. She asserted she understood that her child would, following such order, be placed for adoption within her extended family, and as such, she would have continued contact. That did not take place. There, the appellant was described as being of "borderline level of intelligence". It was argued that the trial judge breached the statutory duty in s. 41(4)(c) as he made no inquiry as to whether she was consenting or its voluntariness.
> >
> > [72] The Court ultimately agreed with the appellant. Writing for the Court, Pugsley, J.A. noted:

> [39] The key question is whether the Court is required, in the course of satisfying itself, of the issues raised in s. 41(4)(c) to direct questions in Court (as well as obtain responses) to the parent or guardian, or where the child is 12 or more, to the child. (By expressing the question in this manner, I do not mean to imply that the Court, in the course of satisfying itself, should limit itself to inquiries of this nature.)
>
> [40] In my opinion, unless there are exceptional circumstances, which do not appear in this case, the Court should conduct such an in court inquiry.
>
> [41] I concede there may be exceptional circumstances, in a case where:
>
> > 1. The parties are represented by counsel, and counsel specifically addresses the issues raised in s. 41(4)(c);
> >
> > 2. The client is present in Court to hear the exchange between the judge and his, or her, counsel. (Although Ms. D. was present in Court, the issues raised in s. 41(4)(c) were not specifically addressed in Ms. D.'s presence.)
> >
> > 3. There is nothing in the evidence previously heard by the Court to affect the issues.
>
> [42] Even in the exceptional circumstances postulated, I would suggest the better practice is for the Court to directly question the parties involved.

[73] Justice Pugsley noted the assessor's observations regarding the appellant's level of intelligence, and that even at age 26 was still viewed "as a child in the home, even when of adult age". He indicated such was "cogent indicia" that a direct inquiry by the trial judge respecting the issues raised in s. 41(4)(c) was warranted.

[74] From the transcript, it is clear the family court judge did not directly ask the appellant whether she was consenting, nor whether the consent was voluntary. The appellant asserts that the present case is on all fours with *G.D.* and the result -- remitting the matter back to the family court for a permanent care and custody hearing, should also be the same.

[75] Although it would have been preferable for the family court judge to confirm directly with the appellant that her consent was being voluntarily given, his failure to do so in this case does not justify appellate intervention. Here, there is no suggestion the appellant was intellectually impaired. She had been present at every court proceeding and had the opportunity to hear the exchanges between counsel and the court, specifically on March 17th and 24th when the matter of consent had been raised. Further, she had received the Plan of Care which clearly set out the consequences of consenting to the permanent care and custody order. In

> my view, such falls within the "exceptional circumstances" as contemplated by this Court in *G.D.*
>
> [55] Like in *M.W.*, it appears Judge Sparks did not directly confirm with the appellants that they were consenting to the permanent care order, nor confirm their consent was informed and voluntary. With respect, it seems undertaking that inquiry would not be onerous and, in light of the statutory directive, and the potential for a resulting order to be challenged on appeal, such should be done as a matter of course.
>
> [56] The above being said, the failure of Judge Sparks to undertake that inquiry does not, in the circumstances of this case, constitute reversible error. Clearly Judge Sparks had satisfied herself as to the adequacy of the consent – her order explicitly says so. Here the appellants were represented, had previously consented to a permanent care order, and had been earlier advised by the court of the consequences of such an order at the protection hearing. Judge Spark's conclusion that the appellants' consent was informed and voluntary was well-founded.

[35] As was the case in *M.W.* and *C.C.*, I am satisfied the circumstances of this appeal fall within the types of exceptions contemplated in *G.D.* There is no expert evidence that the mother here was of "borderline level of intelligence" or that she was viewed "as a child in the home, even when of adult age". There is nothing in the record and no fresh evidence suggesting that the mother thought she was consenting to anything other than permanent care for the purpose of adoption.

[36] She knew the importance of child protection proceedings from her experience with her three older children, including the possibility of putting forward a plan for a kinship placement if available. This possibility was canvassed with her by the Minister. She was present at all court appearances, although unrepresented by her choice after June 20, and heard the exchanges concerning consent and the Minister's plan. She expressed her consent twice on June 20 and again on June 26, once she had a copy of the written Plan of Care. There is no evidence she was coerced to consent by the father or anyone else. In fact, as indicated previously, the father now supports her appeal. I agree with the Minister that a lawyer's speculation in a factum and an appellant's silence do not amount to evidence that her consents were not informed and voluntary.

[37] This Court's statement in *C.C.* is applicable here:

> [58] Section 41(4)(c) of the *Act* is intended to protect the interests of parties who, through misunderstanding, coercion or otherwise may not be validly consenting to a permanent care order. **This provision should not be used as a means for those who clearly gave valid consent, to later reconsider and rescind that**

> **decision.** In my view, that is exactly what happened here, and as such, the circumstances fall within the type of exception contemplated in *G.D.*
>
> [Emphasis added]

[38] I would dismiss the appeal. As no costs were sought, none will be awarded.

Hamilton, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.