FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Minister of Community Services)v. M.K.*, 2020 NSFC 7

Date: 2020-01-30
Docket: FT No. 111627
Registry: Truro

Between:

Minister of Community Services

Applicant

v.

M.K. and P.K.

Respondents

Restriction on Publication: Pursuant to s. 94(1) of the *Children and Family Services act*, S.N.S. 1190, c.5.

Judge:	The Honourable Associate Chief Judge S. Raymond Morse
Heard	January 9, 2020, in Truro, Nova Scotia
O**ral Decision**:	January 30, 2020
Counsel:	A. Melvin, for the Minister of Community Services B. Bailey, for the Respondent, P.K. M. K., self-represented

By the Court:

Background

[1] The Respondents are the parents of nine-year-old T.K.. T.K. is the subject of a protection proceeding commenced on behalf of the Minister (Minister of Community Services) pursuant to Protection Application and Notice of Hearing dated September 26, 2018. The Minister maintains that T.K. is in need of protective services pursuant to subparagraphs (b), (e), (h), (j) and (k) of Section 22(2) of the *Children and Family Services Act*.

[2] T.K. has been in the temporary care and custody of the Minister since the taking into care effected by the Minister on September 27, 2018. That taking into care coincided with the initial interim hearing held pursuant to Section 39 of the *Children and Family Services Act*. At the conclusion of that hearing the court confirmed an initial order for temporary care and custody and authorized medical assessments for the child, including a psychological assessment. The Respondents were represented by Lloyd Berliner at time of the initial hearing. It was actually Cassandra Armsworthy, an associate of Mr. Berliner's, who appeared on Mr. Berliner's behalf. Counsel for the Respondents confirmed at that point that the Respondents were consenting to participation in psychiatric assessments as requested by the Minister. Accordingly, the court authorized psychiatric assessments for each of the Respondents.

[3] On October 4, 2018, the court received correspondence from Mr. Berliner confirming that he was no longer representing the Respondents and advising that they had been provided with notices of intention to act on their own behalf for filing with the court.

[4] When the matter returned to court for completion of interim hearing on October 25, 2018, Michael Owen appeared as counsel for the Respondents. Mr. Owen, again, indicated that his clients were agreeing to the psychiatric assessments as requested by the Minister and also indicated that he would like those assessments to be completed as quickly as possible. Counsel for the Minister confirmed that Dr. Risk Kronfli had agreed to complete the psychiatric assessment for M.K., and that Dr. Pogosyan would be completing the assessment for P.K.

[5] The court granted the Minister's request for extension of the existing order for temporary care and custody and the matter was scheduled for pre-trial prior to

protection hearing on December 6, 2018, and protection hearing on December 18, 2018.

[6] On November 7, 2018, the Minister filed a copy of a report submitted by a pediatrician who had completed an assessment of the child on September 28, 2018. The pediatrician expressed the opinion that the child was suffering from failure to thrive, global developmental delay, dysmorphic features, clubbing, hyperextensibility, weaknesses and decreased tone.

[7] At the protection pre-hearing held December 6, 2018, counsel for the Minister advised the court that the Respondent mother, M.K., had indicated that she no longer consented to a psychiatric assessment and had missed a scheduled appointment with Dr. Kronfli. Mr. Sonnichsen appeared on behalf of Mr. Owen at time of the pre-hearing. During the course of the pre-hearing, the court noted that on two occasions counsel representing the Respondents had confirmed the Respondents' agreement to participate in psychiatric assessments and that the assessments had been court ordered on that basis. The court confirmed the court's expectation that the court orders authorizing psychiatric assessments would be complied with by both Respondents.

[8] The protection hearing proceeded on December 18, 2018. Mr. Sonnichsen, again, participated, but participated by phone, as counsel for the Respondents. The Respondents were personally present in court during the time of the hearing. Mr. Sonnichsen confirmed that the Respondent parents were not taking a position with respect to the Minister's request for a protection finding.

[9] At the conclusion of the hearing the court made the necessary protection finding, subject to a reservation of rights in favor of the Minister to request findings on alternative grounds at some subsequent point in the proceeding, if necessary and appropriate. The court extended the existing order for temporary care and custody and the matter was adjourned for pre-hearing prior to disposition on February 7, 2019, and for disposition hearing on March 14, 2019.

[10] On January 16, 2019, Mr. Owen submitted a letter to the Family Court with an attached Notice of Intention to Act on One's Own Behalf signed by the Respondents. The notice confirmed that the Respondents had discharged Mr. Owen effective January 11, 2019.

[11] The Respondents appeared without legal counsel at the pre-hearing held February 7, 2019. The court encouraged the Respondents to arrange for legal

representation as soon as possible. The court advised that the matter would proceed to disposition hearing on March 5, 2019.

[12] On March 4 the court received a written request for adjournment from M.K.. M.K.'s correspondence explained that P.K. had been hospitalized as a result of a heart attack and was scheduled for surgery on March 5. Accordingly, at time of the March 5 initial disposition hearing, the court confirmed the matter would be adjourned for completion of disposition on March 12, 2019.

[13] The Respondents attended the March 12, 2019 hearing without legal representation. They advised the court that they were continuing their efforts to obtain new legal counsel. They confirmed to the court that they were not taking any position in regard to the Minister's disposition application. The court, therefore, granted the Minister's request for extension of temporary care and custody by way of initial disposition order. The matter was scheduled for early review on May 2, 2019 in the hope that the Respondents would be represented by new legal counsel at that point.

[14] On April 29, 2019 the Minister filed a copy of Dr. Kronfli's Psychiatric Assessment for M.K. dated April 22, 2019. In the impression portion of his report Dr. Kronfli indicates as follows at page 21, in reference to M.K.:

> "She presents with delusional and paranoid thought patterns, with fixed, false beliefs that cannot be proven; however, she will go to any length to seek evidence to support them and avoids any information that refutes her beliefs. These false beliefs have significantly impaired (M.K.'s) judgement, rationale, insight and ability to function adequately in order to make logical, organized decisions with respect to parenting her child. They have also rendered her incapable of appreciating the legal aspects of the Agency's concerns, to the point that her lawyer reportedly dropped her case in January 2019.
>
> (M.K.'s) delusional thought patterns, resistance to accept clear information and documentation, avoiding any detailed discussion and becoming over inclusive in her presentation and discussion, are all characteristic of a diagnosis of Delusional Disorder and Psychosis. (M.K.) also suffers from hoarding behaviors, in addition to Avoidant personality traits."

[15] Then in the recommendations portion of his report, Dr. Kronfli indicated as follows,

> "From a Psychiatric standpoint, (M.K.) requires Psychiatric treatment, including a trial of Psychotropic medication, like Risperidone or Aripiprazole (Abilify). The efficacy of this medication regime should be closely monitored under the

> supervision of a Psychiatrist. Having said that, it is extremely difficult to treat delusional Disorders and (M.K.) has total lack of insight and no acceptance that there is anything wrong with her perception. The chances that she would accept treatment is in my opinion very slim. The prognosis for a change is very limited."

[16] He went on to indicate in his report that M.K. would benefit from long term Cognitive Behavioral Therapy.

[17] At the review hearing held May 2, 2019, P.K. and M.K. once again appeared without legal counsel. At the conclusion of the May 2 hearing, the matter was scheduled for further review on June 4, 2019.

[18] On June 4, 2019, Brian Bailey appeared as counsel for the Respondents. Mr. Bailey confirmed that he was new to the file. He advised that the Respondent parents were currently in the process of separating and that that might impact upon his ability to act for both parties. However, he indicated that for purposes of the June 4 appearance, he was acting for both Respondents. At the conclusion of the June 4 hearing, the court extended the existing order for temporary care and scheduled the matter for further review on July 9, 2019 while acknowledging that the outside limit for the proceeding would be March 12, 2020.

[19] At time of the July 9 review hearing, Mr. Bailey advised that, at that point in time, he was only representing P.K. and that he had encouraged M.K. to attend at Legal Aid. The court also encouraged M.K. to arrange for legal representation through Legal Aid as quickly as possible. At the conclusion of that hearing the matter was scheduled for further review on September 5, 2019.

[20] On September 5, 2019 M.K., again, appeared on her own behalf. Mr. Bailey appeared as counsel for P.K.. In discussions with the court, M.K. advised that she had not yet applied for Legal Aid and that her family was assisting her in trying to find legal representation. M.K. did advise the court that she had an appointment with the summary advice counsel scheduled for September 20. The court emphasized with M.K. the importance of her being represented by legal counsel and encouraged her to attend at Legal Aid immediately to make application for Legal Aid.

[21] At the review hearing held October 22, 2019, M.K., once again, appeared on her own behalf. Counsel for the Minister expressed concern that the Respondent mother had not followed through with respect to Dr. Kronfli's recommendations and confirmed that the Minister's position was that, until M.K. had been stabilized

on medication as recommended by Dr. Kronfli, the Minister did not see this as a situation where there was any point in providing services or that the provision of services would be likely to have any meaningful impact.

[22] Once again, the court spent considerable time discussing with M.K. the importance of her having legal representation. The court, again, encouraged M.K. to attend at Legal Aid. M.K. did inquire as to the ability of the court to appoint counsel for her, and the court responded by suggesting to M.K. that she had to take the steps necessary to follow through with available options, such as Legal Aid representation, before the court could consider appointment of counsel. The matter was scheduled for further review on January 9, 2020.

[23] On December 23, 2019, the Minister filed a Review Application and Notice of Hearing dated December 20, 2019 confirming the Minister's request that the child, T.K., be placed in the permanent care and custody of the Minister, and the Minister's application was supported by a Plan of Care dated December 19, 2019.

[24] The Family Court submitted correspondence dated December 23, 2019 by email to Mr. Melvin, counsel for the Minister, inquiring as to the Minister's position with respect to appointment of *Guardian Ad Litem* or *Amicus Curiae* for M.K. A copy of that letter was forwarded to Mr. Bailey, as well as to M.K.. Mr. Melvin subsequently responded by correspondence dated January 8, 2020. In his correspondence he confirmed that his client had contacted Dr. Kronfli seeking opinion or comment on M.K.'s capacity. He advised that Dr. Kronfli declined to provide an opinion or additional comments as Dr. Kronfli had not seen M.K. since her psychiatric assessment. Mr. Melvin's correspondence also contained submissions on behalf of the Minister in relation to issues relating to appointment of state funded counsel or *Amicus*.

[25] The case proceeded to review hearing on January 9, 2020. During the course of the January 9 hearing, M.K. confirmed that she had not filed an application with Legal Aid. The court invited counsel for the Minister as well as counsel for P.K. to provide submissions to the court with respect to potential options that might be considered by the court, including appointment of *Guardian ad Litem* as well as *Amicus*. The court scheduled the matter for further hearing on today's date, January 30, and confirmed the court's intention to provide a decision on today's date in relation to M.K.'s role as a self-represented litigant.

State-funded Counsel

[26] In *D.B. v A.B.*, 2016 NSCA 43, Chief Justice MacDonald of the Nova Scotia Court of Appeal determined that it was necessary and appropriate to direct the Attorney General to provide counsel for the appellant parents in the context of a child protection proceeding. In his decision, Chief Justice MacDonald referred to Chief Justice Lamer's decision in *New Brunswick (Minister of Health and Community Services) v G.(J.)[J.G.]*, 1999 CanLII 653. Chief Justice MacDonald stated that it is well settled that when the state seeks to enforce its child protection authority, the parent's Section 7 charter rights are engaged, and went on to note that this necessarily gives rise to an obligation on the part of the court, in appropriate circumstances, to require provision of counsel for indigent parents in recognition of the government's constitutional obligation to provide an indigent parent with state-funded counsel in order to ensure the hearing process is fair.

[27] Chief Justice MacDonald also acknowledged that the Supreme Court of Canada's decision in *J.G.* indicated and confirmed that not every case will require appointment of state-funded counsel and whether or not it is necessary for a parent to be represented is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.

[28] In *D.B.*, the Attorney General acknowledged that the appellants had insufficient funds to advance the appeal and that they had exhausted all Nova Scotia Legal Aid avenues. The Minister of Community Services acknowledged the seriousness of the interests at stake, namely, permanently losing contact with the appellants' children.

[29] While Chief Justice MacDonald indicated that he did not view the matter as complicated, he did express concern that, as self-represented litigants, the appellants risked making the appeal more complicated than it need be and concluded that it may take the involvement of state-funded counsel to avoid complication. Finally, Chief Justice MacDonald acknowledged in his decision that his overriding concern was the appellants' emotional state and the fact that they were too overwhelmed by the process, and he concluded that it would be too much to expect that the appellants would be able to effectively represent themselves for purposes of the appeal.

[30] I would also refer to a decision of the Ontario Court of Justice, *Children's Aid Society of Toronto v A.J., M.H. and L.M.*, 2019 ONCJ 537, where the court reached a similar conclusion in the context of a child protection proceeding. In her

decision, Justice O'Donnell confirmed that the children's maternal aunt, who had been caring for the three children who were the subject of the proceeding since their mother's death, should be represented by state-funded counsel. The decision notes that the aunt was refused a Legal Aid certificate for reasons that were unclear to the court, and that she also could not afford to hire legal counsel. In determining that state-funded counsel should be appointed in order to ensure a fair hearing, Justice O'Donnell indicated she was satisfied the aunt had not been able to adequately represent herself in the child protection proceedings, given the legal complexity of the proceedings, not to mention the trauma and shock of her sister's brutal murder, and suddenly becoming the caregiver for three young children. Justice O'Donnell concluded that the prerequisites for appointment of state-funded counsel, as identified by the Supreme Court of Canada in J.G., had been adequately established. Justice O'Donnell did, however, defer final decision on the issue of state-funded counsel pending opportunity for submissions from Legal Aid Ontario and the Attorney General of Ontario.

[31] In considering and reviewing this matter, I have little hesitation in concluding that the Minister's request for an order for permanent care and custody of the child who is the subject of this proceeding triggers a hearing in which the interests protected by Section 7 of the *Canadian Charter of Rights and Freedoms* are engaged. Similarly, I have concluded that representation by counsel would be appropriate in order to ensure the fairness of any final review hearing.

[32] I am also satisfied based upon, again, the limited information available to the court, that the Respondent mother is not able to afford private counsel. Similarly, I am satisfied that the trial process, including the issues arising for determination and the evidence to be adduced in relation to the issues, will be complicated and well beyond the capacity of M.K. as a self-represented litigant. I believe that the concerns with respect to capacity are amplified by the information set forth in Dr. Kronfli's report, albeit I also acknowledge that that report has yet to be formally introduced into evidence.

[33] Unfortunately, I am unable to conclude that the Respondent mother has adequately pursued or exhausted the option of Nova Scotia Legal Aid. It seems clear to the court that the Respondent would most likely qualify for Nova Scotia Legal Aid representation given her current financial circumstances, as understood by the court. It is unclear to the court why M.K. has not followed through appropriately with an application to Nova Scotia Legal Aid given the repeated encouragement of the court, and others, that she do so as quickly as possible. No

adequate explanation or reasonable excuse for her failure to follow through with an application has been provided to the court. And, while the court can speculate that M.K.'s failure to adequately pursue the option of Nova Scotia Legal Aid may in some manner or way be related to her mental health issues, there is certainly no appropriate basis upon which I can reach such a conclusion at this point in the proceeding.

[34] I am mindful of the following excerpt from Justice Lamer's decision in *J.G.* at paragraph 103, in which Chief Justice Lamer indicated as follows;

> 103 As similar cases may arise in the future, I will briefly outline the procedure that should be followed when an unrepresented parent in a custody application seeks state-funded counsel. The judge at the hearing should first inquire as to whether the parent applied for Legal Aid, or any other form of state-funded legal assistance offered by the province. If the parent has not exhausted all possible avenues for obtaining state-funded legal assistance, the proceeding should be adjourned to give the parent reasonable time to make the appropriate applications, providing the best interests of the children are not compromised. It goes without saying that if the parent, whether or not he or she is able to pay for a lawyer, chooses not to have one that there will be no entitlement to state-funded legal assistance : see *Rowbotham*, *supra*, at p.64. This is because the parent voluntarily assumes the risk of ineffective representation, for which the government cannot be held responsible.

[35] In his written submissions dated January 8, 2020, Mr. Melvin, counsel for the Minister, referred to this excerpt from Justice Lamer's decision in support of his conclusion that M.K. cannot be provided with state-funded counsel.

[36] In this case, I have regrettably concluded that the Respondent mother has not exhausted all possible avenues for obtaining legal assistance, in particular, she has not made application to Nova Scotia Legal Aid, despite the repeated encouragement of the court and others, and the repeated opportunities afforded to her to do so. Given these circumstances, I have concluded that it would not be appropriate to proceed by way of appointment of state-funded counsel.

Appointment of *Guardian Ad Litem*

[37] As an alternative to appointment of state-funded counsel, I have also considered whether or not the appointment of a Litigation Guardian for the Respondent mother would be appropriate in the circumstances of this case.

[38] The Family Court has jurisdiction to appoint a Litigation Guardian pursuant to *Family Court Rule* 5.06. That rule authorizes the appointment of a Litigation Guardian for a "person under disability" who is defined as either (a) a person under the age of majority who is required by order of the court to commence or defend proceeding by way of litigation guardian, or (b), a person who is not capable of managing their affairs. Pursuant to *Family Court Rule* 5.06(4), a Litigation Guardian of a person under disability must act by counsel.

[39] In this case, the only basis for appointment of a Litigation Guardian would, obviously, be on the basis of a finding that M.K. is not capable of managing her own affairs. The only information available to the court suggesting that appointment of Litigation Guardian might be appropriate for M.K. is the information as set forth and referred to in the Psychiatric Assessment Report submitted by Dr. Kronfli, which again, I understand and acknowledge has not been entered into evidence at this point in the proceeding. Neither of the Respondents has had the opportunity to cross-examine Dr. Kronfli on the opinions as expressed in his report, and M.K. has never clearly indicated acceptance of Dr. Kronfli's diagnosis or his recommendations.

[40] Separate and apart from any evidentiary issue relating to Dr. Kronfli's report, it is also important to note that Dr. Kronfli certainly in his report did not expressly indicate or offer an opinion that M.K. was mentally incompetent or incapable of managing her own affairs. This observation is, I believe, supported by the information provided most recently by Mr. Melvin advising the court that Dr. Kronfli declined to offer an opinion with respect to M.K.'s capacity in the absence of an opportunity to undertake an updated assessment. This is information that came to the court's attention in the correspondence provided by Mr. Melvin dated January 8, 2020.

[41] There are some Ontario case authorities that provide some assistance. In *McMurtry v McMurtry*, 2019 ONSC 4828, Justice Corthorn of the Ontario Superior Court of Justice considered a motion for appointment of a Litigation Guardian for one of the parties. In first instance, Justice Corthorn deferred decision on the motion based upon her conclusion that there was no first-hand medical evidence in support of the motion. The court indicated that the absence of first-hand evidence from the physician was a deficiency that the court could not overlook.

[42] However, Justice Corthorn also referred to her decision in *Milicevic v Ottawa Police Service,* 2019 ONSC 3599, as a case in which special circumstance, or circumstances justified the conclusion that it would be just and appropriate for the court to determine a similar motion pursuant to the *Ontario Rules of Civil Procedure*. In that case, Justice Corthorn, in determining a request for appointment of Litigation Guardian, acknowledged the right of a litigant to have the final say in directing how his or her litigation is to be conducted or resolved, and that that right is to not be lightly taken away. She went on to conclude that the opinions expressed by a physician, if admissible as evidence, would support a finding that the delusions from which Mr. Milicevic suffered would apply to an issue in the proceeding. She also referred to case authority which indicated that persons under disability are subject to the *Parens Patriae* jurisdiction of the Ontario Superior Court of Justice, and that the court should exercise its discretion in a manner that enhances the protection of such individuals.

[43] In the end result, Justice Corthorn concluded that if the opinions expressed by the physician were entitled to be considered they would support a finding that Mr. Milicevic was a person under disability and granted the application for appointment of Litigation Guardian.

[44] The Family Court is a statutory court, it is not a superior court and does not exercise *Parens Patriae* jurisdiction. The Family Court's jurisdiction is exercised pursuant to applicable statutory law and regulations and in accordance with the *Family Court Rules*, and *Civil Procedure Rules* as applicable. In the circumstances of this case, I am unable to conclude that there is an appropriate evidentiary basis upon which the court can make the requisite finding or determination that the Respondent mother is incapable of managing her own affairs so as to justify, or require, appointment of Litigation Guardian in accordance with the *Family Court Rules*. While the court's understanding of Dr. Kronfli's report does certainly raise significant concerns with respect to M.K.'s capacity to adequately and effectively represent herself, it does not, at this point in time, provide or constitute an appropriate or sufficient evidentiary basis to support or justify the conclusion that M.K. is incapable of managing her own affairs.

[45] I would also, again, like to acknowledge that in the written submissions on behalf of the Minister dated January 8, 2020, the court was advised and informed that Dr. Kronfli expressly declined to offer an opinion as to M.K.'s capacity in the absence of him having a further ability to undertake an updated assessment.

[46] I believe it is also important to recognize the right on the part of M.K. to have the opportunity to participate in the proceeding as a self-represented litigant. That right is not to be denied or taken away except in appropriate circumstances, and I am not satisfied in the circumstances of this case that it is appropriate to deny M.K. the opportunity to participate in a final review hearing as a self-represented litigant. Indeed, in reaching this conclusion, I have also considered the possibility that the appointment of a Litigation Guardian might indeed further exacerbate M.K.'s mental health issues.

Amicus Curiae

[47] Family Court Rule 5.09 indicates as follows,

> Any person may, with leave of the court and without becoming a party to a proceeding, intervene in the proceeding as a friend of the court for the purposes of assisting the court.

[48] In *Morwald-Benevides v. Benevides*, 2019 ONSC 1136, Justice Koke, of the Ontario Superior Court of Justice, determined an appeal by the Ministry of Attorney General of a decision by the trial judge to appoint two *amici* during the course of the trial as commenced in the Ontario Court of Justice. That trial commenced in April 2014 and lasted 23 days, being finally completed in late June 2015. The mother decided to represent herself at trial. The trial judge described the mother's behavior on the first day of trial as bordering on hysterical. Just before noon she collapsed in the courtroom and was rushed to hospital by ambulance. The trial judge decided to appoint an *amicus* to assist with presentation of the mother's case. The judge's endorsement stated that he appointed *amicus* "to assist the court in relation to the interest of the applicant" and his formal order also confirmed that the *amicus* was "to assist the court in making decisions that relate to the best interests of the children." The father, the other party in the case, ran out of money part way through trial and his lawyer applied to be removed. That application was granted, and the trial judge then appointed a second *amicus* to assist with presentation of the father's case.

[49] In determining the appeal, Justice Koke reviewed the test for appointment of *amici* indicating as follows at paragraph 12,

> In *R v Imona-Russell*, 2013 SCC 43 [2013] 3 SCR 3, also referred to as *Ontario v Criminal Lawyers Association of Ontario,* the Supreme Court of Canada outlined the test a trial judge must apply when deciding whether to appoint *amici*. The court stated as follows at paras. 47-48:

> 47. Thus, orders for the appointment of *amici* do not cross the prohibited line into the province's responsibility for the administration of justice, provided certain conditions are met. First, the assistance of *amici* must be essential to the judge discharging her judicial functions at the case at hand. Second, as my colleague, Fish, J. observes, much as is the case for other elements of inherent jurisdiction, the authority to appoint *amicus* should be used sparingly and with caution, in response to specific and exceptional circumstances (para. 115). Routine appointment of *amici* because the defendant is without a lawyer would risk crossing a line between meeting the judge's need for assistance and the province's role in the administration of justice.
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> 48. So long as these conditions are respected, the appointment of *amicus* avoids the concern that it improperly trenches on the provinces role in the administration of justice.

[50] Justice Koke, in his decision, stated as follows at paragraph 20;

> [20] After completing his review of the law and the appointment and role of amicus, the trial judge set out his own summary of the feature of *amicus curiae* in paragraph 43 of his decision, a summary he describes as extracted primarily from the Supreme Court of Canada and provincial and federal appellant courts:
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> (a) The ultimate and primary purpose is to provide assistance to trial judges on issues of law or facts, wherein the trial judge is of the view that an effective, fair and just decision cannot be made without such assistance.
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> (b) Such orders are made to ensure a fair trial process, the orderly conduct of proceedings, and to ensure the proper administration of justice.
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> (c) It is usually driven by the initiative of the judge, but may also occur at the request of one or more of the parties.
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> (d) There are many scenarios to which *amicus* may apply. The class of scenarios is not closed. There is no "one size fits all" standard.
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> (e) The power to appoint has a high threshold. Such should be exercised sparingly and with caution. Appointments should be made in response to specific and exceptional circumstance. A judge must not externalize his or her duty to ensure a fair trial of unrepresented accused by shifting the responsibility to *amicus curiae*, who under a different name assume a role nearly identical to that of defence counsel.
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> (f) The judge decides the terms and conditions of the role, which may vary widely.
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> (g) Caution is to be exercised if an appointment mirrors the role of a defence counsel. The primary purpose must still be to assist the court, though there may be an incidental beneficial result for a party. In such a case, clear directions must be given to the party and *amicus*.

(h) There is no solicitor-client privilege between an *amicus* and a party.

(i) Only the judge can dismiss an *amicus*, not the party.

(j) An *amicus* may override so-called instructions or directions from a party. An *amicus* may operate if the party does not cooperate or remains mute or chooses not to attend court.

(k) Once an *amicus* order is made, the Attorney General is obligated to compensate the *amicus*. Although *amicus* may often be paid by the legal aid fund, that is not always necessarily so. There should be a negotiation process between the Attorney General and an intended *amicus* as to compensation. The judge may play a role in this process that is persuasive only. If the judge is not satisfied as to the compensation issue, the judge ought to consider issuing a stay of proceeding until the compensation issue can be resolved.

[51] In his summary and conclusions, Justice Koke indicated as follows:

[56] In summary, I am of the view that the two appointments were consistent with the directive of Karakatsanis J. that *amici* can be appointed if this is *necessary* to *permit a particular proceeding to be successfully and justly adjudicated* (see paragraph 44 of *Criminal Lawyers* decision) and with the comment of Fish J. that a court should appoint an *amicus* when such an *appointment is necessary to ensure the orderly conduct of proceedings and availability of relevant submissions* (see paragraph 87 of *Criminal Lawyers* decision).

[57] In my view, the trial judge made it clear that the *amici* were not to play the role of counsel. *Amici* could not be dismissed, as the mother had done with 5 previous counsel. The *amici* were not obligated to follow the instructions or directions of the parties, and although they were required to elicit their cooperation, they could proceed without such cooperation from the parties if necessary. They were also instructed that they could proceed if the parties chose not to attend court.

[58] Furthermore, the trial judge also recognized that the power to appoint an *amicus* has a high threshold. He recognized this case represented exceptional circumstances...

[52] Later, Justice Koke indicated as follows,

[60]…the trial judge recognized that the appointment of an *amicus* cannot have as its primary purpose as a substitute for traditional counsel. He stated that if an order does mirror traditional counsel then the primary purpose of such an order must still be the assistance required by the court (see par. 25 f the trial judge's reasons), and any benefit derived from the party is *incidental* thereto. In support of his position he quoted Fish J. in the *Criminal Lawyers* case at paragraphs 119 and 120:

> 119 While the *amicus* may, in some circumstances come to be called upon to "act" for an accused by adopting and defending the accused's position, his role is fundamentally distinct from that of defence counsel who represents an accused person either pursuant to a legal aid certificate or under a *Rowbotham* order. Furthering the best interests of the accused may be *an incidental result* but is not the purpose of an amicus appointment.
> 120 As Durno J. explained in Cairenius, at para. 62
>
> > …*amicus* is generally not counsel for the accused/applicant, there is no solicitor/client relationship and *amicus* does not take instructions from a client. The general role of *amicus* is to assist the court. *Amicus*, as a friend of the court, has an obligation to bring facts or points of law to the court's attention that might be contrary to the interests of the applicant. This is contrary to the traditional role of defence counsel…

[53] In dismissing the appeal, Justice Koke concluded that the trial judge applied the proper principles when he decided to appoint *amici*. He found that the trial judge required assistance and guidance from learned counsel in order to come to an understanding of the law, and given the personalities involved, he required assistance to ensure the trial could proceed in an orderly fashion. He concluded that the decision of the trial judge to appoint *amici* stabilized the trial and ensured the trial could proceed in an orderly manner. [1]

[54] In this particular case, the matter between the Minister and P.K. and M.K. relating to the child, T.K., having regards to my earlier conclusions respecting appointment of state-funded counsel and the appointment of *Guardian ad Litem*, I am satisfied that in the current circumstances the assistance of an *amicus* is required and appropriate. I have not reached this conclusion lightly and I acknowledge that the appointment of an *amicus* is only to be done in appropriate or exceptional circumstances.

[55] I find, and I am satisfied, that there are exceptional circumstances in this case that justify appointment of an *amicus*. This trial is going to be a fairly complex trial. It is anticipated that there will be considerable expert evidence adduced during the course of the final review hearing. There will be medical

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[1] At time of a Review Hearing on March 23, 2020., the court acknowledged that the Ontario Court of Appeal, in a decision released December 24, 2019, had dismissed the Ontario Attorney General's appeal of Justice Koke's decision for mootness, but nevertheless indicated that Justice Koke had erred in upholding the trial judge's decision to appoint *amici* while also stipulating that the Court of Appeal's reasons would not apply to appointment of *amicus* in the context of child protection proceedings.

evidence relating to the medical condition of the child at the outset of the proceeding, as well as with respect to the child's current medical issues or needs. There will likely be psychiatric evidence with respect to either or both parents. The expert testimony to be adduced at trial is likely to include testimony from a pediatrician, child psychologist, occupational therapist and possibly two psychiatrists.

[56] It is anticipated that it is likely that there will be technical evidentiary issues relating to the admissibility of out-of-court statements attributed to the child, the admissibility of which certainly on a preliminary basis, would have to be dealt with by way of a *voir dire* process, which in laymen's terms is often referred to as a trial within a trial related to determination of preliminary issues relating to admissibility of the statement. In determining the *voir dire*, of course, the court does not make the ultimate finding with respect to reliability of any such statement but rather considering threshold reliability.

[57] The issues and associated evidence are going to be extremely emotional for the parties and will pertain to allegations of neglect and sexual abuse.

[58] The psychiatric assessment undertaken by Dr. Kronfli highlights the difficulties that the Respondent mother may have in dealing with such evidence during the course of the proceeding, and in making that comment I don't want for a moment to not recognize that the evidence may well be emotional and difficult for M.K. as well. I believe that there is obvious potential for the trial to become destabilized given the nature of the anticipated evidence as well as my belief and understanding as to the Respondent mother's vulnerable emotional state.

[59] Indeed, given the nature of the issues and the anticipated evidence, I believe it is reasonable to conclude that even an individual without any significant mental health issues would likely have difficulty participating effectively in this proceeding as a self-represented litigant.

[60] Similar to the concerns expressed by Justice, Chief Justice MacDonald in *D.B.*, I believe that M.K. appears to be overwhelmed by the process to the point where her ability to effectively represent herself will be significantly compromised.

[61] Based upon my first-hand observations and my repeated conversations with the Respondent mother during review hearings, it is apparent to the court that M.K. really does not have an adequate grasp of the issues involved in this proceeding, nor does she adequately comprehend or appreciate the challenges that she will be

met with in attempting to participate in a final review hearing as a self-represented litigant. I believe she has an inadequate understanding of the process that is about to unfold, and what will be required of her as a self-represented litigant in order to respond effectively to the Minister's application. She has not demonstrated, from my perspective, even minimal insight into the litigation process or associated procedures. On more than one occasion I have observed her to fixate upon issues or events that appear to have little relevance to determination of the matters either before the court at the time or to the ultimate determination of this matter.

[62] I have, therefore, concluded then in this particular instance, it is essential for the court to appoint an *amicus* in order to assist the court in discharging its obligation to ensure that the trial process is fair and to ensure the orderly conduct of the proceeding, and to facilitate the presentation of evidence and the availability of relevant submissions.

[63] Given the circumstances of this case and the polarized position of the parties, it is anticipated that the *amicus* will play an adversarial role to properly test the evidence in order to assist the court in discharging its obligation to make appropriate findings of fact and credibility, and ultimately allow the court to make the necessary determination with respect to the best interests of T.K. I would therefore confirm that the *amicus* is also to assist as necessary and appropriate with the presentation of the Respondent mother's case.

[64] In making those comments, I want to make it absolutely clear that the amicus is not M.K.'s lawyer. M.K. will not have the right to discharge the amicus. That right exists only with the court. Furthermore, the *amicus*, not being M.K.'s lawyer, is not obligated to comply with M.K.'s requests or directions, or any instructions that she might attempt to provide the *amicus*. Again, the *amicus* is not M.K.'s lawyer. The *amicus* is being appointed by the court as a friend of the court for the reasons that I have just articulated.

[65] I also believe that my decision to appoint an *amicus* is intended to minimize the potential for delay in regards to conclusion of this proceeding, especially having regards to the outside limit. Avoidance of delay with respect to the conduct and completion of protection proceedings is consistent with the philosophy of the *Children and Family Services Act*, which requires the court to be mindful of the child's sense of time and the associated principle that unreasonable or undue delay in the completion of a protection proceeding is generally considered to be

inconsistent with the best interests of the child, or children, who are the subject of the proceeding.

[66] I believe that the participation of an *amicus* will assist the court in avoiding undue delay and will permit, or assist in permitting, the final review hearing, which has just recently been scheduled for 10 days, to be completed in a more orderly fashion and minimize the risk of delay.

[67] Again, I'm going to repeat this message because I just want it to be absolutely clear, it is of course essential to recognize an *amicus* will not be counsel for M.K. The *amicus*' sole client is the court and the purpose of the *amicus* is to provide the court with a perspective that the court feels is lacking.

[68] Indeed, it is important to recognize that the *amicus* has an obligation to bring facts or points of law to the court's attention that may indeed be contrary to the interests of the Respondent mother.

[69] Again, I apologize for repeating myself, but I feel the need to make this absolutely clear, there will be no solicitor-client relationship between the *amicus* and M.K. The *amicus* is not M.K.'s lawyer. M.K. will not be able to dismiss or discharge the *amicus*, only the court will have that ability. An *amicus* does not take instructions from or represent a client. The *amicus* throughout acts as a friend of the court for the purposes of assisting the court.

[70] I'm also mindful that in appointing *amicus*, I'm not to externalize or delegate my obligation and duty to ensure a fair trial for a self-represented litigant by shifting that responsibility to the *amicus*. My responsibility remains throughout to ensure that the trial process is fair, however, I do believe that the participation of an amicus in this case, in this particular case, will assist the court in discharging its obligation to ensure a fair trial.

[71] I would therefore confirm my conclusion that the appointment of an *amicus* curiae to assist the court with the Respondent mother's case, and in particular to assist the court in making the decisions that relate to the best interests of the child, is necessary and appropriate.

[72] I believe that appointment of an *amicus* is, indeed, consistent with the best interests of the child, T.K., who is the subject of the proceeding insofar as the *amicus* will assist the court in ensuring all relevant evidence, relevant to determination of best interests, is properly before the court.

[73] Finally, I would confirm that Nova Scotia Legal Aid shall be responsible for provision of *amicus curiae*, and I would also indicate that for purposes of payment of fees associated with the *amicus*' participation in this proceeding, such fees are to paid in accordance with Nova Scotia Legal Aid's policies and procedures, including authorization for disbursements, monitoring and review of accounts, billing practices and payment rules. The *amicus* is to abide by Nova Scotia Legal Aid's policies and procedures, including authorization for disbursements, and again, monitoring and review of accounts, billing practices and payment rules.

S. Raymond Morse, ACJFC