

FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Health) v. A.E.P.*, 2014 NSFC 2

Date: 20140120

Docket: Yarmouth No. F.C. No. APA 082193

Registry: Yarmouth

Between:

Minister of Health for the Province of Nova Scotia

Applicant

v.

A.E.P.

Respondent

Editorial Notice: Identifying information has been removed from this electronic copy of the judgment.

Judge: The Honourable Judge John D. Comeau, JFC

Heard: November 20, 2013, in Yarmouth, Nova Scotia

Counsel: Colin Fraser Esq, for the Minister of Health of Nova Scotia
Lynette Muise Esq., for the Respondent A.E.P.
Sara Allen Esq., for the Guardian Ad Litem

Introduction/The Application:

[1] On the 8th of August, 2012, Judge Robert J.L. White found the Respondent to be an adult in need of protection pursuant to section 3(b)(ii) of the *Adult Protection Act* and she was placed in a nursing home. G. G. was appointed Guardian Ad Litem.

[2] The order was renewed by this Court on February 6, 2013. Again on July 17, 2013 the order was renewed on an interim basis. This was also done on September 11, 2013 as the Respondent wished to contest the Minister's long term plan for her care. In this order the Minister was required to arrange for a home care assessment for the Respondent A.E.P. Through her counsel, A.E.P. was to submit a plan of care of her own, outlining the services that could be provided by the Applicant. She admits she is an adult in need of protection.

[3] The Court has received a written report from the Guardian Ad Litem, G. G..

[4] This is an application for renewal of an adult protection order.

Issue:

Long term care of an adult in need of protection within the context of an application to renew an adult protection order.

The Facts:

[5] Through her counsel, the Respondent A.E.P. is not disputing that she is an adult in need of protection. At the original hearing before Judge White affidavit evidence was received from Michael Humphreys, the adult protection worker employed by the Applicant Minister of Health. On July 31, 2012 the Minister's office had received a referral from Dr. Julie Chandler that the Respondent A.E.P. had left the hospital on that date without the doctor's approval because she did not eventually want to go into a nursing home. Dr. Chandler felt she was incompetent to make her own decisions regarding her care / health / placement needs.

[6] On August 1, 2012 the Minister's agent visited the Respondent's home and she confirmed she left the hospital because she did not want to go into a nursing home. At the time he observed black bruises on her left and right arms as well as bruises on her face. She indicated she had fallen on the kitchen floor.

[7] During this visit the Respondent's son arrived and he and the agent persuaded her to go back to the hospital. Her son had indicated to the Minister's agent that he felt his mother should be in the Minister's care. At that time and presently, he has a Power of Attorney and Personal Directive signed by the Respondent.

[8] Dr. Chandler completed an Adult Medical Observation Form and at paragraph six she indicated the Respondent was in need of 24 hour supervising and nursing care. From this report and two letters from Dr. Chandler to the Minister's agent her conclusions were:

“It is apparent from these documents that A.E.P. has experienced a relatively rapid decline in her Montreal Cognitive Assessment score, despite being on relatively the same medication that she was on during past hospitalization. She continues to show problems with self-neglect and her multiple falls indicate there are significant safety concerns regarding her living alone. These have been present in the past as well, however, at this point in my opinion she is now no longer competent to make decisions regarding her residence, finances or medical care”.

[9] It was on this evidence that Judge White found the Respondent A.E.P. an adult in need of protection and she was placed in a nursing home. This was on August 8, 2012.

The Renewal Application/Update:

[10] Dr. Julie Chandler testified at the renewal hearing and confirmed her original assessment which was dated August 2, 2012 and has been referred to earlier.

[11] The doctor's notes from June 17, 2013 refer to the Respondent A.E.P. having retained a lawyer and wanted to go home. She agreed to do the Montreal Cognitive Assessment and she scored 17 out of 30. There were errors in recall, mathematics and language function among others. She displayed poor insight and impaired judgement as before. In hospital her MCA was 14/30. There is a bit of improvement since she has resided in the nursing home but the doctor believes that is because she lives in a protected environment and has no access to alcohol (which was a problem). Medication is given by nursing staff.

“It is still my opinion that she is not competent to make decisions regarding her place of residence, finances or medical care”.

[12] The Guardian Ad Litem, prepared a report for the section 10 application before Judge White. G. G. who was appointed Guardian Ad Litem reviewed the Respondent A.P's hospital file and had a 40 minute conversation with her prior to the court hearing. She indicated in her report the following:

“The record shows several hospitalizations since March 2012 for falls, non-compliance and/or abuse of prescription drugs and alcohol. (The Respondent A.P.) has lost 40 pounds since March 2012. As Julie Chandler has assessed her as lacking the capacity to make decisions on finances or place of residence

(Her son) described an untenable situation in the Respondent’s home since the death of her husband. Abuse of prescriptions, falls and anxiety or panic attacks have been frequent

I believe that the Respondent is an adult in need of protection due to diminished mental capacity, a pattern of prescription drug and alcohol abuse and anxiety concerns. There are no family members able or willing to provide care, and the Respondent is not capable of managing effectively on her own. I believe that her perception of her need for care is unrealistic. I do not believe that the Respondent has the ability to decide whether to accept care”.

[13] There is no evidence that the Guardian Ad Litem has changed her opinion since time has passed. An updated report made October 28, 2013 makes the following conclusions:

“Conclusions:

I believe that as long as A.P. is able to leave the nursing home, she continues to be an adult in need of protection. It is the degree of safety, security and structure provided at [...] that enables her to thrive as well as possible. I have serious

doubts that the same degree of supervision can be provided effectively in a private home setting.

Cost, and the ability of the Minister of Health and Wellness to supply equivalent services in a community setting are other issues.

Because A.P. continues to oppose the Order and refuses to accept her need for placement in long term care, I support the renewal of the Order of Protection, and I support her placement in long term care at [...]. A.P.'s improved general health is evidence that the placement has been successful.

I further believe that A.P.'s family have acted in good faith and have made their best effort to assist A.P. I believe that their unwillingness to continue providing assistance was a reasonable and practical decision in August of 2012".

[14] The Respondent in her affidavit (she did not testify) states she used to have a drink of wine with dinner but does not believe she has a drinking problem. She was taking anti-anxiety and sleeping pills prescribed by a doctor. She fell at home and pushed her help button and an ambulance took her to the hospital as her son was not available. It was after this that adult protection got involved and Dr. Chandler felt it was necessary she be placed in an assisted living facility. Prior to this she had Homecare which consisted of light housework, preparing lunch at 12 noon and returning again at 4 pm to assist with supper.

Minister's Long Term Plan Of Care:

[15] The Minister was tasked by the Court to investigate alternatives to nursing home placement. This was as a result of the Respondent's proposal for assisted living in her own home.

[16] This plan is a result of that investigation and is as follows:

“Proposed Care plan:

On August 8th, 2012 an Order was obtained from the Family Court pursuant to the Adult Protection Act that A.P. was an adult in need of protection pursuant to section 3(b)(ii) and that the Minister of Health provide her with services including placement in a facility approved by the Minister.

Prior to being deemed an adult in need of protection the client was receiving home support services through [...] Home Support agency. These services were in place for an hour each morning and a half an hour each evening, seven days per week. The nature of this care included one hour of personal care each morning; thirty minutes of home support each evening for a tuck-in and two hours of housekeeping every two weeks. During visits home support workers would do a 'medication reminder'.

Despite these services, several risks were identified by Dr. Julie Chandler, Renee Muise Bishara, Hospital Social Worker, and the client's family. These risks

included medication mismanagement, abuse of medications and alcohol, frequent falls and poor nutrition.

The Minister continues to believe that A.P. is an adult in need of protection and requires placement in an approved facility in order to care and fend adequately for herself. Adult Protection does not believe the risks can be mitigated through the provision of in-home services/supports.

Based on the current assessment provided by Continuing Care, the in-home services and supports available to the client include:

- Personal Care Assistance 2-3 times per week for 1 hour per visit.
- Housekeeping/Laundry every 2 weeks for 2 hours each visit.
- Authorization of a Medication Dispenser.
- Financial assistance for a Personal Alert Button if someone was willing to act as the initial contact person.
- Financial assistance for a private individual or agency to assist with groceries or errands.

The client has demonstrated that she is able to complete much of her own personal care. She currently receives some assistance with personal care but is independent for most of her own hygienic needs.

Continuing Care would authorize meal preparation three times per week. While the client is physically able to prepare some meals independently history has

demonstrated that she does not do so. The issue in the past was that she simply would not tend to her nutritional needs without family prompting. The result, in part, was frequent falls and low body weight. Nursing notes at [...] indicate that the client does require prompting to eat. This risk cannot be adequately addressed in the home.

Continuing Care will authorize a medication dispenser however the client's family is no longer willing to provide support. If the client returns home with a medication dispenser there is no one willing to monitor prescription refills, secure medication from pharmacy, fill dispenser weekly and monitor. Furthermore, an automatic medication dispenser cannot dispense PRN pro re nata or 'as the situation demands') medications such as the client's dilaudid. These are the medications that are most frequently abused and would have the greatest impact on the client's health. The neighbour, J.L. is unable to assist.

VON (Victorian Order of Nurses) does assist with medication management in the home however they would not be able to dispense the dilaudid as often as the client receives it. VON cannot secure the medications between visits.

At this point in time, the client will not have a family doctor to prescribe medications if she returns home. Dr. Julie Chandler has stated that the client's abuse of medications and alcohol would cause liability concerns and thus she would not be comfortable acting as a prescribing doctor. Dr. Chandler does not feel that Dr. Marais will accept the client back as a patient.

These risks; medication mismanagement, abuse of medications and alcohol, frequent falls and poor nutrition cannot be adequately addressed in the home environment. Services and supports through VON and [...] Home Support have been provided to the client in the past. In the past these services were not sufficient to mitigate risk.

While at [...] the client is provided meals, medications and supervision. The client receives visits from family and friends. She is able to participate in group activities. Based on the client's history in her home and her actions while residing at [...], the client would not be safe in her home, even with the provision of extensive services. The Minister believes that placement in a Long Term Care Facility is the only means of mitigating the current risks. Accordingly, should an order be granted authorizing the Minister to provide A.P. with placement, she would remain at [...] facility”.

Respondent's Long Term Plan of Care:

[17] The Respondent's plan of care is set out in her affidavit sworn August 15, 2013. This document was also used to refute some of the allegations with respect to her drinking. She says that she would have a glass of wine at dinner but does not consider herself to have a drinking problem. She is taking anti-anxiety and sleeping pills by prescription. She did have a fall and as a result Adult Protection got involved.

[18] She is now in the nursing home [...] and before that she had assistance from Homecare (see Minister's plan of care) but she says she is able to take her medication on her own and with the assistance of Homecare (they did light housework and assisted her in preparation of lunch and supper) she could reside in her home.

[19] There was an allegation of medication abuse, but she denies this. She refers to certain friends and neighbours that are willing to assist, however the Minister's evidence presented is to the contrary. Her son indicates she is unable to take care of herself and he does not have the ability to provide the care she needs. He also points out that the home needs repairs and has rodents.

[20] The Respondent says:

“That I object to any indication that I am unable to care for myself and I rely on the care at [...], as I am forced to be under their care and have no opportunity to demonstrate my independence

That except for providing meals and lowering me in my bathtub and washing my back, which were all done in my home by Homecare every morning while I was residing in my own residence, I do a lot of my own personal care myself, including getting dressed in the morning, reading, going for walks

That I know I can go home and look after myself with the assistance of Homecare, as I was doing before my fall”.

[21] The Respondent presented one witness M.E.D. She is the niece of the Respondent and is in her 60’s. She is prepared to help with dispensing the Respondent’s medication but does not want a month’s supply of pills in her home. She resides in the same community as the Respondent and could go pick up the medication at the pharmacy weekly. She would also take her to get groceries and would stop in to see her if her driveway was clear (of snow). She did indicate if this would be twice a week.

[22] The problem M.E.D. has is that she does not want to be the only person tasked with the responsibility of the Respondent’s best interests. She has not seen her medication dispenser. She does not know who to contact with respect to issues concerning the house. For example, if the furnace broke down.

Consequence of Applying the Respondent’s Plan of Care:

[23] Lisa Bowden, the Minister’s agent, indicated that if the Respondent returned to her home she would lose her place in the nursing home in which she now resides. Her doctor A.J. Marais has provided the Court with a letter stating that he is not accepting patients in his practice and would not take the Respondent

back. She is presently under the care of Dr. Natalie Horton and Dr. Julie Chandler because she is [...].

The Law:

[24] The *Adult Protection Act* is applicable. Section 3(b) of the *Act* sets out the relevant definition of an “adult in need of protection”.

“(b) “adult in need of protection” means an adult who, in the premises where he resides,

(ii) is not receiving adequate care and attention, is incapable of caring adequately for himself by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his adequate care and attention”.

[25] Some adults need the state at a certain period in their life to protect them and that is the purpose of the *Act*.

“Purpose of Act

2 The purpose of this Act is to provide a means whereby adults who lack the ability to care and fend adequately for themselves can be protected from abuse and neglect by providing them with access to services which will enhance their ability to care and fend for themselves or which will protect them from abuse or neglect”.

[26] Adult protection orders expire six months after they are made or renewed (see sections 9(5) and (8). An application for renewal is made pursuant to section 9(6).

[27] The factor to consider on an application for renewal is set out in section 9(7).

“(7) An order made pursuant to subsection (3) may be varied, renewed or terminated by the court where the court is satisfied that it is in the best interests of the adult in need of protection.

Powers of court

(5) Upon the completion of the hearing, the court may

- (a) dismiss the application and direct the return of the person removed; or
- (b) make an order in accordance with subsection (3) of Section 9.”.

[28] The Supreme Court of Canada in *Nova Scotia (Minister of Health) v. J.J.*, 2005 SCC 12, [2005] 1 SCR 177 dealt specifically with the *Nova Scotia Adult Protection Act*.

[29] It is clear from this decision that the Court has the ability to accept, reject or modify the Minister’s plan.

“The interpretation to be given to s. 9(3) of the Act must be consistent with the Act’s purpose as set out in s. 2: to provide adults who cannot protect or care for

themselves with access to services which are in their best interests and will enhance their ability either to look after or protect themselves. The governing consideration, found in s. 12, is the welfare of the adult. Responsibility for ensuring the welfare and best interest of the vulnerable adult is legislatively assigned to the Family Court.

The legislative scheme recognizes that a review is required of the state's decisions which may, however well intentioned, be incompatible with the best interests of those adults who have lost the right to make decisions for themselves.

After declaring an adult to be in need of protection under either s. 9(3)(a) or (b), the court is given the discretion under s. 9(3)(c) to authorize the Minister to provide services in the adult's best interests, including placement in a government-approved facility, that will enhance his or her ability to care for or protect himself or herself.

This means that the court is not only the gatekeeper to state intervention, it is also, having approved the adult's loss of autonomy, responsible for assessing whether the services to be provided by the state are consistent with the adult's welfare and best interests.

While it is true that the Minister, and not the Family Court, is responsible for developing plans for a vulnerable adult, this does not mean that the Minister can unilaterally dictate the nature of the services or placement. The Act assigns to the court the responsibility to authorize only those services that are in the best

interests of the adult because they “will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect”. It is inherent in that obligation that the court be able to assess whether those proposed services comply with the requirements in s. 9(3)(c). This in turn requires the court to be able to indicate to the Minister what aspect of the plan the court, as the statutorily designated guardian of the adult’s welfare, finds acceptable or unacceptable based on whether it meets the statutory test.

To meaningfully fulfil its statutory duty to measure the proposed services against the best interests standard, the court’s jurisdiction must of necessity include the ability to amend proposals suggested by the Minister. That in turn means that in putting the Minister’s plan on one scale and the adult’s welfare on the other, the court must be able to attach reasonable terms and conditions to the Minister’s suggestions (see *Nova Scotia (Minister of Community Services) v. L.K. reflex*, no sense to give a court the jurisdiction to assess the Minister’s plan without including in that authority the ability to refine the government’s intervention to ensure legislative compliance.

The Minister’s argument that the court’s ability under s. 9(3)(c) is limited to a mere veto or approval power gives the court no other option, when confronted with a plan inconsistent with the adult’s welfare, than to leave the adult with no services until the Minister produces a plan the court is prepared to approve. This deprives the court of its supervisory function.

The significance of independent judicial review of state action when a vulnerable adult has been deprived, at the instigation of the state, of the right to function autonomously, cannot be overstated. The court's statutorily assigned supervisory role emerges from the adult's vulnerability. The corollary of a judicial determination that an adult is in need of protection is a corresponding limitation on that adult's autonomous decision making and liberty. It is the function of the court to monitor the scope of that limitation. The legislation must, therefore, be interpreted in a way which acknowledges the intrusiveness of the determination and offers muscular protection from state intervention incompatible with the adult's welfare. Section 9(3)(c) should not be applied in a way that frustrates that responsibility.

In assessing the terms and conditions it considers most conducive to the adult's welfare under s. 12 and best interests under s. 9(3)(c), the court is of course obliged to consider the availability of services and the Minister's capacity to provide them. However, having made the decision to take responsibility for the adult, the state is obliged to develop a plan in that adult's best interests".

Conclusions/Decision:

[30] In a manner of speaking this case involves the liberty of the subject. There has been no legal issue with respect to this but in the mind of the Respondent A.P., she is detained. There has been much evidence of cognitive disabilities

but she is more than capable of understanding that the authorities will not let her go home. She left the hospital on July 31, 2012 without her doctor's approval because she did not want to go to a nursing home. On August 1, 2012 the Agent for the Minister of Health was on her doorstep (he visited her home). He and her son persuaded her to go back to the hospital where an assessment was done and Dr. Chandler indicated she was not competent to make decisions regarding her residence, finance or medical care.

[31] The Respondent through her counsel does not take issue that she is an adult in need of protection. She continues to have that status but feels she can be protected in her own home.

[32] The Minister's long term plan of care is to continue to provide placement in a nursing home where the Respondent will be safe and receive adequate care and attention.

[33] The Respondent's plan of care is lacking in support from her family and the one person, her niece, who would help out has certain conditions that would prevent adequate care on a 24 hour basis. The evidence discloses this is required because of the Respondent's health and cognitive difficulties. Her plan

is not reasonable and cannot be carried out in a manner that would provide for her protection.

[34] A review of the Minister's long term plan indicates it is lacking in one aspect. Reference is made to the nursing home in which the Respondent resides:

“.... At [...] the client is provided with meals, medications and supervision. The client receives visits from family and friends. She is able to participate in group activities”.

[35] She has been in a nursing home environment and a considerable period of that time has been at [...] (placed in care on August 8, 2012).

[36] What appears to be lacking in the Minister's long term plan is a reference to what is planned or what has been done over the course of a year and some two months to make the Respondent feel at home, to become happy and comfortable in the nursing home environment.

[37] Her contest of the Minister's plan may have something to do with cognitive disabilities but that evidence does not disclose that she would not have the ability to be assisted to become acclimatized to the nursing home environment.

[38] There is no evidence before the Court of such programs at [...] although one would reasonably contemplate that they exist.

[39] At the present circumstance, the Minister is the guardian and caretaker of the Respondent who is an adult in need of protection and the Minister has a duty to make an extra effort to assist the Respondent to, in simple terms, settle in and be happy in the nursing home so she understands it is for her benefit and for the long term.

[40] This service by the Minister shall be over and above any such type of program provided by the nursing home, [...] or any other nursing home in which she resides.

[41] In summary, the Court finds as follows:

1. The Respondent A.P. continues to be an adult in need of protection;
2. The Minister of Health shall provide her with services that include placement in a nursing home (presently residing at [...] in Yarmouth, Nova Scotia);
3. The Minister shall provide orientation services to the Respondent A.P. over and above those provided by the nursing home. These services

are to be given for the purpose of helping the Respondent become settled and acclimatized to the nursing home setting with the hope she will have a happy life.

4. This matter will be reviewed on April 2, 2014 at 9:00 a.m. at the Courthouse in Yarmouth, N.S.

[42] A written report will be required by the Guardian Ad Litem, G. G. to the Family Court Officer at least a week before the court date and it shall be distributed by the Court Officer to the parties.

[43] The parties may respond to this report in such a manner as they see fit.

[44] Counsel for the Minister shall prepare this order.

[45] Order accordingly.

John D. Comeau, JFC