CITATION: C.M.M. v. D.G.C. 2015 ONSC 2447
DIVISIONAL COURT FILE NO.: 57/14
DATE: 20150416

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MARROCCO A.C.J., LEDERMAN & NORDHEIMER JJ.

BETWEEN:	
C.M.M. Applicant (Appellant)	*J. Wilson & J. Braude,* for the appellant
– and –	
D.G.C. and J.M. Respondents (Respondents in appeal)	*V. Ambrosino,* for the respondent, D.G.C. No one appearing for the respondent, J.M.
- and -	
THE ATTORNEY GENERAL OF ONTARIO, THE CHILDREN'S LAWYER and JUSTICE FOR CHILDREN AND YOUTH Interveners	*J. Hunter*, for the Attorney General of Ontario *S. Preshner*, for the Children's Lawyer *A. Luey & M. Birdsell*, for Justice for Children and Youth
	HEARD at Toronto: April 10, 2015

NORDHEIMER J.:

[1] This is an appeal, with leave, from that portion of the order of the motion judge, D. Wilson J., dated January 24, 2014, that held that the appellant was required to have a litigation

guardian in order to bring an application for child support.[1] This is, in fact, the second appeal of this order. The first appeal was heard by a different panel of this court. However, subsequent to that hearing and the release of their decision, the respondent, D.G.C., raised a conflict issue that ultimately led that panel to disqualify themselves, set aside their decision and order a re-hearing.[2] Thus, this matter appears for a second time in this court.

[2] Before turning to the appeal itself, I should say something about the three interveners who appeared on this appeal. We did not find it necessary to hear either from the Attorney General of Ontario or from the Children's Lawyer. The issues to which their submissions were principally directed – a possible constitutional issue (in the case of the Attorney General of Ontario) and who should be the litigation guardian if the order below was upheld (in the case of the Children's Lawyer) – were not before us under the order granting leave to appeal. We did hear from counsel for Justice for Children and Youth, as it was formally granted intervener status by an order of a single judge of this court.

[3] The appellant is now a sixteen year-old girl (she was fourteen at the time that this application was commenced) who is seeking child support from her biological father, the respondent, D.G.C. The appellant lives with her mother, the respondent J.M., who, while named as a party, has not played any role in this proceeding.

[4] The appellant was born in 1998 when J.M. unexpectedly became pregnant after a relatively short relationship with D.G.C. The two respondents negotiated and executed a written agreement that provided for the payment of a one-time lump sum of $37,500 by D.G.C. to J.M. It also provided that D.G.C. was to have no contact with the child whatsoever. Both J.M. and D.G.C. were represented by experienced counsel at the time that the agreement was entered into.

[5] The lump sum was paid and D.G.C. played no role in the birth or life of the appellant, as stipulated by the agreement. However, in February 2013, the appellant wrote to D.G.C.'s mother. In that letter, the appellant asked for financial support so that she could attend Havergal

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[1] *C.M.M. v. D.G.C.*, [2014] O.J. No. 762 (S.C.J.)
[2] *C.M.M. v. D.G.C.*, [2015] O.J. No. 1261 (Div. Ct.)

College for her high school years. The application for child support and other expenses, that has led to this appeal, was commenced shortly thereafter.

[6] In December 2013, various motions were heard and determined by the motion judge. Among other things, the motion judge held that the appellant had to be represented in this proceeding by a litigation guardian. In reaching that conclusion, the motion judge relied on Rule 7 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, having found that the *Family Law Rules*, Reg. 114/99 did not address the issue.

[7] Before turning to the central issue, I will say something about the standard of review to be applied to the decision being appealed since the parties raise, but disagree on, the applicable standard. On this point, I would first note that this is not a judicial review application from an administrative tribunal. Therefore, the considerable time and effort that has been expended by courts, over a great many years, addressing the question of the appropriate standard of review in those cases, is of limited application here.

[8] That said, in terms of the basic principles, in my view the standard of review here is correctness. This is a matter of general law. It is the interpretation of the rules established by regulation under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and utilized by this court to govern the conduct of family law proceedings in this Province. As such, it is the type of question that is properly approached on a standard of correctness: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 60; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8.

[9] I reject the respondent's attempt to characterize the motion judge's order as an exercise of discretion restricted to the particular facts of this case. The reasons of the motion judge clearly demonstrate that she reached the conclusion, that the appellant required a litigation guardian, as a conclusion of general application. She referred in her reasons, for example, to "sound policy reasons for the requirement of a Litigation Guardian in a case involving a minor" (para. 45) and "the usual procedure of a minor being represented by a Litigation Guardian" (para. 46). Further, the contention that the order under appeal was an exercise of discretion is belied by the reasons of the judge who granted leave to appeal. Indeed, if the order below had simply been an exercise

of discretion, on the particular facts of this case, it is highly doubtful that leave to appeal would have been granted.

[10] Turning then to the central issue, one has to have, as a starting point, reference to the *Family Law Rules*. Those rules contain a general provision regarding representation in a family law proceeding. Rule 4(1) provides that a party may act in person, be represented by a lawyer or be represented by a person who is not a lawyer, but only if the court gives permission in advance. Rule 4(2) then deals with the representation of what the *Family Law Rules* refer to as a "special party". Rule 4(2) reads:

> The court may authorize a person to represent a special party if the person is,
> (a) appropriate for the task; and
> (b) willing to act as representative.

Rule 4(3) goes on to provide that, if there is no appropriate person willing to act as a special party's representative, the court may authorize the Children's Lawyer or the Public Guardian and Trustee to act as representative, but only with that official's consent.

[11] The definition of a "special party" is of some significance. It is defined in the following terms in rule 2(1):

> a party who is a child or who is or appears to be mentally incapable for the purposes of the *Substitute Decisions Act, 1992* in respect of an issue in the case and who, as a result, requires legal representation, but does not include a child in a custody, access, child protection, adoption or child support case;

[12] Finally, in terms of the *Family Law Rules*, I should mention rule 1(7) that was relied upon by the motion judge to apply Rule 7 of the *Rules of Civil Procedure* to this case. Rule 1(7) reads:

> If these rules do not cover a matter adequately, the court may give directions, and the practice shall be decided by analogy to these rules, by reference to the *Courts of Justice Act* and the Act governing the case and, if the court considers it appropriate, by reference to the Rules of Civil Procedure.

[13] Although the motion judge did not expressly so find, it is implicit in her reasons that she found that this situation was not "adequately" covered by the *Family Law Rules*. The motion

judge chose, therefore, to rely on Rule 7 of the *Rules of Civil Procedure* to find that a litigation guardian was necessary for the appellant to pursue her claim. In doing so, the motion judge said, at para. 43:

> The rule requires that persons under a disability must be represented by a Litigation Guardian -- the language is mandatory

[14] In fact, that is not actually what Rule 7 requires. While it is clear that the presumption created by Rule 7 is that person under a disability (which includes a minor) will be represented by a litigation guardian, the rule itself provides for a discretion in the court as to whether that will be a requirement in any given case. Specifically, rule 7.01(1) reads:

> Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian. [emphasis added]

[15] Assuming, for the moment, that the *Family Law Rules* did not adequately address the issue of whether the appellant was required to have a litigation guardian, then recourse to the *Rules of Civil Procedure* did not automatically lead to the conclusion that a litigation guardian was required. Rather, Rule 7 would require the court to assess the particular case and determine if the requirement of a litigation guardian ought to be imposed.

[16] Having said that, however, I am of the view that the *Family Law Rules* did adequately cover the situation that presented itself to the motion judge and there was no need, consequently, to have reference to the *Rules of Civil Procedure*. The rationale for having separate rules governing family law proceedings is that there is a distinct difference between the issues raised in family law matters and those raised in general civil proceedings. Not only are the issues to be addressed fundamentally dissimilar, so is the approach that is taken to the resolution of those issues. That central and important distinction means that recourse to the rules that apply to civil proceedings should be undertaken cautiously and with full recognition of those essential differences. Indeed, that conclusion is reinforced by the wording of rule 1(7) of the *Family Law Rules* itself that leaves recourse to the *Rules of Civil Procedure* as the option of last resort and, even then, only when it is "appropriate" to do so.

[17] Rule 1(7) refers to situations where a matter is not covered "adequately" by the *Family Law Rules* as distinct from situations where a matter is not covered perfectly, or completely, or where there might be a conflict between two sets of Rules. Under the *Family Law Rules*, however, the status of children is both implicitly addressed in Rule 4 and expressly addressed in rule 2(1). Children are presumptively special parties under rule 2(1). However, that same rule expressly exempts, from that presumption, a child who is "in a custody, access, child protection, adoption or child support case". The appellant here is, of course, engaged in a child support case.

[18] The respondent submits that the above exemption is only intended to refer to a situation where a child is the subject of such a case, not where the child is a party in such a case. I do not accept that submission. I do not see any reason to restrict the meaning of rule 2(1) in that fashion and, I note, no such restriction is contained within the rule itself. I find further support for that conclusion in the fact that the authors of the *Family Law Rules*, in crafting those rules, would have known that a child can bring an application for relief under a number of different statutes. Of particular relevance for this case is that s. 33(2) of the *Family Law Act*, R.S.O. 1990, c. F.3 expressly allows a "dependent" (which includes a child) to bring an application for support.

[19] It has been suggested that an interpretation of "special party" that would include, within the exemption, a child who is a party to the proceeding (as opposed to just where the child is the subject of the proceeding) leaves the rule with no practical application since a child would only be involved, one way or the other, in one of those types of proceedings. I do not follow that reasoning. First, it is not clear to me that the exemption in rule 2(1) exhausts all of the possible proceedings that could involve a child. Second, it is important to remember that what rule 2(1) does, in creating the category of "special party", is address the possible requirement for "legal representation". It may be that in most situations the issue of whether a child needs representation and, if so, what type of representation, is best left for determination under the general provisions of Rule 4. Regardless, what rule 2(1) does not establish is any asserted requirement that either a child, or a party who is mentally incapable, must have a litigation guardian in order to pursue relief. I would also note that the *Family Law Rules* cannot oust the inherent *parens patriae* jurisdiction of the court when it comes to the interests of children.

[20] The concept of a litigation guardian is one that has a long history in civil proceedings and, I must assume, would have been well known to the authors of the *Family Law Rules*. Yet there is not a single mention of litigation guardians anywhere in those rules. By contrast, litigation guardians are the subject of an entire rule in the *Rules of Civil Procedure*. It is difficult to conceive that, had the authors of *the Family Law Rules* intended to require a child to have a litigation guardian, in order to bring an application for child support, they simply forgot to include such a provision in the *Family Law Rules*. It is also difficult to reconcile the suggestion that children should be subject to an exceptional requirement to have a litigation guardian with the fact that the very rule that addresses special parties, under the *Family Law Rules,* exempts children, in a child support case, from even the requirements associated with that status.

[21] In any event, even if the respondent is correct, and the appellant is properly considered a "special party" under the *Family Law Rules*, that finding does not lead inexorably to the conclusion that recourse must be had to the *Rules of Civil Procedure*, and thus require the appointment of a litigation guardian. If the appellant is a "special party", then rule 4(2) permits the court to appoint any person to represent the special party, if the person is appropriate for the task and willing to act as the representative. There is nothing in the wording of that rule that would preclude the court from concluding that the appellant's counsel was an appropriate and sufficient representative, especially given that rule 2(1) is directed towards the issue of legal representation, not the type of representation contemplated through a litigation guardian. The motion judge does not appear to have considered that avenue to address any concerns that she may have had regarding the appellant's status in this proceeding, prior to having resort to the *Rules of Civil Procedure*.

[22] The motion judge placed considerable reliance in reaching her conclusion on the decision in *Zabawskyj v. Zabawskyj*, [2008] O.J. No. 1650 (S.C.J.). The decision in *Zabawskyj* dealt with two elderly litigants who were mentally incapable. There is no suggestion that the appellant in this case is mentally incapable or unable to provide proper instructions to her counsel. Indeed, the evidence on the record is to the contrary. Further, the decision in *Zabawskyj* did not rely on the *Rules of Civil Procedure* for the purpose of deciding whether a litigation guardian was required. Rather, having decided that representation, of the type inherent in the appointment of a

litigation guardian, was required in that particular case, given the incapacities of the two parties, the trial judge in *Zabawskyj* simply turned to the *Rules of Civil Procedure* to provide the framework to be utilized to accomplish the representation required in that case.

[23] I would also note that, if the motion judge's conclusion that a child must always have a litigation guardian is correct, then it is hard to see why it was necessary for the authors of the *Family Law Rules* to create a category known as a "special party" and to devote the entirety of rules 4(2) & 4(3) to how such persons should be represented. If the intent had been to require litigation guardians in such cases, then those provisions were largely unnecessary. Instead, the *Family Law Rules* could simply have incorporated the requirements of Rule 7 of the *Rules of Civil Procedure* by reference.

[24] I would add, on this point, that there is a consequential access to justice issue that arises from the conclusion that a child must have a litigation guardian in order to exercise her/his rights to seek support. Normally, the logical persons to act as a litigation guardian for a child is that child's parents. However, in child support cases, the parents (or at least one of them) is likely to be on the opposite side to the child in the application. Indeed, in this case, we have the father as the respondent to the application, and the mother unable (or unwilling) to be involved in the case.[3] There is, therefore, a legitimate concern that the requirement that a child must always have a litigation guardian in such matters may effectively disenfranchise many children from the very relief that the *Family Law Act* (and a number of other statutes) accords to them.

[25] Finally, I will briefly address two other points that are advanced in favour of an interpretation of the *Family Law Rules* that would prescribe a mandatory requirement that a child applicant, in these circumstances, must have a litigation guardian. The first contention is that, without such a mandatory requirement, a child, who advances such a claim, is likely to be immune from an adverse costs award. There is no principle, of which I am aware, that establishes impecuniosity as a basis for refusing a person his/her right to access the justice system. Certainly, under the *Rules of Civil Procedure*, the fact that an adult may be impecunious does not preclude that adult person from commencing a proceeding or bringing an application. I

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[3] The mother's lack of involvement may well arise from the fact that any involvement by her could be relied upon as a breach of the underlying agreement, the terms of which are a central issue in this case

see no rational basis to treat children differently in this respect. The second contention is that, without a requirement for the child to have a litigation guardian, the child may advance a frivolous or unmeritorious claim. The fact is, of course, that adults frequently advance frivolous or unmeritorious claims and, despite the understandable urge to want to cut off such claims "at the pass", there is again no reason to single out children for such treatment when that treatment is not equally applied to adults. Further, this contention appears to ignore the fact that the *Family Law Rules*, under the interpretation that I adopt, would permit the court to require the child to have legal representation (as the appellant in this case has). Counsel is capable, indeed is required, to act as a governor against frivolous or unmeritorious claims in the exercise of his/her professional responsibilities, including the responsibilities imposed on counsel by the *Rules of Professional Conduct*.

[26] In the end result, in my view, the combination of rule 4(2) and rule 2(1) of the *Family Law Rules*, properly interpreted, operates to exempt a child from the definition of special party, and thus from any requirement to even have a legal representative, in a child support case. Under rule 4(1), a child can act on his or her own, or can be represented by a lawyer (as the appellant is in this case) or can be represented by some other appropriate person. I would note, on this point, that there are a number of cases, to which the appellant has referred, where children have been involved in such matters and the court has not required the child to have a litigation guardian. While the respondent attempts to distinguish those cases on the basis that they were dealt with in the Ontario Court of Justice, and not in the Superior Court of Justice, that distinction fails to recognize that the *Family Law Rules* apply to proceedings in both courts: rule 1(2). I would further note, on this point, that a child has been permitted to appear in a proceeding in the Court of Appeal, and there was no discussion of any need for a litigation guardian: *S.G.B. v. S.J.L.*, [2010] O.J. No. 3619 (C.A.); aff'd. [2010] O.J. No. 3738 (C.A.).

[27] The appellant's application was, and is, properly constituted. There is no need to invoke the requirements of Rule 7 of the *Rules of Civil Procedure*. There is no basis for the general proposition that the appellant must have a litigation guardian in order to pursue her claim for support from the respondent.

[28] The appeal is allowed and the order of the motion judge requiring the appellant to have a litigation guardian is set aside. It follows from that conclusion that all steps taken to date in this application, without the appellant having a litigation guardian, were properly taken. However, to avoid any issue arising subsequently on that point, I wish to make it clear that that is the case. In that regard, the respondent's effort to invoke the principles surrounding when a court may make an order *nunc pro tunc* have no application to this situation. This court has simply set aside the order that the motion judge made and rendered it inoperative as a consequence.

[29] If the parties cannot agree on the appropriate disposition of the costs of the appeal, they may file written submissions. The appellant shall file her submissions within fifteen days of the date of the release of these reasons and the respondent shall file his submissions within ten days thereafter. The submissions of each party shall not exceed ten pages in length. No reply submissions shall be filed without leave of the court. There will be no award of costs either in favour of, or against, any of the interveners.

NORDHEIMER J.

MARROCCO A.C.J.

LEDERMAN J.

Date of Release: APR 16 2015

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BETWEEN:

C.M.M.

Appellant

– and –

D.G.C. and J.M.

Respondents

REASONS FOR JUDGMENT

NORDHEIMER J.

Date of Release: APR 16 2015