COURT FILE NO. 57-14
SUPERIOR COURT FILE NO. FS 13-18928

ONTARIO

SUPERIOR COURT OF JUSTICE, DIVISIONAL COURT

BETWEEN:

C.M.M.

Applicant (Appellant)

- and -

D.G.C.

Respondent (Respondent in Appeal)

- and -

J.M.

Respondent (Respondent in Appeal)

- and -

Justice for Children and Youth

Intervener

FACTUM OF THE INTERVENER
JUSTICE FOR CHILDREN AND YOUTH

May 29, 2014

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FACTUM OF THE INTERVENER
JUSTICE FOR CHILDREN AND YOUTH

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PART I – OVERVIEW

1. This case is about a young person's access to justice in family court. This appeal, brought by a 15 year-old, will decide whether a young person under the age of 18 (a "minor") is

required to have a litigation guardian in order to pursue their entitlement to child support under the *Family Law Act*. The Appellant is seeking to set aside the January 24, 2014 Order of the Ontario Superior Court of Justice, that requires her to obtain a litigation guardian in order to proceed with her application for support against her father. In the alternative, she is seeking an Order appointing the Office of the Children's Lawyer as her litigation guardian. Finally, in the further alternative, she seeks an Order that the effect of the rule contravenes s. 15 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") by reason of her age.[1]

PART II - FACTS

2. The Intervener, Justice for Children and Youth ("JFCY"), relies on the facts as set out by the Appellant in Part III of her Factum,[2] as well as facts contained in the Affidavit of Jeffrey Rosekat.[3]

PART III – ISSUES RAISED BY THE APPELLANT

Standard of Review

3. JFCY takes no position on the issue of standard of review.

Summary of JFCY's Submissions:

4. JFCY submits that young people are entitled to unfettered access to justice. Specifically,

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1 *CMM v DGC*, 2014 ONSC 2356, [2014] O.J. No. 1767 [*CMM*] (Factum of the Appellant at para. 39 [FOA]); *CMM* (Appellant's Appeal Book and Compendium, Tab 2: Judge's Order at para 3); *CMM* (Appellant's Appeal Book and Compendium, Tab 3: Judge's Endorsement at para 47).

2 FOA, *supra* note 1 at paras 4-21.

JFCY submits the following:

a) Ontario family law allows capable minors to proceed with applications for support in family court without a litigation guardian.

b) In the alternative, if this court holds that there is a gap in the family law legislation, requiring reference to the *Rules of Civil Procedure* ('the *Civil Rules*"), then *Civil* Rule 7.01(1) still allows minors to proceed without a litigation guardian.

c) The discretion exercised by a court under *Civil* Rule 7.01(1) must comply with the *Charter*, such that capable minors be treated in the same way as capable adults.

JFCY'S Argument

Statutory Interpretation: *Family Law Act; Family Law Rules*

5. The *Family Law Act* ("the *Act*") and the *Family Law Rules* ("the *Family Rules*") form a complete set of rules for family law litigants in support applications, including litigants who are minors. There is thus no need to apply Rule 1(7) and refer to the *Civil Rules* by analogy. The family law legislation does not require a minor making a support application to have a litigation guardian. Capable litigants include children who are parties in their own right. The legislation also provides for the protection of incapable parties and children whose interests are not otherwise represented in a case.

***Family Law Act*: Support Provisions**

6. The *Act* clearly contemplates that capable young people can make support applications

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[3] *CMM* (Motion Record of the Intervener JFCY, Tab 2: Affidavit of Jeffrey Rosekat [Rosekat Affidavit]).

in their own right, without the need for a litigation guardian or "special party" representation (explained below).

7. "Dependent" is defined in s. 29 of Part 3 (Support Obligations) of the *Act* as "a person to whom another has an obligation to provide support under this Part".

8. The right of child support belongs to the child.[4] Section 31(1) of the *Act* provides that:

> "Every parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so."[5]

9. Section 33(2) of the *Act* provides that "An application for an order for the support of a dependent *may be made* ***by the dependent*** or the dependent's parent." [emphasis added].

10. The legislation purposefully omits language relating to litigation guardians or representatives. This part of the *Act* makes it clear that dependent children can bring an application for support in their own right. There is no age stipulation in s. 33(2). In accordance with the statutory interpretation maxim of "implied exclusion", if the legislature had intended that minors would need a litigation guardian in order to bring a support application they would have made that requirement clear in this provision.[6]

11. As the *Act* is devoid of language regarding litigation guardians, fundamental principles of statutory interpretation and logic therefore dictate that minors with the requisite capacity can proceed with a support application without a litigation guardian in the same

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4 *Richardson v Richardson*, [1987] S.C.J. No. 30, [1987] 1 S.C.R. 857 at para 14.

5 *C.f. Family Law Act*, RSO 1990 c F.3, s 31(2) (removes this obligation in respect of young people aged 16 and 17 who have voluntarily withdrawn from parental control).

way as an adult support claimant.

Special Parties

12. The *Family Rules* relating to special parties are the mechanism by which the family law scheme protects the interests of incapable litigants.

13. Rule 2(1) defines "special party" as:

> 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. [emphasis added]

14. JFCY submits that this definition clearly excludes children making support applications from the definition of special party.

15. A "representative" in a family law proceeding functions in a similar way to a "litigation guardian" in a civil proceeding,[7] the difference being that the rules are more flexible in the family proceeding to align with the purposes of the family law legislation. Since the *Family Rules* provide a regime specifically tailored to meet the needs of family law litigants, there is no need to resort to the *Civil Rules*.

16. Rule 4(2) ensures protection for special parties by giving the court the power to authorize said 'representatives' to assist them.

17. The language in Rule 4(2) is discretionary, making it clear that even if a court were to consider a capable minor to be a special party (which in our submission would be an

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6 See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada, 2008) at 243-50.

7 See e.g. *Fee Waiver*, O Reg 2/05, s 7 (parties under a disability with respect to civil proceedings and special parties under the *Family Rules* are treated identically, requiring the litigation guardian of the party under

improper use of the special party provision if it were an access, custody, support or child protection matter), they are still not required to have a representative. Specifically, Rule 4(2) states that: "[t]he 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." [emphasis added]

18. Beyond Rule 4(2), the additional *Family Rules* addressing special parties and their representatives are similar to those in Rule 7 of the *Civil Rules* which protect the interests of incapable litigants.[8]

19. Rule 4(7) provides additional protection for children who are not parties, by giving the court discretion to: "authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise."

20. Following basic statutory interpretation principles, this unique subrule also clarifies that Rule 4(2) is intended to address an issue other than legal representation here, representation that parallels the protections provided by a traditional litigation guardian.

21. The special party provisions in the *Family Rules* are designed to protect the interests of mentally incapable adults in any proceeding in which they have an interest, as well as children who are not otherwise the subjects of, parties to, or applicants in, a family law

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disability or the representative of the special party to complete any fee waiver requests.

[8] See e.g. *Family Law Rules*, O Reg 114/99, s 17(19) [*FLR*] (courts must approve conferences involving special parties); *FLR* s 18(12) (courts must approve settlements with special parties); *FLR* s 25.1(16) (courts can order payment of money out of court on behalf of special parties); *FLR* s 42(5) (the Family Case Manager has no jurisdiction over special parties); *FLR* s 20(6) (courts may order someone to be questioned instead of or in addition to special parties).

proceeding.[9] In other words, children may require special party status when their interests are not otherwise directly before the court—for example, in a divorce case dealing with property interests that could affect them.

22. Minors whose interests are directly engaged, that is to say, they are the subjects of a proceeding—such as custody, access or support case—do not require special party status to ensure that their interests are before the court. Likewise, capable children who are applicants in their own right—such as a minor applying for access to a sibling, or a minor applying for support—do not require special party status because their interests are represented *directly* by way of their participation as a full party. Capable minors who are applicants are to be treated the same as any other capable party in a proceeding. A court is not required to authorize representation for regular parties, including capable minors, because these parties have the requisite capacity to make decisions about their case.

23. In the recent case of *Nezic v. Nezic,*[10] the Ontario Superior Court of Justice relied solely on the *Family Rules* to determine that an incapable adult respondent was a special party, appointing the Office of the Public Guardian and Trustee to be her representative. In making this decision Justice Coats noted of the special party designation that "a court must proceed cautiously as such a finding removes decision-

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9 *C.f. Child and Family Services Act*, RSO 1990, c C.11, s 38(3) [*CFSA*] (guarantee of legal representation for subject children); *CFSA* s 38(5) (provision for legal representation of minor parents).

10 *Nezic v Nezic*, 2013 ONSC 1899 at para 4 (available on CanLII) [*Nezic*].

making from the party."[11] Other family court cases have relied solely on Rule 4 when determining special party status and appointing representatives.[12]

24. The *Family Rules* are a complete code in this context. They ensure a system that protects those without capacity to instruct counsel by authorizing representatives, thus performing a similar function as that of a litigation guardian in the civil context. They also give non-applicant, non-party minors the right to be represented by legal counsel and to obtain full-party status when appropriate.[13]

Cases Involving Minor Applicants

25. There are a number of reported cases in Ontario's family courts where young people under age 18 have sought and/or obtained support orders without a litigation guardian.[14]

26. In *Moody v Moody*, one of the few reported cases where a person under age 16 applied for support, the Court made it clear that it was not ruling that the law *required* a litigation guardian for a minor applicant,[15] but had decided in that specific case to designate and

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11 *Nezic*, *supra* note 10 at para 2.

12 See e.g. *Daugharty v Symons*, 2011 ONSC 7676 at para 1, [2011] O.J. No. 5997 (court required special party to have representative in addition to legal counsel); *Webster v Webster*, [2006] O.J. No. 2749 at para 6, 25 E.T.R. (3d) 141 (ONSC) (incapable adult applicant had representative in addition to legal counsel); *Re S.M.*, 2009 ONCJ 317 at para 42, [2009] O.J. No. 2907 (adoptive parents both represented by Public Guardian as special parties).

13 See e.g. *Sharpe v Sharpe* [2002] O.J. No. 1836 at paras 3-7, 28 R.F.L. (5th) 425 (ONSC) (16 year-old made a party, not a 'special party', to parents' custody case, was not required to have a litigation guardian or representative).

14 See e.g. *G.(J.) v G.(P.)*, [1988] O.J. No. 3137, 1988 CanLII 1429 (ONCJ) (Court did not find "reasons for the necessity of someone being responsible for costs in order to require someone taking a guardian capacity" at para 7); *Re: Dolabaille and Carrington et al.*, [1981] O.J. No. 2963, 32 O.R. (2d) 442 (ON Prov Ct (Fam Div)); *G.(S.) v G.(R.)*, [1986] O.J. No. 1731 (QL) (ON Prov Ct (Fam Div)); *Bertram v Bertram* [1994] O.J. No. 1792 (QL) (On Ct J (Prov Div)); *J.L.E. v R.B.E.* [1998] O.J. No. 492, 1998 CarswellOnt555 (On Ct J (Prov Div)).

15 *Moody v Moody*, 47 RFL (3d) 75, 1993 CanLII 5611 at para 21 (ON Ct J (Gen Div)).

appoint one.

> "I have concluded that, here, on the facts before this court, the appropriate course of action **in the interest and welfare of the child** is to designate and appoint a litigation guardian." [16] [emphasis added].

27. In *Moody*, the minor had an aunt with whom she was living who the Judge considered appropriate to be both her litigation guardian and her trustee for the support payments.

28. JFCY submits that *Moody* would be the exception to the general rule that minor support applicants do not require a litigation guardian. The specific facts in *Moody* were such that the appointment of a litigation guardian would clearly assist the minor in obtaining and benefitting from her legal entitlement to support, rather than prevent or defer her access to such support, as in the case at bar.

29. JFCY regularly represents minors in various family law proceedings at the Ontario Court of Justice, including support cases. JFCY's clients have never been required by the court to obtain a litigation guardian for such cases. When a minor is competent to instruct counsel, JFCY is always able to seek and act on the instructions of these applicants.[17]

Needs and Realities of Young People Seeking Support

30. A litigation guardian must necessarily be someone for whom the minor has the utmost trust, confidence and respect. As well, such a person must be willing to accept the responsibilities and risks required of the appointment.

31. The reality is that many minors do not have access to a trusted adult on whom they can rely to be their litigation guardian. Many of these young people have left home because

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16 *Ibid* at para 22.

of abuse, neglect or high levels of conflict.[18]

32. The assumption that all minors could have access to someone to be their litigation guardian is misinformed and not an appropriate response to the actual needs of many young people.

33. Many of the vulnerable young people who are seeking support are living in very precarious circumstances, be it in a shelter, "couch-surfing", insecure or sometimes exploitative landlord-tenant situations, or unhealthy relationships. While some of these young people are lucky enough to be taken in by the kind aunt, the selfless neighbour or their boyfriend's parent, in JFCY's experience, most are not. Many young people will not have access to supportive adult family and friends to assist them with their immediate crises or to provide ongoing support, let alone an adult who is willing and able to take on the onerous task of acting as their litigation guardian.[19]

34. Even for young people still living with a parent, the parent, or other adult members of their extended family may not be willing to get involved in what may be a difficult family situation and its associated layers of conflict.

Access to Justice

35. In order to ensure a capable minor has meaningful access to justice, they should not be required to have a litigation guardian in order to proceed with a support claim in family court. To require a litigation guardian will leave some minors in the extremely

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17 Rosekat Affidavit, *supra* note 3 at paras 6-8.

18 *Ibid* at para 10.

19 *Ibid*.

vulnerable position of not having access to financial support to which they may be legally entitled.

Potential Negative Outcomes

36. If capable minors are not able to seek a support order against their parents they can be in a very vulnerable situation that can affect their physical and mental well-being, health, safety and education.[20]

37. Minors who have a valid support claim against their parents but who are unable to proceed because they don't have access to a litigation guardian would be forced to seek or continue to seeking other means of financial support.

38. The alternative to parental support is often social assistance in the form of Ontario Works[21], a fixed and very modest amount of money which comes with a number of inflexible rules, as well as social stigma.[22] Forcing a young person to resort to Ontario Works unfairly transfers a parent's responsibility of support to the government.

39. The other forms of assistance relied on by young people without access to financial support from family are also often publicly funded, such as shelters, food banks, employment programs, and youth drop-in centres.[23]

40. The struggles faced by minors without access to financial support can lead to a disruption or delay in completing their education and reaching their potential as valuably contributing members of society. For some, the inability to access family

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20 *Ibid* at paras 9, 12.

21 *Ontario Works Act*, SO 1997, c 25 (Sched A).

22 Rosekat Affidavit, *supra* note 3 at para 10.

support leads to homelessness.[24]

41. JFCY, in representing young people with support claims, has seen how access to justice in family court can lead to very positive results. An enforceable support order, even if a modest amount of money, has put clients in much more secure positions, allowing them to end or reduce their reliance on social assistance, secure and maintain appropriate housing, access to healthy food, complete high school and pursue post-secondary education.[25]

***UN Convention of the Rights of the Child*: Best Interests and Participation**

42. Canada's commitment under the United Nations *Convention on the Rights of the Child* ("the *Convention*") is an important consideration in interpreting domestic legislation.

43. The *Convention* is the world's most widely ratified and accepted human rights treaty. With specific reference to the *Convention*, the Supreme Court of Canada has held that Canadian law must wherever possible be interpreted in compliance with Canada's international treaty obligations[26]. As signatory to the *Convention*, Canada has undertaken to provide special protective treatment to children based on their vulnerability.

44. Article 3.1 of the Convention provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative

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23 *Ibid* at paras 9-10, 12.

24 *Ibid* at paras 7, 9-10.

25 *Ibid* at paras 9, 12.

26 *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] S.C.J. 76, [2004] 1 S.C.R. 76 at para 9.

bodies, the best interests of the child shall be a primary consideration." [emphasis added]

45. The *Convention* underpins the *Act* and *Family* Rule: such that decisions made in the context of all family law cases must be interpreted in a way that makes the best interests of the child the paramount consideration. Without doubt this includes "the child" who is seeking support directly from a parent.

46. Article 5 is also important, demanding that:

> "States Parties shall respect the **responsibilities**, rights and **duties** of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, **in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."** (emphasis added)

47. Ensuring that capable minors can bring support applications in their own name is the only interpretation of the *Act* and *Family Rules* consistent with a respect for children's evolving capacities.

48. JFCY concedes that sometimes it is appropriate for the law, including the *Family Rules* and *Civil Rules*, to treat children differently than adults. We would, however, submit that such differential treatment should only be used to protect children, where necessary, and NOT in a way that restricts their rights and freedoms in a discriminatory way.

49. Since the 'best interests' framework is required by the *Convention*, any decisions regarding children in family court must be based on the best interests standard. This includes interlocutory decisions, such as whether a minor requires a litigation guardian in

order to proceed with a support claim. The primary consideration in making such a decision must be about the best interests of the child, and not other factors, such as cost considerations of the adult respondents. If a decision to require a litigation guardian means that an otherwise capable minor is not able to proceed with their case or would encounter significant delay, such a requirement is not aligned with the best interests standard.

Purpose of *Family Law Act* and *Family Law Rules*

50. JFCY submits that the purpose of the *Act* and *Family Rules* would be frustrated by a requirement that a capable minor have a litigation guardian in order to proceed.

51. The purpose of the *Family Rules* is stated at Rule 2:

> **PRIMARY OBJECTIVE**
>
> (2) The primary objective of these rules is to enable the court to deal with cases justly.
>
> **DEALING WITH CASES JUSTLY**
>
> (3) Dealing with a case justly includes,
>
> (a) ensuring that the procedure is fair to all parties;
>
> (b) saving expense and time;
>
> (c) dealing with the case in ways that are appropriate to its importance and complexity; and
>
> (d) giving appropriate court resources to the case while taking account of the need to give resources to other cases.
>
> **DUTY TO PROMOTE PRIMARY OBJECTIVE**
>
> (4) The court is required to apply these rules to promote the primary objective, and parties and their lawyers are required to help the court to promote the primary objective.

52. Requiring a capable minor to have a litigation guardian is not a 'just' way of dealing with a support case and could impair all of the legislative purposes by:

> a) making the court process unfair in that the young person is denied or delayed access to the court,
> b) lengthening the amount of time it takes to resolve the issue of support if a young person must take time to find a litigation guardian or wait until age 18 to start an application,
> c) not dealing with a support case in a way that is appropriate to its importance to the young person, and
> d) prematurely ending the case, inappropriately redirecting court resources away from the case.

53. The requirement to have a litigation guardian could result in a young person delaying their application for support until they are 18 and then seeking retroactive support, which is negative for both applicants and respondents and which the Supreme Court of Canada has discouraged.[27] It causes delay to the resolution of the issue, decreases certainty for all parties and, most unjustly, denies a young person the opportunity to seek statutorily entitled financial support when they likely need it most (i.e. when trying to complete high school, with limited opportunities for employment).

IN THE ALTERNATIVE: IF CIVIL RULE 7 MUST BE USED

54. As argued above, JFCY submits that Ontario family law does not require a capable minor to have a litigation guardian in order to proceed with a support application. However, should the court order otherwise and decide that there is a gap in the family law legislation such that the family court must resort to the *Civil Rules*, then JFCY

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27 See e.g. *D.B.S. v S.R.G.; L.J.W. v T.A.R.; Henry v Henry; Hiemstra v Hiemstra*, 2006 SCC 37, [2006] 2 S.C.R.

submits that Rule 7.01 of the *Civil Rules* gives court the discretion to not require a litigation guardian. Rule 7.01 states:

> "***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)

EXERCISE OF DISCRETION MUST COMPLY WITH CHARTER

55. JFCY submits that in order to be *Charter* compliant the Court must provide capable minors with unfettered access to making child support applications. Thus, a court's exercise of discretion in deciding whether a minor requires a litigation guardian under Rule 7.01(1) must comply with the *Charter*.

56. Similarly, the court must give priority to ensuring meaningful and equal access to the judicial process to minors with the capacity to instruct counsel over protecting a respondent from the possibility of a hollow costs award.

57. Case law about adult capacity provides that there must be evidence before the court before a litigation guardian is appointed.[28] Futhermore, education, training, and lack of life experience are not to be considered in determining whether a party is under a disability.[29] JFCY submits that if the court resorts to Rule 7.01(1) in the context of support applications by minors in family court, the Rule must be read as creating an opportunity for a capacity assessment and not as a pure presumption of incapacity based on age.

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231 at para 135.

[28] See e.g. *Limbani (Litigation Guardian of) v. Limbani*, [1999] O.J. No. 1228, 29 C.P.C. (4th) 33 (Ct J Gen Div) at paras 9-11.

[29] *Ibid* at para 10.

58. If the court concludes that a minor has the capacity to instruct counsel independently then they should not be required to have a litigation guardian in a support case.

59. In other words, JFCY submits that an otherwise capable minor should have the same right to be a party claimant in a family law support case as a capable adult claimant. Requiring a capable minor to have a litigation guardian when a similarly situated capable adult is not amounts to discrimination based on age and thus violates s. 15 of the *Charter*.

Costs Consequences are Not A Relevant Consideration

60. A fear that a minor would not be able to pay a *potential* costs award is not an appropriate reason to require a minor to have a litigation guardian. Such a consideration amounts to discrimination based on age: a similarly situated adult who is seeking a support order may also have an inability to pay costs, yet is able to proceed with a claim simply because they are older.

61. Excluding a capable minor from making a support claim on the basis of assumed inability to pay costs is not only unfair, it is also illogical. Being an adult does not equate with an ability to fulfill a costs award. Imposing a litigation guardian requirement on a capable minor based on costs concerns equates to imposing a litigation guardian based on impecuniosity, which on its own does not justify a court order securing costs.[30]

62. The fact of an applicant's minority status is not relevant to ensuring that respondents

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30 See e.g. *Guirmag Investments Inc. v. Milan* (1999), 43 C.P.C. (4th) 113 (S.C.J.) at para 10a; *FLR* s 24(13);

would be able to realize a potential costs award and thus should not be used to justify a requirement that they have a litigation guardian.

63. Further, as with any other situation where an unsuccessful litigant is without the funds to fulfill a costs award, there would be nothing stopping a successful litigant from delaying the enforcement of a costs award against a minor until such time as the minor has the ability to fulfill it.

Withler v. Canada

64. The test for discrimination was articulated by the Supreme Court of Canada in *Withler v. Canada*. This two part test is: 1) Does the law create a distinction that is based on an enumerated or analogous ground? And2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[31]

65. If a court were to exercise its discretion and decide that an otherwise capable minor requires a litigation guardian without taking the young person's capacity into account, and/or give more emphasis to the potential cost consequences of the respondents than to the rights of the young person to proceed with their case, this constitute discrimination under the *Withler* test because:

> 1) The application of the discretion authorized by law treats young people differently than adults for the sole reason that they are under age 18, and
> 2) An order requiring the capable minor have a litigation guardian as a result of their age stereotypes young people as not be capable of instructing counsel and not worthy of accessing justice in their own right and doesn't reflect the actual needs and capacities of the young person.

Rules of Civil Procedure, RRO 1990, Reg 94, s 56.01(1).

31 *Withler v Canada* 2011 SCC 12, [2001] 1 S.C.R. 396 at para 30 [*Withler*].

A.C. v. Manitoba

66. JFCY submits that the Supreme Court's reasoning in *A.C. v. Manitoba ("A.C.")* [32] should be applied in cases where a court must rely on Rule 7.01 to determine whether a minor requires a litigation guardian. The reasoning specifically requires is a proper assessment of a minor's:

> "evolving capacities for automonous decision-making. It is not only an option for the court to treat the child's views as an increasingly determinative factor as his or her maturity increases, it is, by definition, in a child's best interest to respect and promote his or her autonomy to the extent that his or her maturity dictates."[33]

67. This would require an individualized assessment of capacity and not a blanket assumption based on age.

68. In *A.C*, a 14 year-old challenged the constitutionality of provincial child welfare legislation in the context of the refusal of essential medical treatment. While the facts in *A.C.* related to different and specific legislation, the analysis is useful in the context of the case at bar.

69. The challenged provisions in *A.C.* were deemed to be constitutional because they sufficiently respected a young person's capacity for mature, independent judgment in the context of particular medical decision-making. The provisions were held to strike the right balance between a young person's fundamental right to autonomous decision-making and the law's "equally persistent" attempt to protect vulnerable

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32 *A.C. v Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, [2009] 2 S.C.R. 181 [*A.C.*]

33 *Ibid* at para 88.

children from harm.[34]

70. JFCY submits that in the case at bar, if the court decides it must resort to the *Civil Rules* (which we submit it need not) an assessment of capacity to instruct counsel must be made by a court in determining whether to exercise its discretion to appoint a litigation guardian in a family law proceeding.

71. Should a court not do a proper capacity assessment in determining whether a minor requires a litigation guardian, then JFCY submits this would result in a similar situation to what Justice Abella was cautioning against in *A.C.* if courts were granted:

> *"unfettered discretion to make decisions on behalf of all children under 16, despite their actual capacities, while at the same time presuming that children 16 and over were competent to veto treatment they did not want, I would likely agree that the legislative scheme was arbitrary and discriminatory."*[35]

CONCLUSION REGARDING THE APPLICATION OF THE CHARTER

72. If Rule 7.01(1) is applied in a way that determines that a minor support applicant must have a litigation guardian for the sole reason of their age, without properly determining that minor's actual capacity, this would amount to discrimination based on age and thus violate s. 15 of the *Charter*.

73. Such a determination creates a clear distinction between applicants under age 18 and applicants over age 18, such that only those applicants over age 18 may commence a support claim without a litigation guardian.

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[34] *A.C.*, *supra* note 32 (the court relied on the *Convention* in holding that the impugned legislation's 'best interests' standard operated on a "sliding scale" of scrutiny, with the young person's views increasingly determinative with greater maturity, as appropriate in context of the legislation's objective to protect children from harm at para 115).

[35] *Ibid* at para 116.

74. The effect of such a distinction is that many minors under age 18 will not have access to justice in the family courts.

PART IV – ADDITIONAL ISSUES

75. JFCY submits that capable minors do not require a litigation guardian for any family law case in which they are a direct Applicant, or where they have party or quasi-party status, including cases about access, and child protection.

76. JFCY further submits that the fact that a capable minor has not withdrawn from parental control should not be determinative of whether they require a litigation guardian to pursue a claim in family court. In JFCY's experience it is more common for young people who have withdrawn from parental control to apply to the court for support, because if living at home it is usually the parent who applies. However, even where parents are unable or unwilling to apply, it remains true that support is the right of the child. The child must still have reasonable access to the court despite the conduct of their parent(s).

PART V – ORDER SOUGHT

77. JFCY respectfully requests that this honourable court order that Ontario family law does not require minors to have a litigation guardian when proceeding with an application for support in family court.

CERTIFCATE OF SOLICITOR

I hereby certify:

1. That an Order under subrule 61.09(2) is not required; and

2. As per the May 22, 2014 Order granting leave to intervene, 20 minutes will be required for oral argument.

All of which is respectfully submitted this 29th day of May, 2014

Andrea Luey (53764P)
Mary Birdsell (38108V)
Counsel for Justice for Children and Youth

Tab A

SCHEDULE "A"

List of Authorities

1. *CMM v DGC*, 2014 ONSC 2356, [2014] O.J. No. 1767.
2. *Richardson v Richardson*, [1987] S.C.J. No. 30, [1987] 1 S.C.R. 857.
3. *Nezic v Nezic*, 2013 ONSC 1899 (available on CanLII).
4. *Daugharty v Symons*, 2011 ONSC 7676, [2011] O.J. No. 5997.
5. *Webster v Webster*, [2006] O.J. No. 2749, 25 E.T.R. (3d) 141 (ONSC).
6. *Re: SM*, 2009 ONCJ 317, [2009] O.J. No. 2907.
7. *Sharpe v Sharpe*, [2002] O.J. No. 1836, 28 R.F.L. (5th) 425 (ONSC).
8. *JG v PG*, [1988] O.J. No. 3137, 1988 CanLII 1429 (ON Prov Ct (Fam Div)).
9. *Re: Dolabaille and Carrington*, [1981] O.J. No. 2963, 32 O.R. (2d) 442 (ON Prov Ct (Fam Div)).
10. *G(S) v G(R)*, [1986] O.J. No. 1731 (QL) (ON Prov Ct (Fam Div)).
11. *Bertram v Bertram*, [1994] O.J. No. 1792 (QL) (On Ct J (Prov Div)).
12. *JLE v RBE*, [1998] O.J. No. 492, 1998 CarswellOnt555 (On Ct J (Prov Div)).
13. *Moody v Moody*, 47 RFL (3d) 75, 1993 CanLII 5611 (ON Ct J (Gen Div)).
14. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] S.C.J. 76, [2004] 1 S.C.R. 76.
15. *DBS v SRG; LJW v TAR; Henry v Henry; Hiemstra v Hiemstra*, 2006 SCC 37, [2006] 2 S.C.R. 231.
16. *Limbani (Litigation guardian of) v Limbani*, [1999] O.J. No. 1228, 29 C.P.C. (4th) 33 (Ct J Gen Div)
17. *Guirmag Investments Inc v Milan*, [1999] O.J. No 4034, 91 A.C.W.S. (3d) 919 (ONSC).
18. *Withler v Canada*, 2011 SCC 12, [2001] 1 S.C.R. 396.

19. *AC v Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, [2009] 2 S.C.R. 181.

Tab B

SCHEDULE "B"

Relevant Provisions of Statutes, Regulations and By-Laws

1. *Constitution Act 1982*, R.S.C. 1985, Appendix II, No. 44, Schedule B; Part I, s. 15
2. *Rules of Civil Procedure*, *Courts of Justice Act*, R.R.O. 1990, Regulation 194, Rules 7, 56
3. *Family Law Act*, R.S.O. 1990, c. F.3, ss. 29, 31, 33(2),
4. *Family Law Rules, Courts of Justice Act*, O. Reg. 114/99, c. C. 43, Rules 2(1), 2(2), 2(3), 2(4), 4, 13.01(19), 18(12), 20(6), 24(13), 25.1(16), 42(5),
5. *Administration of Justice Act, O. Reg 2/05: Fee Waivers, s.7*
6. *Child and Family Services Act*, R.S.O. 1990, c. C.11, s.38
7. *Ontario Works Act*, 1997, S.O. 1997, c. 25, Sched. A
8. *United Nations Convention on the Rights of the Child*, Article 3, 5

Constitution Act 1982, R.S.C. 1985, Appendix II, No. 44, Schedule B

PART I

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

RULE 7 PARTIES UNDER DISABILITY

REPRESENTATION BY LITIGATION GUARDIAN

Party under Disability

7.01 (1) 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. O. Reg. 69/95, s. 2.

Substitute Decisions Act Applications

(2) Despite subrule (1), an application under the *Substitute Decisions Act, 1992* may be commenced, continued and defended without the appointment of a litigation guardian for the respondent in respect of whom the application is made, unless the court orders otherwise. O. Reg. 69/95, s. 2.

Previously Appointed Committees

(3) A committee named by order or statute before April 3, 1995 is the litigation guardian of the person in respect of whom the committee was named, and shall be referred to as the litigation guardian for all purposes. O. Reg. 377/95, s. 2.

(4) Subrule (3) also applies to the Public Guardian and Trustee acting under an order made under subsection 72 (1) or (2) of the *Mental Health Act* as it read before April 3, 1995. O. Reg. 69/95, s. 2.

LITIGATION GUARDIAN FOR PLAINTIFF OR APPLICANT

Court Appointment Unnecessary

7.02 (1) Any person who is not under disability may act, without being appointed by the court, as litigation guardian for a plaintiff or applicant who is under disability, subject to subrule (1.1). O. Reg. 69/95, s. 3 (1).

Mentally Incapable Person or Absentee

(1.1) Unless the court orders otherwise, where a plaintiff or applicant,

(a) is mentally incapable and has a guardian with authority to act as litigation guardian in the proceeding, the guardian shall act as litigation guardian;

(b) is mentally incapable and does not have a guardian with authority to act as litigation guardian in the proceeding, but has an attorney under a power of attorney with that authority, the attorney shall act as litigation guardian;

(c) is an absentee and a committee of his or her estate has been appointed under the *Absentees Act*, the committee shall act as litigation guardian;

(d) is a person in respect of whom an order was made under subsection 72 (1) or (2) of the *Mental Health Act* as it read before April 3, 1995, the Public Guardian and Trustee shall act as litigation guardian. O. Reg. 69/95, s. 3 (1).

Affidavit to be Filed

(2) No person except the Children's Lawyer or the Public Guardian and Trustee shall act as litigation guardian for a plaintiff or applicant who is under disability until the person has filed an affidavit in which the person,

(a) consents to act as litigation guardian in the proceeding;

(b) confirms that he or she has given written authority to a named lawyer to act in the proceeding;

(c) provides evidence concerning the nature and extent of the disability;

(d) in the case of a minor, states the minor's birth date;

(e) states whether he or she and the person under disability are ordinarily resident in Ontario;

(f) sets out his or her relationship, if any, to the person under disability;

(g) states that he or she has no interest in the proceeding adverse to that of the person under disability; and

(h) acknowledges that he or she has been informed of his or her liability to pay personally any costs awarded against him or her or against the person under disability. O. Reg. 14/04, s. 7.

(3) Revoked: O. Reg. 14/04, s. 7.

LITIGATION GUARDIAN FOR DEFENDANT OR RESPONDENT

Generally must be Appointed by Court

7.03 (1) No person shall act as a litigation guardian for a defendant or respondent who is under disability until appointed by the court, except as provided in subrule (2), (2.1) or (3). R.R.O. 1990, Reg. 194, r. 7.03 (1); O. Reg. 69/95, s. 4 (1).

Where Minor Interested in Estate or Trust

(2) Where a proceeding is against a minor in respect of the minor's interest in an estate or trust, the Children's Lawyer shall act as the litigation guardian of the minor defendant or respondent, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 7.03 (2); O. Reg. 69/95, s. 19.

Mentally Incapable Person or Absentee

(2.1) Unless the court orders otherwise, where a proceeding is against,

(a) a mentally incapable person who has a guardian with authority to act as litigation guardian in the proceeding, the guardian shall act as litigation guardian;

(b) a mentally incapable person who does not have a guardian with authority to act as litigation guardian in the proceeding but has an attorney under a power of attorney with that authority, the attorney shall act as litigation guardian;

(c) an absentee, and a committee of his or her estate has been appointed under the *Absentees Act*, the committee shall act as litigation guardian;

(d) a person in respect of whom an order has been made under subsection 72 (1) or (2) of the *Mental Health Act* as it read before April 3, 1995, the Public Guardian and Trustee shall act as litigation guardian. O. Reg. 69/95, s. 4 (2).

Affidavit by Guardian or Attorney

(2.2) A person who has authority under subrule (2.1) to act as litigation guardian shall, before acting in that capacity in a proceeding, file an affidavit containing the information referred to in subrule (10). O. Reg. 14/04, s. 8.

(2.3) Revoked: O. Reg. 14/04, s. 8.

Defending Counterclaim

(3) A litigation guardian for a plaintiff may defend a counterclaim without being appointed by the court. R.R.O. 1990, Reg. 194, r. 7.03 (3).

Motion by Person Seeking to be Litigation Guardian

(4) A person who seeks to be the litigation guardian of a defendant or respondent under disability shall move to be appointed by the court before acting as litigation guardian. R.R.O. 1990, Reg. 194, r. 7.03 (4).

Motion by Plaintiff or Applicant to Appoint Litigation Guardian

(5) Where a defendant or respondent under disability has been served with an originating process and no motion has been made under subrule (4) for the appointment of a litigation guardian, a plaintiff or applicant, before taking any further step in the proceeding, shall move for an order appointing a litigation guardian for the party under disability. R.R.O. 1990, Reg. 194, r. 7.03 (5).

(6) At least ten days before moving for the appointment of a litigation guardian, a plaintiff or applicant shall serve a request for appointment of litigation guardian (Form 7A) on the party under disability personally or by an alternative to personal service under rule 16.03. R.R.O. 1990, Reg. 194, r. 7.03 (6).

(7) The request may be served on the party under disability with the originating process. R.R.O. 1990, Reg. 194, r. 7.03 (7).

(8) A motion for the appointment of a litigation guardian may be made without notice to the party under disability. R.R.O. 1990, Reg. 194, r. 7.03 (8).

(9) A plaintiff or applicant who moves to appoint the Children's Lawyer or the Public Guardian and Trustee as the litigation guardian shall serve the notice of motion and the material required by subrule (10) on the Children's Lawyer or the Public Guardian and Trustee. R.R.O. 1990, Reg. 194, r. 7.03 (9); O. Reg. 69/95, ss. 19, 20.

Evidence on Motion to Appoint

(10) A person who moves for the appointment of a litigation guardian shall provide evidence on the motion concerning,

(a) the nature of the proceeding;

(b) the date on which the cause of action arose and the date on which the proceeding was commenced;

(c) service on the party under disability of the originating process and the request for appointment of litigation guardian;

(d) the nature and extent of the disability;

(e) in the case of a minor, the minor's birth date;

(f) whether the person under disability ordinarily resides in Ontario and,

except where the proposed litigation guardian is the Children's Lawyer or the Public Guardian and Trustee, evidence,

(g) concerning the relationship, if any, of the proposed litigation guardian to the party under disability;

(h) whether the proposed litigation guardian ordinarily resides in Ontario;

(i) that the proposed litigation guardian,

(i) consents to act as litigation guardian in the proceeding,

(ii) is a proper person to be appointed,

(iii) has no interest in the proceeding adverse to that of the party under disability, and

(iv) acknowledges having been informed that he or she may incur costs that may not be recovered from another party. R.R.O. 1990, Reg. 194, r. 7.03 (10); O. Reg. 69/95, ss. 19, 20.

REPRESENTATION OF PERSONS UNDER DISABILITY

Litigation guardian for party

7.04 (1) Unless there is some other proper person willing and able to act as litigation guardian for a party under disability, the court shall appoint,

(a) the Children's Lawyer, if the party is a minor;

(b) the Public Guardian and Trustee, if the party is mentally incapable within the meaning of section 6 or 45 of the*Substitute Decisions Act, 1992* in respect of an issue in the proceeding and there is no guardian or attorney under a power of attorney with authority to act as litigation guardian;

(c) either of them, if clauses (a) and (b) both apply to the party. O. Reg. 69/95, s. 5.

Legal representative for minor who is not a party

(2) Where, in the opinion of the court, the interests of a minor who is not a party require separate representation in a proceeding, the court may request and may by order authorize the Children's Lawyer, or some other proper person who is willing and able to act, to act as the person's legal representative. O. Reg. 69/95, s. 5.

Litigation guardian for incapable person who is not a party

(3) Where, in the opinion of the court, the interests of a mentally incapable person who is not a minor and not a party require separate representation in a proceeding, the court may appoint as the mentally incapable person's litigation guardian the Public Guardian and Trustee or some other proper person who is willing and able to act. O. Reg. 69/95, s. 5.

POWERS AND DUTIES OF LITIGATION GUARDIAN

7.05 (1) Where a party is under disability, anything that a party in a proceeding is required or authorized to do may be done by the party's litigation guardian. R.R.O. 1990, Reg. 194, r. 7.05 (1); O. Reg. 69/95, s. 18.

(2) A litigation guardian shall diligently attend to the interests of the person under disability and take all steps necessary for the protection of those interests, including the commencement and conduct of a counterclaim, crossclaim or third party claim. R.R.O. 1990, Reg. 194, r. 7.05 (2); O. Reg. 69/95, s. 18.

(3) A litigation guardian other than the Children's Lawyer or the Public Guardian and Trustee shall be represented by a lawyer and shall instruct the lawyer in the conduct of the proceeding. R.R.O. 1990, Reg. 194, r. 7.05 (3); O. Reg. 69/95, ss. 18-20; O. Reg. 575/07, s. 1.

REMOVAL OR SUBSTITUTION OF LITIGATION GUARDIAN

7.06 (1) Where, in the course of a proceeding,

(a) a minor for whom a litigation guardian has been acting reaches the age of majority, the minor or the litigation guardian may, on filing an affidavit stating that the minor

has reached the age of majority, obtain from the registrar an order to continue (Form 7B) authorizing the minor to continue the proceeding without the litigation guardian;

(b) a party under any other disability for whom a litigation guardian has been acting ceases to be under disability, the party or the litigation guardian may move without notice for an order to continue the proceeding without the litigation guardian,

and the order shall be served forthwith on every other party and on the litigation guardian. R.R.O. 1990, Reg. 194, r. 7.06 (1); O. Reg. 69/95, s. 18.

(2) Where it appears to the court that a litigation guardian is not acting in the best interests of the party under disability, the court may substitute the Children's Lawyer, the Public Guardian and Trustee or any other person as litigation guardian. R.R.O. 1990, Reg. 194, r. 7.06 (2); O. Reg. 69/95, ss. 19, 20.

NOTING PARTY UNDER DISABILITY IN DEFAULT

7.07 (1) If a party to an action is under a disability, the party may be noted in default under rule 19.01 only with leave of a judge. O. Reg. 19/03, s. 2.

(2) Notice of a motion for leave under subrule (1) shall be served,

(a) on the litigation guardian of the party under disability; and

(b) on the Children's Lawyer, unless,

(i) the Public Guardian and Trustee is the litigation guardian, or

(ii) a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.07 (2); O. Reg. 69/95, ss. 18-20.

DISCONTINUANCE BY OR AGAINST PARTY UNDER DISABILITY

7.07.1 (1) If a party to an action is under a disability, the action may be discontinued by or against the party under rule 23.01 only with leave of a judge. O. Reg. 19/03, s. 3.

(2) Notice of a motion for leave under subrule (1) shall be served,

(a) on the litigation guardian of the party under disability; and

(b) on the Children's Lawyer, unless,

(i) the Public Guardian and Trustee is the litigation guardian, or

(ii) a judge orders otherwise. O. Reg. 19/03, s. 3.

APPROVAL OF SETTLEMENT

Settlement Requires Judge's Approval

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (1).

(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (2).

Where no Proceeding Commenced

(3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application. R.R.O. 1990, Reg. 194, r. 7.08 (3).

Material Required for Approval

(4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,

(a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;

(c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and

(d) a copy of the proposed minutes of settlement. R.R.O. 1990, Reg. 194, r. 7.08 (4); O. Reg. 69/95, s. 18; O. Reg. 575/07, s. 10.

Notice to Children's Lawyer or Public Guardian and Trustee

(5) On a motion or application for the approval of a judge under this rule, the judge may direct that the material referred to in subrule (4) be served on the Children's Lawyer or on the Public Guardian and Trustee as the litigation guardian of the party under disability and may direct the Children's Lawyer or the Public Guardian and Trustee, as the case may be, to make an oral or written report stating any objections he or she has to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement. R.R.O. 1990, Reg. 194, r. 7.08 (5); O. Reg. 69/95, ss. 18-20.

MONEY TO BE PAID INTO COURT

7.09 (1) Any money payable to a person under disability under an order or a settlement shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (1).

(2) Any money paid to the Children's Lawyer on behalf of a person under disability shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (2); O. Reg. 69/95, s. 19.

RULE 56 SECURITY FOR COSTS

WHERE AVAILABLE

56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

(a) the plaintiff or applicant is ordinarily resident outside Ontario;

(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;

(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (2).

DECLARATION OF PLAINTIFF'S OR APPLICANT'S PLACE OF RESIDENCE

56.02 The lawyer for the plaintiff or applicant shall, forthwith on receipt of a demand in writing from any person who has been served with the originating process, declare in writing whether the plaintiff or applicant is ordinarily resident in Ontario and, where the lawyer fails to respond to the demand, the court may order that the action or application be stayed or dismissed. R.R.O. 1990, Reg. 194, r. 56.02; O. Reg. 575/07, s. 1.

MOTION FOR SECURITY

56.03 (1) In an action, a motion for security for costs may be made only after the defendant has delivered a defence and shall be made on notice to the plaintiff and every other defendant who has delivered a defence or notice of intent to defend. R.R.O. 1990, Reg. 194, r. 56.03 (1).

(2) In an application, a motion for security for costs may be made only after the respondent has delivered a notice of appearance and shall be made on notice to the applicant

and every other respondent who has delivered a notice of appearance. R.R.O. 1990, Reg. 194, r. 56.03 (2).

AMOUNT AND FORM OF SECURITY AND TIME FOR FURNISHING

56.04 The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court. R.R.O. 1990, Reg. 194, r. 56.04.

FORM AND EFFECT OF ORDER

56.05 A plaintiff or applicant against whom an order for security for costs (Form 56A) has been made may not, until the security has been given, take any step in the proceeding except an appeal from the order, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 56.05.

DEFAULT OF PLAINTIFF OR APPLICANT

56.06 Where a plaintiff or applicant defaults in giving the security required by an order, the court on motion may dismiss the proceeding against the defendant or respondent who obtained the order, and the stay imposed by rule 56.05 no longer applies unless another defendant or respondent has obtained an order for security for costs. R.R.O. 1990, Reg. 194, r. 56.06.

AMOUNT MAY BE VARIED

56.07 The amount of security required by an order for security for costs may be increased or decreased at any time. R.R.O. 1990, Reg. 194, r. 56.07.

NOTICE OF COMPLIANCE

56.08 On giving the security required by an order, the plaintiff or applicant shall forthwith give notice of compliance to the defendant or respondent who obtained the order, and to every other party. R.R.O. 1990, Reg. 194, r. 56.08.

SECURITY FOR COSTS AS TERM OF RELIEF

56.09 Despite rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief and, where such an order is made, rules 56.04 to 56.08 apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 56.09.

Family Law Act, **R.S.O. 1990, c. F.3**, ss. 29, 31, 33(2),

PART III
SUPPORT OBLIGATIONS

Definitions

29. In this Part,

"dependant" means a person to whom another has an obligation to provide support under this Part; ("personne à charge")

Obligation of parent to support child

31. (1) Every parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so. R.S.O. 1990, c. F.3, s. 31 (1); 1997, c. 20, s. 2.

Idem

(2) The obligation under subsection (1) does not extend to a child who is sixteen years of age or older and has withdrawn from parental control. R.S.O. 1990, c. F.3, s. 31 (2).

Order for support

33. (1) A court may, on application, order a person to provide support for his or her dependants and determine the amount of support. R.S.O. 1990, c. F.3, s. 33 (1).

Applicants

(2) An application for an order for the support of a dependant may be made by the dependant or the dependant's parent. R.S.O. 1990, c. F.3, s. 33 (2).

***Family Law Rules, Courts of Justice Act*, O. Reg. 114/99, c. C. 43, Rules 1(7), 2(1), 2(2), 2(3), 2(4), 4, 13.01(19), 18(12), 20(6), 24(13), 25.1(16), 42(5)**

1(7)

MATTERS NOT COVERED IN RULES

(7) 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. O. Reg. 114/99, r. 1 (7).

Rule 2(1)

"child" means a child as defined in the Act governing the case or, if not defined in that Act, a person under the age of 18 years, and in a case under the *Divorce Act* (Canada) includes a "child of the marriage" within the meaning of that Act; ("enfant")

"special party" means 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; ("partie spéciale")

2(2) PRIMARY OBJECTIVE

(2) The primary objective of these rules is to enable the court to deal with cases justly. O. Reg. 114/99, r. 2 (2).

DEALING WITH CASES JUSTLY

(3) Dealing with a case justly includes,

(a) ensuring that the procedure is fair to all parties;

(b) saving expense and time;

(c) dealing with the case in ways that are appropriate to its importance and complexity; and

(d) giving appropriate court resources to the case while taking account of the need to give resources to other cases. O. Reg. 114/99, r. 2 (3).

DUTY TO PROMOTE PRIMARY OBJECTIVE

(4) The court is required to apply these rules to promote the primary objective, and parties and their lawyers are required to help the court to promote the primary objective. O. Reg. 114/99, r. 2 (4).

DUTY TO MANAGE CASES

(5) The court shall promote the primary objective by active management of cases, which includes,

(a) at an early stage, identifying the issues, and separating and disposing of those that do not need full investigation and trial;

(b) encouraging and facilitating use of alternatives to the court process;

(c) helping the parties to settle all or part of the case;

(d) setting timetables or otherwise controlling the progress of the case;

(e) considering whether the likely benefits of taking a step justify the cost;

(f) dealing with as many aspects of the case as possible on the same occasion; and

(g) if appropriate, dealing with the case without parties and their lawyers needing to come to court, on the basis of written documents or by holding a telephone or video conference. O. Reg. 114/99, r. 2 (5).

4(2)
PRIVATE REPRESENTATION OF SPECIAL PARTY

(2) 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. O. Reg. 114/99, r. 4 (2).

PUBLIC LAW OFFICER TO REPRESENT SPECIAL PARTY

(3) 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. O. Reg. 114/99, r. 4 (3).

12(2) A special party's application, answer or reply may be withdrawn (whether in whole or in part) only with the court's permission, and the notice of motion for permission shall be served on every other party and on,

(a) the Children's Lawyer, if the special party is a child;

(b) the Public Guardian and Trustee, if the special party is not a child.

13.01(19) (19) No agreement reached at a conference is effective until it is signed by the parties, witnessed and, in a case involving a special party, approved by the court. O. Reg. 114/99, r. 17 (19).

18(12) (12) A special party may make, withdraw and accept an offer, but another party's acceptance of a special party's offer and a special party's acceptance of another party's offer are not binding on the special party until the court approves.

20(6) If a person to be questioned is a special party, the court may, on motion, order that someone else be questioned in addition to or in place of the person.

24(13)

ORDER FOR SECURITY FOR COSTS

24(13) A judge may, on motion, make an order for security for costs that is just, based on one or more of the following factors:

1. A party ordinarily resides outside Ontario.
2. A party has an order against the other party for costs that remains unpaid, in the same case or another case.
3. A party is a corporation and there is good reason to believe it does not have enough assets in Ontario to pay costs.
4. There is good reason to believe that the case is a waste of time or a nuisance and that the party does not have enough assets in Ontario to pay costs.
5. A statute entitles the party to security for costs. O. Reg. 114/99, r. 24 (13).

25.1(16) The court may, on motion, order payment out of court of money for or on behalf of a special party or a child who is not a party.

42(5) The Family Case Manager has no jurisdiction in respect of,

(b) a case involving a special party;

Administration of Justice Act, O. Reg 2/05: Fee Waivers, s.7

Litigation guardian or representative

7. (1) This section applies to a person who is,

(a) under a "disability" as defined in subrule 1.03 (1) of Regulation 194 of the Revised Regulations of Ontario, 1990 (Rules of Civil Procedure) made under the *Courts of Justice Act*;

(b) under a "disability" as defined in subrule 1.02 (1) of Ontario Regulation 258/98 (Rules of the Small Claims Court) made under that Act;

(c) a "special party" as defined in subrule 2 (1) of Ontario Regulation 114/99 (Family Law Rules) made under that Act. O. Reg. 671/05, s. 3.

(2) Where a person to whom this section applies seeks to obtain a fee waiver certificate, and the proceeding in respect of which the fee waiver is sought is one in which the person has or will have a,

(a) litigation guardian under Rule 7 of Regulation 194 of the Revised Regulations of Ontario, 1990 (Rules of Civil Procedure) made under the *Courts of Justice Act*;

(b) litigation guardian under Rule 4 of Ontario Regulation 258/98 (Rules of the Small Claims Court) made under that Act; or

(c) special party representative under Rule 4 of Ontario Regulation 114/99 (Family Law Rules) made under that Act,

any fee waiver request made under the *Administration of Justice Act* shall be completed by the litigation guardian or representative, or by the person who intends to become the litigation guardian or representative. O. Reg. 671/05, s. 3.

Child and Family Services Act, R.S.O. 1990, c. C.11, s.38

LEGAL REPRESENTATION

Legal representation of child

38(1) A child may have legal representation at any stage in a proceeding under this Part.

Court to consider issue

(2)Where a child does not have legal representation in a proceeding under this Part, the court,

(a) shall, as soon as practicable after the commencement of the proceeding; and

(b) may, at any later stage in the proceeding,

determine whether legal representation is desirable to protect the child's interests.

Direction for legal representation

(3)Where the court determines that legal representation is desirable to protect a child's interests, the court shall direct that legal representation be provided for the child. R.S.O. 1990, c. C.11, s. 38 (1-3).

Criteria

(4)Where,

(a) the court is of the opinion that there is a difference of views between the child and a parent or a society, and the society proposes that the child be removed from a person's care or be made a society or Crown ward under paragraph 2 or 3 of subsection 57 (1);

(b) the child is in the society's care and,

(i) no parent appears before the court, or

(ii) it is alleged that the child is in need of protection within the meaning of clause 37 (2) (a), (c), (f), (f.1) or (h); or

(c) the child is not permitted to be present at the hearing,

legal representation shall be deemed to be desirable to protect the child's interests, unless the court is satisfied, taking into account the child's views and wishes if they can be reasonably ascertained, that the child's interests are otherwise adequately protected. R.S.O. 1990, c. C.11, s. 38 (4); 1999, c. 2, s. 10.

Where parent a minor

(5)Where a child's parent is less than eighteen years of age, the Children's Lawyer shall represent the parent in a proceeding under this Part unless the court orders otherwise. R.S.O. 1990, c. C.11, s. 38 (5); 1994, c. 27, s. 43 (2).

United Nations Convention on the Rights of the Child, Article 3, 5

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Court File No. 57-14
Superior Court File No. FS 13-18928

C.M.M.

Appellant

- and -

D.G.C.

Respondent

- and -

J.M.

Respondent

- and -

Justice for Children and Youth

Intervener

ONTARIO SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

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