Case Name:

C.M.M. v. D.G.C.

Between
C.M.M., Applicant/Appellant, and
D.G.C. and J.M., Respondent/Respondents in Appeal
And between
The Children's Lawyer, Respondent in Appeal, and
Attorney General of Ontario and Justice
for Children and Youth, Interveners

[2015] O.J. No. 714

2015 ONSC 39

Divisional Court File No.: 57/14

Court File No.: FS 13-18928

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

H.E. Sachs, E. Frank and D.M. Brown JJ.

Heard: November 28, 2014.
Judgment: January 13, 2015.

(84 paras.)

Counsel:

Jeffrey Wilson, for the Applicant/Appellant.

D.G.C., Respondent/Respondent in Appeal, appeared in person.

*Samantha **Preshner***, for the Office of the Children's Lawyer, Respondent in Appeal.

Joshua Hunter, for the Attorney General of Ontario, Intervener.

Andrea Luey and *Mary Birdsell*, for the Justice for Children and Youth, Intervener.

The judgment of the Court was delivered by

H.E. SACHS J.:--

Introduction

1 At the heart of this appeal is the question of whether the *Family Law Rules*, O. Reg. 114/99 (the "*Family Rules*") permit a child bringing a child support proceeding to be represented by a lawyer without first having to obtain a litigation guardian. The question is complicated by the less-than-clear wording of the *Family Rules* and by the fact that if the *Rules* do permit this course of action, their approach is fundamentally different from the approach to child litigants in the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 (the "*Civil Rules*").

2 The Appellant, C.M.M., is the fifteen-year-old child of the Respondents, D.G.C. and J.M. She commenced an application for child support against D.G.C., her father, which he is defending on the basis of a contract that he and J.M. entered into before the Appellant's birth under which he paid J.M. a one-time lump sum in satisfaction of all his obligations for child support and gave up all his rights to have any contact with the Appellant. The contract contained a specific acknowledgment that it could not preclude an application by the Appellant for child support.

3 The Appellant commenced her application when she was 14-years-old. To do so, she retained her present lawyer, Jeffrey Wilson. After the litigation was commenced, the Respondent argued that the Appellant's application was not properly constituted because she did not have a litigation guardian. The motion was argued before D. Wilson J. and she ordered that the Appellant be represented by a litigation guardian. This is an appeal from that decision.

4 A sub-issue on the appeal is whether, if the Appellant has to be represented by a litigation guardian, the court should order that the Children's Lawyer be appointed as her litigation guardian.

5 For the reasons that follow, I would allow the appeal and set aside the order that the Appellant has to be represented by a litigation guardian. In reaching this conclusion, I find that the *Family Rules* represent a deliberate departure from the regime established by the *Civil Rules* for the participation of children in legal proceedings. Under the family law regime, when children commence their own proceedings, the focus is on whether there is a need for those children to be represented, not on putting in place an adult to act as the instructing party instead of the child.

6 Before I go on with my reasons, I wish to emphasize how different the hearing we had on the appeal was from the hearing before the motion judge. First, the motion judge had a number of other issues before her in addition to the issue that is the subject of this appeal. Second, it is clear from her reasons that an inadequate amount of time was booked before her to hear the motions in question. Third, and most importantly, we had the benefit of submissions from the Attorney-General of Ontario, the Children's Lawyer, and Justice for Children and Youth, all of whom were granted intervener status on the appeal, but did not know of or make representations during the hearing before the motion judge. It was the interveners, particularly the Attorney-General of Ontario, who took us through the legislative background to the formulation of the *Family Rules.* As the reasons below illustrate, the insight provided by this historical perspective plays a key role in my analysis and conclusion.

Factual Background

The Respondent Father's Version of the Events Leading Up to the Execution of the Contract

7 The Respondent mother, J.M., was added as a party to the proceedings by the Respondent father, D.G.C. However, thus far, she has chosen to take no part in the action. Thus, D.G.C.'s version of the events leading up to the execution of the agreement between him and J.M. is the only version the record before us contained.

8 According to D.G.C., J.M. engaged in deceptive and wrongful conduct towards him, which resulted in her conceiving a child. Despite his lack of certainty about whether he was really the father of her child, once he heard that J.M. was pregnant and that she wanted him to have nothing to do with the child, he commenced litigation claiming, among other things, joint custody, reasonable access, information related to the birth of the child, an order that the child would have his surname included in her surname, and an order restraining J.M. from leaving the jurisdiction.

9 This litigation was eventually settled by way of an Agreement entered into between D.G.C. and J.M. on March 25, 1999 (the "Agreement"). The Appellant was born a day later, on March 26, 1999.

The Terms of the Agreement

10 Under the Agreement, D.G.C. agreed that he would not, under any circumstances, seek to have any contact either with the Appellant or with J.M. It also provided that he would pay J.M. the sum of $37,500.00 to satisfy any potential child support obligations.

11 The Agreement contains two penalty provisions: (1) if J.M. either directly or indirectly claimed child support from D.G.C. or, if at some future time D.G.C. was required to pay child support by a court of competent jurisdiction, D.G.C. was to be reimbursed for the lump sum payment in the amount of $37,500.00 and his legal costs in seeking that reimbursement; and (2) if D.G.C. either directly or indirectly, initiated any contact with J.M or the Appellant, he would be liable for child support under the Child Support Guidelines.

12 The Agreement also contained a clause whereby both parties acknowledged "that the law does not permit a child's rights to financial support to be released".

13 There is no issue that both parties were represented by experienced and competent counsel at the time they signed the Agreement.

Events Leading up to the Litigation

14 After the Agreement was signed, the Appellant continued to reside with her mother and had absolutely no contact with her father. D.G.C. married and he and his wife have three children.

15 According to the Appellant, her mother has struggled to support them. As a result, they both now reside with her maternal grandfather in his home.

16 The Appellant takes the position that she is a gifted student who has enjoyed considerable academic and extra-curricular success. As a result, when it came to her high school education, she and her mother researched which schools could provide the best enriched programs for gifted children. According to the Appellant, Havergal College, a private girls school in Toronto, offered the best program for her.

17 She decided to apply. She was accepted and received a $5000.00 scholarship. That still left a considerable deficit -- a deficit that neither her mother nor her grandfather had the resources to cover.

18 The Appellant contacted her paternal grandmother by mail, asking to obtain her "family's financial support" for her fees at Havergal. When she received no reply, she retained a lawyer to contact her father. That lawyer made it clear that the Appellant did not want anything to do with her father, but she wished him to pay her Havergal fees. When he refused, she retained Jeffrey Wilson as her lawyer to commence these proceedings. At the time, she was fourteen-years-old.

History of the Litigation

19 The proceedings were commenced in September of 2013. At the present time, the Appellant's request is for an order that D.G.C. finance her education at Havergal and pay her ongoing and retroactive child support, commencing the day of her birth.

20 D.G.C. filed his Answer to the Appellant's application in November of 2013. A case conference was held and an expedited trial date was set for March of 2014.

21 The parties then brought a number of motions and cross-motions, all of which were heard by D. Wilson J. in December of 2013. It is fair to say that D.G.C. was almost entirely successful before D. Wilson J., as a result of which she ordered that the Appellant pay D.G.C. his costs fixed in the amount of $7,500.00, with payment deferred until the end of the trial.

22 The Appellant sought leave to appeal the decision of D. Wilson J. Her application for leave was dismissed, with one exception. She was granted leave to appeal the order requiring her to appoint a litigation guardian. As a result of the pending leave application and appeal, the matter did not proceed to trial in March as scheduled.

23 When the parties appeared before D. Wilson J., the Appellant's maternal grandfather had sworn an affidavit in which he stated that if the Appellant was ordered to have a litigation guardian, he was prepared to fill that role. After the hearing of the motion, but before the judge released her decision, Mr. Wilson sought leave to file a supplementary affidavit from the Appellant's grandfather in which he deposed that he was no longer prepared to be the Appellant's litigation guardian as he could not afford the exposure to potential costs. When she made her order requiring the Appellant to appoint a litigation guardian, D. Wilson J. stated:

> If her grandfather is unwilling to act in this capacity, the [Appellant] shall appoint another individual forthwith.

24 The Appellant sought to file evidence on this appeal that she has not been able to find anyone to act as her litigation guardian. As a result, she sought an order that if she was required to have a litigation guardian, the Office of the Children's Lawyer should be appointed to fill that role.

25 The Appellant also challenged the constitutionality of the provisions requiring her to appoint a litigation guardian. At the hearing of the appeal, her counsel clarified that he only sought to maintain the constitutional challenge if the Appellant was required to appoint a litigation guardian and the court did not appoint the Office of the Children's Lawyer to fill that role. In that event, according to the Appellant, she, as a child, would effectively be precluded from pursuing litigation that she had a right to pursue, something that would not happen to an adult and was, therefore, discriminatory under the *Charter*.

The Legal Framework

The Family Law Act and the Appellant's Right to Litigate on Her Own Behalf

26 The Appellant's right to sue her father for child support is grounded in s. 33 of the *Family Law Act*, R.S.O. 1990, c. F-3. Under s. 33(2) of that *Act*, an application for support may be commenced by the dependant or by the dependant's parent. Section 29 of the *Act* defines a "dependant" as a person to whom another has an obligation to provide support "under this Part", and s. 31(1) in "this Part" 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." By virtue of these provisions, the Appellant is a dependant, with a right to commence an action on her own behalf against her father for support.

The Family Rules and What They Say About How the Appellant Can Litigate

27 Rule 2(1) of the Family Rules defines a "child" as 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...". Under that definition the Appellant is a "child".

28 Rule 2(1) also contains a definition of what the Family Rules describe as a "special party". That definition reads as follows:

> 'special party' means a party who is a child or who is or appears to be mentally incapable for the purposes of the *Substitutes 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 or child support case;

29 It is this definition that is the first source of confusion in this case. Under the first part of the definition, the Appellant would appear to be a special party since she is a child. However, the definition ends by appearing to exclude "a child in ...a child support case", which is the action the Appellant is bringing. Does this mean that the Appellant is not a special party? Further, does the reference to "requires legal representation" in the definition mean that if the Appellant is a special party, she is required to have legal representation?

30 Under the Family Rules, a party to a proceeding may act in person, be represented by a lawyer or be represented by someone who is not a lawyer, if the court gives permission in advance (Family Rule 4(1)).

31 Pursuant to Family Rule 4(2), the court may authorize "a person to represent the special party if the person is, (a) appropriate for the task; and (b) willing to act as representative". Under Family Rule 4(3), if there is no one who is 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". Thus, in contrast to the definition section in Rule 2(1), Rule 4, the rule that deals with the ability of the court to appoint or authorize representation for a special party, does not require that that representation be legal representation. Further, in contrast to the Civil Rules, discussed below, if the Appellant is a special party, the court can appoint the Children's Lawyer to act as her representative, but only if that official consents to take on the retainer.

32 Nowhere in the *Family Rules* is there any mention of the need for a litigation guardian or similar person to act as someone to give instructions on behalf of the child. The *Family Rules* speak only of representation, which is a different role.

33 Section 1(7) of the *Family Rules* states:

> 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.

34 The question that then arises is whether the lack of provision for a litigation guardian in the *Family Rules* requires the court to resort to the Civil Rules for guidance. In other words, is there a gap in the Family Rules, or did the legislature make a deliberate choice to put in place a different code governing the participation of children in family law proceedings?

Child Litigants Under the Civil Rules

35 Rule 7.01(1) of the *Civil Rules* requires a minor who commences, continues or defends a proceeding to have a litigation guardian, unless the court or a statute provides otherwise. If there is no proper person willing to act as the minor's litigation guardian, Rule 7.04(1) states that the court shall appoint the Children's Lawyer to do so. Under Rule 7.04(1), there is no requirement that the Children's Lawyer's consent be obtained before the appointment is made.

36 Rule 7.04(2) also gives the court the power to appoint the Children's Lawyer as a legal representative for a minor who is not a party to a proceeding, but whom the court believes requires separate representation in the proceeding.

The Motion Judge's Decision

37 The motion judge "did not accept the submission of the solicitor for the [Appellant] that the *Family Law Rules* state that a child does not need a Litigation Guardian to bring an application." (*C.M.M. v. D.G.C.*, 2014 ONSC 567, at para. 39). In making this finding, she distinguished the case at bar from those cases where children who had left the parental home were permitted to sue their parents for support. She found that the latter cases were provincial court cases where the rules were different and no one had challenged the right of the child to bring his or her application without a litigation guardian.

38 The motion judge then went on to find that the *Family Rules* did not provide a detailed enough framework for the conduct of litigation by minors and mentally incapable persons. Therefore, relying on Family Rule 1(7), it was appropriate to look to the *Civil Rules* for guidance. This would have the added advantage of ensuring consistency on the issue between the *Civil Rules* and the *Family Rules*.

39 The motion judge reviewed the policy reasons behind requiring minors to have litigation guardians. One of these is to ensure that there is someone who is responsible for the payment of costs in the event that the minor is unsuccessful in his or her litigation. In this case, the motion judge found that it would be unfair to allow the Appellant to proceed with her application without a litigation guardian as this would effectively insulate her from any liability for costs if she lost the application.

40 The motion judge also concluded that while the Appellant "may be a bright, mature 14- year-old, she requires someone with maturity to counsel her on the merits of the lawsuit and to provide instructions to counsel going forward" (para. 47). Thus, she ordered that the Appellant be "represented" by a litigation guardian. She ordered that if the Appellant's grandfather was unwilling to act in that capacity, the Appellant was to appoint another person forthwith.

Position of the Parties on this Appeal

41 The Appellant's position is that the motion judge's decision requiring her to appoint a litigation guardian should be set aside and that she should be allowed to proceed with her application using the lawyer of her choice, Jeffrey Wilson. According to the Appellant, the *Family Rules* are a complete code and nothing in those rules requires her, as a capable child, to appoint a litigation guardian. The Appellant argues that she is not a "special party" within the meaning of Rule 2(1) of the *Family Rules*, but even if she is, those rules do not mandate that special parties have litigation guardians. In the alternative, if she is required to appoint a litigation guardian, the court should appoint the Children's Lawyer to fill that role. If the court does neither, the Appellant seeks a declaration that the effect of the rules governing litigation by minors is to contravene her s. 15 *Charter* rights.

42 The interveners, the Office of the Children's Lawyer, the Attorney-General, and Justice for Children and Youth, all agree with the Appellant's submission that the *Family Rules* are a complete code and that nothing in them requires that the Appellant, as a capable minor, have a litigation guardian. All three interveners agree that there is no difference in principle between a minor who has withdrawn from parental control suing for support and a minor like the Appellant suing for support. Logically, if the Rules require the latter to have a litigation guardian, then the same would be true for the former. This, in turn, could impact on the rights of minors who have left home and have no trusted adults they can turn to.

43 Justice for Children and Youth also agree that the Appellant is not a "special party" within the meaning of the *Family Rules*. The Children's Lawyer argues that she is a "special party" and the Attorney-General takes the position that it is not necessary for the court to decide the point as the Appellant has legal representation.

44 On the question of who should be appointed the Appellant's litigation guardian if the court finds that one is required, the Children's Lawyer takes the position that the maternal grandfather, having sworn an affidavit indicating his willingness to be the Appellant's litigation guardian, should not be allowed to withdraw from that role because of a fear about liability for costs.

45 Justice for Children and Youth argues that requiring capable children to have a litigation guardian before they can pursue their rights to support under the *Family Law Act* violates their rights under the *Charter*. The Attorney-General made extensive submissions to counter any argument that adopting the *Civil Rules* for the capable minor litigants would result in a *Charter* breach, particularly because those rules allow the court to make an order dispensing with the requirement for a litigation guardian.

Analysis

Is the Appellant a "special party"?

46 As already outlined, a "special party" is defined in Rule 2(1) as follows:

> 'special party' means a party who is a child or who is or appears to be mentally incapable for the purposes of the *Substitutes 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;

47 The *Family Rules* contain a number of provisions respecting special parties: Rule 4(2) gives the court the power to authorize someone to represent a special party, Rule 4(3) provides the court with the ability to appoint the Children's Lawyer to be the representative of a special party, but only with that official's consent, Rule 17(19) provides that no agreement involving a special party that is reached at a conference is effective until it is approved by the court, Rule 18(12) states that accepted offers to settle involving special parties are not binding on the special party without court approval, Rule 20(6) provides that the courts may order someone to be questioned instead of or in addition to special parties, Rule 25.1(16) gives the court the power to order payment of money out of court on behalf of special parties or on behalf of a child who is not a party, and Rule 42(5) states that the Family Case Manager (a person with specified jurisdiction to manage family law cases in the Family Court of the Superior Court of Justice in Ottawa) has no jurisdiction over a case involving a special party.

48 As noted below, the concept of a "special party" was first introduced into the *Family Law Rules* in 1999. Prior to that, the rules designed for family courts just contained a general discretion in the courts to give directions for the representation of a minor or a mentally incapable person as the court considered proper.

49 The wording of Rule 2(1) is confusing and difficult as the first part of the definition would clearly include the Appellant since she is a "party who is a child". However, the definition goes on to state that a "child in a custody, access, child protection, adoption or child support case" is not included in the definition of "special party". Since the Appellant's case is a child support case does this mean that she is not a "special party"? According to the Appellant and the intervener, Justice for Children and Youth, this is exactly the effect of Rule 2(1). According to the Children's Lawyer, it is not and the Appellant is a "special party".

50 In answering this question, it is important to keep in mind the modern principles of statutory interpretation. As summarized by Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014):

> ...the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (page 1)

51 Thus, the modern principle of statutory interpretation emphasizes the importance of a purposive analysis in interpreting legislative instruments. Sullivan notes that in conducting such an analysis, the following principles apply:

(a) All legislation is presumed to have a purpose.

(b) Legislative purpose must be taken into account at every stage of interpretation, including initial determination of the text's meaning.

(c) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purposes should be adopted, while interpretations that do the opposite be avoided (page 259).

52 Rule 2(2) of the *Family Rules* states that "[t]he primary objective of these rules is to enable the court to deal with cases justly" which under Rule 2(3), includes "(a) ensuring that the procedure is fair to all parties; and (b) saving time and expense."

53 If the last part of the definition of "special party" is interpreted as not including the Appellant because she has commenced a child support proceeding, then it is difficult to see that there is any purpose to the definition of special party. What proceedings other than custody, access, child protection, adoption or child support would a child be a party in? Clearly, the definition of "special party" was meant to have some significance as it is a concept that is used throughout the Rules.

54 Further, if children who are parties in child support proceedings are not "special parties", the *Family Rules* would provide no ability to the courts to exercise their discretion, where appropriate, to appoint representation for these children. Given the existence of such discretion in the case of minors in the prior iterations of the *Family Rules* (from which the current rules are derived), it makes no sense that rules designed to promote a just result would be designed to take that discretion away.

55 Therefore, viewed purposively and in context, the purpose of the exclusionary phrase at the end of the definition of "special party" is to exclude children who are the subject-matter of proceedings that are brought by their parents, not to exclude children who have commenced proceedings on their own behalf. Rule 4(7) provides the protection for children who are not parties, by giving the court the discretion to "authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise".

56 The fact that the *Family Rules* make a distinction between children who are "parties" and, therefore, "special parties" is reinforced by the wording of Rule 25.1(16), where the court is given the power to order the payment of money out of court for or on behalf "of a special party or a child who is not a party". This would clearly imply that a child who is a party is a "special party".

57 The other confusing aspect of the definition of "special party" is the reference to "as a result, requires legal representation". Does this mean that if someone is a special party, he or she must have legal representation? In view of the clear wording of Rule 4 and the stated purpose of saving expense, the answer to this question is "no". Under Rule 4, a party to a family law proceeding may act in person, be represented by a lawyer and, with the permission of the court, be represented by a non-lawyer. In the case of a special party, the court may order someone to represent that party, but the Rule imposes no requirement that the person who is ordered to provide that representation must be a lawyer. The only reference to a special party requiring "legal representation" is in the definition section, a section that employs the phrase in a descriptive sense and is not the operative portion of the *Family Rules* that deals with representation for special parties.

58 In summary, under the *Family Rules*, the Appellant is a special party for whom the court has the discretion to provide representation. In this case, there is no need for the court to exercise its discretion in this regard as the Appellant does have legal representation.

59 Nowhere in the *Family Rules* is there a reference to the need for a minor to have a litigation guardian. Is this a gap such that the court should look to the *Civil Rules* for guidance or was it a deliberate choice by the legislative bodies charged with making rules for family law proceedings that the court should respect? As already alluded to, to answer this question, it is necessary to review the historical background of the *Family Rules*.

Historical Background to the Family Rules

60 Prior to 1978, the laws regarding support for wives and children were complicated and overlapping. The only way a child could obtain support for himself or herself was to launch a quasi-criminal proceeding under the *Deserted Wives' and Children's Maintenance Act*, R.S.O. 1970, c. 128. Instituting such a proceeding required the highly- inflammatory step of serving a summons on the father (only fathers were liable under the *Act*), often by a police officer. The matter would then be tried pursuant to the procedures that regulated summary criminal trials set out in the *Summary Convictions Act*, R.S.O. 1970, c. 450.

61 Until 1977, there were no special rules governing family law proceedings. Proceedings in the former juvenile and family courts were quasi-criminal in nature and were governed by the *Summary Convictions Act*, local practice, and the rules of natural justice. Family cases brought in the Supreme and County or District Courts used the ordinary Civil Rules, which required minor parties to have a next friend or guardian *ad litem*.

62 In the mid-1970's, the Ontario Law Reform Commission made a number of recommendations for family law reform (Ontario Law Reform Commission, *Report on Family Law, Part V -- Family Courts* (Toronto: Ministry of the Attorney General, 1974) and Ontario Law Reform Commission, *Report on Family Law, Part VI -- Support Obligations* (Toronto: Ministry of the Attorney General, 1975)).

63 First, the Commission recommended the creation of a separate family court with unified jurisdiction over all family matters (a recommendation that was endorsed by the Law Reform Commission of Canada two years later) (Law Reform Commission of Canada, *Report -- Family Law* (Ottawa: Information Canada, 1976)).

64 Second, it recommended the reform of the legislation governing child support in Ontario so that all children had the right to be supported by both their parents.

65 Third, it recommended that the procedure in family courts should reflect the unique context of family disputes. The principles set down to guide those procedures were flexibility, aimed at allowing "spouses and children to be treated as individuals with individual problems, to discourage further hostility between parties, to avoid jeopardizing any possible chance of reconciliation and settlement, and to minimize the inevitable insecurity and indignity felt by the parties". In addition to flexibility, the Commission recommended that the procedures focus on accessibility such that the family courts' procedures "**be as simple and inexpensive as possible and that delays be minimized" (**emphasis added). As the Commission recognized, family problems are often urgent and most family law litigants do not have large resources (*Report on Family Law*, 1974, at pp. 46-47).

66 Following the Ontario Law Reform Commission's Reports, a number of changes did occur that fundamentally affected the conduct of family law in Ontario. The *Family Law Reform Act, 1978*, S.O. 1978, c. 2 was passed. Like the *Family Law Act* which replaced it, the *Act* expressly gave children the right to apply on their own behalf for support from both their parents. In 1977, a Unified Family Court was created in Hamilton-Wentworth on a pilot basis, a court that was made permanent in 1982. Finally, the Provincial Courts Rules Committee and Lieutenant Governor in Council (the rule-maker for the Unified Family Court) implemented the Commission's recommendations to pass specialized rules for the family courts. Such rules were first passed for the Unified Family Court in 1977 and for the Provincial Court (Family Division) in 1978.

67 Prior to the passage of these rules, the *Rules of Practice and Procedure of the Supreme Court of Ontario*, R.R.O. 1970, Reg. 545 contained the following provision regarding the ability of "infants" to sue or counterclaim:

> 92(1) An infant may sue or counterclaim by his next friend and may defend by his guardian appointed for that purpose or by the Official Guardian, as the case may be.

68 However, the Rules Made Under the Unified Family Court Act, 1976, O. Reg. 450/77, r. 8 and the Rules of the Provincial Court (Family Division), O. Reg. 210/78, r. 8 did not contain a similar provision. Instead, they both took a different course when it came to the participation of minors and persons "of unsound mind" in proceedings before their courts, focusing on the courts' ability to supervise how such people are represented before them, as opposed to requiring that they have an alter ego to give instructions on their behalf. In particular, both sets of rules contained the following identical provision:

> 8. Where a court is satisfied that the interests of a minor or a person of unsound mind are involved in the proceeding, the court may give such directions for the representation of the minor or person of unsound mind as the court considers proper.

69 Both sets of rules made it clear that their purpose is to "secure an inexpensive and expeditious conclusion of every proceeding consistent with a just determination of the proceeding". Given this purpose, which flows directly from the Ontario Law Reform Commission's recommendations regarding the need for more flexible, accessible and simpler family law procedures, it is apparent that, at this point, a deliberate choice was made not to adopt the more cumbersome and complicated requirements of the Supreme Court rules for the participation of minors in family law proceedings. Instead, the court was given the absolute discretion to control how minors were represented.

70 The first time that a Family Rules Committee was established to make rules, subject to the approval of the Lieutenant Governor in Council, in family law proceedings was in 1990 after the passage of the *Courts of Justice Amendment Act, 1989*, S.O. 1989, c. 70. Under this *Act*, the Provincial Court (Family Division) was amalgamated with the Provincial Court (Criminal Division) to become the Ontario Court (Provincial Division). The District Court was merged with the Supreme Court to become the Ontario Court (General Division) and the Unified Family Court was continued as a separate superior court of record in Hamilton-Wentworth presided over by a federally-appointed judge of the Ontario Court (General Division) who was also authorized by a provincial Order-in-Council to exercise the jurisdiction of a judge of the Ontario Court (Provincial Division).

71 The court's discretion to provide representation for minors who were parties before them in family law proceedings remained unchanged after the creation of the Family Rules Committee (See: *Rules of the Ontario Court (Provincial Division) in Family Law Proceedings*, R.R.O. 1990, Reg. 199, r. 10; *Rules of the Unified Family Court*, R.R.O. 1990, Reg. 202, r. 9). As the Unified Family Court was renamed the Family Court in 1995, its rules were renamed the *Family Court Rules.* Again, the discretion of the court to provide representation for minors remained unchanged (*Family Court Rules*, R.R.O. 1990, Reg. 202, r. 9, as am. by O. Reg. 282/95, s. 1).

72 In 1999, a single set of Family Law Rules was enacted to govern all family law proceedings in both the Ontario Court of Justice and the Family Branch of the Superior Court (*Family Law Rules*,

O. Reg. 114/99). In 2004, the *Family Law Rules* were extended to all family law matters in the Superior Court, whether Family Branch or not (*Family Law Rules,* O. Reg. 89/04). The result was one set of rules for all family law proceedings in the province.

73 The 1999 *Family Law Rules* (as amended) are the rules in force at the present time. For the first time, the concept of a "special party" was introduced. However, while the wording of the rules was changed, the fundamental direction regarding the participation of minors in family law proceedings remained the same -- the focus is on providing the court with discretion to provide for representation, not on mandating that minors obtain a litigation guardian. As put by Benotto J., as she then was, in her article "The Family Law Rules: Why?" (Winter 2004) 23 Advocates' Soc. J. 3, 6-9, "The Family Law Rules reflect a philosophy that family law cases should not be treated in the same way as other civil matters".

74 Thus, as this history demonstrates, from as early as 1977, family law took a different direction procedurally than civil law regarding child litigants. In taking this direction, the Provincial Court Rules Committee, the Lieutenant Governor in Council, and the Family Law Rules Committee must be presumed to have been aware of the rationale behind the requirement in the civil context for young people to have an alter ego in the form of a next friend or litigation guardian. As expressed in *Holmested and Gale on the Judicature Act of Ontario and Rules of Practice*, vol. 2, looseleaf (Toronto: Carswell, 1983) r. 92, note 3, the primary object of this requirement is to ensure that there was someone to answer for the propriety of the action and through whom the court could compel compliance with court orders. However, another important objective is the one alluded to by the motion judge in her reasons, namely, to ensure that there is someone to recover costs from in the event that the minor's action fails.

75 In the civil context, when a minor commences an action, it is usually the case that he or she has a parent or a parental figure who is willing to assume the responsibilities of a next friend or litigation guardian. In the case of a child who is suing his or her parent for support, it is unlikely that such a parental figure will exist. If there is one in the child's life, the action will usually be commenced by the parent, in the parent's name. In most cases where children sue their parents for support, they have withdrawn from parental control and have no adult figure in their life who would be willing to take on the responsibilities of a litigation guardian. The case at bar is an unusual one as the Appellant is residing with her custodial parent. However, in this case, the Appellant's mother stands to face penalties under the Agreement she signed if the Appellant is successful in her application. Under that Agreement, if the court makes any order for support against the Respondent father, the Appellant's mother is liable to pay the Respondent back the lump sum she received when she signed the Agreement. Thus, according to the Appellant, she, too, finds herself in the position where she has no parental figure who is willing to be her litigation guardian.

76 Some concerns have been expressed that allowing minors to appear without litigation guardians could cause undue problems in the litigation process and might result in the court losing control of its own process. For example, it is true that if a child is unsuccessful in his or her application for child support and has no litigation guardian, it will be harder for the successful party to collect his or her costs. However, impecuniosity has never been a reason for disallowing a party from pursuing an important right in the courts. As the Ontario Law Reform Commission made clear, the right of children to be supported by both their parents is an important right.

77 It is also true that one could have a child that, while capable of giving instructions, may lack the judgment to be reasonable about his or her demands. I simply pause here to note that family law

is full of unreasonable adult litigants who are not required to get alter egos before they can continue with their proceedings. Further, the ability of a court to appoint a representative for the minor allows it in some way to ensure that the minor has someone who can advise him or her about the reasonableness of his or her actions.

78 Dealing with the case at bar, there is no suggestion in the record before us that the Appellant is not capable of giving her legal representative instructions. Viewing the course of the litigation to date, which has been marked by procedural wrangling that has caused delay and the loss of a trial date, one could speculate that the appointment of the litigation guardian could bring sense to the proceedings and result in a settlement. However, that would be pure speculation. This is a case where the "truths" of both parties are real and extreme. For the Appellant, she feels that she, unlike the Respondent's other children, has been disadvantaged economically by virtue of a contract that she was not a party to. As a result, her opportunities in life have been narrowed unfairly. She may also, like most people in her position, feel that she has been abandoned by her father. For the Respondent, having possibly been "tricked" (as he sees it) into having a child, and being forced to give up any ability to have a relationship with that child, he is being faced with financial demands that he says he has no ability or obligation to meet. It is not at all clear that it will be possible to build a bridge between these two positions and effect a settlement.

79 Also, to the extent that a concern arises that a young person's lawyer may be driving the litigation in an unreasonable direction, the *Family Law Rules* provide a remedy. Under Rule 24(9), "[i]f a party's lawyer or agent has run up costs without reasonable cause or has wasted costs, the court may or on its own initiative, after giving the lawyer or agent an opportunity to be heard...; (b) order the lawyer or agent to repay the client any costs that the client has been ordered to pay another party; (c) order the lawyer or agent to personally pay the costs of any party..."

80 In addition to flagging the availability of specific rules to deal with these specific concerns, two larger points need be made. First, the jurisprudence disclosed that for some time children who were parties have appeared without litigation guardians in the provincial courts and the Unified Family Court. If havoc has been caused, it has not been documented. Furthermore, if there were problems with the procedure, one must presume that the Family Law Rules Committee would not have continued in the same direction over 20 years later.

81 Second, the current procedure governing family law cases enables the court through case management to exercise significant supervision over the steps taken by the parties in a proceeding to ensure that they do not stray from the primary objective of the *Family Rules* of dealing with cases justly, including ways which save expense and time. Indeed, in cases like the present one in which a child asserts, as a special party, a claim for child support against a parent, the best case management practice would be to designate one judge to manage the case to a reasonably quick trial date, as Herman J. initially attempted to do .

Conclusion

82 For these reasons, I find that the motion judge erred when she found that the *Family Rules* provided an incomplete code for the participation of children in family law proceedings and, therefore, resorted to the *Civil Rules* to order the Appellant to be represented by a litigation guardian. The *Family Rules* provide their own code for the participation of children, a code that does not include the need for a litigation guardian. As a result, I would set aside the order of the motion judge requiring the Appellant to appoint a litigation guardian. In view of this finding, there is no need to

deal with the arguments surrounding who should be the Appellant's litigation guardian or to deal with the constitutional arguments that were raised on the appeal.

83 As mentioned, this case no doubt would benefit from the appointment of a designated case management judge who would manage the proceeding to a new fixed trial date.

84 Failing agreement, the parties may make brief written submissions (not more than 5 pages) on the question of costs. The Appellant and the interveners shall make their submissions within 10 days of the release of these reasons; the Respondent shall have 10 days to respond and the Appellant shall have 5 days to make reply submissions, if any (not more than 2 pages).

H.E. SACHS J.
E. FRANK J.
D.M. BROWN J.