Date: 20001204
Docket: CA 164077

NOVA SCOTIA COURT OF APPEAL
[Cite as: Mills v. Hardy, 2000 NSCA 140]

Bateman, Flinn and Oland, JJ.A.

BETWEEN:
CECIL ALLISTER MILLS

Appellant

- and -
TENA LOUISE HARDY

Respondent

REASONS FOR JUDGMENT

Counsel: Appellant in person
Respondent did not appear

Appeal Heard: November 23, 2000

Judgment Delivered: December 4, 2000

THE COURT: Appeal dismissed per reasons for judgment of Bateman, J.A.; Flinn and Oland, JJ.A. concurring.

BATEMAN, J.A.:

[1] Cecil Allister Mills has appealed the May 11, 2000 decision of Justice Darryl Wilson of the Supreme Court (Family Division) refusing his request to have the

Court appoint counsel for him, ancillary to a custody dispute. Mr. Mills represents himself. The respondent has not participated in the appeal.

BACKGROUND:

[2] According to the information provided by Mr. Mills, he and his former common law spouse, Tena Louise Hardy separated in September of 1997, having cohabited for 17 years. They each seek custody of their child. Ms. Hardy has apparently had interim custody pending final resolution of their applications. They have appeared in Court several times since 1997 and have attended pre-trial conferences. Mr. Mills has been represented by counsel from time to time both privately funded and pursuant to a legal aid certificate. Those solicitor-client relationships have all ended. Mr. Mills says that he cannot now find a lawyer to represent him, although he continues to hold a legal aid certificate. He asked Justice Wilson, who has been overseeing this case, to appoint a lawyer for him.

ISSUES:

[3] Mr. Mills frames the issues on appeal as follows:

> 1. Does the Canadian Charter of Rights and Freedom apply to the May 11, 2000 decision of Judge Darryl Wilson to deny appointing legal counsel?
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> 2. Does the decision of May 11, 2000 violate ss. 7 of the Canadian Charter of Rights and Freedoms of the Appellant?
>
> 3. Does the decision of May 11, 2000 violate ss. 10(b) of the Canadian Charter of Rights and Freedoms of the Appellant?

> 4. Does the decision of the Learned Trial Judge of May 11, 2000, violate ss. 11(d) of the Canadian Charter of Rights and Freedoms of the Appellant?
>
> 5. Did the Learned Trial Judge err in law in that he failed to appointing legal counsel to represent the Appellant in his custody proceedings?
>
> 6. Did the Learned Trial Judge err in law in that he allowed hearings to continue with the Appellant not having legal representation to present his case.

[4] Summarizing, Mr. Mills asserts here that he has a right to counsel or a right to lay representation and that the judge erred in denying him those rights.

ANALYSIS:

[5] This is an appeal from a discretionary interlocutory order. In **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.** (1990), 96 N.S.R. (2d) 82, Matthews, J.A. wrote at p. 85:

> The approach an appeal court must adopt in considering a discretionary order made by a chambers judge has been stated by this Court in **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, wherein Chief Justice MacKeigan in delivering the unanimous judgment of the Court on an appeal concerning an interlocutory injunction stated at p. 333:
>
> > "This Court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result."

(a) The right to counsel:

[6] In his grounds of appeal Mr. Mills has raised ss.10(b) and 11(d) of the **Charter**. Section 10(b) provides that ". . . [e]veryone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right". Pursuant to s. 11(d) ". . . [a]ny person charged with an offence has the right

to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". In this proceeding Mr. Mills was not arrested or detained nor is he charged with an offence. Neither the s.10(b) or s.11(d) rights are engaged.

[7] Mr. Mills asserts, as well, a right under s.7 of the **Charter** which provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In **New Brunswick (Minister of Health and Community Services) v. G.(J.),** [1999] 3 S.C.R. 46 a mother, who was denied legal aid in child welfare proceedings, was found, in the circumstances of that case, to be entitled to court appointed counsel. There the court held that s.7 guarantees every parent the right to a fair hearing when the state seeks to obtain custody of their children. While a parent need not always be represented by counsel in order to ensure a fair custody hearing, in some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel. While it is clear that in **G.(J.)** the context of the discussion of the right to counsel is a state apprehension proceeding, the majority judgment regularly refers to a "custody proceeding" rather than an apprehension or wardship proceeding. This

could leave the impression that the court is speaking generally of all custody proceedings, not just state action to take a child from his or her parents. Lamer, C.J. does say, however, at § 104, in setting out the factors to be considered on a request for appointment of counsel: "I hasten to add that I am limiting my comments here to child protection proceedings, and need not and should not comment as to other kinds of proceedings."

[8] Here, it is not the state seeking to take Mr. Mills' child. This is a proceeding between the two parents. I am unaware of any decisions extending the ambit of **G.(J.)** to private litigants. It is important to note, as well, that Mr. Mills has not been denied funding for counsel. In that regard there is no "state action" akin to that in **G.(J.)** which would, *prima facie*, call for **Charter** scrutiny. Whether the judge's decision is "state action" attracting a **Charter** inquiry need not be resolved here (see for example, **R.W.D.S.U. v. Dolphin Delivery Ltd**., [1986] 2 S.C.R. 573, **Hill v. Church of Scientology of Toronto**, [1995] 2 S.C.R. 1130, **B.C.G.E.U. v. British Columbia (AG)**, [1988] 2 S.C.R. 214.) This appeal can be resolved on its facts.

[9] Justice Wilson found on the facts that the appointment of counsel was not necessary to Mr. Mills having a fair trial. That decision is deserving of deference

by this Court, particularly where the appeal is an interlocutory one as here. As the majority said in **G.(J.),** per Lamer, C.J. at § 82:

> . . . When a trial judge decides that an indigent parent does not need legal representation for there to be a fair custody hearing, the judge's finding should ordinarily be accorded deference by a reviewing court if the reviewing court becomes seized of the matter prior to the commencement of the hearing pursuant to an interlocutory appeal. This is because whether counsel for the parent is necessary to ensure the fairness of the hearing depends on a consideration of the factors I outlined above, and a trial judge is generally better positioned than a reviewing court to make this determination. He or she is better situated to make an accurate assessment of the complexity of the proceedings and, in particular, the parent's capacities. Moreover, the trial judge is under a duty to ensure a fair hearing, and has the ability to assist the parent in the proceedings, within the limits of his or her judicial role. Even if the parent is in need of some assistance, the judge may feel that he or she can intervene sufficiently to ensure the fairness of the hearing. Therefore, an appellate court should be wary of overturning a trial judge's decision, assuming that the appropriate factors are considered.
>
> (Emphasis added)

[10] Nor, said the Court, is the appointment of counsel always essential to a fair trial:

> [86] I would like to make it clear that the right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting that individual's right to life, liberty, or security of the person. In particular, a parent need not always be represented by counsel in order to ensure a fair custody hearing. The seriousness and complexity of a hearing and the capacities of the parent will vary from case to case. Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.

[11] The Court in **G.(J.)** set out the factors to be considered on a request for appointment of counsel:

> [103] As similar cases may arise in the future, I will briefly outline the procedure that should be followed when an unrepresented parent in a custody application seeks state-funded counsel. The judge at the hearing should first inquire as to whether the parent applied for legal aid or any other form of

> state-funded legal assistance offered by the province. If the parent has not exhausted all possible avenues for obtaining state-funded legal assistance, the proceedings should be adjourned to give the parent a reasonable time to make the appropriate applications, provided the best interests of the children are not compromised. It goes without saying that if the parent, whether or not he or she is able to pay for a lawyer, chooses not to have one that there will be no entitlement to state-funded legal assistance: see *Rowbotham*, supra, at p. 64. This is because the parent voluntarily assumes the risk of ineffective representation, for which the government cannot be held responsible.
>
> [104] If the parent wants a lawyer but is unable to afford one, the judge should next consider whether the parent can receive a fair hearing through a consideration of the following criteria: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent. The judge should also bear in mind his or her ability to assist the parent within the limits of the judicial role. If, after considering these criteria, the judge is not satisfied that the parent can receive a fair hearing and there is no other way to provide the parent with a lawyer (i.e., pursuant to a statutory power to appoint counsel), the judge should order the government to provide the parent with state-funded counsel under s. 24(1) of the *Charter*. I hasten to add that I am limiting my comments here to child protection proceedings, and need not and should not comment as to other kinds of proceedings.
>
> (Emphasis added)

[12] I again emphasize that Mr. Mills has been provided with access to state funded counsel through a legal aid certificate. He was asking Justice Wilson not to authorize funds for counsel, but to impose a solicitor-client relationship. Justice Wilson, in declining to do so, said (transcript December 20, 1999):

> **THE COURT:** Ah, Mr. Mills, the matter has been going on for a year and a half. You've had three or four lawyers. You failed to show up on on [sic] scheduled dates. The court's not not [sic] granting you any adjournments for lawyers. You've had a lawyer represent you. Your lawyer withdrew. That is your it's your difficulty, you're the source of the problem. With yourself and the lawyers, this matter has been ongoing for a long period of time. You've held it hostage by by by not [sic] by changing lawyers so I'm certainly not granting you any adjournment to have a lawyer. If you are having difficulty

> with lawyers, it is your own fault, you understand that. You'll have to represent yourself. You didn't show up when you were scheduled to give evidence. We've had to adjourn this, you've inconvenienced this court on many occasions. You you've frustrated the process that's where we are today, Mr. Mills. That's what's happened. We've attempted to try to resolve what's best for this child and you have frustrated that process. . . .
>
> (Emphasis added)

[13] At a pre-trial conference on May 2, 2000 Mr. Mills again asked the judge to appoint counsel. According to the transcript, Mr. Mills had previously indicated, when the dates were set for the custody hearing, that he did not intend to have counsel. It was his intention that a lay person, Bill O'Neill would be assisting him. There was discussion about the extent to which Mr. O'Neill would be permitted to participate at the hearing. At the May 2 conference the judge again pointed out to Mr. Mills that he had had at least two lawyers up to that time and the opportunity to retain counsel. It was important to move the matter, which had been ongoing for two years, to a hearing. The judge advised that he would again assess Mr. Mills' request for the appointment of counsel, considering, in particular, **Civil Procedure Rule** 5.17. On May 11 the parties reconvened and Justice Wilson ruled on the renewed request that counsel be appointed.

> **THE COURT**:. . . I've come to the conclusion that I'm not going to appoint counsel for you. I don't think it's appropriate for the Court to assign counsel in this case. You've had the opportunity to have counsel. If you're able to get counsel on your own with your certificate, that's fine, but if not you'll have to present your case on your own. I believe you can present your case. You're well aware of the circumstances. If you have difficulty in presenting it you'll

> be given ample opportunity. The Court understands that you're not a lawyer and will assist in legal issues, not in the sense of the case, but will make latitudes to assist you in presenting your case. But in terms of actually appointing counsel, the Court is not aware of any section which gives it the authority to appoint counsel.
>
> (Emphasis added)

[14] And after further submissions from Mr. Mills the judge continued:

> Mr. Mills has reiterated his position concerning the appointment of counsel. I appreciate the difficulty in which we all find ourselves. I again reiterate, this matter has gone on for a considerable period of time. Mr. Mills has had two or three counsel in the past appointed by Nova Scotia Legal Aid. There's been a breakdown in those relationships for whatever reason. Now he has a certificate which allows him to have Legal Aid pay for other counsel. The Court has granted adjournments while he has attempted to get counsel but no one will represent him. He's asking this Court to assign counsel. Rule 5.17 talks about assigning to assist, it doesn't talk about representing, and I'm saying that Mr. Mills, despite his protestations that he's not able to represent himself in this difficult matter, I believe he's well aware of the issues; he more than anyone or more than any counsel, of the issues that are before the Court. To assign counsel would only further unnecessarily delay this case. I don't think it's necessary. . . .

[15] I am satisfied that in declining to appoint counsel for Mr. Mills, Justice Wilson properly considered the relevant factors outlined by the Court in **G.(J.)**.

[16] In addition to the passages excerpted above, the transcript reveals that there was extensive discussion about the need to examine witnesses, the fact that there would be expert evidence, and the admissibility of tapes and affidavits. Justice Wilson was well aware of the potential complexity of the proceeding and referred to the court's ability to assist Mr. Mills. The judge was in the best position to assess

Mr. Mills' capacity to present his case without counsel, having presided over the matter for many months.

(b) The right to lay representation:

[17] On Mr. Mills' request to have lay representation there was the following exchange between Justice Wilson and Mr. Mills on May 11, 2000:

> **THE COURT**:. . . The Court indicated also that if you wish to have someone assist you and if Mr. O'Neill is assisting you, that's fine, you can rely upon him but you represent yourself in terms of making representations to the Court. I don't want to hear representation from another person. . .
>
> The Court has indicated that it is prepared to assist this process and try to determine the admissibility of some evidence beforehand, on a before trial basis. Hopefully, if that would assist in trying to narrow the issues and allow you to present the case in a more logical manner.
> ....
>
> **MR. MILLS**: . . . I ask two things of the Court, and they are to appoint legal counsel to represent me as pursuant to the Procedure Rules; two, I have a lay person to present my case as with *Rule 5.04* of the *Rules of the Family Court* and *5.10* concerning [Inaudible - word unclear] ... I'm not sure if I pronounced that properly, but Your Honour, *5.10* says that: "Any person may with the leave of the Court and without becoming a party to intervene in a proceeding as a friend of the Court for the purpose of assisting the Court." . . .
>
> **THE COURT**: And I don't think Mr. O'Neill would fit in that category as a "friend of the Court to assist the Court". He doesn't fit into that particular category. Mr. O'Neill, I understand, is providing assistance to you and if you want to rely upon him outside the Court setting that's up to you, if he's helping you organize things and you want to accept that, that's fine, but in terms of making representations to the Court you are the party and I think it's important that you make the representation. If you want to have Mr. O'Neill present and speak to him about it, that's your decision, but the Court wants to hear from you. Mr. O'Neill is not a lawyer. He may have been in Court and assisting people and making representations in other cases but I don't think it's appropriate in these circumstances, given the nature of the conflict. I don't think it's important to have a third person interjected into it. And really, Mr. Mills, I've listened to you and I do think you have the ability to present this matter. You're not a lawyer but you're certainly familiar with your son's interests and you can

> bring that to the Court's attention. I think you're able to do that. Now I think it's important that someone hear this and conclude it. So I think you can present your case and you can present your concerns about Ms. Hardy being the custodial parent of the child or the access parent for the child. I think you know the issues and you can bring those concerns to the Court in your evidence. You can arrange for Dr. Rajkhowa to testify.
>
> The Court is also well aware there is a long history of conflict between you and Ms. Hardy, and the Court doesn't want this to become a hearing in which all of that ... that becomes the main focus of the hearing. There may be parts of the conflict that are important to hear in terms of if it impacts on the child, but the Court doesn't want to get into a long hearing of the conflict between the two of you because I'm well aware that there is this conflict and the difficulty you have in dealing with one another, but the issue is to try to resolve this for the child and bring it into the Court setting so it can be finalized. I think you can do that. I think you can bring your concerns and state your wishes to the Court, and that's what I'm trying to get done. I'm trying to move it along so we can go ahead, and I'm giving the ruling and that's it. Now I guess unfortunately you have to live with it. I'm saying that I'm not assigning counsel to you, I'm not allowing Mr. O'Neill to come here and take over representing you. If you want to get his advice, you can do that.

(Emphasis added)

[18] **Family Court Rule** 5.04, cited by Mr. Mills, does not apply to proceedings in the Supreme Court, which are governed by the **Civil Procedure Rules**. Representation of a party by a lay person is a matter within the discretion of the Court. I am not persuaded that there was any error in the exercise of that discretion.

DISPOSITION:

[19] On both issues before the Court I am satisfied that Justice Wilson applied the proper test, considered all of the relevant factors and did not err. I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Flinn, J.A.

Oland, J.A.