NOVA SCOTIA COURT OF APPEAL

Citation: *C.S.J.L.M. v. Nova Scotia (Community Services)*, 2019 NSCA 59

Date: 20190711
Docket: CA 486242
Registry: Halifax

Between:

C.S.J.L.M.

Appellant

v.

Minister of Community Services

Respondent

Restriction on Publication: s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	June 20, 2019, in Halifax, Nova Scotia
Subject:	Mootness
Summary:	A Judge of the Family Court of Nova Scotia directed appointment of a litigation guardian for a young person for purposes of an application for a Secure Treatment Order under s. 56 of the *Children and Family Service Act*. That order expired after 45 days however the young person appealed the appointment of the litigation guardian.
Issue:	Was the appeal moot and, if so, should the Court exercise its discretion to decide the issue raised by the appellant?
Result:	Appeal dismissed without costs. Issue was moot and the Court was not prepared to exercise discretion.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 5 pages.

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Judges: Wood, C.J.N.S.; Fichaud and Bryson, JJ.A.

Appeal Heard: June 20, 2019, in Halifax, Nova Scotia

Held: Appeal dismissed without costs, per reasons for judgment of Wood, C.J.N.S.; Fichaud and Bryson, JJ.A. concurring

Counsel: Joshua Beardon, for the appellant
Peter C. McVey, Q.C. and Sarah Lennerton, for the respondent

Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

SECTION 94(1) PROVIDES:

> 94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Reasons for judgment:

[1] On February 12, 2019, the Honourable Judge Corrine E. Sparks of the Family Court for the Province of Nova Scotia issued a Secure Treatment Order (the "Order") pursuant to s. 56 of the *Children and Family Services Act*, S.N.S. 1990, c. 5 with respect to the young person, C.S.J.L.M ("C.M."). It remained in effect until March 28, 2019 when it expired in accordance with its terms. A similar order had previously been granted in October 2018.

[2] The Order was issued following a brief hearing. C.M. arrived at court with counsel intending to oppose the Minister's application. The hearing judge determined that a litigation guardian should be appointed for C.M. and directed that this take place. The guardian then instructed counsel to consent to the Order.

[3] C.M. has brought this appeal to challenge the hearing judge's decision to appoint a litigation guardian for him. Counsel for the Minister argues that the appeal is moot because the Order expired on March 28, 2019 which brought the proceeding to an end. The appointment of a litigation guardian was only for purposes of that hearing. For the reasons that follow, I agree with the Minister's submissions and dismiss the appeal on the basis of mootness.

Background

[4] On October 11, 2018, the Minister made an earlier application for a Secure Treatment Order with respect to C.M. That application was heard by Associate Chief Judge S. Raymond Morse who granted the order. No litigation guardian was appointed for purposes of that proceeding. However, after the hearing, Associate Chief Judge Morse suggested that the parties should consider the possibility of a litigation guardian for C.M. in any future proceeding. According to the affidavit of Lindsey Parker, affirmed on April 11, 2019, which was filed as fresh evidence on the appeal by agreement, the following exchange took place between Associate Chief Judge Morse and counsel:

> 12. After the hearing, Judge Morse went off record and indicated that [C.M.], as a youth with an intellectual disability, might require a litigation guardian at any future hearing, and directed that [C.M.'s] counsel consider this if the matter returned for a review or renewal.

[5] At the hearing which is the subject of this appeal, counsel for the Minister advised Judge Sparks of Associate Chief Judge Morse's comments. She responded as follows:

> THE COURT: Well, this is the kind of situation where the young person has intellectual deficits and another Court has ordered that he have a guardian. And I'm not sure that it's a discretionary matter when another judge has ordered that there be a guardian appointed for this young person. I have read through the affidavit and certainly I'm satisfied that he has compromising intellectual deficits. And although he may seem as if he's full functioning ... that is [C.M.] may seem as if he's fully functioning to legal counsel, that's really not the test.
>
> So I think once a sitting Family Court judge has made a pronouncement that a young person should be represented by a guardian, that should be adhered to unless there's a compelling reason to deviate from the judge's ruling. So I'm giving you an opportunity to address that issue, but I'm not going to second guess Judge Morse and certainly I make my own independent ruling based upon the affidavit of Ms. Parker. There are many instances where the affidavit itemizes [C.M.'s] intellectual disability. So I am ... unless you have a further argument, I'm directing that [C.M.] confer with the guardian.

[6] Neither counsel for the Minister nor C.M. corrected the judge's misunderstanding about whether Associate Chief Judge Morse had issued an order appointing a litigation guardian. The judge's confusion with respect to what was done by Associate Chief Judge Morse is one of the grounds of appeal being advanced on behalf of C.M.

Issue

[7] The issue on which this appeal is to be determined is mootness which, in the context of this case, I would describe as follows:

> Is the appeal moot due to the expiry of the Secure Treatment Order on March 28, 2019 and, if so, should the Court exercise its discretion to hear the matter in any event?

The Standard of Review

[8] Since the issue of mootness arises in first instance at this Court, there is no standard of review which is applicable.

Analysis and Disposition

[9] Both counsel agree that the expiry of the Order on March 28, 2019 also terminated the order appointing the litigation guardian. If new proceedings are initiated with respect to C.M., they say the question of whether a litigation guardian should be appointed will be decided afresh based upon the evidence filed and the legal submissions made at that time.

[10] Even if a matter is moot, the court retains discretion to consider the issue in appropriate circumstances. The seminal decision from the Supreme Court of Canada on the issue is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. There the Court said that, when considering its discretion to decide a matter which is moot, a court should consider the rationales behind the doctrine of mootness which are:

1. Necessity for an adversarial context which is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

2. The importance of conserving scarce judicial resources and considering whether the circumstances of the dispute justify applying those resources to its resolution.

3. Sensitivity to the courts' adjudicative role and ensuring that it will not intrude into the role of the legislative branch by pronouncing judgments in the absence of a dispute affecting the rights of litigants.

[11] These principles were discussed and applied by this Court in *Nova Scotia (Community Services) v. Nova Scotia (Attorney General)*, 2017 NSCA 73.

[12] Counsel for C.M. argues that we should exercise our discretion and consider the merits of the appeal. This is based on a concern that the issuance of the order in this case might be given some precedential weight in a future proceeding when the appointment of litigation guardian is being considered. This stems, in part, from

comments found in the Minister's factum filed on this appeal. At paragraphs 117 and 118, counsel for the Minister states as follows:

> 117. The second judge clearly did believe the first judge had made a **ruling** to which she should defer: "unless there's a compelling reason to deviate from the judge's ruling."
>
> 118. This was not accurate. The hearing judge must have misunderstood what counsel said. **If there was an Order in place, this would be determinative**: *Family Court Rule* 5.06(1)(b).
>
> [emphasis added]

[13] Counsel for C.M. says that the statement that an order by Associate Chief Judge Morse would have been determinative at the subsequent hearing suggests that the order under appeal might have application in the future. For this reason, counsel for C.M. argues that we should consider the merits of the appeal.

[14] In oral argument, counsel for the Minister agreed that Judge Sparks' order has no effect, now or in the future. Any new application for appointment of a litigation guardian would be decided based upon the circumstances which then exist, the evidence presented and the submissions of counsel.

[15] In this case, neither counsel for the Minister nor C.M. made any substantive submissions to the hearing judge with respect to appointment of the litigation guardian. The arguments presented on appeal were not made before Judge Sparks. In addition, the evidentiary record was directed to the necessity of a Secure Treatment Order but not whether C.M. required a litigation guardian in order for the matter to proceed. Consequently, this Court does not have the benefit of the hearing judge's view, informed by a proper record, on the issue we are asked to decide.

[16] I am satisfied that, in the circumstances of this case, the Court should not exercise its discretion and decide what would otherwise be a moot issue. Should future proceedings arise involving C.M., where the Minister believes it would be appropriate to seek appointment of a litigation guardian, that application should be supported by appropriate evidence and submissions. The hearing judge will make their decision based on the circumstances which exist at that time.

[17] For the above reasons the appeal is dismissed without costs.

Wood, C.J.N.S.

Concurred in:

Fichaud, J.A.

Bryson, J.A.