

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** L.F. v. Children's Aid Society of Halifax, 2005 NSCA 49

**Date:** 20050317

**Docket:** CA 237775

**Registry:** Halifax

**Between:**

L.F. and C.V.

Appellants

v.

Children's Aid Society of Halifax

Respondent

**Restriction on publication:** Pursuant to s. 94(1) Children and Family Services Act.

**Judge:** The Honourable Justice Joel Fichaud

**Application Heard:** March 11, 2005, in Halifax, Nova Scotia, In Chambers

**Held:** Application to permit amendment to notice of appeal dismissed.  
The court gave directions re appointment of counsel.

**Counsel:** The appellants in person  
Pam MacKeigan, for the Children's Aid Society of Halifax  
Walter Yeadon, for the Nova Scotia Legal Aid Commission  
Glenn Anderson, for the Attorney General of Nova Scotia

**Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.**

**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.**

**Decision:**

- [1] This is an application to permit an amendment to the notice of appeal and for appointment of counsel.

***Background***

- [2] The appellants' daughter M.F. was born on (*Editor's note- birthdate removed to protect identity*). On January 14, 2004 the Children's Aid Society of Halifax ("CAS") applied for an order that M.F. was in need of protective services pursuant to ss. 22(2)(b) and (g) of the *Children and Family Services Act* ("CFSA"). The CAS also sought a supervision order for M.F.
- [3] The proceedings have been heard by Justice Smith (as she then was) of the Supreme Court (Family Division).
- [4] On January 15, 2004 the Supreme Court found, for purposes of s. 39(3) of the *CFSA*, that M.F. was in need of protective services, issued a temporary care and custody order and adjourned the matter for completion of the interim hearing.
- [5] After completing the interim hearing, on February 12, 2004 the Supreme Court confirmed that M.F. was in need of protective services and granted a further temporary care and custody order.
- [6] On March 22, 2004 the Supreme Court found that M.F. was in need of protective services under s. 22(2)(g) of the *CFSA*.
- [7] In the spring of 2004 C.V., M.F.'s mother, had disappeared with the child. In May 2004 the authorities located and apprehended M.F. in Halifax.
- [8] On June 9, 2004 Justice Smith ruled that M.F. should remain in the temporary care and custody of the CAS.
- [9] Under the *CFSA* there are to be periodic disposition review hearings before the final disposition hearing. On September 7, 2004 the Supreme Court began a disposition review hearing. The CAS requested an order, under s. 42(1)(d) of the *CFSA*, that M.F. remain in the temporary care and custody of the CAS. The CAS requested an order that the appellants, parents of M.F., obtain a psychological/psychiatric assessment and a parental assessment. The CAS also sought an order that the CAS offer rehabilitative and support services to the appellants, as agreed between the parties, and rehabilitative and support services for M.F. as deemed to be in her best interest.
- [10] On October 14, 2004, during the review hearing, Justice Smith considered whether to appoint counsel. Throughout the proceeding, L.F. and C.V. had appeared without counsel. They had expressed aversion to the legal profession. They had been given Legal Aid certificates for counsel but,

nonetheless, had not used these certificates to retain counsel. Justice Smith decided that counsel should be appointed as *amicus curiae*. She explained the role of the *amicus*:

I am not anticipating that the *amicus* will be actively involved in the questioning of witnesses, or in making submissions to the court, unless Mr. [L.F.] or Ms. [C.V.] specifically request this assistance. I want the *amicus* to be available to assist the respondents by providing advice on procedural, evidentiary and substantive matters.

- [11] Section 46 of the *CFSA* describes what matters are to be considered on the review hearing and the powers of the court after completion of the review.
- [12] By written decision dated November 26, 2004 and an order dated November 30, 2004, Justice Smith found that M.F. continued to be a child in need of protection. She accepted the expert psychiatric evidence that L.F., M.F.'s father, suffers from delusional disorder (persecutory type) as well as a personality disorder. She found that L.F.'s delusional views have placed M.F. at substantial risk of physical and emotional harm.
- [13] Justice Smith found that C.V., M.F.'s mother, was actively involved in the disappearance of M.F. and in an armed stand off which occurred at their home in May 2004. She found that C.V.'s actions have placed M.F. at substantial risk of physical and emotional harm.
- [14] Justice Smith concluded that it was in the best interests of M.F. that she issue a further order granting temporary care and custody of M.F. to the CAS until further order of the court and, in any event, for a period not to exceed three months.
- [15] Justice Smith scheduled the next review hearing for January 2005. According to the *CFSA*'s time limits, the final disposition hearing would be heard by June 2005.
- [16] On December 24, 2004, C.V. prepared a letter addressed to the Attorney General of Canada and the Attorney General of Nova Scotia stating that C.V. had set a hearing date in the Supreme Court of Nova Scotia to consider four constitutional questions:
  1. Whether psychiatric and or psychological assessments of a parent or parents whose offspring are in state care or who are subject to becoming state wards by virtue of the *Children and Family Services Act*, 1990 c. 5 are relieving contingencies within s. 22(2)(f) and s. 22(2)(g) of the *Act* and if so, whether these assessments violate parental conscience, thought, belief's, opinion, and expression protected by s. 2(a) and s. 2(b) of the *Charter* and if so, do discriminatory effects weighted between the best interest of the child to be reared within an a familial context and the psychological integrity of the parent(s) pass ss. 1 scrutiny.

2. Whether collective directives, contractual arrangements and payments, and information gathering between departments of Community Services, Justice, and Health for procuring psychiatric and or psychological assessments of parents whose offspring are or who are subject to state wardship:
  - a) is ultra [vires] Parliament's intent;
  - b) violates equality laws under ss. 15 of the *Charter* by mandatory and respository parental participation;
  - c) precludes impartiality that cannot be saved by ss. 1.
3. Whether the embodiment of the *Child and Family Services Act* for Nova Scotia incorporates the use of interpretations and opinions of a parent or parents' mental disposition rendering parental 'mis-fitness' and having the effect of permanent transference from parental authority to state authority violates life, liberty, and security of persons within family, and if so is anticipated life long familial alienation between child and parent(s) a justifiable infringement of ss. 7 by virtue of ss. 1.
4. Whether a court rendering relying on s. 22(2)(f) and s. 22(2)(g) of the *Act*, that a newly born suffers from or is at "substantial risk" of suffering from severe anxiety, withdrawal, depression, and self-destructive and aggressive behaviours bypasses "reasonable and probable" grounds when ordering the infants removal from parental authority and falls short of Canada's founding principles on the rule of the law, the Supremacy of God, professional scrutiny, and reasoned analysis.

The letter is dated December 24, "2003". At the chambers hearing, I was informed by the appellants that the actual date of the letter should be "2004".

[17] The appellants did not properly commence a proceeding to consider the stated constitutional issues. The constitutional issues did not proceed for a hearing in the Supreme Court of Nova Scotia.

[18] Meanwhile, the appellants filed a notice of appeal dated December 23, 2004 to this court from Justice Smith's review decision of November 26, 2004 and order of November 30, 2004. The notice of appeal was signed by C.V. on behalf of both appellants. Neither appellant was represented by counsel.

[19] Appeals under the *CFSA* are subject to statutory time limits. Section 49(4) of the *CFSA* states:

(4) . . . the appeal shall be heard by the Appeal Division of the Supreme Court within ninety days of the filing of the notice of appeal or such longer period of time, not to exceed sixty days, as the Court deems appropriate.

The 150 day period would expire on May 22, 2005. The date of hearing of this appeal has been scheduled for May 13, 2005. The CAS has prepared, filed and served the appeal books.

### *Issues*

[20] This brings me to the contested issues which were heard on the chambers hearing of March 11, 2005. The appellants filed an interlocutory notice which requested (1) leave to amend their notice of appeal to include the constitutional questions, quoted above, that were set out in the letter of December 24, 2004 and (2) appointment of counsel on their behalf for this appeal.

### *Amendment of Notice of Appeal - Constitutional Issues*

[21] *Rule* 62.04(4) states that a notice of appeal may be amended within 20 days of filing and thereafter only with leave of a judge. The 20 days have expired.

[22] I decline to grant leave to amend the notice of appeal. My reasons are these.

[23] The requested new grounds involve constitutional questions which are premised on disputed issues of fact. Neither those facts nor the constitutional issues were litigated at the trial.

[24] The Court of Appeal is not a court of first instance. Substantial legal issues which are intertwined with contested facts should not be introduced at the appeal level. The appellants seek to amend a notice of appeal, not an originating notice. Before serious originating matters may be litigated in this court, it is important that there be a trial which canvasses the contested facts and law and enunciates a decision from which an appeal may be taken.

[25] I note that the *CFSA* requires a final disposition hearing before permanent care and custody may be directed to the CAS. That hearing has not yet begun in the Supreme Court (Family Division).

[26] Further, if the amendment were made, then, according to counsel for the Attorney General, the constitutional issues would be seriously contested. The Attorney General would be entitled to intervene. It would be necessary to consider the filing of pleadings and factums on the constitutional issues. It would be impossible, at this late date, to compress this additional process into the outside time limit for the hearing of this appeal, mandated by s. 49(4) of the *CFSA*.

[27] For those reasons I dismiss the appellants' application to amend the notice of appeal.

***Appointment of Counsel***

[28] *Rule* 62.31(7)(f) permits a chambers justice to order that:

(7) A Judge may order that

...

(f) legal counsel be appointed to represent a party to an appeal pursuant to the *Children and Family Services Act*, where the Court is authorized to do so.

[29] The court's authority to appoint legal counsel, in a case such as this, derives from s. 7 of the *Charter of Rights*. In *New Brunswick (Minister of Health and Community Services) v. G (J)*, [1999] 3 S.C.R. 46, the Supreme Court held that a child protection proceeding challenges the physical and psychological integrity of the parents, whose child has been apprehended by the state. This invokes the parents' "security of the person" interest under s. 7 and requires the application of principles of fundamental justice. Fundamental justice may afford to the parents the opportunity for effective legal representation. The court noted that it is not always necessary that parents be represented by counsel. But in certain cases where the parents are indigent and the custodial issues are serious and complex, fundamental justice may require that the state provide funding for counsel to ensure a fair trial. The court held that such a violation of s. 7 would not be justified under s. 1.

[30] In my view, the child protection proceedings now underway are sufficient to invoke the appellants' security of the person interest under s. 7. The proceedings are sufficiently serious and complex that, if the appellants were unable to afford counsel, it would be necessary that the state provide funded counsel to comply with the principles of fundamental justice. I have no specific evidence on this application respecting the financial circumstances of the appellants. From their submissions, I will assume that they cannot afford counsel.

[31] Under s. 32(1)(b) of the *Charter*, the substantive provisions of the *Charter* apply to the Government of Nova Scotia ("Province") and provincial legislature. The Nova Scotia Legal Aid Commission ("Commission") is established by the *Legal Aid Act*, R.S.N.S. 1989, c. 252 ("Act"). The Commission is the entity funded by the Province and tasked by the *Act* with the function of providing legal aid in appropriate cases. Section 6(2) of the

- Act* states that the Commission acts under the direction of the Attorney General of the Province. Counsel for the Commission attended at this application.
- [32] In my view the Province, through the Commission, is obligated by s. 7 of the *Charter* to offer reasonable funding to the appellants for legal representation in these proceedings where the CAS seeks care and custody of the appellants' child.
- [33] To date, the Commission has fully complied with this constitutional obligation.
- [34] At the hearing of this application I asked counsel for the Commission what has been done to date. Mr. Yeadon noted that he could not fully answer this question unless the appellants waived solicitor client privilege, concerning their discussions with prospective counsel. Both appellants then stated that they waived solicitor client privilege.
- [35] In June 2004, the Commission offered staff legal counsel to act in this CAS proceeding. C.V. met with the Commission's staff counsel, but C.V. declined the offer of representation. The Commission then notified C.V. that if C.V. changed her mind, the Commission's staff counsel would be available.
- [36] In July 2004 the Commission notified C.V. that the Commission has given approval for a Legal Aid certificate respecting this CAS proceeding. The certificate would permit the appellants to retain private counsel who would be reimbursed by the Commission according to the provisions of the *Act*. The Commission has provided to the appellants a list of counsel who work under Legal Aid certificates. The appellants have not retained counsel for this CAS proceeding.
- [37] The Commission has made it clear that the Commission is willing to fund counsel to represent the appellants at a reasonable level under the normal tariff arrangements. L.F. acknowledged at the hearing of this application that the appellants have no complaint with the Commission's willingness to fund counsel to represent the appellants in this proceeding.
- [38] The appellants have had the opportunity to be represented by capable counsel funded by the Commission. They have declined this opportunity.
- [39] The Commission has corresponded with Legal Aid Commissions in New Brunswick, Prince Edward Island and Newfoundland to request names of potential counsel who would be willing to represent the appellants and whom might be acceptable to the appellants. There was no evidence before me as to what, if any, particular response resulted from these initiatives. I understand from Mr. Yeadon and the appellants that, despite these

initiatives, the appellants have not retained counsel who are acceptable to the appellants.

[40] L.F. requested that I order a private law firm to represent him whether or not the law firm is willing to do so. I have no power to make such an order. The *Charter* applies to governments and statutory entities. It does not bind private law firms. Given the fiduciary relationship, such a shotgun arrangement would be unworkable in any event.

[41] The appellants are unrepresented solely because they have chosen to be unrepresented. They have the right to reject counsel. They also have the right to change their mind at this time and to request state funded counsel.

[42] Given these circumstances, in my view, the appropriate remedy is the following:

(a) If the appellants decide to accept the Commission's offer of representation by staff counsel with the Commission, then the Commission shall make reasonable efforts to provide that legal representation under the procedures authorized by the *Legal Aid Act*.

(b) In case the appellants prefer private representation, the Commission shall maintain its Legal Aid certificate or certificates to be honoured with reasonable funding under the procedures in the *Legal Aid Act*.

(c) If the Commission becomes aware of private counsel who would be willing to represent the appellants, then the Commission shall notify the appellants as soon as is reasonably practicable. Whether the appellants retain such counsel is between the appellants and the lawyer involved, and will not be ordered by this court.

(d) In any event, the Commission shall use reasonable efforts to retain counsel who will act as *amicus curiae* for this proceeding in the Court of Appeal. The functions of the *amicus* would be to use reasonable efforts: (1) to review the appeal books and the decision under appeal; (2) to prepare a factum which would make submissions in support of any arguable grounds of appeal; (3) to deliver that factum to the appellants by April 29, 2005; (4) to appear in court on May 13<sup>th</sup>, 2005, the scheduled date of this hearing, and, in the panel's discretion, to make oral presentations and respond to questions from the court. If the appellants wish to file the factum with the court, then by May 6, 2005, the appellants would file the factum with the court and serve a copy on counsel for the CAS. Otherwise the factum would not be

filed or served on the CAS. The Commission would pay the reasonable fees and expenses of this *amicus*, as authorized by the *Legal Aid Act*.

(e) The Commission shall report in writing to the chambers justice, copied to the appellants, no later than Friday, April 8, 2005 on the Commission's efforts to comply with these directions. If the Commission considers it advisable to report in person, the Commission shall give notice of appearance, copied to the appellants, for a chambers date no later than April 8, 2005.

[43] Because of the time limits for the hearing in s. 49(4) of the *CFSA*, the parties should expect to adhere to the time limits in this decision.

[44] There will be no costs of this application.

Fichaud, J.A.