

**IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)**

BETWEEN:

MINISTER OF HEALTH

APPLICANT

- and -

L. V. J.

RESPONDENT

DECISION

HEARD: Before the Honourable Associate Chief Justice Robert F. Ferguson, at Halifax, Nova Scotia on January 8, 2002

DECISION: January 10, 2002 (Orally)

WRITTEN RELEASE: January 25, 2002

COUNSEL: John Underhill, counsel for the Applicant
David Perlmutter, counsel for the Respondent

Krista Forbes, counsel for Litigation Guardian, Vernal Trotter

FERGUSON, A.C.J. (Orally)

Decision Regarding the Appointment of a Litigation Guardian:

The Minister of Health is seeking a declaration that L. V. J., the defendant, is an adult in need of protection. The Originating Notice is dated November 14, 2001, and states, in part:

“TAKE NOTICE that this application will be made on behalf of the plaintiff to the judge presiding in Chambers at the Supreme Court of Nova Scotia (Family Division) at 3380 Devonshire Avenue, Halifax, Nova Scotia, on Wednesday, the 27th day of November, 2001, at the hour of 12:00 o'clock noon, or so soon therefore as the application can be made for:

1. A declaration that the defendant, L. V. J., is an adult in need of protection, pursuant to s. 9(1) of the *Adult Protection Act*,
2. A declaration that the defendant, L. V. J., is not mentally competent to decide whether or not to accept the assistance of the Minister of Health, pursuant to s. 9(3) of the *Adult Protection Act*; and
3. An Order authorizing the Minister of Health to provide the defendant, L. V. J., with services, including placement in a facility approved by the Minister of Health, pursuant to s. 9(3)(c) of the *Adult Protection Act*.

AND TAKE NOTICE that in support of the application will be read the affidavit of Patricia Cosgrove, Adult Protection Worker, a true copy of which is hereto attached, and such other material as counsel may advise, a true copy of which

will be delivered to you or your solicitor not later than four (4) clear days before the hearing of the application.

AND FURTHER TAKE NOTICE that Civil Procedure Rule 6.02 provides as follows:

6.02 (1) A person under disability shall commence or defend a proceeding by his litigation guardian.

(3) A litigation guardian of a person under disability shall act by a solicitor.

At the hearing of the application, should you be found to be a person under disability, a litigation guardian may be appointed for you and that litigation guardian shall be represented by counsel.”

When the application came forward, the applicant, as has become the custom, provided for a proposed litigation guardian with legal counsel to be present. The proposed guardian offered an affidavit and an order was made available to the court providing for such appointment. Mr. L. V. J. informed the court he was opposing the application and the Minister’s request that he be provided with a guardian ad litem.

Also present on this occasion were three of Mr. L. V. J.’ children, two daughters and a son. Although not parties, they were given the opportunity to address the court. The two daughters spoke in favor of the Minister’s application while Mr. L. V. J.’ son supported his father with regard to his views in opposing the application of the Minister and that he be provided with a guardian ad litem.

The court was informed Mr. L. V. J. was currently a patient at the QEII Health Services Center and would be remaining as such until a decision was rendered as to this application.

The application was adjourned pending a hearing to determine if Mr. L. V. J. was a person “under disability” and, as such, be required to defend the Minister’s application by the use of a litigation guardian. This preliminary matter came forward on January 8, 2002. Mr. L. V. J., thanks primarily to the efforts of the proposed guardian ad litem’s counsel (a member of Nova Scotia Legal Aid) was represented by counsel. Dr. David Wood and Dr. Joanne MacDonald testified on behalf of the Minister. It was the intention of the Minister also to have Patricia Cosgrove, an Adult Protection Worker, testify. Ms. Cosgrove had filed an affidavit in support of the initial application. However, the defendant agreed Ms. Cosgrove’s affidavit could be available to the court without the necessity of her being available for cross-examination. Mr. L. V. J. testified on his own behalf.

Mr. L. V. J. was admitted to the QEII Health Center in June 2001. Mr. Jones has a history of previous admissions to hospital. He also has a history of previous involvement with those who administer the *Adult Protection Act*; going back, in fact, to 1995. On these occasions, those who sought such involvement, including family members, suggested Mr. L. V. J. was an adult in need of protective services. On these occasions which included, once in 1995, once in 1996 and five times in 1997, those

investigating concluded Mr. L. V. J. did not meet the criteria of an adult in need of protective services. However, as of November 14, 2001, the Minister has concluded Mr. L. V. J. is an adult in need of protective services and, accordingly, requests such a finding from this court.

Dr. MacDonald is a psychiatrist and testified as an expert witness. On September 11, 2001, she signed a declaration of competency in which she declared that, in her opinion, Mr. L. V. J. is not competent to administer his estate. This declaration outlines the items she considered and the observations she made in coming to this opinion. She testified as to that conclusion.

Dr. Wood, on October 6, 2001, signed a document entitled "Medical Observation Form" stating that Mr. L. V. J., in his professional opinion, was an adult in need of protective services. He testified that he signed this document primarily because of Dr. MacDonald's opinion.

Ms. Cosgrove, an Adult Protection Worker, on October 26, 2001, signed a document entitled "Adult Protection Services Assessment Form." It indicates her conclusion that, in accordance with the medical observation and tests, the Minister seeks an order determining that Mr. L. V. J. is an adult in need of protective services.

Mr. L. V. J. testified as to what had transpired prior to him becoming a hospital patient, of his ability to provide for himself without the services of the Minister and of his wish to return to his apartment as soon as possible.

Civil Procedure Rule 6 is entitled “Infants and Mentally Incompetent Persons.” Rule 6.02(1) states that “A person under disability shall commence or defend a proceeding by his litigation guardian.”

Civil Procedure Rule 1.05(v) states a “‘person under disability’ means a person who is an infant or a mentally incompetent person.” Subsection (r) states: “‘mentally incompetent person’ means a person, not an infant, who is incapable from infirmity of mind of managing his own affairs.”

In response to Mr. L. V. J. application that he be given the right to oppose the Minister’s application without benefit of a guardian ad litem, his counsel notes that Mr. Jones is aware of his current circumstances; is aware of the request of the Minister; knows what he wants and he does not want and, accordingly, should be allowed to conduct his defense without the imposition of a guardian ad litem.

The Minister stresses the evidence, especially that of an expert witness and psychiatrist is supportive of a conclusion that Mr. L. V. J. is a person who is under a

disability as he is a mentally incompetent person and the reason for that is because he is, as a result of infirmity of mind, incapable of managing his own affairs.

There is considerable evidence as to Mr. L. V. J. abuse of alcohol over an extended period of time and, further, that such abuse has impaired his ability to function and provide for himself to the point of endangering his safety. There is evidence chronicling the concern of people, including family members, as to Mr. L. V. J.' safety and even survival during the times he abuses alcohol. This evidence leads to a concern that parties with the best of intentions would seek to have this person, Mr. L. V. J., who clearly abuses alcohol to a point of endangering his health and safety, be labeled as a person under disability because he is mentally incompetent, primarily for the protection, such a designation may bring to that person.

I have concluded from the evidence presented, especially from that of Dr. MacDonald, that such is not the case in this instance. I find the evidence establishes Mr. L. V. J. is currently a person under disability by virtue of being a mentally incompetent person pursuant to Civil Procedure Rule 1.05 as I find the evidence clearly establishes he is incapable from infirmity of mind from managing his own affairs. I say this despite the fact that he presents himself, as counsel indicates, as someone who wishes and is willing to instruct his counsel and has some insight as to what is transpiring at this time.

MR. PERLMUTTER: My Lord, I have a question as it relates to my role in this matter and I'm wondering if, as a result of the proceedings, you feel that you're in a position to determine whether or not Mr. L. V. J. is capable of instructing independent counsel. It only arises in light of the fact that Mr. L. V. J. continues to . . . it seems to me that he and his guardian are going in two different directions in terms of how the matter should proceed with respect to a finding of him being an adult in need of protection which I understand has not been made yet.

THE COURT: I have concluded that what I have been required to determine today was if Mr. L. V. J. is or is not a person under disability. I have concluded that he is. Civil Procedure Rule 6 says a person under disability shall commence or defend a proceeding by his or her litigation guardian. It does not say "may" - it says "shall." That determination precludes him from defending this proceeding other than by way of litigation guardian.

Decision Regarding Finding the Defendant to be an Adult in Need of Protection:

MR. UNDERHILL: The only question I have before the matter then proceeds is that Mr. Trottier's affidavit was sworn on the 27th of November . . . just before the first hearing and I wonder . . . the Minister's position remains unchanged, that we're seeking the declarations and the order laid out in the application. The affidavit would suggest that Mr. Trottier is in agreement with that. He speaks through his counsel but I'm wondering if there is anything more that Mr. Trottier has to add, anything that has

developed since there has been such a long period of time between swearing the affidavit. He's had ongoing contact with Mr. L. V. J..

THE COURT: As a result of the passage of time and anything else he has heard, is Mr. Trottier indicating that the consent he signed on the 27th of November is still valid. Can you say that?

MR. TROTTIER: Yes, My Lord, I've heard nothing new to add to that.

THE COURT: If he can say that the affidavit that he presented to the court remains the same. Yes. That being the case, I'll proceed.

MR. UNDERHILL: The Minister would suggest that the evidence already on file, including the affidavit of Patricia Cosgrove in support of the application, and the evidence that was called by the Minister of Health in support of the application to declare Mr. L. V. J. a person under disability for the matter of making that preliminary determination also supports the application itself and seeks, on a consent basis, the litigation guardian's declarations that Mr. L. V. J. is indeed an adult in need of protection pursuant to section 9(1) of the *Adult Protection Act*. We seek a further declaration that, for the purposes of this application, he is not competent to decide whether or not to accept the assistance of the Minister of Health and an order issue authorizing the Minister of Health to provide services to Mr. L. V. J., including placement in a facility

approved by the Department of Health. I have an order that's prepared for the 29th of November but I would also submit an updated form of order if the court sees fit to grant that today.

THE COURT: Thank you. After hearing from what is currently the applicant and defendant and indicating I am familiar with the documentation on record, I will grant the order. I will request that the matter be brought back perhaps a little earlier than usual. On all occasions when I sign these orders, I do so out of great concern acknowledging the balancing act that the Minister has to make and, indeed, this court, at times, in providing as is required by law for the protection for people such as Mr. L. V. J. while at the same time encroaching their right to control their own lives.

J.