

NOVA SCOTIA COURT OF APPEAL

Citation: *P.G.B. v. Nova Scotia (Community Services)*, 2014 NSCA 113

Date: 20141211

Docket: CA 428759

Registry: Halifax

Between:

P.G.B.

Appellant

v.

The Minister of Community Services and S.M.B.

Respondents

<p>Restriction on Publication: Pursuant to s. 94(1) of the <i>Children and Family Services Act</i>, S.N.S. 1990, c. 5.</p>

Judge: The Honourable Chief Justice J. Michael MacDonald

Motion Heard: December 11, 2014, in Halifax, Nova Scotia in Chambers

Written Decision: December 17, 2014

Held: The motion for state-funded counsel is denied without costs and the Registrar's motion to dismiss the appeal is granted.

Counsel: Appellant, in person
Respondent, S.M.B., not present
Peter McVey, for The Attorney General of Nova Scotia

Restriction on publication: Pursuant to s. 94(1) of the *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.

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 matter involves the appellant P.G.B.'s motion for the appointment of state-funded counsel to represent him on this appeal and the Registrar's motion to dismiss the appeal due to P.G.B.'s failure to file the necessary documentation to advance the appeal.

BACKGROUND

[2] The appellant P.G.B. applied to the Nova Scotia Supreme Court (Family Division) to terminate a permanent care order, involving his two children. In the process, he asked Justice Leslie J. Dellapinna to order state-funded counsel to assist him with this endeavour. Justice Dellapinna denied this relief (2014 NSSC 182), prompting P.G.B. to seek leave to appeal that interim decision to this Court.

[3] P.G.B. is yet to file the documentation to support his leave application, asserting that he has no funds to produce the necessary transcript of the proceedings under appeal. This had prompted him to ask my colleague, Justice Cindy A. Bourgeois, to relieve him of this obligation. Justice Bourgeois concluded that the transcript was necessary and that she was not prepared to order the state to fund its cost (2014 NSCA 83).

[4] Therefore, with the appeal left in limbo, the Registrar moved to have the appeal dismissed for want of perfection. This prompted P.G.B. to file the instant motion, asking me to provide state-funded counsel for the appeal. Following oral and written submissions, I denied P.G.B.'s motion with reasons to follow. I also reserved my decision on the Registrar's motion. Here are my reasons, dealing with both motions.

ANALYSIS

State-funded Counsel Motion

[5] In his decision under appeal, Justice Dellapinna, relying on the Supreme Court of Canada decision of **New Brunswick (Minister of Health and Community Services) v. G. (J.)**, [1999] 3 S.C.R. 46, identified the factors to be considered when state-funded counsel is sought in the child protection context. They should apply equally to me:

¶33 The Attorney General acknowledged that P.B. wants a lawyer, has exhausted all possible avenues for obtaining state-funded legal assistance and is unable to afford a lawyer. The issues in this case therefore are as follows:

1. Is the Minister's opposition to the Applicant's application to terminate the Permanent Care and Custody orders relating to his children a state action that threatens the Applicant's right to security of the person?
2. Can the Applicant receive a fair hearing without a lawyer through a consideration of the following criteria:
 - (a) the seriousness of the interest at stake;
 - (b) the complexity of the proceedings;
 - (c) the capabilities of the Applicant; and
 - (d) the ability of the judge at the hearing to assist the Applicant within the limits of the judicial role.
3. Should merit be a consideration and if so what is its impact on the Applicant's application for state-funding?

[6] For the purposes of this motion, I will assume (as Justice Dellapinna concluded) that the Minister's opposition to the termination motion represents a state action that threatens P.G.B.'s right to security of the person. I will also assume that there is sufficient merit to P.G.B.'s appeal. Here, I acknowledge the Attorney General's invitation to (a.) impose a threshold merit requirement for P.G.B. to qualify for state-funded counsel, and (b.) conclude that P.G.B. has not met this threshold. That reflects the approach taken by Justice Dellapinna. I resist this invitation because it is unnecessary in these circumstances. I say this because, as I will explain, even assuming the appeal has merit, I would still deny the motion.

[7] Therefore, with the Attorney General conceding that P.G.B. has exhausted all avenues to obtain state-funded counsel (including a denial from Nova Scotia Legal Aid) and also conceding that P.G.B. cannot afford a lawyer, the only remaining question is whether he can receive a fair appeal hearing without a

lawyer. To resolve this question, I will follow the four considerations set out in **G. (J.)**; namely (a.) the seriousness of the interest at stake, (b.) the complexity of the proceedings, (c.) the capabilities of the appellant, and (d.) the ability of the court to assist.

The Seriousness of the Interest at Stake

[8] It is hard to think of a higher interest than that of a parent whose children have been placed in the permanent care of the state. Here, I adopt completely Justice Dellapinna's reasoning:

¶59 In G.(J.) the Court held at paragraph 76 that the interests at stake (when the Agency is seeking custody) are "unquestionably of the highest order". Lamer C.J. said:

"Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

¶60 And then at paragraph 87:

"Although all custody hearings engage serious interests, the seriousness of the interests varies according to the length of the proposed separation of parent from child. For instance, permanent guardianship applications are more serious than temporary custody applications. Therefore counsel will more likely be necessary in guardianship applications than custody applications....There is also a difference in the seriousness of the interests at stake in custody hearings depending on the length of any previous separation."

¶61 The seriousness of the interests at stake are greater the longer a child is separated from a parent because as noted by the Court at paragraph 77:

"...generally speaking, the longer the separation of parent from child, the less likely it is that the parent will ever regain custody."

¶62 As the Supreme Court indicated, when the state pursues custody of a parent's child, or in my view seeks to maintain custody of a child, the interests at stake are of the highest order. Given that P.B.'s daughters have been in the care of the Agency for years, first by virtue of Temporary Care and Custody orders and then as a result of the orders of Permanent Care and Custody which were granted in April 2012, I find that the interests at stake in the present application are extremely high.

The Complexity of the Proceeding

[9] This is not a complicated matter. The Supreme Court of Canada in **G. (J.)**, *supra*, provided a road map for judges dealing with requests for state-funded counsel in the child protection context. So there are no novel issues. Nor did Justice Dellapinna deal with any evidentiary rulings of note. As the Attorney General reminds me, “this motion concerns binding principles, strong factual findings and a clear standard of review”. I agree with the Attorney General that it is not a complex appeal.

P.G.B.’s Capabilities

[10] P.G.B. is highly intelligent. He acknowledges this. In fact, one of his grounds of appeal alleges that he is being discriminated against because of his intelligence:

3. Judicial Error – Justice Dellapinna has, inadvertently, endangered my s. 7 charter rights further by, unintentionally, denying me counsel because he feels me too intelligent, thereby discriminating against me based on mental capacity.

[11] I was impressed with P.G.B.’s intellect. It was abundantly clear to me that he fully understood the issues and he appeared to catch on very quickly to the Court processes. The record to date also supports P.G.B.’s capabilities. He has marshalled numerous preliminary motions both before Justice Dellapinna and this Court. The Attorney General, in her pre-motion brief, provides this summary:

Proceedings to Date

On June 27, 2013, (P.G.B.) filed a Notice of Application to Terminate Orders for Permanent Care and Custody with respect to his two daughters. . . .

On September 30, 2013, (P.G.B.) also filed a Notice of Application to have the Attorney General of Nova Scotia provide funding for his legal counsel under Sections 7& 24(1) of the *Canadian Charter of Rights and Freedoms*. . . .

The Motion for state-funded counsel was first set for a hearing on February 20, 2014. However, (P.G.B.) brought a preliminary Motion on that date, seeking to have all counsel from the office of the Attorney General ruled to be in a conflict of interest. (P.G.B.) presented case law and argued the Motion without the assistance of counsel.

The Trial Justice dismissed the Conflict Motion by Decision dated February 28, 2014 and rescheduled the state-funded counsel Motion for a hearing on its merits: *PB v. Nova Scotia (Minister of Community Services)*, 2014 NSSC 82.

(P.G.B.'s) Motion for state-funded counsel was then heard on April 17, 2014. (P.G.B.) presented evidence, case law and argued the Motion without the assistance of legal counsel. The Trial Judge released his Decision on May 16, 2014, dismissing the Motion: *PB v Nova Scotia (Minister of Community Services)*, 2014 NSSC 182. . . .

On June 23, 2014, (P.G.B.) filed a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) in relation to the Decision dated May 16, 2014.

Initial motions for date and directions were heard by this Court on July 3, 2014 and July 24, 2014. (P.G.B.) appeared on each occasion and represented himself.

On August 11, 2014, (P.G.B.) filed a Motion for leave to waive compliance with the norm of including in the Appeal Book a transcript of the hearing below. (P.G.B.) filed evidence, case law and argued the Motion without the assistance of legal counsel.

On September 12, 2014, the Honourable Justice Cindy A. Bourgeois (in Chambers) dismissed (P.G.B.'s) Motion, ruling in part that there is no authority for a justice in chambers to order an opposing party to arrange and pay for an appeal transcript: *PGB v Nova Scotia (Community Services)*, 2014 NSCA 83.

On November 12, 2014, (P.G.B.) next filed a further Motion in Supreme Court (Family Division), seeking the appointment of state-funded legal counsel “to handle further submissions re: obtaining state funded counsel for an application to terminate permanent care”. (P.G.B.) filed no evidence but did file case law and argued the Motion without the assistance of legal counsel.

On November 24, 2014, the Honourable Justice Leslie J. Dellapinna dismissed that Motion by oral decision, not yet reported, finding there had been no change in circumstances since his previous ruling of May 16, 2014, and that this new request for state-funded counsel was therefore *res judicata*.

On December 3, 2014, (P.G.B.) next filed a Motion before this Court, seeking state-funded counsel in order to argue the appeal of the Decision rendered May 16, 2014. With his Motion, (P.G.B.) filed evidence by Affidavit but no case law.

[12] This list makes it abundantly clear that, despite his lack of success to date, P.G.B. is fully capable of representing his interests.

The Court's Role

[13] While the Court cannot act as advocate for P.G.B., it will do its best to help him navigate the process. More and more litigants represent themselves in our courts. We are aware of our duty to assist and we have developed numerous tools and courses to assist us in fulfilling our duty to ensure fair processes for self-represented litigants. As well, the Minister's acknowledges her obligation to assist

P.G.B., as appropriate. In other words, her role is not to engage in *win at all costs* advocacy. Instead, as counsel for the Attorney General has acknowledged, “the Crown and the Court both have a duty to assist self-represented litigants within the limits of their respective roles”. Furthermore, there now exists a wealth of online resources that P.G.B. is fully capable of utilizing.

Conclusion on this Issue

[14] Despite the tremendously important issues at stake, I am convinced that P.G.B. can receive a fair appeal without counsel. The appeal is not complicated. He is very capable and fully able to access many online resources. With the assistance of the Court and the Minister (as appropriate), I am confident that he would be able to have the benefit of a fair process. His motion for state-funded counsel is therefore denied.

The Registrar’s Motion

[15] This takes me to the Registrar’s motion to dismiss. P.G.B. has made it clear that he will not be filing the documentation necessary to have this appeal proceed to hearing. This is in spite of my offer to allow him more time to do so. However, he insists that he simply does not have the money to pay for the transcripts. Nor does he foresee coming up with the funds. In short, he acknowledges that there is no realistic chance of him filing the transcripts.

[16] Yet P.G.B.’s proclaimed inability to file the transcript has already been the subject of a full hearing before this Court. Justice Bourgeois has concluded that the transcripts were necessary and that they would not be state-funded. She reasoned:

¶8 The appellant has in my view provided insufficient information supporting his claim that obtaining a transcript is beyond his financial reach. Although it appears his recent income is very modest, it also appears that given the length of the proceeding from which the appeal originates, the cost of the transcript is also relatively modest. In my view, a determination that the appellant’s impecuniosity prevents him from obtaining a transcript must take into consideration factors beyond just his current income. The funds to obtain a transcript may come from a number of sources other than monthly income, including savings or loans, just to name two possible examples. The Court is unaware of what other resources the appellant may have to facilitate obtaining the transcript – the evidence is silent in that regard.

¶9 There is, however, a more compelling reason to dismiss the motion. It is my view that this appeal could not be properly considered without a full transcript

of the proceeding before Justice Dellapinna. In the leading decision relating to applications for state-funded counsel, **New Brunswick (Minister of Health and Community Services) v. G.(J.)**, [1999] 3 S.C.R. 46, the Supreme Court of Canada set out a framework for considering such requests. One of the essential considerations is the capabilities of an applicant to undertake the litigation, as part of a broader analysis of whether a fair hearing can be had without the benefit of legal representation. To determine whether Justice Dellapinna properly addressed this consideration, it is essential for the panel to review how the appellant had conducted himself in front of the motions judge. The transcript is required for that purpose.

¶10 Having determined the transcript is necessary, I am aware of no authority in which a respondent or the state has been compelled to provide same or fund its cost. I am not prepared to make such an order in this instance.

[17] All this leaves me with no choice but to grant the Registrar's motion. This is regrettable but, at the same time, given P.G.B.'s capabilities, I am convinced (as was Justice Dellapinna) that P.G.B. is fully capable of advancing his termination motion on its merits. The appeal is therefore dismissed.

Conclusion

[18] The motion for state-funded counsel is denied without costs and the Registrar's motion to dismiss the appeal is granted.

MacDonald, C.J.N.S.