

FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. J.R. , 2011 NSFC 13

Date: 20110524

Docket: FAN CFSA 073062

Registry: Yarmouth

Between:

Minister of Community Services

Applicant

v.

J.R. and S.D.

Defendant

INTERLOCUTORY DECISION

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

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

Judge: The Honourable Judge John D. Comeau

Heard: Comeauville May 12, 2011 and Digby May 17, 2011

Counsel: Donald Urquhart Esq. For the Minister
Oliver Janson Esq. For J.R.
Colin Fraser Esq. For S.D.

THE APPLICATION AND FACTS

[1] The Applicant Minister of Community Services applies to recall an expert witness to testify concerning an update on the Respondent mother's (J.R.) boyfriend. The plan of the mother in asking for return of the children at Disposition includes a relationship that would bring this individual (boyfriend) in daily contact with the three children of the parties.

[2] The evidence indicates the expert was doing a parenting assessment on the boyfriend but had not completed it when he testified and concluded his evidence. It should be noted the Minister is still in the process of presenting the case on behalf of the state.

ISSUE:

[3] Whether the Minister should be allowed to recall the expert witness.

THE LAW:

[4] Civil Procedure Rules 51.14(1) is applicable as there is no provision concerning this issue under the **Family Court Rules** (see F.C. Rule 1.04).

Discretion is given to the Trial Judge to recall a witness:

“Judge calling, or recalling, witness

51.14 (1) A presiding judge may call a witness, and the judge may examine the witness or provide directions for direct examination and cross-examination of the witness.

(2) The discretion to call a witness includes recalling a witness called by a party.”

[5] The decision of the Ontario Superior Court of Justice in **Griffi v. Lee** 2007 Can II 12704 (Ont. S.C.) is a civil suit for damages was dealing with a similar provision in the Ontario rules:

“Leave to recall a witness

subrule 53.01(3)

The discretion to permit a witness to be recalled is found in subrule 53.01(3) (emphasis added):

53.01(3) The trial judge may at any time direct that witness be recalled for further examination.

The effect of this wording is to provide the court with the widest imaginable discretion.”

[6] In considering to exercise judicial discretion Justice Quinn set out a number of items to be considered: (In this case the Plaintiff had not completed their case and wanted to recall a medical witness for an update).

- (a) **It is fundamental, under subrule 53.01(3), for the moving party to clearly explain why it is proposed that a witness be recalled.**
- (b) **In the presumably rare event that counsel for a moving party fails to explain why it is necessary to recall a witness, leave should not be granted.**
- (c) **Where counsel for a moving party has made a conscious and informed decision to conduct his or her case in a certain fashion and then, perhaps because things are going badly, wishes to take a different approach requiring additional evidence from a witness who has already testified, a court probably should not grant leave**

particularly where the decision is rooted in tactics.

- (d) When considering an explanation as to why a witness is to be recalled, the court must be mindful of maintaining the integrity of the *Rules of Civil Procedure*.**
- (e) In circumstances where counsel for a moving party misapprehends the law and conducts his or her case consistent with the misapprehension, leave is likely to be granted so long as irreparable prejudice is not caused to the other side.**
- (f) If recalling a witness is necessary to correct some other mistake, such as a misapprehension of the evidence, leave should be granted, however, again, only where there will be no irreparable prejudice to the opposite party.**
- (g) Where counsel for a moving party, through inadvertence, omits to ask a question or questions of a witness, leave should be granted if, to do so, will not cause irreparable prejudice to the other side.**
- (h) Has an intervening event rendered further questions of a witness necessary?**

- (I) **It is not sufficient that counsel for a moving party desires to put a few more questions to a witness. Recalling a witness is not meant to allow a litigant to polish his or her case. Instead, it is intended to cure a material omission in the evidence of a party such that, to refuse leave, will create the reasonable risk of a complete failure of justice based upon the court record as it stands at the time (in other words, a miscarriage of justice).**
- (j) **What will be the effect upon the opposing party, if leave is given to a moving party to recall a witness? Costs and an adjournment will cure most instances of prejudice to the opposing party.**
- (k) **In the end, after all factors have been considered, one should step back, look at the whole picture and ensure that a proper balance is struck between the accountability of counsel and the interests of justice. Will the decision of the court be fair overall?**

CONCLUSION/DECISION

[7] Any decision the court makes in a matter under the **CFSA** is governed by section 2:

“Purpose and paramount consideration

2(1) The purpose of this **Act** is to protect children from harm, promote the integrity of the family and assure the best interests of children.

(2) In all proceedings and matters pursuant to this **Act**, the paramount consideration is the best interests of the child.”

[8] In the case before the Court there is an intent set out in the Respondent mother’s plan to have her boyfriend be in continuous contact with the children. The expert witness called by the Minister with respect to the mother’s parenting advised he was completing an assessment on her boyfriend.

[9] After the witness withdrew, counsel for the Minister advised he would want to have the expert recalled. Counsel for the mother objected.

[10] In order for the Court to consider the best interests of the children it is important to hear all relevant evidence that is or may be available within a reasonable period of time. This approach is contemplated in Justice Quinn's reasoning that the Court must look at the whole picture to insure that there is fairness overall. It is in the best interests of the children that the Court hear the evidence and the witness will be recalled at a time the report and the witness is available

[11] This witness is a third party independent witness and one cannot speculate that his evidence would cause irreparable prejudice to the opposite party.

VETTING THE QUESTIONS TO BE ASKED ON A RECALL

[12] There is a limitation on questions that may be asked of the witness on recall. It will be limited to the items set out in the assessment on the Respondent mother's boyfriend.

JOHN D. COMEAU
JUDGE OF THE FAMILY COURT
OF NOVA SCOTIA