LEGAL BULLETIN

Issue No. 38

Access to state-funded counsel in guardianship applications following allegations of family violence

Introduction

This bulletin considers the cases of ***J.L & J.F v. New Brunswick (Justice)*, 2021 NBQB 150** and ***Minister of Justice v. J.F*, 2021 NBCA 61** in which a mother's application for state-funded counsel was approved by the New Brunswick Court of Queen's Bench (NBQB) but denied upon appeal by the New Brunswick Court of Appeal (NBCA). Key factors to this case were that the mother seeking permanent guardianship was not a custodial parent and her claim that her irregular visitation was influenced by coercive controlling behaviour by the child's father inhibited her access to the child. While the trial judge found a history of family violence and coercive controlling behaviour by the father to be effectively impeding upon the mother's access, the appeal judge found family violence to be irrelevant. In addition, the interpretation of recent legislation amendments, which consider the best interests of the child, were debated. In consideration of this case, necessity of court recognition of the impact of family violence and post-separation coercive controlling parenting behaviours is highlighted, as well as the importance of access to counsel for parent's legal navigation to ensure appropriate evidence is supplied to the court.

Case Background

JL (father) and JF (mother) separated after their son "A"'s first birthday. JF moved to Campbellton, NB and retained sole custody for three years until she was incarcerated. Custody was then deferred to JL who resided in Moncton, a four-hour commute from Campbellton. JF alleged to the court that following release, she had tried to sustain a relationship with her son but without a car, current COVID-19 related travel restrictions, and ongoing refusal of access by JL meant irregular contact. JF alleged "horrible" mental abuse by JL during their relationship which continued in current tactics such as only allowing her to see their child if she stayed at his residence, refusing phone calls, and not allowing for any health or educational decision making (NBQB, paras. 6-8). These issues were ongoing for the past eight years.

The Minister of Social Development took protective care of the then eleven-year-old child after a confidential source alleged that JL was abusing drugs/alcohol and physically and emotionally abusing the child. The child disclosed to social workers and police that his father forced him to "kiss and lick the floor", to hold a pillow while his father kicked it, was kicked for having accidents in his pants, was made to stay in cold baths, and threatened to have to eat his food off the floor (NBQB, para. 10). The child also explained that his father made him nervous and afraid. JL was arrested for assault; however, the charge was later withdrawn, and weekly supervised visits were initiated.

This case refers to the Minister of Social Development's request of guardianship. Upon filing of the application, both JL and JF applied for Legal Aid in which only JL was approved. JF then applied for state-funded counsel for the upcoming five-day trial to determine guardianship of the child.

J.L & J.F v. New Brunswick, 2021 NBQB 150 Ruling and Reasoning

The sole issue for consideration in this case was whether it was appropriate to order state funded counsel to JF to ensure her interests were adequately represented at the upcoming trial. Madam Justice Marie-Claude Belanger-Richard cited the Supreme Court of Canada's decision in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46 (hereinafter "G"), which recognized a constitutional right (under section 7 of the Charter) to state-funded counsel for a party in a child protection matter where the Minister seeks guardianship, and the party cannot afford a lawyer and has been denied legal aid. The party must also show that other avenues of representation have been exhausted, and the case must be sufficiently complex to rule out self-representation, where "the assistance of a lawyer [is] necessary to ensure the [party]'s right to a fair hearing" (SCC, para. 55). Importantly, the child must have been taken into care by the Minister from the party seeking state-funded counsel.

In *J.L. & J.F.*, the NBQB judge considered these requirements for state-funded counsel within the context of prior family violence and allegations of ongoing coercive control. Specifically, the judge noted that while JF was not the custodial parent of "A", JF had been involved as much as she could within the existing circumstances, observing that the mother's "relationship with (the child) was impeded by the father's controlling and coercive behaviour toward her" and that "the nature and impact of the family violence in [the] matter" had "affected and significantly reduced" JF's involvement and parenting role (NBQB, para. 37).

The NBQB concluded that: (a) JF was in financial need and had exhausted all other avenues of representation; (b) counsel was needed considering the severity and complexity of the trial, likely to include "voluminous" documentary evidence; and (c) that JF would find self-representation "daunting" and "challenging" in such a case. Even though JF had been involved in prior criminal proceedings, no trials had ever taken place. As such, the Judge ruled that JF was entitled to receive state-funded counsel.

Minister of Justice v. J.F, 2021 NBCA 61 Ruling and Reasoning

The Minister of Social Development appealed the NBQB decision, stating that the Judge had misapplied the legal test to determine entitlement to state-funded counsel established by the "G" decision by misinterpreting the meaning of "custody" (NBCA, para. 9). Specifically, the Minister argued that JF's lack of involvement in the child's life at the time of state intervention rendered her ineligible for state-funded counsel.

The NBCA agreed, remarking that "it cannot be said the mother had custodial care of the child at the time the Minister took protective care" (NBCA, para. 22). The NBCA also found that not all avenues for legal representation had been exhausted, noting that JF could have filed a private custody claim, which are eligible for legal aid funding when domestic violence is asserted. The court observed that JF had been "relieved of her custodial rights when the child was approximately two years of age" and that to

consider her a custodial parent for the purposes of an application for state-funded counsel "stretches the 'notion' of custodial rights" beyond the meaning ascribed to it by the SCC in the G decision.

Notably, however, the NBCA acknowledged that JF had been actively working with a lawyer following the lower court's decision to award state-funded counsel and therefore delayed the release of its decision until after JF's guardianship application hearing had been held.

On a second ground of appeal, the Minister argued that the G decision analysis is "silent" on the impact of domestic violence, and therefore the lower court judge should not have considered its role when assessing JF's application. The NBCA allowed this ground of appeal as well, finding that domestic violence "should not have been a relevant consideration" in the case, as the parties to the application for state-funded counsel were JF and the Minister, with no evidence that the Minister was impeding or interfering with JF's access to her child (NBCA, para. 27).

An application for leave to appeal was submitted to the Supreme Court of Canada on February 3, 2022, but dismissed on June 30, 2022.

Implications

Two key implications arise from this case. First, in serious and complex child protection cases, a right to state-funded counsel exists under s. 7 of the *Charter* when the state is seeking permanent or temporary guardianship; however, this right is limited to the parent from whose home or primary care the child will be removed. Access to counsel is essential to ensure that evidence of family violence is accurately portrayed to the courts and survivors may struggle to exercise their rights without it.

Secondly, without adequate tools to identify and understand family violence and coercive controlling behaviour, courts may overlook its impact when assessing parental relationships and creating safe parenting plans.

The Onus of Navigating the Legal System Falls to the Survivor Parent

In this case, JF had only completed grade eleven and had spent the previous few years in and out of incarceration facilities. While she admitted to the court that she had mistakenly turned to drugs as a coping mechanism, she had been successfully part of a methadone program for three and a half years. Raising another child, whom she was not receiving child support for, and relying on social assistance, JF would be unlikely to have time or resources to familiarize herself with family court procedures. As the NBQB considered, she had no prior experience with self-representation in a trial proceeding. Without appropriate counsel, it is unlikely the average person would be familiar with alternative routes to custody such as a private custody claim when faced with a current application for state intervention.

JF alleged that family violence and coercive controlling behaviours infringed on her contact with her son. While this allegation was supported by the NBQB, the NBCA suggested that family violence should have been addressed in a separate, private proceeding, (taking place *after* the guardianship hearing). The lack of legal counsel would have hindered the mother's ability to navigate these options and develop effective legal strategies for presenting evidence to the court.

Family Violence is Always a Pertinent Factor in Custody Cases

There were significant definitional issues in these case between the application of the new amendments to the *Divorce Act/Family Law Act* and the Family Services Act. The courts identified one set of definitions for the best interests of the child in private proceedings and another set for child protection proceedings. Additionally, the court considered the newly incorporated concepts of "parenting arrangement", rather than "custody and

access" for private proceedings, and the concepts of "custody, care, and control" when it is a matter between the state and parent(s).

While the 2021 amendments to the *Divorce Act/ Family Law Act* were considered by the NBQB judge to highlight the impacts of family violence when considering the best interests of the child, the NBCA determined family violence was not a relevant factor when assessing applications for state-funded counsel. Standardization among definitions and concepts could better support child-centered approaches to custody decisions. Moreover, a failure to consider the wide-reaching effects of family violence on parenting arrangements and access options for parents in contexts of vulnerability may result in a family law system that reproduces barriers to fair trial rights for family violence survivors and work against the best interests of the child.

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