

Case Name:
Fischer (Litigation guardian of) v. Balofsky

Between
Ethan Fischer et al., and
Stephen Balofsky and Daniel Fischer

[2005] O.J. No. 2152

Court File No. 04-FD-23882 FIS

Ontario Superior Court of Justice

A. Harvison Young J.

Heard: May 10, 2005
Oral judgment: May 11, 2005.

(11 paras.)

Civil procedure -- Parties -- Representation of -- Children or incompetent persons -- Litigation guardian or next friend.

Application by the defendant father, Fischer, for an order removing the mother, Milo, as the litigation guardian for their son, Ethan, and an order replacing her with the children's lawyer. The mother purchased Ethan a new scooter. While he was in his father's care, Ethan used the scooter and was involved in an automobile accident with the defendant, Balofsky. The mother commenced this action against the father and Balofsky. The father counterclaimed against the mother for failing to properly instruct Ethan in the safe use of the scooter. Besides this action, the father and mother were involved in a highly acrimonious family law action. The father argued that the mother was using her position as litigation guardian to gain advantage over him in the family law proceedings, and was thereby excluding him from participating fully in Ethan's continuing care, treatment, rehabilitation and education. The father claimed the mother was in a position of conflict. The mother opposed the application. She also argued that this court did not have jurisdiction to hear this matter because the matter was within the case management system, and only the case management master was able to hear the motion. The father argued that because of the concurrent family law proceedings, it was appropriate for a superior court judge with broad jurisdiction to hear the matter.

HELD: Application allowed. This court did have the jurisdiction to hear the application. The tort proceeding was rendered more complex by the existence of the other proceeding. Furthermore, it might not have been open to the case management master to hear the motion as it related to the family law proceedings. In the interest of efficiency, it would not have been reasonable to force the father to bring this motion before the master. The mother was removed and replaced by the children's lawyer. The mother was not disinterested in the outcome of the litigation. In addition, there was a possibility that the acrimony that existed between the parents could have adversely affected the mother's decisions during the course of the tort litigation. The tort litigation was connected to the family issues. The mother might not have been as objective as she should have been in making decisions that arose in the course of litigation on Ethan's behalf.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 7.06(1), Rule 37.02(1), Rule 77, Rule 77.12(1)

Counsel:

No counsel mentioned.

1 A. HARVISON YOUNG J. (orally):-- This action arises as a result of personal injuries sustained by Ethan Fischer when he was in a motor vehicle accident while riding his new scooter which his mother Nira Milo had purchased for him a few days earlier. The accident occurred on June 28, 2004, and the vehicle was driven by the defendant Stephen Balofsky. At the time of the accident, Ethan was in the care of his father Daniel. Approximately two months after the accident, Ms. Milo, as litigation guardian, commenced the tort action which named both Stephen Balofsky and Daniel Fischer as defendants. Within the last few months, Mr. Fischer has issued a counterclaim alleging that Ms. Milo had failed to properly instruct Ethan in the safe use of the scooter before letting him ride it. At the time of the accident, Mr. Fischer and Ms. Milo had separated and the custody/access issues between them concerning their two sons, Aren and Ethan, had already become conflicted and acrimonious. Proceedings are underway relating to these and related matrimonial matters are currently underway. Sadly, matters have worsened since the accident. The present motion is brought by Mr. Fischer to have Ms. Milo removed as litigation guardian and replaced by a third party such as the Children's Lawyer. He submits that Ms. Milo is using her position as litigation guardian to gain advantage over him in the family law proceedings, and that she is in a position of conflict such that she should be removed and replaced by a neutral third party. Ms. Milo opposes this motion on the basis that this motion is not properly before me but should rather be heard by the Case Management Master (Master Abrams) in charge of the tort action, and that in the event that it is properly before me, that she should not be removed as there is no evidence to suggest that she has not acted in Ethan's best interests regarding the carriage of the tort action thus far.

The Jurisdictional Issue

2 Ms. Milo's position on this issue is that R. 77.12(1) of the Rules of Civil Procedure apply to this motion. It states that where an action is within the case management system, a motion "may be

made only to a case management judge or case management master." On this basis, she submits, I do not have jurisdiction to decide this matter. The applicant, on the other hand, submits that the context of the concurrent family law proceedings, and the significance of the broader best interests of the children, must be understood as tempering Rule 77.12(1), rendering it appropriate that a superior court judge with broad jurisdiction decide this matter.

3 Having considered the evidence, submissions and the authority cited I have decided that I do have jurisdiction and that it is appropriate for me to decide this motion. While the tort action is being case managed, and most issues relating to that are properly dealt with pursuant to Rule 77, there are a number of reasons that support the conclusion that it is appropriate to deal with the merits of this motion. First of all, each of the two proceedings involving these litigants and these children is rendered more complex by the parallel existence of the other proceeding. All four members of the Fischer/Milo family are, at this point, directly involved in both proceedings, either as parties or as children in the divorce matter. It is, in my view, neither possible nor desirable to ignore the other. Second, had a case management judge been assigned to this case, it might have made sense for him or her to hear the motion, but none has. One can imagine that an argument might well have been made before Master Abrams that she could not entertain this motion as it related to the family proceedings. In the course of his submissions on behalf of the Applicant Mr. Zarek suggested that Master Abrams had in effect issued an "open invitation" to the applicant to bring this motion here. Her endorsement dated March 31, 2005 states that "I cannot require a judge of the family court to hear the motion to remove Nira Milo as litigation guardian ...", which is consistent with Mr. Zarek's point.

4 Rule 77, and all the Rules of Civil Procedure, are designed to facilitate the hearing of substantive issues and to increase fairness and efficiency. I do not see what purpose would be served in this case by forcing the applicant back to the Master on this issue who may well have concerns about the appropriateness of deciding a matter which does relate (at least to some extent) to the family law proceedings with respect to which she does not have jurisdiction. The cases which the respondent cited in support of her position are cases where litigants sought to avoid the case management judge by going to a different court (such as Hamilton in *Gluchowski v. Eisenberg*, [1999] O.J. No. 4440, or Barrie in *T.D. Bank v. Berthin*, [1992] O.J. No. 1589). Those cases fell very squarely within the purpose of the case management system. Applying the mandatory nature of the rule here, where the issue is affected by a proceeding outside the case managed action, and where the case management master is fully aware of this proceeding, does not make sense and would defeat the purposes of efficiency and coordination which all the rules and especially Rule 77 are intended to serve. As the applicant noted, Rule 37.02(1) stipulates that "a judge has jurisdiction to hear any motion in a proceeding".

5 Accordingly, I will proceed to address the substance of the motion.

Application to Remove Ms. Milo as Litigation Guardian

6 The heart of Mr. Fischer's motion is that Ms. Milo is not an appropriate litigation guardian because she is using, he claims, that role to take control of all aspects of Ethan's life and thereby exclude him from participating fully in his continuing care, treatment, rehabilitation and education. Ms. Milo denies that, and takes the position that her conduct towards Mr. Fischer is irrelevant to the issue of her status as litigation guardian and that the only relevant consideration is the narrow one of her direction of the course of the tort litigation so far. She submits that her suitability as litigation guardian is not to be assessed against the extent to which she generally protects Ethan's best inter-

ests, but only his best interests as far as the conduct of the tort action is concerned. The respondent also submits that the counterclaim filed against Ms. Milo by Mr. Fischer was a tactic amounting to an abuse of process, designed simply to put her in a conflict within the four corners of the tort action.

7 Rule 7.06(1) of the Rules of Civil Procedure provides that the court may substitute a litigation guardian with another "where it appears to the court that a litigation guardian is not acting in the best interests of the party under disability". In the case of *Gronnerud v. Grunnerud*, [2002] 2 S.C.R. 417 Major J. set out the components of the test and stated: (para. 20)

The third criterion, that of "indifference" to the result of the legal proceedings, essentially means that the litigation guardian cannot possess a conflict of interest vis-à-vis the interests of the disabled person. Indifference by a litigation guardian requires that the guardian be capable of providing a neutral, unbiased assessment of the legal situation of the (dependent adult) and offering an unclouded opinion as to the appropriate course of action. In essence the requirement of indifference on the part of a l.g. is a prerequisite for ensuring the protection of the best interests of the (dep. adult). A l.g. who does not have a personal interest in the outcome of the litigation will be able to keep the best interests of the dependent adult front and centre, while making decisions on his or her behalf.

Major J. also went on to say that while it is "acceptable in most cases, and perhaps desirable in some" to have a trusted family member as litigation guardian, there are exceptions, as in that case where there was an acrimonious issue among the children concerning their parent's estate. In that case, the court upheld the removal of two of the four children and their replacement with the Public Trustee.

8 Having considered the submissions by counsel and the material filed, I have come to the conclusion that Ms. Milo should be removed and replaced by the Children's Lawyer. Ms. Milo cannot fairly be said to be "disinterested" in the outcome of this litigation, and it cannot be said that the acrimony existing between these parents will not affect her decisions in the course of the tort litigation, which is in very early stages. As I stated earlier, the key players (except for Balofsky) are central in both proceedings. The family proceedings are highly conflicted and acrimonious. The extent of Ms. Milo's hostility toward Mr. Fischer is illustrated most recently by the latest volley documented in the email in the applicants material where she advises Mr. Fischer that she and Ethan have finished putting his possessions out on the front lawn. The intersection of all the ongoing issues between these parents is also manifest in the issue which was the flashpoint leading to this with respect to the case manager assigned to coordinate all aspects of the care and treatment of Ethan. While Mr. Fischer and Ms. Milo had disagreed over some time over the approach and competence of the former case manager, it is clear that the role of this person and the role of Ms. Milo in instructing this person has been a lightning rod for conflict between the parties. The role of Ms. Milo in instructing the case manager, which rightly or wrongly was that she alone did the instructing, made Mr. Fischer feel ousted as a parent. The situation has not been helped by the respondent's position that, as a defendant, Mr. Fischer cannot participate in treatment decisions while the litigation is pending. The point here is that the conduct of the tort litigation is connected to the family issues; the parental roles and extent of their involvement in their son's life and treatment may be affected, and it is not in Ethan's best interests that conflict be exacerbated unnecessarily. While I make no

finding on the extent to which it is necessary or appropriate to limit Mr. Fischer's role re Ethan's care and treatment during the litigation, the acrimony gives rise to the concern that Mr. Fischer might be excluded more than necessary. In addition, the high level of acrimony does suggest the Ms. Milo might well, consciously or unconsciously, not be as objective as she should be with respect to decisions that arise in the course of the litigation on Ethan's behalf. This is central to the question of her "indifference" with respect to the tort litigation.

9 The final issue to be addressed is the counterclaim. While the respondent's counsel advises of his intent to bring a motion to strike it as an abuse of process, he has not yet done so. It would not be appropriate for this court to assume that it is in fact an abuse of process, or indeed to make any assumption one way or the other as to the merits. In the meantime, this alone places Ms. Milo in a conflict of interest with respect to the outcome of the litigation.

10 Accordingly, the motion is allowed and the Office of the Children's Lawyer, whose counsel has advised of its willingness to serve as litigation guardian in this matter, shall be so appointed. It shall be up to the litigation guardian to appoint a new case manager.

Costs

11 After hearing the submissions of counsel on the matter of costs, I am satisfied that there are no to depart from the usual rule that costs follow the event, and accordingly I order costs in the amount of \$2500 payable by the respondent to the applicant.

qp/s/qlgkw/qlkjg/qlrme