

History 258/Political Science 258 Private Law in Canada

Family Law Test

March 15, 2011

I am going to lay before you a tragedy that really happened and convene the class as the Supreme Court of Canada and so the test is to write a judgment as a Supreme Court of Canada (SCC) Justice covering the points that I am going to list.

I enclose a copy of the **Director of Family and Child Services v. D. M. G.**

This was a 2007 decision of our Court of Appeal with a single Judge sitting in Chambers because the issue was not “should the Court of Appeal grant or dismiss the appeal” but, instead, the issue was “should the Appellant (person appealing) be granted leave (permission) to appeal at all”. For the purpose of our course, we are going to assume that the decision was the appeal hearing and that the Court of Appeal dismissed the appeal (upheld the lower Court decision). We are going to further assume that a further appeal was filed to the Supreme Court of Canada and that you are going to decide whether or not to grant leave (permission to appear to the SCC).

The facts in this case are set out in the course of a short six page Judgment, which I want you to read in full. Baby M. G. was brought to the hospital with bruising to his head, leg, blood in his eyes, a fractured right forearm and several bilateral rib fractures. There were four caregivers: his mother, his stepfather, his maternal grandmother and his stepfather’s mother who looked after M. G. during the material time. The baby was removed from the caregivers at the hospital and never returned.

Each of the four caregivers denied hurting the baby or doing anything that might result in the injuries found.

Assume that both the mother and the stepfather passed the polygraph and that there was no evidence that anyone failed it. Assume also that, while the child was in the care of one of these four people for the great majority of the material period, there were others who briefly had care and charge of the child.

The ground of appeal to the Supreme Court of Canada is that the Court of Appeal erred in failing to order that in the circumstances of this case the polygraph evidence ought to have been admitted.

I am also providing you with a copy of S. L. G. v. D. P. P., a copy of E. W. v. D. W. aka D. K., a copy of D. M. G. in the Supreme Court and, finally, a copy of Beland. These cases and this fact pattern will reappear for the purpose of the Family Law portion of the final. But for the unit test, I want you to answer the preliminary question that a Judge of the Supreme Court of Canada would have to answer, which is: in the circumstances of this case, should the Court reconsider its decision in Beland such that leave to appeal to the Supreme Court of Canada ought to be granted.

You should know a little more about the facts of this case. In fact, there was a second child born to this couple, after M. G. was born. By the time D. M. G. reached the Court of Appeal, baby M. G. was no longer a baby but was over three years old. He had a baby sibling by that time. As a result of what happened to M. G., that baby sibling was also removed by MCFD at birth and was also the subject of a Continuing Custody Order. That is to say, both children were removed from their parents, permanently.

As the Chambers Judge in the Supreme Court of Canada I want you to canvas the following issues in deciding whether or not to grant the mother of these children (who is the Appellant) permission to appeal to the Supreme Court of Canada:

1. How may the decision of the majority in Beland be fundamentally distinguished from the circumstances in D. M. G. (what is the striking, and relevant, difference between the two cases)?
2. Does the decision of the Legislature in Section 68(2) of the CFCSA permit the Court to admit polygraph evidence which would be inadmissible in other proceedings?
3. Is Justice McIntyre correct in finding that polygraph evidence is “oath helping”?
4. What special circumstances ought to be present, if any, for the admission of polygraph evidence?
5. Would the admission of polygraph evidence disturb the stability of, or confidence in, our system of justice and, if polygraph evidence would tend to destabilize, or reduce confidence in, our system of justice, is that a sufficient reason for excluding it?
6. What kind of expert should have been available to the parents in the case in addition to a polygraph operator and what ought the Supreme Court of Canada to do, if anything, about that?