COURT OF APPEAL FOR ONTARIO

CITATION: S. v. A., 2021 ONCA 744
DATE: 20211007
DOCKET: M52807 (C69835)

Coroza J.A. (Motion Judge)

BETWEEN

W.S.

Applicant

(Respondent/Responding Party)

and

P.I.A.

Respondent

(Appellant/Moving Party)

Gary S. Joseph and Alice Parama, for the moving party

Gary Gottlieb and Mira Pilch, for the responding party

Heard: September 23, 2021

REASONS FOR DECISION

[1] Mr. S, the respondent, and Ms. A, the appellant, were married in 2011 and separated in 2016. They have two children, L who is seven and A who is five.[1]

[1] The decision appealed from initialized the parties' and the children's names as well as omitting their birthdates to protect their privacy. I have decided to continue to do the same in these reasons.

[2] Regrettably, both parties could not resolve the parenting issues relating to their children. The respondent issued an Application in 2016. A hotly contested 39day trial was held over nine weeks in the Superior Court of Justice beginning in May of 2021. On September 9, 2021, the trial judge released very lengthy and comprehensive reasons ordering that the primary care of the children be transferred to the respondent and granting him sole responsibility for decision making.

[3] The appellant has filed a Notice of Appeal with this court. She seeks a stay of the trial judge's final order pending her appeal. The motion is opposed by the respondent.

[4] The test for a stay is not disputed. This court recently summarized the test in the following way, in *D.C. v. T.B.*, 2021 ONCA 562, at para. 9:

> Custody and access orders remain in effect pending an appeal to this court unless the court has ordered otherwise. In determining whether to stay an order involving the parenting of a child, the courts must consider: (1) whether, on a preliminary assessment, the appeal raises a serious question (recognizing that this is a low threshold); [2] whether the child will suffer irreparable harm if a stay is refused; and (3) the balance of convenience: namely whether there would be greater harm from the granting or refusal of a stay pending a decision on the merits of the appeal. The overriding consideration, again, is the best interests of the child. In other words, the court must be satisfied that it is in the child's best interests to grant a stay. [Citations omitted.]

[5] For the reasons that follow, I would dismiss the application for a stay.

Serious Question

[6] It is not necessary to outline each and every ground of appeal that will be advanced by the appellant in her Notice of Appeal. This is not the appeal. For the purpose of this motion, I will address three arguments that the appellant intends to develop on appeal.

[7] First, the appellant argues that the trial judge erred by reversing custody because the respondent has a long and documented history of domestic violence against her and the children. The appellant submits that the children show signs that they fear him and during the trial, the appellant provided examples of the oldest child kicking, screaming, biting, punching, and swearing to avoid seeing his father. The appellant contends that the trial judge unreasonably rejected this relevant and compelling evidence of serious domestic violence and that this is a significant error because the amendments to the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), prioritize considerations of family violence and its impact on the parenting of the children.

[8] In my view, the appellant faces an uphill climb in advancing this ground of appeal. The trial judge made strong findings that the appellant's allegations of physical, financial, and sexual abuse had not been made out. Moreover, the trial judge found that the appellant had intentionally acted to undermine court-ordered parenting schedules and reunification counselling by bringing false allegations of

sexual abuse designed to terminate the children's relationship with the respondent. As I read her reasons, the trial judge was prepared to find that the respondent did verbally and emotionally abuse the appellant during their marriage, but this had no impact on his present ability to be primary caregiver and decision maker for the children. That was the trial judge's call to make. When I consider that the standard for appellate review of a custody or parenting decision is exacting, and that the function of this court will not be to retry the case, these complaints appear to me to be destined to fail: *Bors v. Bors*, 2021 ONCA 513, at paras. 18-20; *A.M. v. C.H.*, 2019 ONCA 764, 32 R.F.L. (8th) 1, at paras. 4, 74.

[9] The trial judge also specifically dealt with the argument that the amendments to the *Divorce Act* put domestic violence at the forefront, at para. 23 of her reasons. After noting that a history of family violence has always been an important factor in the adjudication of parenting disputes, she concluded that the pattern of family violence that threatened the children's best interests was not the conduct of the respondent. Instead, she made very strong findings that it was the appellant's conduct that undermined the best interests of the children. Her careful reasons do not reveal any obvious error in reaching that conclusion.

[10] Second, the appellant argues that the trial judge erred in relying on a dated assessment under s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. Howard Hurwitz completed this assessment in 2017 and provided the court with a detailed report on March 9, 2018.

[11] The appellant argues that the trial judge stated that the report was dated and could not be of any assistance to her. The appellant points to comments that the trial judge made when she adjourned the trial on June 2, 2021, so that she could explore obtaining an updated report from Mr. Hurwitz. However, when the parties next appeared in court on June 4, 2021, the trial judge seemingly changed her mind and told the parties an updated was not necessary and did not explain why. In his report, Mr. Hurwitz reported that he saw no evidence that the respondent was dangerous or that he could not move forward with the appellant to develop a healthy parenting plan. However, Mr. Hurwitz did not recommend custody reversal in his report – he had recommended sole custody to the appellant. The appellant argues that the trial judge erred in relying on the report.

[12] I do not find this argument to be a compelling one.

[13] I am not clear as to what an updated s. 30 assessment report would have accomplished. As this court has previously held, the law is clear that a trial judge should not delegate decision making to an assessor, and an assessor's evidence is but one piece of evidence to consider: *Mattina v. Mattina*, 2018 ONCA 641, at para. 13, leave to appeal refused, [2018] S.C.C.A. No. 392. The fact that the report may have been dated was a factor to consider. It was the trial judge's call to make whether or not an updated report was required. Of course, the context of this trial cannot be ignored. The trial had been extensively case managed by judges of the Superior Court, and there had been lengthy delays in getting the

matter to trial. The decision not to order an updated s. 30 report is an exercise in trial management, and I see no obvious error in the trial judge's call.

[14] In any event, even if the report was dated, Mr. Hurwitz was produced for trial. Counsel for the appellant was able to cross-examine Mr. Hurwitz and inquire about the respondent's weaknesses as a caregiver. It appears that there was very little prejudice visited on the appellant by not having an updated report. The trial judge was entitled to rely on the report and the cross examination in reaching her decision.

[15] Third, the appellant submits that it is of grave concern that, out of the several professionals involved with the parties and their children since 2016, none recommended a custody reversal except a reunification therapist, Wendy MacKenzie, who was a clinician permitted to offer opinion evidence without a *voir dire*. The appellant also complains that Ms. MacKenzie was not a registered social worker.

[16] The respondent argues that the trial judge did inquire into Ms. MacKenzie's qualifications and that previous judges involved in prior motions in this case had accepted Ms. MacKenzie as an expert.

[17] I am not prepared to say that this argument should be dismissed out of hand. The appellant may develop an argument that Ms. MacKenzie provided inadmissible opinion evidence that strayed well beyond her expertise and that a

voir dire was required to determine her qualifications and the nature of the opinion that she was qualified to give to the court.

[18] That said, I note that it is the appellant, through counsel, who first proposed in early January 2020 that the parties retain Ms. MacKenzie to conduct reunification counselling. It seems to me that the bulk of Ms. MacKenzie's evidence (as summarized by the trial judge) relates to her observations of the parties during this process. The trial judge's reasons reveal that Ms. MacKenzie provided evidence on which parent was best prepared to work within the reunification process. The trial judge also described in detail the efforts made by Ms. MacKenzie to counsel the appellant about fostering a positive relationship with the respondent. In the end, the trial judge found that the appellant had intentionally undermined and sabotaged the reunification process. The trial judge found that, although Ms. MacKenzie had made efforts to convince the appellant to support the children's relationship with their father, this proposition was never accepted by the appellant. I do not see any obvious error in the trial judge's treatment of Ms. MacKenzie's evidence, nor do I see how the failure to hold a *voir dire* would make her observations inadmissible.

[19] That said, this is not the appeal. The threshold to cross in order to establish that there is a serious question on appeal is a low one. I am prepared to say, with this ground of appeal, the appellant has met the threshold for establishing a serious

question for appeal. To be clear, I am not suggesting that this ground of appeal is strong.

Irreparable Harm

[20] The appellant argues that the children will suffer irreparable harm if they are forced to reside with their father, and that the court should revert back to the *status quo*. The appellant argues that there has been a long history of domestic violence towards the children, and that she has had primary care of the children. The appellant submits that the order causes irreparable harm because the children effectively lose their meaningful parent-child relationship with her, their primary caregiver, mother, and support system.

[21] The appellant argues that the change ordered by the trial judge is so drastic that it has caused physical, emotional, social, and psychological harm to the children. The appellant relies on two pieces evidence that she has obtained post-trial to support her submission on irreparable harm.

[22] First, the appellant points to a recent chat she had with her oldest child on Zoom. In that chat, the child wrote, “help call popo [police].” The child also wrote, “pls [please] get me out of here” and “i hate my life.” The appellant points to this as evidence that the child is suffering in the current situation.

[23] As a preliminary matter, the respondent objected to the appellant filing these excerpts of communications. I do not see the basis for the objection. This appeal

involves the best interests of a child and on a motion to stay it is important to have the most current information possible when determining irreparable harm. I see no issue with this evidence because the primary concern is the child's best interests.

[24] Turning now to the appellant's argument that the chats demonstrate irreparable harm, I do not view this as evidence of significant harm. Arguably, there is contrary evidence from the respondent that suggests that the children have adjusted well since the order was made and are working on a continuing positive relationship with the respondent.

[25] It is beyond dispute that moving children back and forth is necessarily disruptive. It seems to me that, while reversal of custody decisions contemplate that there will be initial unhappiness, they are decided for the long-term benefit. The trial judge recognized this. While the chats are troubling, they do not provide evidence of significant or irreparable harm.

[26] Second, the appellant relies on an opinion from Dr. Peter Jaffe, a psychologist and Professor Emeritus in the Faculty of Education at Western University and Director Emeritus of the London Family Court Clinic. According to the opinion, the type of arrangements ordered by the trial judge rarely work, and custody reversal is highly intrusive and does not always succeed because it may further traumatize children.

[27] Respectfully, I am not persuaded that this report should carry much weight in the analysis. I do not dispute that Dr. Jaffe is an expert. But this evidence does not assist me on this motion. It has not been subjected to cross-examination, he was not called as a witness at trial, he did not meet the children or the parties, or review the trial evidence. He was only asked to comment on his opinion with respect to custody reversal. This opinion does not provide a picture to this court as to how the children are doing post-trial in assessing “irreparable harm”. In addition, it is not clear to me that this new evidence would be admissible on the appeal, even with the caveat that the test for fresh evidence is more flexible where an appeal involves the best interests of a child: *Goldman v. Kudelya*, 2017 ONCA 300, at para. 25.

Balance of Convenience

[28] In my view, this factor tips in favour of the respondent. I am not satisfied that there is evidence of irreparable harm or risk of harm to the children as a result of the order, but there is evidence of benefit to the children in continuing to have the trial judge’s order intact pending appeal. The trial judge concluded that the very best outcome for the children is to first restore their parenting relationship with the respondent, and then to progress parenting as quickly as possible to a schedule appropriate to their age and stage of development, while minimizing transitions. To stay the order under appeal would be highly disruptive to this goal and would not be in their best interests. The order was made on September 9, 2021. The

children have had less than one month to adjust to being with the respondent. I see no reason at this stage to doubt the trial judge's conclusions as to what the best interests of the children are.

[29] The overarching consideration in whether to grant a stay pending appeal is whether doing so is in the interests of justice. By all accounts, this was a very difficult, high-conflict trial. In light of the very weak grounds of appeal, no evidence of irreparable harm, and the balance of convenience tipping in favour of maintaining the trial judge's goal of restoring the parenting relationship with the respondent, it is not in the interests of justice to grant a stay.

Conclusion

[30] For these reasons, the application for a stay pending appeal is dismissed. Within ten days of the release of this decision, the parties may provide costs submissions in writing not to exceed three pages, supported by bills of costs. The parties are directed to contact the Appeal Scheduling Unit to arrange for a case management judge with a view of expediting the appeal.

"S. Coroza J.A."