COURT OF APPEAL FOR ONTARIO

CITATION: W.S. v. P.I.A., 2021 ONCA 923
DATE: 20211222
DOCKET: C69835

Hourigan, Trotter, and Zarnett J.A.

BETWEEN

W.S.

Applicant (Respondent)

and

P.I.A.

Respondent (Appellant)

Gary S. Joseph and Alice Parama, for the appellant

Gary Gottlieb and Mira Pilch, for the respondent

Heard: December 17, 2021

On appeal from the order of Justice Heather A. McGee of the Superior Court of Justice, dated September 9, 2021, with reasons reported at 2021 ONSC 5976.

REASONS FOR DECISION

[1] The appellant mother appeals the trial judge's order that transferred primary care of the parties' two children to the respondent father. The order imposed an initial period of no contact by the mother, other than by Zoom or under supervision of a child and family therapist, and provided for increased parenting time to the mother in stages, with the goal of equal parenting time after six months. Prior to the order, the children's primary caregiver was the mother.

[2] At the conclusion of oral argument, we dismissed the appeal with reasons to follow. These are those reasons.

[3] Parenting orders are inherently exercises of discretion: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 13. A trial judge's exercise of discretion and factual findings in connection with it are entitled to deference on appeal: *A.M. v. C.H.,* 2019 ONCA 764, 32 R.F.L. (8th) 1, at para. 4. The caution an appellate court must show before interfering with a parenting order by a trial judge is all the more pronounced where, as here, the decision has already been implemented and we are asked to interfere with the trial judge's step by step process mid-course, but without current information.

[4] The trial judge made the order after an assiduous review of the evidence given at a 39-day trial. She found that the children were unable to spend as much time with each parent as was consistent with their best interests while they were in the primary care of the mother. She found that a transfer of primary care and a staged process toward equal parenting time was the only viable option in the children's best interests given the conduct of the mother. She described that conduct as the mother having intentionally sought to undermine agreed, court-ordered parenting schedules and sabotage reunification counselling with false allegations of sexual abuse, in order to terminate the children's relationship with

the father. Despite the mother's statements to the contrary, the trial judge found the mother did not actually want the children to have any relationship with the father.

[5] The mother raises a number of grounds of appeal that are, in essence, attacks on the trial judge's factual findings. She argues, among other things, that the trial judge allowed the father's counsel to lead witnesses, that she gave inconsistent treatment to what use could be made of prior judicial endorsements in cross-examination, and that she relied on evidence the father had "scripted" or that was based on his self-reporting. She argues that the trial judge did not refer to certain evidence that the mother says was helpful to her case. We see no merit in those grounds of appeal. The trial judge appropriately controlled the admission of evidence, was alive to how it was generated, and made justifiable rulings. The weight she gave, and her assessment of that evidence, was within her discretion. She was not obliged to refer to every piece of evidence. Her reasons show that she grappled with the essential issues. It is not the job of this court to retry the case.

[6] The mother also submits that the trial judge permitted a non-expert to give opinion evidence favourable to the father yet prohibited such opinions from the mother's witnesses. We disagree. The trial judge imposed appropriate parameters

for the scope of witness testimony, based on the individual circumstances of each witness and what they were being asked to give evidence about.

[7] The mother also argues that the trial judge erred when she ruled certain evidence to be inadmissible, including recordings made surreptitiously by the mother. We see no such error. The trial judge's rulings were made on proper considerations, including that she found the recordings to be unreliable.

[8] We also see no error in the trial judge having herself raised the suggestion that an updated report from a custody assessor should be obtained, but then deciding to continue the trial without any update from that custody assessor. Given the breadth of the evidence that was available to her, and the need to bring a timely resolution to this high-conflict litigation, her decision was within her discretion. Nor was there an error in her refusal to draw certain adverse inferences as the mother suggests she should have.

[9] Finally, the mother argues that the trial judge failed to properly take into account the provisions of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) that require consideration of family violence and its impact in prescribing the parenting arrangements that she did, and therefore failed to properly consider the best interests of the children. We disagree. The trial judge found that the mother's allegations of physical, financial, and sexual abuse were not established, and that

any other past conduct of the father that may have been abusive had no impact on his present ability to be a primary caregiver and decision-maker. She found the father “is the only parent able to foster and protect the boys’ emotional wellbeing, and moreover, that he is the only parent willing to support the children's relationship with the other parent.”

[10] The trial judge reached a reasoned conclusion about the parenting arrangements that were in the best interests of the children based on her assessment of the evidence and her consideration of the correct legal factors.

[11] For these reasons, we dismissed the appeal.

[12] Costs of the appeal are awarded to the father in the sum of $25,000, inclusive of disbursements and applicable taxes.

“C.W. Hourigan J.A.”
“Gary Trotter J.A.”
“B. Zarnett J.A.”