SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Jarvis v. Landry, 2011 NSSC 116

Date: 20110321
Docket: SFHF-10960
Registry: Halifax

Between:

Robert Gregory Jarvis

Petitioner

v.

Tessa Louise Landry

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	March 21, 2011
Written Decision:	March 24, 2011
Counsel:	Michael Owen, on behalf of Robert Jarvis Joyce Ruck De Peza, on behalf of Tessa Landry

By the Court:

Introduction:

[1] At the beginning of May 2011, I'll hear a two day trial to determine the parenting arrangements for the seven year old twin daughters of Tessa Landry and Robert Jarvis. The girls currently live with their father and their fifteen year old brother.

Application

[2] Ms. Landry has applied pursuant to section 32F of the *Judicature Act*, R.S.N.S. 1989, c. 240 for a home study or custody / access assessment with regard to each parent, and for a children's wish report. With regard to the former, she seeks information about how the girls interact and relate with their father's girlfriend.

[3] Mr. Jarvis opposes the application for a number of reasons. He argues that these reports are not necessary for the proper disposition of the trial. They will put him to an expense he can ill afford and they will delay the trial.

[4] Section 32F(1) of the *Judicature Act* provides that I may direct a family counsellor, a social worker, a probation officer or some other person to make a report concerning any matter that, in my opinion, is a subject of the proceeding. Section 32 outlines other aspects of court-ordered reports. The author of the report must file a written report with the Family Division and provide a copy to each party. The report's contents may be received in evidence and the author is a competent and compellable witness who may be cross-examined by each party. For many, the most significant aspect of a court-ordered report is that I may, subject to the regulations, specify the amount that each party is required to pay for it. The specific regulations are pursuant to the *Costs and Fees Act*, R.S.N.S. 1989, c. 104 and are found in section 19(a) of *Fees and Allowances Under Part I and II of the Act*, N.S. Reg. 91/2009. Pursuant to the Regulations, a party whose annual income is less than $20,000.00 pays no amount toward the cost of the report, while a party whose annual income exceeds $65,001.00 will pay the entire cost of a report. The Regulation relieves many parties of some of the expense of a report.

Home study or custody / access assessment

[5] Ms. Landry argues that the adversarial process will result in each parent adducing evidence to support its position. She says that since I have no ability to function in an inquisitorial capacity, without an assessment from an independent third party, it will be my responsibility to ferret the truth out from those adversarial positions.

[6] I agree with Ms. Landry's summary of the trial process: each party advocates for its chosen result and adduces the best evidence available to support that position, while seeking to undermine the opposing party's position. That I may be required to make a decision without

information from a non-partisan witness is no more than what judges do every day. Even with an assessment, I am not permitted to delegate the decision making to the assessor: at paragraph 11 of its decision in *Johnson v. Cleroux*, 2002 CanLII 37304 (ON C.A.), the Ontario Court of Appeal stated it is an error for a judge to delegate her decision to another.

[7] Some decisions dealing with applications to appoint an assessor, such as *D. v. R.*, 2004 NSSF 105 and the decision cited in it, state assessments should only be ordered in cases where there is a clinical issue. If this is the appropriate test, then an assessment should not be ordered in these circumstances because there is no clinical issue here.

[8] If it is not necessary that there be a clinical issue, then I must decide whether it is in the girls' best interests to order a home study or custody / access assessment. This is a discretionary decision and I must exercise my discretion in a manner that is consistent with the best interests of the children. The children's best interests outweigh the parents' interests, costs or convenience.

[9] The Department of Community Services has been involved with this family. So, I can hear evidence from Ms. Landry, Mr. Jarvis and personnel employed by the Department, if they are brought to the trial. The concerns of child welfare authorities may be quite different from what engages me in determining custody and access in a private custody dispute. However there may be relevant information in the possession of the Department: whether one parent makes unsubstantiated negative reports about the other; whether any negative reports are substantiated; and how recently there have been referrals to the Department. Information from the Department is subject to cross-examination so I can assess its reliability. If either parent’s concerns about the other relate to the adequacy of parenting, then information in the hands of the Department may validate or invalidate those concerns.

[10] In *Farmakoulas v. McInnis*, 1996 CanLII 5447 (NS S.C.), Justice Edwards summarized the law relating to applications for assessments. I find his summary very helpful. He said at paragraph 15 that, unless the parties consent, assessments shouldn't be ordered as a matter of course. The burden is on the party requesting the assessment to show that a professional opinion is required. He noted at paragraph 15 that assessments should be ordered where there's a specific need for the type of information generated by them and assessments should be ordered where they are likely to provide information not otherwise available because the information falls within the special knowledge of the expert. In *Farmakoulas v. McInnis*, 1996 CanLII 5447 (NS S.C.), Justice Edwards denied the request for an assessment, finding the assessment really was a fishing expedition. I`m not convinced that Ms. Landry`s request is a fishing expedition.

[11] Accepting Justice Edwards' criterion as an appropriate test for ordering an assessment (the need for a professional opinion, the need for the specific type of information the assessment will generate and the likelihood the assessment will provide information not otherwise available because it falls within the special knowledge of the assessor), this is not a case where an assessment is appropriate. Ms. Landry’s request seems to seek an assessment to use as an organizational framework for her case.

[12] Ms. Landry hasn't discharged the burden of proving the need for an assessment as explained by Justice Edwards in *Farmakoulos v. McInnis*, 1996 CanLII 5447 (NS S.C.): that a professional opinion is needed; that there's a specific need for the type of information the assessment will generate; or that the assessment is likely to provide me with information otherwise unavailable because it falls within the assessor's specialized knowledge.

[13] The dispositive consideration is the children's best interests. If their best interests required it, an assessment would be ordered, regardless of the fact it might delay the scheduled trial and cost Mr. Jarvis. At present, a home study or custody / access assessment without psychological testing can be completed in approximately three and one-half months. At his income level, Mr. Jarvis would be required to pay one-half its cost.

Children's wish report

[14] Ms. Landry asks for an order that a children's wish report be prepared. She wants someone who has no interest in the outcome of the trial to speak to the girls about their views.

[15] Ms. Landry argues that the nature of the adversarial process will result in each parent advancing only those of the girls' views which support his or her own position. She notes, as has been noted by Justice Sandomirsky of the Saskatchewan Court of Queen's Bench in *Vipond v. Hoffman*, 2009 SKQB 503 and *Aalbers*, 2010 SKQB 172, that I lack any sort of inquisitorial capacity that would allow me to determine the girls' views, independent of their parents' expression of them.

[16] In the course of the Department of Community Services' involvement with this family, the girls have spoken with Geoff Hood. Mr. Hood is a registered social worker, employed by the Department. Mr. Hood is not an advocate for either parent. As an employee of the Department, his work with this family is directed to ensuring the children are not exposed to risk. The children have expressed opinions to Mr. Hood. This expression of their views is unlikely to be motivated by seeking the approval of one of their parents. Mr. Hood can be brought to the trial and questioned about the girls' views.

[17] The girls are seven years old. They will turn eight in July, two months after the trial. I acknowledge Justice Martinson's view, expressed at paragraph 2 of her reasons in *G.(B.J.) v. G.(D.L.)*, 2010 YKSC 44, that "all children in Canada have legal rights to be heard in all matters affecting them, including custody cases." Her comment is tempered by her recognition, at paragraph 3, that this right is not absolute. Children must be capable of forming their own views.

[18] The girls' ages do not automatically persuade me that they are capable of forming their own views. While Ms. Landry applies for the children's wish assessment, she has not offered any evidence of the girls' capability to form their own views. Ms. Landry and Mr. Jarvis have

recognized that Brandon, at fifteen, has that capability. Ms. Landry and Mr. Jarvis are not similarly agreed about their daughters' capability.

[19] I dismiss Ms. Landry’s application for a children’s wish report.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia