IN THE SUPREME COURT OF NOVA SCOTIA
Citation: S. v. D., 2004 NSSF 018

Date: 20040309
Docket: SFHMCA030271
Registry: Halifax

Between:

C.R.S.

Applicant

v.

A.A.D. Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September 26, 2008.

Judge:	The Honourable Justice Douglas C. Campbell
Heard:	March 4, 2004, in Halifax, Nova Scotia
Written Decision:	March 09, 2004
Counsel:	Mary Jane McGinty and Perry F. Borden, counsel for the Applicant, C.R.S. A.A.D., not present, nor represented

By the Court:

I. This matter comes before me originally as an ex parte application for custody but the notice of the hearing was actually served upon the Respondent father in Ontario. His counsel has contacted the Court by letter suggesting that the matter ought to be adjourned until the question of jurisdiction is settled.

II. The parties had lived together in Ontario for a period of time and had one child, a daughter who is just less than four years old. The mother admits to having abused illegal drugs, largely as a result of which she made arrangements for an Ontario child welfare agency to intervene to look after the interests of the child. The mother placed the child with the paternal grandmother and signed a voluntary care agreement with the Ontario agency. She eventually sought detox and treatment and has been drug free since the summer of 2003. The Ontario agency reintroduced the mother and child by way of supervised access which gradually gave way to unsupervised access and then returned the child to the full custody of the mother, subject to the continuation of the voluntary care agreement. That occurred in December 2003.

III. On about January 11,2004 the mother made a decision to return to her home province of Nova Scotia where she has family, friends and could reside with her parents, whom she had visited for a period of time over the Christmas holidays in December 2003. She did not tell the father about her intended departure, nor did she tell the paternal grandmother and her reason was based on her fear for her personal safety and that of her child. There had been a history of domestic violence in the relationship and drug abuse by both parents. The agency in Ontario dealt with the question of paternal access by declaring that the father was to have no contact with the child except with the agreement of the agency. When the mother returned to Ontario from Nova Scotia after her Christmas visit, she voluntarily allowed the paternal grandmother to have some time to celebrate the then expired holidays with the child and that day extended to a second day with her approval, but when she went to retrieve the child the step-grandfather advised that the child had been taken by the grandmother to a safe place and was not being returned. The Ontario agency intervened and secured the return of the child and then made it a part of their arrangement that any access between the child and any third party, including the paternal grandmother, would be at the discretion of the mother.

IV. C.R.S., the mother, did not apply to a Court in Ontario for a custody order before leaving that province and at least at the time of her departure there was no Court order in existence in any jurisdiction.

V. This Court has not been made aware and the mother is not aware of any application on behalf of the father for custody either in this Court or in a Court of any other province.

VI. The mother and this Court have however been made aware of an application in Ontario by the paternal grandmother for custody and although there is some confused information as to the timing of that application, it may well be that that application was set for today's date and that it may have occurred before this hour of the day. Counsel has not been able to clarify whether that is the case and therefore I make my decision without knowing what, if anything, happened in Ontario today.

VII. There is jurisdiction in the province where the child was taken because of the presence and existence of the child. There is also jurisdiction in the departing province by virtue of the fact that that province had been the child's habitual residence. She had lived there from the time of her birth until her removal by the mother on January 16th or 17th, 2004. In light of that dual jurisdiction, it is the policy of most Courts as a matter of general rule that the receiving province would decline to use its jurisdiction in favour of the jurisdiction of the province of habitual residence with which the child has the most substantial connection. The main reason for this policy is to discourage the clandestine removal, whether it amounts to kidnapping or not, of children from one province to the other.

VIII. There are a number of factors in this case that are different from the norm. First, there has been no competing application by the other parent. Second, the agency whose specialty it is to concern itself with child welfare issues had insisted in its voluntary care agreement with the mother that there be no contact with the father, except with agency approval and that fact I consider to be of major significance. There was a unilateral taking by the paternal grandmother which was resolved only by the intervention of the Ontario agency which is a factor. Although both the mother and the father had a history of illegal use of hard drugs there is evidence before me that the mother's recovery has been successful for about eight or nine months and there is serious question in my mind about whether there has been any success by the father in terms of treatment and if there has been success, it has clearly been for less time. A minor factor is that there is no court order for custody in any province.

IX. When there are competing applications between a mother and a paternal grandmother, there is less reason to follow the above mentioned policy for at least four reasons. First, in a situation where a mother has de facto custody of a child and a father has no right of access or contact and the paternal grandmother

has no legal paperwork or right to custody, it would simply not occur to a mother in those circumstances that she would need the approval of, in this case, the Ontario Court in order to move home to be where she grew up, with her parents and with her family. Second, in light of that first factor, it would be a profound intrusion by the Court to expect her to use scarce resources to make her way back to Ontario for what could turn out to be a protracted lawsuit.

X. While I do not want those comments to diminish the importance of grandparents in the lives of a child, I cannot resist the observation that this mother would feel fully in charge of her child's care and custody issues in light of the arrangements made and specified by the agency.

XI. Another factor that makes this case different is that the mother sought the permission of the Ontario agency before making her move and fully cooperated with that agency. She agreed to wait until an arrangement could be made with the Nova Scotia child welfare agency to take over from Ontario before implementing this change and that agreement has similar terms with respect to access. That is to say, she has the full discretion for access issues regarding any third party and that there is no contact with the father.

XII. I was particularly impressed upon learning that the agency worker in Ontario responded to the mother's request for permission to move to Nova Scotia by not only approving the move, but by promoting it and commented that it would be the best plan for this particular mother to make. This fourth factor confirms that the mother was operating on the understanding that she needed the permission of the agency (as opposed to a court).

XIII. In the application that is before the Ontario court it will not surprise me if the court there pursues the usual policy that I mentioned, which favours decision making regarding jurisdiction and the acceptance of jurisdiction in the departing province for reasons of discouraging child snatching. I often think in these cases that even when these extraordinary circumstances that apply to this mother do not apply, it would be a surprise to me if a mother who has the charge of her children would think that she needs permission of a court in order to move back home. I think that the policy that I mentioned has to be approached very, very carefully. Sometimes there can be greater harm to a child both emotionally and financially to order the return than to allow the child to remain, especially if at the end of the day the removing parent is likely to have custody. The circumstances that I have mentioned in this case, whereby the husband at the instance of an agency, is not permitted contact with the child would make it highly unlikely that he would succeed in a custody claim. Although the grandmother looked after this child for a period of time and would

therefore have some chance to succeed in a custody claim, the circumstances of this case suggest that her claim would be weak.

XIV. One of the most perplexing and difficult to resolve issues in these mobility cases, where the movement happened unilaterally, is that the Judge hearing the case in the departing province is not very likely to have the facts fully disclosed. In an ex parte proceeding there is a duty on that party to disclose to the Court all those facts which might be detrimental to his own case that would bear on a proper deliberation by that Judge and when that person fails to bring that type of evidence before the ex parte Judge he can be liable for costs. In family law that is a very hollow remedy because by then the child might already have been ordered to be returned to Ontario based on the evidence before an Ontario Judge from parties who have a vested interest in withholding information. By contrast, the Court in the receiving state has some knowledge of what went on procedurally and historically in the other province and in this particular case I have the absolutely unusual and extra comfort that comes from the knowledge that a child protection agency is monitoring this parenting issue both in Ontario and in Nova Scotia and that that agency had a full awareness of the history and involvement of all three players in this child's life. While I do not have the much needed evidence from the father and paternal grandmother, the agency involvement makes it more likely that I have the benefit of a more complete picture than will be made available to the Ontario court.

XV. Counsel has referred me to a decision in Nova Scotia by Judge Levy of the Family Court in *J.S. v. L.K.* [2001) N.S.J. No. 596 QL. Judge Levy was obviously sensitive to the concern I have raised above about the policy and he said this:

> "I want to address one issue a little more fully, and that is the matter and manner of the mother's return to Nova Scotia without notice to the father. I am of course aware of the law, much of which has been cited before me, to the effect that the courts have an obligation to discourage kidnapping or child abduction or 'child-snatching..."
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> "[T]here has to be a realization, that a spouse and parent may be so economically disadvantaged and dependent, so far from home and with few supports, maybe even in an environment when she is not fluent in the prevailing language, that the option of not leaving the jurisdiction is simply not open to her. More often than not it can be close to impossible for a parent to wait the months involved and a court should take her or his plight into consideration when reacting to a removal of this kind. I am not arguing for anarchy, just a realistic understanding of how the burden of complying with the courts' expectations can fall very unevenly depending upon on one's circumstances and role during the marriage."

XVI. I endorse those words completely and suggest that if there ever was a case to which those words should apply, it is this one.

XVII. Before deciding the question of custody therefore I should decide whether I should determine the jurisdiction issue and, if I do, whether I should accept jurisdiction. I am cognizant of the fact that the Respondent has not been present in order to debate the jurisdictional question and that is problematic but I at least have the confidence of the knowledge that this is not being done ex parte at the end of the day, that the Respondent had notice of the hearing and whether or not the Respondent could have been here personally to take part, he could have been represented here and the jurisdiction question could have been dealt with today with the benefit of that input. I have decided to accept jurisdiction. I appreciate that this is an unusual decision. The Court in Ontario, when it learns of this may wonder why that was done and I have elaborated to the best that I can as to what makes this case different in my view. It is those reasons that cause me to deviate from the norm and to accept jurisdiction in the receiving province rather than to order a return of the child to the departing province. I can only say that if I were the Ontario judge deciding upon Ontario jurisdiction based largely on the policy of discouraging child snatching, without the benefit of the facts relied upon above, I would, upon later learning those facts, regret my reliance on that policy.

XVIII.I am being asked to deal with interim custody. I have had the benefit of only one side's evidence and therefore I will make an order that will be returnable. I find that the best interests of this child is served by having her placed in the custody of her mother and I so order. The order will state that the mother shall have interim sole custody of K.R.S., born [in 2000]. It will provide a provision that any access between the child and any third party shall be at the mother's discretion until further order of the Court. It will provide, further, that the child shall not be removed from the Province of Nova Scotia without the written consent of the mother or an order made by a Court of competent jurisdiction. The order will contain a clause that this matter is returnable for an Organizational Pre-Trial Conference for one-half hour on my docket within four weeks. The purpose of the Organizational Pre-Trial is to simply give the Respondent an opportunity to be represented now that it will come to his attention that this Court has accepted jurisdiction. That is not a re-trial but it will be an opportunity for the Court to be advised as to whether or not the Respondent seeks custody or whether the grandmother seeks leave, which I believe she would have to have in order to seek custody, and to manage the file from that point forward including the opportunity for the Respondent or a third

party to bring evidence that would cause me to review my order. This interim order will continue until further order of the Court.

XIX. The order will also contain the usual the usual enforcement clause in accordance with the draft put before me. I am going to order a transcript of my decision to be made, that initially the order itself will be forwarded to Mr. T.F. Baxter, counsel for the paternal grandmother and to Mr. Eric D. McCooeye, Ontario counsel for the Respondent, with a covering letter explaining that a transcript of my decision will be forwarded in due course. I will require Mr. Borden's undertaking to pass this on by letter to the above counsel.

J.