SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *P.H. v L.T.*, 2014 NSSC 221

Date: 2014-06-23
Docket: SFHMCA-084320
Registry: Halifax

Between:

P.H. and R.H.

Applicants

v.

L.T.

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	June 16, 2014, in Halifax, Nova Scotia
Written Release:	June 23, 2014
Counsel:	Mark Bailey for P.H. Christopher M. White for R.H. David A. Grant for L.T.

Revised Decision: The text of the original decision has been revised July 16, 2014 to remove personal identifying information of the parties.

Restriction on publication:

Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

Section 94(1) provides:

> No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this *Act*, or a parent or guardian, a foster parent or relative of the child.

Publishers of this case further take note that in accordance with s. 94(2) no person shall publish information relating to the custody, health and welfare of the children.

By the Court:

Introduction

[1] I have been asked to reconsider my decision to dismiss a request for an adjournment.

History

[2] P.H. and R.H.'s application for custody of D was scheduled to be heard on May 14 and 15, 2014. D is Mr. H's son and Ms. H's grandson. Native Child and Family Services of Toronto placed D with Ms. H in August 2012. Until then, D had lived with his mother, L.T.

[3] The application was called into court at approximately 10:10 a.m. though it was scheduled to begin at 10 o'clock. Ms. H and Mr. H appeared with their lawyers. Ms. T's lawyer appeared, but Ms. T did not. Her lawyer said that he had received a text message from Ms. T saying she was unable to attend. The message had been lost, and he did not know its details. He was forthright in saying that he didn't know whether it would be appropriate to wait for her arrival, and that attempts to reach her by telephone would not be successful.

[4] Ms. H and Mr. H argued that I should grant their application for joint custody and primary care of D.

[5] Ms. T's counsel requested an adjournment.

[6] After hearing submissions, I gave an oral decision, granting the request for joint custody and dismissing the request for an adjournment. We concluded at 10:38. Ms. T hadn't appeared and no sheriff arrived during the proceeding to tell me that she had attempted to contact the court while the proceeding was ongoing.

[7] This is an application under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. It is not a trial, so Civil Procedure Rule 4.20 doesn't guide my consideration of whether to grant an adjournment.

[8] "The decision to grant or refuse an adjournment is within the discretion of the presiding judge", according to Justice Cromwell, then of the Court of Appeal, at paragraph 33 of *Moore v. Economical Mutual Ins.*, 1999 CanLII 7248 (NS CA). At paragraph 35 of this decision, Justice Cromwell adopted the British Columbia

Court of Appeal's statement in *Sidoroff v. Joe*, 1992 CanLII 1815 (BC CA), at paragraph 8, as a succinct and accurate summary of the principle which governs my exercise of this discretion:

> The settled principle is that the interests of justice must govern whether to grant an adjournment. The interests of justice always require a balancing of interests of the plaintiff and the defendant. (The emphasis is Justice Cromwell's.)

[9] I dismissed the request for an adjournment for a number of reasons. First, Ms. H and Mr. H had pursued resolution of the application diligently, through numerous conferences and two adjournments. There would be prejudice to them, largely financial, by the delay.

[10] Second, Ms. T did not show herself to be engaged in the court process.

(a) She didn't file a Response to the application.

(b) She did not attend the Parent Information Program.

(c) When supervised access was ordered through Veith House, she did not arrive on time for the access sessions with D. Accounts vary, but there were no more than five visits.

(d) When Veith House withdrew its support for supervised access visits, she would not cooperate in making alternate arrangements for supervised access.

(e) She did not attend a pre-hearing conference in September 2013.

(f) The application was originally scheduled to be heard on January 23 and 24, 2014. Ms. T was directed to file her affidavit for that hearing by December 27, 2013. She filed nothing.

(g) Ms. T did not instruct her counsel prior to the initially scheduled hearing dates in January 2014 and her counsel was on the verge of moving to be removed from the record at the commencement of that hearing when Ms. T arrived at court, approximately ten minutes after the hearing was scheduled to begin.

(h) The January 2014 hearing dates were adjourned at Ms. T's request (and over the objections of Ms. H and Mr. H).

(i) The new hearing dates (May 14 and 15, 2014) gave Ms. T a further three months to prepare her affidavit offering evidence in support of the relief she wanted.

(j) Ms. T's affidavit, filed on May 2, 2014, was eighteen sentences (nine paragraphs) long. With regard to D, in it, she recites D's birthdate and says that the family lived together until 2009 when she took D to Toronto where she worked to support him. She says that in August 2012 a member of Native Child and Family Services in Toronto attended her home and expressed nonspecific concerns about her parenting and wouldn't listen to her explanations. She says she couldn't afford her accommodations and was on the verge of eviction. She says that D was placed with his grandmother for six months by agreement and there was to be specific access, which Ms. H did not provide. She says that Ms. H was given interim care of D on March 11 and "there is no reason why I should not have day to day care of my son". She says she's able to provide living accommodations and "that there was never any serious concerns about my parenting skills or treatment" of D. Claiming good health and no use of non-prescription drugs, she said that her access had been limited since the March 11 order and she wanted his custody or unsupervised access three weekends each month.

(k) My summary of Ms. T's affidavit does not exaggerate its brevity or lack of content. The affidavit also notes that she was charged with assault and was being investigated by the Minister of Community Services.

(l) While aware of the May hearing dates and with plenty of time to prepare her affidavit, Ms. T provided scant evidence to support her claim. Ms. T has had the opportunity to engage in the court process and has barely done so.

[11] Third, D is eight years old. It's been almost two years since he lived with his mother and he's had little face-to-face contact with her despite orders for access. Telephone access with his mother has been troubling for him, with broken promises and inappropriate content. D has adjusted to his new home, school and community.

[12] I believe that the interests of justice which govern the granting of adjournments must also include consideration of the best interests of a child, where

parenting is at issue. Aside from the parties' interests, my decision to dismiss the request for an adjournment was informed by consideration of D's best interests and creating stability for him.

[13] I dismissed the request for an adjournment and directed Ms. H's counsel to prepare an order granting custody to her and to Mr. H and making no provision for Ms. T's access.

Current circumstances

[14] Before the order was sent to me, I received correspondence from Ms. T's counsel providing new information. I was told that Ms. T did not appear in court on May 14, 2014 because she was at the Provincial Court. (The Family Division hearing was scheduled to begin at 10 o'clock and was scheduled for two days. The Provincial Court appearance was scheduled at 9:30 when the matter was set over until June to enter a plea.)

[15] The letter with this new information came more than three weeks after the hearing date.

[16] Because the order had not been taken out, Ms. T's counsel asked that I reconsider the request for an adjournment. I heard submissions from counsel during a telephone conference on June 16, 2014.

[17] Counsel agreed that I have the discretion to withdraw, modify or even reverse my decision, as noted by Justice Hamilton in *MacLellan v. MacDonald*, 2010 NSCA 34 at paragraph 26 and, more recently, by Justice Farrar in *McMullin-Mullin v. Henley*, 2013 NSCA 85 at paragraphs 13-15.

[18] Ms. H and Mr. H wish to preserve the order granting them D's care and custody. There has been expense and effort in advancing their application. They believe the process has been prolonged by Ms. T's failure to attend to it and that this delay is not in D's best interests. They oppose an adjournment.

[19] Ms. T argues that telephone contact is being withheld now the applicants have custody. She says that any prejudice from the adjournment may be compensated by an award of costs, noting that Mr. H resides in a home that he and she jointly own.

[20] There is no application outstanding with regard to the jointly owned property. Ms. T's counsel suggested that an application to deal with it could be added to this application, if an adjournment is granted.

[21] At this point, Ms. T would need leave to file a Response to Application and to bring a claim relating to the property. While Ms. T's affidavit sworn to on May 1, 2014 made reference to the property and her claim to it, she did not seek leave to bring this claim when she filed her affidavit prior to the May hearing dates. It is not a claim that's even alluded to in Ms. H and Mr. H's affidavits. If this claim was added to the existing application, it could have the effect of further delaying it. In any event, Ms. T has taken no steps to advance this claim.

[22] Ms. T is not forestalled from bringing a future application with regard to her son's custody if she believes that the circumstances have changed and the current order is no longer in D's best interests.

[23] Ms. T's counsel provided me with materials from the Provincial Court. These indicate that Ms. T's appearance on May 14 had been scheduled on March 8 and she was present when it was scheduled on March 8.

[24] Ms. T's affidavit was sworn before her lawyer on May 1, so I know that she met with her lawyer *after* learning she needed to be in the Provincial Court on the same day that the Family Division application was to start. This meeting was approximately two weeks *before* the Family Division application was to start. There's no explanation as to why Ms. T didn't talk to her lawyer about this or ask to delay the start of the Family Division hearing until she could make her way to the Halifax court.

[25] This is the second time that Ms. H, Mr. H and their counsel have been poised to begin the hearing while Ms. T's attention has been elsewhere. The evidence offered by Ms. H and Mr. H indicated that D needs consistency and stability. Delay and the concomitant uncertainty are not in his best interests.

[26] I have re-considered Ms. T's request for an adjournment and dismiss it. I have endorsed the order prepared by Ms. H's counsel.

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

Halifax, Nova Scotia