

CANADA / JUDGMENT

T.N. v. J.C.N.

2013 BCCA 432

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 432 T.N. v. J.C.N. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: T.N. v. J.C.N., 2013 BCCA 432 Date: 20130912 Docket: CA040893 Between: T. N. Appellant (Claimant) And J.C.N. also known as J.C.S. Respondent (Respondent) Before: The Honourable Madam Justice Levine (In Chambers) On appeal from: Supreme Court of British Columbia, May 8, 2013 (T.N. v. J.C.N. also known as J.C.S., Vancouver Registry E093681) Oral Reasons for Judgment Counsel for the Appellant: A.L. Perry Counsel for the Respondent: G. Gordon Place and Date of Hearing: Vancouver, British Columbia September 12, 2013 Place and Date of Judgment: Vancouver, British Columbia September 12, 2013 Summary Application for leave to appeal an order for interim relief under the Family Law Act, S.B.C. 2011, c. 25. In a high-conflict dispute over guardianship and contact with a child, the chambers judge set conditions for adjournment of the trial to February 2014 that recognized the parties as joint guardians of the child, granted full interim parental responsibilities to the father and limited interim parental responsibilities to the mother, and set conditions for supervised access of the child on terms set in a psychologist's report. The father appealed, arguing the chambers judge misinterpreted the guardianship provisions of the Family Law Act, and giving any parental responsibilities to the mother had the potential to harm the child. Held: application for leave to appeal dismissed. The court will only interfere in matters involving interim orders and, in particular, in matters involving custody, in exceptional circumstances. In this case, the parties had appeared before the chambers judge once to vary the interim order, and further applications were pending. An appeal to this Court would likely delay the trial and interfere with the management and ongoing consideration of the issues involved in this very difficult case that can best be done in Supreme Court.

- [1] LEVINE J.A.: This is an application for leave to appeal an order for interim relief made under the Family Law Act, S.B.C. 2011, c. 25.
- [2] I will outline the background briefly. The parties married in 1986. They have one child born in December 2003. In 2006, the mother began using alcohol and in 2008, she became addicted to alcohol. The parties separated in July 2009, and the father commenced proceedings in British Columbia Supreme Court in November 2009.

- [3] The mother's addiction interfered with her ability to mother the child. Attempts at rehabilitation failed until late in 2012 and early 2013 when the mother appeared to be recovering. In the meantime, the child was primarily cared for by the father, the maternal grandmother and a series of nannies. The child has shown acute anxiety and distress with respect to her mother's presence and conduct.
- [4] A consent order was entered into and approved by Master Tokarek in April 2010. It gave interim physical custody of the child to the father and interim joint guardianship to the parties. It provided a default tie-breaker to the father on matters concerning the child's health, education, and general welfare, as well as the location and circumstances of access. The order was subsequently extended by consent.
- [5] After an adjournment of an earlier trial date by consent, the trial was scheduled for May 27, 2013. The mother applied for an adjournment and the father applied for orders seeking sole guardianship under the Family Law Act, supervised access in accordance with the report of a psychologist, and restraining orders. The chambers judge adjourned the trial to February 3, 2014, making that date peremptory on the mother. He imposed conditions that recognized the parties as joint guardians of the child, granted full interim parental responsibilities to the father and limited interim parental responsibilities to the mother, and set conditions for supervised access of the child on terms set in the psychologist's report. No restraining orders were granted.
- [6] The chambers judge subsequently varied the order with respect to the appointment of the access supervisor following a second psychological report. I was informed by the mother's counsel at this hearing that the parties subsequently entered into a contract regarding the supervised visits in accordance with the terms of the second psychological report.
- [7] The father's application for leave to appeal concerns the refusal of the chambers judge to award him sole guardianship and the effective joint guardianship of the parties. He objects to the granting of any parental responsibilities to the mother. At this hearing, his counsel also objected to the failure of the chambers judge to grant restraining orders although that matter was not referred to in the grounds of appeal.
- [8] The specific grounds of appeal alleged by the father are that the chambers judge erred by misinterpreting the Family Law Act in relation to the matter of joint guardianship and the granting of day-to-day parental responsibilities to the mother. He alleges that the chambers judge did not consider the best interests of the child and the impact of family violence on the child, and gave insufficient reasons for making the order that he did. Effectively, the father's objection is to the change of the regime from the previous consent order, which gave him the default tie-breaker with respect to decisions involving the health and welfare and education of the child, and with respect to the location and circumstances of access.

- [9] The tests for granting leave to appeal are well established and not in dispute. I am to consider whether the appeal is important to the practice, whether it is important to the parties to the action; whether it has prima facie merit or, on the other hand, it is frivolous; and whether the appeal will unduly hinder the progress of the action. The overarching consideration with respect to these factors is the interests of justice.
- [10] The jurisdiction of the court to vary interim orders for custody and, in fact, most interim orders made in family law matters, is extremely limited. As Madam Justice Huddart put it in *J.G.F. v. C.L.B.*, 2003 BCCA 382 at para. 10: The jurisdiction of this Court to vary an interim order for custody or for most orders made under the Family Relations Act is very limited. All of these orders are discretionary. It is only in exceptional circumstances, where there is a clear reason to interfere that this Court will do so. In a case which Mr. F. so properly provided to me (*Testawitch v. Farquhar* [1997] B.C.J. No. 2866), Mr. Justice Hall commented that the management of these cases is usually best left to the trial court. It is only when a final resolution of the matter has been arrived at in the trial court that it will usually be appropriate for this Court to hear the matter. Even then it is rare for this Court to interfere with the decision of a trial judge after the trial. This Court has recently been told by the Supreme Court of Canada (*van de Perre v. Edwards* [2001] 2 S.C.R. 1014), we should not interfere with a decision of a custody matter except in the most exceptional of circumstances.
- [11] To paraphrase Huddart J., the court will only interfere in matters involving interim orders and, in particular, in matters involving custody, in exceptional circumstances. It is even rare for the court to interfere in matters of custody following a trial.
- [12] The father's counsel has suggested that there are exceptional circumstances here. She argues that the potential for the mother to harm the child in the context of the limited visiting regime that has been put in place is unpredictable and can have serious consequences. She suggests that the interpretation of the Family Law Act is an important matter for this Court to consider and that the appeal has some merit given the circumstances and the new provisions of the legislation.
- [13] Despite father's counsel's strong submissions, I am of the view that this is not a case where leave should be granted. The parties have appeared before the chambers judge at least once and advised me that other applications are pending in British Columbia Supreme Court. These matters can be dealt with more quickly and efficiently in response to ongoing matters as they arise by further interim orders in British Columbia Supreme Court. An appeal to this Court will likely delay the trial and interfere with the management and ongoing consideration of the issues involved in this very difficult case that can best be done in Supreme Court.
- [14] I dismiss this application for leave to appeal. [submissions re costs of application]

[15] LEVINE J.A.: The normal order in this Court is that costs follow the event, which means that the party who is successful on the application or the appeal is entitled to costs. I see no reason to depart from that normal order in this case.

[16] The respondent will be entitled to her costs of this application. "The Honourable Madam Justice Levine"

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