1998 CarswellAlta 888, 42 R.F.L. (4th) 136

B. (P.L.) v. S. (A.)

A.S., Appellant (Defendant) and D.S. and T.S., Appellants and P.L.B., Respondent (Plaintiff)

Alberta Court of Appeal

Bracco, Côté, Hunt JJ.A.

Heard: September 9, 1998
Oral reasons: September 9, 1998
Docket: Calgary Appeal 98-17869

Counsel: *G. Groome*, for A.S. - Appellant (Defendant).

*R. **Low***, for D.S. and T.S. - Appellants.

J. Crook, for P.L.B. - Respondent (Plaintiff).

Subject: Family

Family law --- Custody and access — Interim custody — General

Father of child born to unmarried parents issued statement of claim against mother as soon as child born for declaration that father was already guardian and for custody — Adoptive parents were planning to adopt child with mother's agreement and remove child from Alberta — Urgent order made on day of birth for parties to file affidavits simultaneously within four days with hearing following day without statement of defence, notice of motion or definition in order of issues to be heard — At hearing, only oral evidence led was about duration of parties' cohabitation and whether father was automatically guardian — Chambers judge found that father was not automatically guardian because of insufficient cohabitation but appointed father joint guardian with mother — Guardianship of adoptive parents terminated — Father awarded interim custody — Appeal from order filed — Order amended after factums filed to add formal declaration of paternity in father — Better definition of issues and full chance to adduce oral evidence respecting issues necessary — Order appealed from set aside — Prospective adoptive parents added as defendants to lawsuit — Interim custody until trial granted to father as preservative measure without prejudging issues about guardianship or eligibility for it.

Family law --- Children born outside marriage — Custody and access — Custody

Father of child born to unmarried parents issued statement of claim against mother as soon as child born for de-

claration that father was already guardian and for custody — Adoptive parents were planning to adopt child with mother's agreement and remove child from Alberta — Urgent order made on day of birth for parties to file affidavits simultaneously within four days with hearing following day without statement of defence, notice of motion or definition in order of issues to be heard — At hearing, only oral evidence led was about duration of parties' cohabitation and whether father was automatically guardian — Chambers judge found that father was not automatically guardian because of insufficient cohabitation but appointed father joint guardian with mother — Guardianship of adoptive parents terminated — Father awarded interim custody — Appeal from order filed — Order amended after factums filed to add formal declaration of paternity in father — Better definition of issues and full chance to adduce oral evidence respecting issues necessary — Order appealed from set aside — Prospective adoptive parents added as defendants to lawsuit — Interim custody until trial granted to father as preservative measure without prejudging issues about guardianship or eligibility for it.

Family law --- Children born outside marriage — Custody and access — Practice and procedure

Father of child born to unmarried parents issued statement of claim against mother as soon as child born for declaration that father was already guardian and for custody — Adoptive parents were planning to adopt child with mother's agreement and remove child from Alberta — Urgent order made on day of birth for parties to file affidavits simultaneously within four days with hearing following day without statement of defence, notice of motion or definition in order of issues to be heard — At hearing, only oral evidence led was about duration of parties' cohabitation and whether father was automatically guardian — Chambers judge found that father was not automatically guardian because of insufficient cohabitation but appointed father joint guardian with mother — Guardianship of adoptive parents terminated — Father awarded interim custody — Appeal from order filed — Order amended after factums filed to add formal declaration of paternity in father — Better definition of issues and full chance to adduce oral evidence respecting issues necessary — Order appealed from set aside — Prospective adoptive parents added as defendants to lawsuit — Interim custody until trial granted to father as preservative measure without prejudging issues about guardianship or eligibility for it.

APPEAL by mother and prospective adoptive parents from interim custody order.

The jdugment of the court was delivered by *Côté J.A.*:

1 We do not need to hear any further argument from the respondent in view of the points which have been made and the positions taken in argument so far, and we are now in a position to give judgment in this appeal. I will give the unanimous judgment of the Court.

2 A baby was born to unmarried parents, and as soon as she was born, the present respondent issued a statement of claim against the mother, who is one of the appellants. It contended that the mother planned to have the child adopted by the S's (who were not parties to the suit but are parties to this appeal). It sought a declaration that the father was already a guardian, and an award of custody to him.

3 It appeared that the S's, with the agreement of the mother, were planning to adopt the child and remove her from Alberta. Therefore, an urgent order was made on the very day of birth. By that order, the parties were to file affidavits simultaneously within four (4) days (which included a weekend) and then there was to be a hearing the following day. There was no statement of defence, and no notice of motion, and the order did not define the issues which were to be tried.

4 The hearing was held as scheduled. The chambers judge called for oral evidence on points on which the

affidavits clashed, and not for duplication of the affidavits. The only oral evidence led was about the duration of the parties' cohabitation, and so whether the father was automatically a guardian. Only a few witnesses testified, and many of the key people were not seen by the court.

5 The chambers judge found that there had not been sufficient cohabitation, and so the father was not automatically a guardian. But he then appointed the father joint guardian along with the mother, who already was automatically a guardian. He terminated the guardianship which the prospective adopting parents had secured or apparently secured because of a signed consent by the mother. And he awarded interim custody to the father. An appeal was filed, and after factums were all filed, the order appealed from was amended to add a formal declaration of paternity in the father.

6 After extended argument, it became plain that there were some problems. The first is that the affidavits clashed on a number of factual matters. The second is that more time to reflect and exchange arguments developed more issues which were probably not seen clearly by counsel initially. The third is that on some issues there is little or no evidence, or evidence which is a mere conclusion, or an opinion by someone arguably unqualified to give it. The next problem is that some counsel seem to have been taken somewhat by surprise, though whether they should have been, or whether they took proper steps to remedy that, is much less clear. The final problem is that the interim custody order appealed will not settle the dispute. If the order is upheld, counsel for the natural mother says that she will then likely seek custody for herself, and indeed the reasons of the chambers judge almost invite her to do so.

7 Therefore, it appears to us that there should be better definition of the issues, and a full chance to adduce oral evidence respecting them. In view of the urgency of the matter, and the extensive argument and thick affidavits, and some oral evidence at the first hearing, we do not contemplate any form of discovery.

8 Accordingly, we set aside the order appealed from, pronounced on July 28 and amended in August 1998. We add the S's as defendants to the lawsuit. We give the plaintiff (respondent) liberty to file and serve any other amendments to his statement of claim that he wishes, by 10 a.m. on September 21st. The defendants must file and serve statements of defence by 4 p.m. on October 1st.

9 We expect the parties to raise in their pleadings all the issues which they wish to rely upon or have decided. We doubt that paternity is disputed, but that should be made clear. There will be a full trial with live evidence as soon thereafter as the Court of Queen's Bench may provide a date. We direct all counsel to attend forthwith upon the Chief Justice of that Court, or his designate, to provide time estimates and seek a trial date.

10 In the meantime, we must provide for the interim custody of the child. She is very young, and has been moved once already (from the S's to her father). Given the short times involved, we give the father (plaintiff) interim custody until the trial which we have ordered, unless otherwise ordered by the Court of Queen's Bench. We do not intend to prejudge issues about guardianship or eligibility for it. We simply award such interim custody as a preservative measure.

11 The problems with the first hearing were not really the fault of any counsel, and arose largely from the otherwise commendable desire for speed evinced by all concerned. Under the circumstances, there will be no costs to anyone of the Queen's Bench proceedings to this point. The appellants will have their disbursements of this appeal, if they really think it worthwhile to demand them from the respondent. Each party will bear his or her own appellate costs in all other respects.

Order accordingly.

END OF DOCUMENT