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Howard v. Howard

Brenda Lyn Howard, Appellant Plaintiff (Defendant by Counterclaim) and Joseph Duane Harvey Howard, Respondent Defendant (Plaintiff by Counterclaim)

Alberta Court of Appeal

Conrad J.A., Côté J.A., Hetherington J.A.

Judgment: May 10, 2000

Docket: Calgary Appeal 00-18650

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Counsel: *D. Castle*, for Appellant.*A. Fares*, for Respondent.

Subject: Family

Family law --- Custody and access — Appeals — General.

APPEAL of order awarding interim child custody.

Conrad J.A. (for the Court):

1 This appeal is from an order for interim custody. The appellant mother had been the de facto custodial parent since the parties separated in 1995, and certainly since they changed residences in 1997. The Chambers Judge granted custody to the father in January of 2000. This Court stayed that order, so custody has remained with the mother since the hearing of this appeal.

2 The Chambers Judge indicated in her reasons for judgment that the main reason for granting the father custody was her belief that the child deserved a stable environment and should not be spending all of her time in a truck with the mother.

3 The case is exceptional in one respect. Notwithstanding that the Chambers Judge changed custody, a careful reading of her reasons indicates that she was thinking in terms of this order being very interim. She states at A.B. 141:

There is no question that Ms. Howard and Ms. Thompson is a good mom, that's not the situation here. I have to look at the best interests of the child. This is not written in stone, things will change. If Ms. Howard

decides to settle in Dewberry and have her child and not go on these long hauls so that Amber can go to school next year, then there is no question in my mind that the child will be back at that residence.

And again later at the same page:

And like I say, if in May she decides that this situation is not - she is going to stay home, then I am most certain that she will probably get the child back.

4 Obviously this child will soon be in Grade 1 and should be in a stable home by that time. Moreover, at the time of the application the mother was pregnant and contemplated quitting work and settling in one place by about April 2000. The Chambers Judge anticipated that a change in custody could take place in that event.

5 In any event, it is obvious that the Chambers Judge viewed the mother as a good mother and she considered that this matter should be reviewed in May, if matters changed. It is now May.

6 While we are not prepared to entertain affidavit evidence and make decisions as to the appropriate place for custody, we have heard representations that Ms. Howard did in fact quit driving her truck and is settled. That was part of the basis for the stay order which was granted.

7 In keeping with the tone of the reasons for judgment, we are of the view that there must be a trial on the merits of this matter. We are prepared to allow the appeal and direct the matter to trial. However, we wish to make it clear that we do so on the representations by the mother's counsel that she is prepared to proceed to trial forthwith. We therefore direct the following:

(i) Both parties will attend on Chief Justice Moore forthwith or, in any event, within 48 hours to obtain a trial date before the middle of July.

(ii) Mrs. Howard and her counsel will sign an undertaking to be filed with this Court within 48 hours undertaking to go to trial on the date so set by the Chief Justice.

8 On the basis of those conditions the appeal is allowed and custody will remain with the mother. That custody will remain with the mother until the date set for the trial by the Chief Justice and the decision that will be rendered following the trial on that date.

9 In the event the matter does not proceed to trial then a fresh application will have to be made, unless it is settled of course.

(DISCUSSION ON COSTS)

Côté J.A.:

10 The appellant will have costs in any event on Column 1, but the respondent does not have to pay them until August 15th.

Appeal allowed; Matter directed to trial.

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