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H. (R.) v. H. (G.G.)

R.H., Respondent (Plaintiff) and G.G.H., Applicant (Defendant)

Alberta Court of Appeal

Peter Martin J.A.

Heard: December 14-15, 2011

Judgment: December 15, 2011

Docket: Calgary Appeal 1101-0311-AC

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Counsel: A.J. Chickloski, for Respondent

D.P. **Castle**, for Appellant

Subject: Family

Family law.

Peter Martin J.A.:

1 This matter comes to me as an emergency application for the stay of an order issued by a case management judge earlier this week. As is common with applications of this nature, the materials presented to me were hastily prepared. For the purpose of my decision, the following brief narrative of this conflicted relationship will suffice.

2 The parties, while married and living in Vancouver, had twin girls who are five years old today. When the children were still infants, that is less than a year old, their mother relocated with them to Calgary. That move was made without the benefit of the father's consent or a court order. I am told the father then visited Calgary regularly to attempt a reconciliation with the mother and to maintain his contact with the children. When that reconciliation proved unsuccessful, those visits stopped and positions hardened. Eventually a parenting scheme was implemented whereby the mother would continue the day-to-day care of the children, while the father was given overnight access, I understand one night every three weeks. That arrangement also contemplated the father having the children one week over Christmas. The specific dates were left to be determined.

3 Notwithstanding that, the mother and her new partner arranged a holiday in Hawaii from December 16, 2011 to January 4, 2012.

4 The father objected and the parties went to their parenting coordinator to attempt to resolve this impasse. When those efforts proved unsuccessful they returned to the Queen's Bench judge assigned to case manage the litigation, for a ruling as to whether the father could have access for a week over Christmas, or whether the mother should be allowed to take the children to Hawaii during that time.

5 As this issue emerged, each party began to accuse the other of sexually inappropriate conduct in the presence of the children. I emphasize that there is no suggestion of sexual interference, just allegations of inappropriate sexual conduct, such as being naked in the presence of the children, and on behalf of the mother, that the father was doing "special exercises" with the children which included his rubbing their stomachs above the pubic bone, opening and closing their legs and rubbing their thighs.

6 Such allegations were advanced in affidavit form and presented to the case management judge. Apparently time did not allow for cross-examination on the affidavits and that has not changed; they remain untested.

7 The case management judge, upon hearing the submissions of counsel and a review of the materials before him, decided there was no good reason to prevent the father from enjoying the access that he had been promised.

8 The mother seeks to appeal that ruling and has asked that I stay the case management judge's order granting access. It is of course obvious that a stay will end the matter as an appeal of this ruling cannot be heard before this immediate crisis has passed.

9 In considering the application, I am mindful of the tripartite test to be applied. The sole basis for the application is the mother's alleged concern that it may be unsafe for her children to be with their father overnight and unsupervised in light of the recent allegations voiced by one of her children. It is not suggested that such an extended stay with the father without their primary caregiver — the mother — would be difficult for the children.

10 I would have hoped that the parents could have negotiated the Hawaii trip in exchange for alternate and perhaps extended access to the father later, but they have not. So I am left to decide this matter for them, according to law and I will do so. On the facts now alleged, I find the mother has not met the test for a stay. On the allegations before me, the same as before the case management judge, I am unable to say that the children are at any greater risk while in the company of their father, than in the company of their mother and her current partner. Indeed, my strong sense is that the children are not in danger while in the company of either one of their parents, and I fear that the allegations now made by each against the other, are exaggerated, if they are true at all.

11 Accordingly, the application is denied.

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