2003 CarswellAlta 1767, 2003 ABQB 211, 49 R.F.L. (5th) 442

W. (J.) v. C. (J.)

J.W. and E.W., Plaintiffs (Applicant/Respondent) and J.C., Defendant (Respondent/Applicant)

Alberta Court of Queen's Bench

Johnstone J.

Heard: January 31, 2003
Judgment: March 4, 2003[FN*]
Docket: Calgary 0301-00176

Proceedings: affirmed *W. (J.) v. C. (J.)* (2003), 2003 ABCA 348, 2003 CarswellAlta 1769 (Alta. C.A.)

Counsel: Lois M. Sparling for Plaintiffs / Applicant / Respondent

Dianne P. **Castle** for Defendant / Respondent / Applicant

Subject: Family; Civil Practice and Procedure

Family law --- Guardianship — Appointment by court — Practice and procedure

Defendant was father and sole guardian of two children — Father remarried five years after wife's death — Plaintiff aunt and uncle alleged sexual abuse by father of one or both children and claimed that father required help in caring for children — Aunt and uncle applied for guardianship of two children — Father applied to strike application of aunt and uncle for lack of standing — Application by aunt and uncle dismissed — Father's application allowed — Allegations of sexual abuse of children by father were not substantiated — Applicable test in contest for guardianship between natural parent and legal stranger is fitness test as opposed to best interests test — Aunt and uncle did not fall within one of four categories for status to apply for guardianship — No allegations were contained in statement of claim of nexus beyond that of aunt and uncle — No evidence established significant nexus between aunt and uncle and children — No relationship existed between plaintiffs and children akin to nurturing parent — Aunt and uncle's relationship with children was limited and appeared tantamount to estrangement — Plaintiffs were not sufficiently intimately connected with children to warrant standing to apply for guardianship.

Family law --- Custody and access — Practice and procedure — Standing

Defendant was father and sole guardian of two children — Father remarried five years after wife's death — Plaintiff aunt and uncle alleged sexual abuse by father of one or both children and claimed that father required help in caring for children — Aunt and uncle applied for guardianship of two children — Father applied to strike

application of aunt and uncle for lack of standing — Application by aunt and uncle dismissed — Father's application allowed — Allegations of sexual abuse of children by father were not substantiated — Applicable test in contest for guardianship between natural parent and legal stranger is fitness test as opposed to best interests test — Aunt and uncle did not fall within one of four categories for status to apply for guardianship — No allegations were contained in statement of claim of nexus beyond that of aunt and uncle — No evidence established significant nexus between aunt and uncle and children — No relationship existed between plaintiffs and children akin to nurturing parent — Aunt and uncle's relationship with children was limited and appeared tantamount to estrangement — Plaintiffs were not sufficiently intimately connected with children to warrant standing to apply for guardianship.

Cases considered by *Johnstone J.*:

B. (B.) v. D. (L.) (2002), 2002 ABQB 429, 2002 CarswellAlta 531, [2002] 8 W.W.R. 178, 3 Alta. L.R. (4th) 317, 313 A.R. 291 (Alta. Q.B.) — considered

Bowes v. Gauvin (2001), 2001 ABCA 206, 2001 CarswellAlta 969, 202 D.L.R. (4th) 573, *(*sub nom. *B. (A.) v. B. (G.J.))* 286 A.R. 395, *(*sub nom. *B. (A.) v. B. (G.J.))* 253 W.A.C. 395, 20 R.F.L. (5th) 301 (Alta. C.A.) — considered

D. (G.) v. M. (G.) (1999), 1999 CarswellNWT 40, 47 R.F.L. (4th) 16 (N.W.T. S.C.) — followed

D. (W.) v. P. (G.) (1984), 54 A.R. 161, [1984] 5 W.W.R. 289, 41 R.F.L. (2d) 229, 11 D.L.R. (4th) 321, 32 Alta. L.R. (2d) 232, 12 C.C.C. (3d) 161, 1984 CarswellAlta 86 (Alta. C.A.) — followed

D. (W.) v. P. (G.) (1984), 33 Alta. L.R. (2d) xxxvi, [1984] 6 W.W.R. lxiii (S.C.C.) — referred to

J. (K.E.) v. J. (D.L.) (2002), 2002 ABQB 188, 2002 CarswellAlta 282, [2002] 6 W.W.R. 124, 26 R.F.L. (5th) 105, 3 Alta. L.R. (4th) 353 (Alta. Q.B.) — considered

Wile v. Tancowny (2000), 2000 ABQB 906, 2000 CarswellAlta 1455, *(*sub nom. *K.A.W. v. B.A.T.)* 282 A.R. 143 (Alta. Q.B.) — considered

Williams v. Williams (1995), 13 R.F.L. (4th) 152, 172 A.R. 10, 1995 CarswellAlta 44 (Alta. Q.B.) — followed

Statutes considered:

Domestic Relations Act, R.S.A. 2000, c. D-14

Generally — referred to

s. 49 — considered

s. 50(1)(a) — considered

s. 50(1)(b)(i) — considered

s. 52 — considered

s. 53(1)(b) — considered

APPLICATION by aunt and uncle for guardianship of children; APPLICATION by children's father to strike plaintiffs' application for lack of standing.

***Johnstone J.*:**

Background Facts

1 On January 7, 2003, J.W. and E.W. (collectively called the "Plaintiffs") commenced an action claiming guardianship of A.C. and J.C.(2) or in the alternative joint guardianship and interim access. No Statement of Defence has been filed. J.W. is the sister of the biological mother of the children and E.W. is her husband. The Plaintiffs reside in Tokyo, Japan.

2 A.C., born 1993, is currently 9 years of age and J.C.(2), born 1996, is currently 6 years of age (collectively called "the children"), N.C., the biological mother of the children, died of a cerebral haemorrhage on November 23, 1996. J.C. (the "Defendant") is the children's father and sole guardian. He remarried on September 29, 2001, and he and his new wife reside with the children. His wife, J.L.C. remains at home as a full-time homemarker and caregiver for the children.

3 When this matter came before me on January 31, 2003, the Plaintiffs sought an adjournment of their application for interim access to the children to February 21, 2003. They further requested an order prohibiting the Defendant from removing the children from the jurisdiction until the matter was heard.

4 The Defendant in turn has brought an application to strike the Plaintiffs' action on the basis that they have no standing, In the alternative the Defendant requests that the Plaintiffs post security for costs in the sum of $50,000.00 within one month and until security has been posted, a stay of proceedings be ordered. In default of security being posted within the time specified, he asks that the Plaintiffs' action be dismissed.

5 At the hearing the Defendants requested that the Court file be sealed because of the sensitivity of the issues raised and the concern that if such allegations become public it may result in termination of the Defendant's employment as a teacher. Counsel for the Plaintiffs was not opposed to this request. I granted the Order sealing the file.

6 Regarding the prohibition order, the Defendant took no issue. However, as he did not wish to attorn to the jurisdiction and thereby acknowledge the standing of the Plaintiffs to bring this application, he agreed to file a written undertaking with the Court confirming that he would not remove the children from this jurisdiction pending conclusion of these proceedings.

Issues

7 The issues requiring my determination are:

1. Whether the action commenced by the Plaintiffs should be struck because they lack standing to bring the action?

2. If the action is not struck are the Plaintiffs required to furnish security for costs in the sum of $50,000.00, and by when?

3. Should all proceedings be stayed until security for costs is furnished?

4. In default of a security being posted, should the action be dismissed without further Court application?

Plaintiffs' Argument

8 The Plaintiffs depose that they have standing to bring this application because they have a genuine and demonstrated interest in the children. They are concerned with their well-being and fear they are at risk because the Defendant may have sexually abused the children. However, even if the Defendant is not guilty of sexual abuse of one or both of the children, he requires help in parenting them and they are the best people to provide him with that help.

9 Further, the circumstances do not warrant the posting of security for costs because the genuine issue to be tried is the determination of whether the children are at risk or the Defendant requires parenting assistance.

Defendant's Argument

10 The Defendant submits that as legal strangers, the Plaintiffs do not have standing before the Court to apply for guardianship. He relies on the Alberta Court of Appeal decision of *Bowes v. Gauvin* (2001), 286 A.R. 395 (Alta. C.A.), which dealt with the test to be applied in a contest between a parent and legal strangers. The legal strangers in that case were the grandparents of the child in question. The Court of Appeal confirmed that when the contest is between a parent and legal strangers, which is the case at bar, the test is that of fitness rather than the best interest rule. However, this case does not stand for the proposition that a "legal stranger" does not have legal standing to apply for guardianship.

11 The Defendant further argues that the Plaintiffs have commenced a frivolous and vexatious action alleging sexual abuse of the children at the hands of the Defendant; allegations which were made by the Plaintiffs in February and September of 2001. None of these allegations have been substantiated after numerous assessments were conducted.

12 The Defendant deposes that the following assessments were conducted or counselling engaged:

1. A parenting assessment by Dr. John W. Pearce of the Child Abuse Service of the Alberta Children's Hospital;

2. A parenting assessment conducted by Dr. Sally During;

3. An assessment of A.C. by Dr. Jocelyn Mendelson;

4. Counselling for A.C. by Holly James, a chartered psychologist who provided a letter dated January 25, 2002 documenting A.C.'s treatment process which was attached as Exhibit B to her Affidavit;

5. Assessment by Dawn McArthur, a social worker from Calgary Rockyview - Child and Family Services; and

6. An investigation by the City of Calgary Police Department.

13 The Defendant further deposes that during this investigative period, his children were not apprehended, but rather Alberta Child Welfare determined that his daughter, A.C. had unresolved issues surrounding the death of

her mother and the bonding to his new wife, J.L.C. As a result, the Defendant and his wife entered into a support agreement with Social Services.

14 Further, the Defendant deposes that as a result of counselling with Holly James over the last year, the behaviour issues concerning A.C. have resolved.

15 The file of Alberta Social Services (Child Welfare) has now been closed. The only Affidavit evidence of these independent assessments is that of Holly James. The parenting assessment report of Dr. Pearce dated May 7, 2002 was provided directly to me but counsel for the Defendant refused to provide a copy to Plaintiffs' counsel. Although not properly before me as evidence, I note that Ms. McArthur had referred this case to Dr. Pearce to provide a parental assessment but he underscored the fact that he did not have the skills nor expertise to complete an evaluation of the risk, if any, that the Defendant poses to the sexual integrity of his daughters.

16 Finally the Defendant submits that if the Plaintiffs are found to have standing, given the frivolous and vexatious nature of the action and the current residence of the Plaintiffs, security for costs should be posted in the sum of $50,000.00 before the Plaintiffs are permitted to proceed.

The Plaintiffs Involvement with the Children

17 The Plaintiffs saw the children in the summers of 1997, 1998 and 1999 when they all vacationed in Michigan but apparently resided in separate cottages.

18 The Plaintiffs indicate that they also spent time with the children during many of the Christmas holidays and the vacations taken in different locations around the world but no details were provided. From mid-June to August of 2000, the children spent a total of three weeks with the Plaintiffs. First for one week and then for a two week period.

19 Then from July 10 to August 1, 2001, the children flew to Michigan and stayed with the Plaintiffs. Since May 2002, the Plaintiffs' contact with the children has ceased. They allege that this is because the Defendant refuses them contact.

Analysis

Standing

Relevant Statutory Provisions

20 The Plaintiffs brought this action under the *Domestic Relations Act*, R.S.A. 2000 c. D-37. The relevant statutory provisions read as follows:

> 49 Except where the authority of a guardian appointed or constituted by virtue of this Act is otherwise limited, each guardian during the continuance of the guardian's guardianship
>
> (a) may act for and on behalf of the minor,
>
> (b) may appear in court and prosecute or defend an action or proceedings in the name of the minor,
>
> (c) after furnishing any security the Court requires under section 54, has the care and management of the estate of the minor, whether real or personal, and may receive any money due and payable to the

minor and give a release in respect of it, and

(d) has the custody of the person of the minor and the care of the minor's education.

50(1) Unless a court of competent jurisdiction otherwise orders, the joint guardians of a minor child are

(a) the mother, and

(b) the father, if

(i) the father was married to the mother of the child at the time of the birth of the child, ...

52 The Court may from time to time appoint a guardian of the person and estate, or either, of a minor to act jointly with the father or mother of the minor or with the guardian appointed by the deceased father or mother of the minor.

53(1) If on the application of a minor, or of anyone on behalf of the minor, it appears

. . .

(b) that the parent or lawful guardian is not a fit and proper person to have the guardianship of the minor,

the Court may appoint a guardian or guardians of the person and estate, or either, of the minor.

21 In *B. (B.) v. D. (L.)* (2002), 3 Alta. L.R. (4th) 317 (Alta. Q.B.), Moen, J. held at para. 8:

To gain standing in a guardianship application, where the person is a legal stranger, the person must show an intimate connection to the child which is almost parental in nature.

22 There have been considerable developments in this area of the law over the last several years. However, the test established in 1984 by the Alberta Court of Appeal in *D. (W.) v. P. (G.)* (1984), 54 A.R. 161 (Alta. C.A.) (leave denied (1984), 33 Alta. L.R. (2d) xxxvi (S.C.C.) remains appropriate. Kerans, J.A. defined the test in the contest for guardianship between a legal stranger and a natural parent as that of the fitness test as opposed to the best interests test. This was recently affirmed by the Alberta Court of Appeal in *Bowes v. Gauvin*, *supra* at para. 9, as earlier noted.

23 I have reviewed the decision of Burrows, J. in *J. (K.E.) v. J. (D.L.)* (2002), 3 Alta. L.R. (4th) 353 (Alta. Q.B.) which was made within the context of divorce. The case dealt with the competing interests of an aunt and uncle versus that of the father of the children in question. In that decision at para. 85, Burrows, J. clearly indicates that in the non-divorce context, the natural parent has a priority over a legal stranger. The presumption is that the child should be in the custody of the natural parent unless the legal stranger can show that the natural parent is unfit. However, in the divorce context the legislation does not recognize priority in the natural parent, nor does it place such an onus on the stranger.

24 There is no question that the Plaintiffs are legal strangers and as a result the fitness test is the appropriate test they must meet. However, the first hurdle the Plaintiffs must overcome is whether they have standing to even bring the application for guardianship.

25 Trussler, J. in *Williams v. Williams* (1995), 172 A.R. 10 (Alta. Q.B.) reviewed the case authority regarding this issue at para. 14:

> Status to apply under Part 7 was exhaustively discussed in *W.(K.K.) v. R.(N.J.)* (1989), 69 Alta. L.R. (2d) 95 (Q.B.) and in *Langdon v. York*, Alta. Q.D. No. 8501-02634 (December 16, 1994). While each case must be determined individually, an applicant will have status to apply for guardianship under Part 7 where:
>
> 1. There is an order in existence confirming the applicant has custody or guardianship legally at the time the application is brought;
>
> 2. The applicant is standing in loco parentis originally with the consent of the legal guardian;
>
> 3. The natural parent consents; or
>
> 4. The applicant has acquired guardianship status.
>
> To bring an application under Part 7, there needs to be some nexus between the minor and the applicant, but that nexus need not be a legally recognized one, and may simply arise by virtue of the circumstances and positions of the parties involved.

26 Clark, J. in *Wile v. Tancowny* (2000), 282 A.R. 143 (Alta. Q.B.) at para. 11 held that only individuals with a genuine, and demonstrated interest in the child are allowed to interfere in the custodial or natural parents' rights.

27 Vertes, J. addresses this principle in *D. (G.) v. M. (G.)* (1999), 47 R.F.L. (4th) 16 (N.W.T. S.C.) at para. 41:

> In my opinion, the best interests of a child are not served by frivolous or ill-founded applications for custody or access. Not anyone who merely has an interest in the child should be allowed to force the custodial or biological parent into court. There must be a connection to the child that can be almost equated to a parental one in the sense of care, nurture and support.

28 Most of the relevant cases in this area have grappled with the issue of whether a party such as a step-parent, stands in *loco parentis* to a child in order to give him or her standing to apply for guardianship. If such standing is found then the Court goes on to determine whether the test is the best interest test or the fitness test.

29 In this case, the Plaintiffs do not fall within the four categories specified by Trussler, J. in *Williams*, *supra*. There is no allegation in the Statement of Claim of any nexus beyond that of uncle and aunt. There is no evidence before me that establishes a sufficient nexus between the Plaintiffs and the children. There is no relationship akin to that of a nurturing and caring parent. Rather the evidence establishes that the Plaintiffs' contact or connection with the children has been limited and now appears tantamount to estrangement. The children visited the Plaintiffs alone without the Defendant on three separate occasions of one week, two week and three week durations respectively during 2000 and 2001. There has been no contact since May of 2002. The Plaintiffs are not intimately connected with the children to such an extent that would warrant them receiving standing to apply for sole guardianship, joint guardianship or interim access.

30 This is not to say that the Plaintiffs are not motivated by their love and good intentions toward the children. However, that is not the test for standing.

31 Furthermore, the serious allegations of sexual abuse raised over two years ago do not given them standing.

Rather this is a situation where the concerns of the Plaintiffs were addressed by Alberta Social Services (Child Welfare) and determined to be unsubstantiated.

32 By virtue of my finding, the remaining issues are rendered moot.

Costs

33 Each party shall bear its own costs.

Order accordingly.

FN* Affirmed *W. (J.) v. C. (J.)* (2003), 2003 ABCA 348, 2003 CarswellAlta 1769, 49 R.F.L. (5th) 450 (Alta. C.A.).

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