FAMLNWS 2016-23
Family Law Newsletters
June 13, 2016

— Epstein's This Week in Family Law

Philip Epstein

Contents

Contempt for Failure to Pay Support, Section 7 Expenses and Failure to Return Children

Harrison v. Harrison, 2016 CarswellBC 1070 (B.C. S.C.) - Justice Madam Gropper. In some provinces in Canada, including British Columbia but not Ontario, failure to pay child support is a basis for a finding of contempt. In this case, the mother moved for a finding of contempt against the father for failing to return the children after a specified parenting time on three occasions and failing to pay child support and section 7 expenses.

Justice Gropper briefly reviews the law of civil contempt and the leading case of *G. (L.) v. G. (R.)*, 2012 CarswellBC 2814 (B.C. S.C.).

Justice Gropper also makes reference to the leading decisions on contempt in *Larkin v. Glase*, 70 R.F.L. (6th) 263 (B.C. C.A.) and *Topgro Greenhouses Ltd. v. Houweling*, 2003 CarswellBC 1430 (B.C. C.A.).

In *Swann v. Swann*, 71 R.F.L. (6th) 269 (B.C. C.A.), the Court of Appeal dealt with the issue of non-payment of support as a basis for contempt. The Court made it clear in that case that the test is whether the payor was capable of complying with the order to make payments, and the onus is on the payor to prove beyond a reasonable doubt that he/she was unable to comply with the court order.

Justice Gropper was satisfied that the father was in contempt of a court order by over holding the children and by failing to pay the child support. Justice Gropper, as she did in *Friedlander v. Claman*, 2015 CarswellBC 4072 (B.C. S.C.) (see *Newsletter* volume 22), imposes a fine payable to the Vancouver Court Registry. She also orders that the father place $10,000 in trust with counsel for the wife to be applied to the children's section 7 expenses in the future. That is an order I have not seen before, but given the wide powers that a judge has in sentencing for contempt, this is a possible and far more useful outcome than a fine.

As a result of the contempt finding, this also leads to an application by the mother to change the parenting time which again leads Justice Gropper to review section 47 of the *Family Law Act* with the same result in *Friedlander*. She finds there has been a material change of circumstances and changes the parenting time to increase the mother's time for the children and reducing the father's time with the children.

Maternal Family Members Seek Access after the Death of the Mother

Torabi v. Patterson, 2016 CarswellOnt 5814 (Ont. C.J.) - Marvin Kurz, J. This case is, I think, noteworthy for the

sensitive and appropriate manner in which Justice Marvin Kurz dealt with this difficult situation. The applicants are the maternal family members of the 4-year-old child who recently lost his mother to cancer. The respondent is the father who, for the most part, opposes court ordered parenting time for the deceased mother's family members.

Justice Kurz begins with a trenchant quote:

> Tragedy can be as corrosive as the sturdiest acid, eating away at the bonds that hold families together. For the parties to this motion, the illness and death of a young mother whom they all loved led only to further dissention, conflict, and ultimately this court proceeding.

The father resists court-ordered access because, as the father he says, he is best able to determine his son's best interests. He has already allowed supervised access by the maternal grandmother, but resists other court ordered time.

The conflict between the parties leading up to and immediately following the mother's death is nothing short of horrendous. In the midst of extreme tragedy people often lose their way and that clearly happened here. Both sides acted badly including denying the husband access to his wife in the hospital as she was dying, and then holding a funeral for her behind his back.

Justice Kurz recognizes that his task is to determine what is in the best interests of a particular child and that the leading case on the issue of extended family access is the Ontario Court of Appeal decision in *Chapman v. Chapman*, 15 R.F.L. (5th) 46 (Ont. C.A.).

In *Giansante v. Di Chiara*, 2005 CarswellOnt 3290 (Ont. S.C.J.), Justice Nelson summarized the principles in Chapman as follows:

1. Does a positive grandparent-grandchild relationship already exist?

2. Has the parent's decision imperilled the positive grandparent-grandchild relationship?

3. Has the parent acted arbitrarily?

Justice Nelson noted that while *Chapman* discusses deference to the decision of parents, that deference may not be as strong when one of the parents has died and the deceased's relative seeks access.

Justice Kurz carefully reviews *Giansante* and then examines whether the Court should defer to the father's wishes in the particular circumstances of this case.

Justice Kurz recognizes that before he can order access, the law generally requires a finding that there is a positive relationship between the relative and the child and one that may supersede the right of the parent to decide whom the child sees.

In this case, there are no doubt relatives that have a positive relationship with this young child, but clearly there are serious issues between some of these family members and the father.

The family members seeking access are the child's blood relatives and without access the child will lose the tie.

The mother's dying wishes were that the parties would work together and that the child would remain part of her family after her death. That leads Justice Kurz to the significant comment in *Giansante* where Justice Nelson noted:

> To hold people responsible forever for their actions at a time when they were emotionally raw and vulnerable might not be appropriate. Although these events appear to have damaged the respondent's relationship with the applicants, that is no reason to sever Jayden's relationship with his mother's family?

Justice Kurz also notes that courts frequently make access orders in high-conflict cases.

Counsel for the family members suggest that the situation will be ameliorated if the family members are ordered not to speak ill of the father.

Justice Kurz decided at the end of oral argument to give the parties an opportunity to address each other directly without the filter of their lawyers (one of the more common practises utilized by mediators). Justice Kurz noted that the two families were able to speak to each other and each member of the maternal family came forward to offer an apology. Justice Kurz takes some comfort from this encounter and recommends that the parties go to mediation, although he recognizes that he cannot order it. In the end, some access is ordered, but the main issue is ultimately left to the trial judge. The maternal relatives are all given some time to see the child on a fairly limited basis for now, but unsupervised.

Time does not heal all wounds but, hopefully, the family that has faced this terrible tragedy will see the wisdom in Justice Kurz's approach and find a better way to resolve the issue in the best interests of this young child.

Children *in Loco Parentis*

Maelbrancke v. Proctor, 2016 CarswellOnt 4890 (Ont. S.C.J.) - R.J. Harper J. Interim motions usually contain highly conflicting affidavits. This becomes even more of a problem when the issue is whether a party stood *in loco parentis* to a child for the purposes of a child support application. In *Mignella v. Federico*, 2012 CarswellOnt 12347 (Ont. S.C.J.), Justice Price reviewed the legal considerations about whether a person acted as a parent in order to be obligated to pay child support. The leading case is, of course, *Chartier v. Chartier*, 43 R.F.L. (4th) 1 (S.C.C.). That case, and many others, demonstrate that there must be at least a *prima facie* case of entitlement shown at the interim stage in order for the court to make an order for child support. See for example, *Lopez v. Lopez*, 48 R.F.L. (3d) 298 (Ont. Gen. Div.), *Butzelaar v. Butzelaar*, 1998 CarswellSask 729 (Sask. Q.B.), *Blackmore v. Blackmore*, 7 R.F.L. (2d) 263 (Ont. Master) and *Land v. Aitchison*, 2005 CarswellOnt 372 (Ont. S.C.J.).

In this case, Justice Harper found that the mother had not made out a *prima facie* case for entitlement and it was not possible on the affidavit evidence to resolve the conflict. The parties had lived together for a very short period of time, the biological father has continued to be involved and the mother did not produce sufficient evidence to tip the balance in her favour on an interim motion.

Loco parentis cases are always difficult and *Chartier* has not made it any easier. However, clearly, either the mother's affidavit was lacking sufficient particulars or the evidence did not justify a *loco parentis* finding.

Surveillance Evidence Struck Out

Veljanovski v. Veljanovski, 2016 CarswellOnt 5884 (Ont. S.C.J.) - J. Paul R. Howard, J. The parties were engaged in a relatively high-conflict custody dispute over their two young children of the marriage. A motion court judge had made a previous interim interim order for a nesting arrangement. The house has now been sold and the parties are back before the court. This *Newsletter* comment only deals with two aspects of this judgment by Justice Howard of the Superior Court of Justice in Ontario.

The first issue is the characterization of the previous court order and whether either party is required to establish a material change in circumstances in order to seek a change in the parenting schedule imposed by that order.

A careful review of that order makes it clear that the order was made on an interim, interim basis, and where an order is made on such a basis, a material change of circumstances need not be demonstrated before a variation of the order can be made. The second and more interesting issue in this case, is what to do about the admissibility of surveillance evidence tendered by the mother.

The original motion court judge had commented on the fact that the parties had been surreptitiously recording

each other and that such a practice must stop.

Notwithstanding that the mother had notice of the admonition by the motion court judge, she continued detailed surveillance of the father for many months after that order including having seven investigators follow the father, the children and his family, and arrange for a GPS tracker to be installed on the family car in order to track the father's whereabouts. The respondent/father moved to strike the surveillance material from the mother's affidavit. Justice Howard reviewed Justice Sherr's leading decision on surreptitious recordings in *Hameed v. Hameed*, 2006 CarswellOnt 4653 (Ont. C.J.) where Justice Sherr noted:

> Surreptitious recording of telephone calls by litigants in family law matter should be strongly discouraged. There is already enough conflict and mistrust in family law cases, without the parties worrying about whether the other is secretly taping them. In a constructive family law case, the professionals and the court work with the family to rebuild trust so that the parties can learn to act together in the best interests of the child. Condoning the secret taping of the other would be destructive to this process . . .
>
> The court in deciding whether to admit such evidence will need to weigh these policy considerations against its probative value. The party seeking its admission should establish a compelling reason for doing so.

Justice Howard reviewed the evidence that the parties had already gathered properly through questioning and documentary discovery and was not convinced that the mother had established a sufficiently compelling reason to admit the surveillance evidence. This was not a case where the surveillance evidence was necessary to reveal information to the court that was not otherwise available. Justice Howard referred to the article by Brian Burke and Margaretta Hanna "Surreptitious Recordings in Family Law: Of 'Odious and Repugnant Practices,' 'Calculated Subterfuges,' 'Tricks and Deceit' - and the Truth".

Justice Howard has noted, as does that paper, that the courts have considered surveillance practices as "odious and repugnant" and admissible only in the narrowest of circumstances.